Keynote 1: Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works

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INTRODUCTION

"Authenticity seems to be the value of the moment, rolling off the tongues of politicians, celebrities, Web gurus, college admissions advisers, reality television stars."[1] While this comment was written in relation to the attempts of media personalities, celebrities and politicians to present an "authentic" image of themselves to the world, authenticity has been valued in the art world for far longer than in the media world. And, while there are many aspects to how an individual presents his or her "authentic" self, so there are many ways of understanding what authenticity means in the art world. The art market is rife with problems of authenticity, ranging from outright, deliberate forgeries to discoveries concerning authenticity made years after a sale and honest uncertainty about proper attribution. While the consequences and detectability of these different types of inauthenticity vary, they constitute serious impediments to the proper functioning of the art market. More importantly, however, they all contribute to distortion and corruption of the historical, art historical and cultural record of our past.

The most fascinating but also the most harmful cases are those involving what Professor Merryman described as the "serious art counterfeiters: people who combine technical skill, care in the choice of materials and familiarity with art history to produce convincing imitations of works of other artists."[2] Over the past several decades, an unfortunate number of deliberate art forgers have succeeded in duping the art world and introducing their works into the market and into the accepted canon of particular artists. A master forger, Wolfgang Beltracchi, was convicted in Germany for creating and selling approximately fifty-three works by artists including Max Ernst, Max Pechstein and Heinrich Campendonk in a scheme that netted approximately $20 million.[3] In a still more recent story, it seems that a

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1. Stephanie Rosenbloom, *Authentic? Get Real*, N.Y. TIMES, Sept. 11, 2011, §1 (SundayStyles), at 2. For a chronicle of the modern obsession with authenticity, particularly visual authenticity, *see* David Lowenthal, *Counterfeit Art: Authentic Fakes?*, 1 INT'L J. CULT. PROP. 79, 80–82 (1992).

2. John Henry Merryman, *Counterfeit Art*, 1 INT'L J. CULT. PROP. 27, 28 (1992).

3. *See* Kate Deimling, *In Germany's Largest Art Forgery Trial, Master Swindler Laments Only That His Fakes Were "Too Good"*, ARTINFO (International) (pt. 28, 2011), http://www.artinfo.com/news/story/38729/in-germanys-largest-art-forgery-trial-master-swindler-

Long Island dealer provided at least sixteen possible forgeries from an unnamed collector, who reportedly acquired the works directly from the artists, to the Knoedler Gallery and other New York dealers. Among the artists whose works may be implicated are Pollock, Motherwell, Diebenkorn, Rothko and de Kooning.[4] The legal complications stemming from these sales—including both private law suits and a federal investigation—have already stretched over several years and will continue.

Yet another example of intentional forgery involved a prominent New York dealer, Eli Sakhai, who was engaged in a complex scheme of forgery and fraud that stretched over twenty years. Sakhai would buy authentic paintings at auction, including paintings by prominent Impressionist and Post-Impressionist artists such as Marc Chagall and Pierre-Auguste Renoir. Sakhai would have copies of these paintings made and he would then sell the forgeries with the original certificate of authenticity and the authentic paintings as well. In the spring of 2000, two Gauguin paintings, both purporting to be the same authentic painting, were offered for sale at the same time, one at Sotheby's and the other at Christie's. In September 2003, when Sotheby's offered a Klee painting, the purchaser of the "same" Klee painting several years before contacted Sotheby's inquiring how Sotheby's could be selling the painting that he still owned. In March 2004, the FBI arrested Sakhai; he pled guilty to mail and wire fraud and was sentenced to incarceration of forty-one months, restitution payment of $12.5 million to buyers whom he had defrauded and forfeiture of eleven paintings believed to be the authentic paintings of which he had forged copies made.[5]

An interesting characteristic of some of the recent forgery schemes is the

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laments-only-that-his-fakes-were-too-good/. Beltracchi agreed to a plea bargain in which he will serve six years; his wife will serve four years in prison. While there were only fourteen works featured in the criminal trial, an additional thirty-nine forgeries were recently identified. *See* Julia Michalska, Charlotte Burns & Emanno Rivetti, *True Scale of Alleged German Forgeries Revealed*, THE ART NEWSPAPER, Dec. 2011, at 55, *available at* http://www.theartnewspaper.com/articles/True-scale-of-alleged-German-forgeries-revealed/25235. For a current list of the identified forgeries, *see* Julia Michalska, *Full List of German Forgeries*, THE ART NEWSPAPER (Nov. 28, 2011), http://www.theartnewspaper.com/articles/Full-list-of-German-forgeries/25133. In statements that reveal something of the mind of a forger, Wolfgang Beltracchi, said: "I didn't especially like the art market and art dealers . . . . You have to know how the art market works. Where is the greatest greed? . . . In 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*." Deimling, *supra* note 3.

4. *See* Patricia Cohen, *Possible Forging of Modern Art Is Investigated*, N.Y. TIMES, Dec. 2, 2011, at A1; Julia Halperin, *Everything You Ever Wanted to Know About the Knoedler Forgery Debacle but Were Afraid to Ask*, ARTINFO (International), (Dec. 6, 2011), http://artinfo.com/news/story/753301/everything-you-ever-wanted-to-know-about-the-knoedler-forgery-debacle-but-were-afraid-to-ask.

5. *See* Press Release, U.S. Att'y S.D.N.Y., Manhattan Art Gallery Owner Sentenced to 41 Months in Federal Prison for Multimillion-Dollar Art Forgery Scheme (July 6, 2005), http://www.usdoj.gov/usao/nys/pressreleases/July05/sakhaisentence.pdf. A Japanese art investor defrauded by Sakhai, Yoichi Takeuchi, sued Sakhai, alleging that Sakhai had committed Racketeering Influenced and Corrupt Organization (RICO) statute violations predicated on fraud. The suit was dismissed on statute of limitations grounds. *See* Takeuchi v. Sakhai, No. 05 Civ. 6925 JSR, 2006 WL 119749, at *2 (S.D.N.Y. Jan. 17, 2006), *aff'd*, 227 F. App'x 106 (2d Cir. 2007).

manufacture of fake provenance as a way of convincing the art world of a work's legitimacy. One such example was the collaboration of the artist-forger John Myatt and John Drewe.[6] Drewe managed to insert information about the fakes into existing catalogues and other archival records, thus providing false provenances for the works and making their scheme particularly difficult to detect.[7] In hindsight, the Myatt fakes were viewed as rather sloppy—most notably, this sloppiness is evidenced by his use of paint emulsions and other "ingredients" that were not known before the mid-1960s. An expose in the *New York Times Magazine* concluded, however,

> If Drewe's success provides any lesson, it is that the art world's aura of sophistication creates a false sense of security that makes it especially vulnerable to what was, in the end, a confederacy of mediocrity. Myatt's sloppy pictures, Drewe's litany of far-fetched identities and the ignorance of his pitiable salesmen should have been no match for the likes of the auction houses, scholars and dealers that Drewe conned. But in the end, the system's multiple lines of defense—dealers, galleries, auction houses, museums, archives, world-class experts—proved all too permeable.[8]

The more recent Beltracchi scheme involved the creation of fake "old" collections, the use of forged authentication labels from the German dealer, Alfred Flechtheim, and staged photos of the art works with members of Beltracchi's family purporting to be from the 1930s.[9] These schemes not only introduce fake works into the *oeuvre* of an artist but also change the direct historical record for both the artist and others, such as museums, auction houses, galleries and collectors, involved in the art world.

In contrast to the intentionally forged work is the work that has been misattributed to a particular artist, time period or culture, usually not as the result of intentional wrongdoing but the lack of sufficient historical information to make proper attributions. Intentional or unintentional, however, a misattribution can have significant effects on the market price of a work while also affecting our understanding of an artist's works. For example, a portrait sold at Christie's in 1998 for a little more than $21,000 was subsequently attributed to Leonardo da Vinci. While experts certainly disagree, the possibility spawned a lawsuit and, if it is truly a da Vinci (named "La Bella Principessa"), its market value would be "priceless" or allegedly worth $150 million.[10]

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6. *See* Emine Saner, *John Myatt: A Story of Fame and Forgery*, THE GUARDIAN (U.K.), Sept. 18, 2011, § G2, at 2, *available at* http://www.guardian.co.uk/artanddesign/2011/sep/18/john-myatt-fame-forgery.

7. *See* Janet Ulph, *Markets and Responsibilities: Forgeries and the Sale of Goods Act 1979*, J. BUS. L. 261, 279 (2011); Peter Landesman, *A 20th-Century Master Scam*, N.Y. TIMES MAG., Jul. 18, 1999, at 31–63, *available at* http://www.nytimes.com/library/magazine/archive/19990718mag-art-forger.html.

8. Landesman, *supra* note 7.

9. *See* Michalska, Burns & Rivetti, *supra* note 3; Catherine Hickley, *Art Forgery Trial Outcome Is 'Scandal,' German Dealers Say*, BLOOMBERG (Nov. 9, 2011, 10:16 AM), http://www.bloomberg.com/news/2011-11-09/art-forgery-trial-result-is-scandalous-german-dealers-association-says.html.

10. *See* Marchig v. Christie's, 762 F. Supp. 2d 667 (S.D.N.Y. 2011), *aff'd in part, rev'd in part,*

The difficulty of dealing with inauthentic works, from both a legal and a historical or cultural perspective, is what Professor John Henry Merryman labeled the "Van Meegeren problem" in an article published close to twenty years ago.[11] If a work is such a good forgery that it appears to be authentic, where is the harm? Further, there is a somewhat pervasive public view that crimes involved with art works are victimless; to the extent there are victims, they are wealthy and sophisticated and they therefore can take care of themselves.

Merryman points out that this questioning of whether authenticity matters results from the confluence of three different lines of thinking. The first is that the absorption of both art historians and the market in questions of authenticity is the product of elitism. In this view, "the concern about authenticity [is] one expression of an undesirable and insincere elitism in the visual arts, propagated by corrupt art historians who are tools of the monied class."[12]

The second view incorporates a romantic or sentimental perception of the forger. This is borne out by the celebrity achieved by Myatt for his current (non-forged) works and, in Merryman's view, the failure of the law to adequately punish the

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430 F. App'x. 22 (2d Cir. 2011) (holding that seller's suit alleging negligent misrepresentation and breach of fiduciary duty in attribution of drawing was barred by the statute of limitations). *See also* Jennifer Welsh, *Lost da Vinci: Priceless da Vinci Portrait Sold for $21,000*, CHRISTIAN SCI. MON. (Oct. 17, 2011), http://www.csmonitor.com/Science/2011/1017/Lost-da-Vinci-Priceless-da-Vinci-portrait-sold-for-21-000. For questions about the authentication of this da Vinci work, *see* David Grann, *The Mark of a Masterpiece*, NEW YORKER, July 12, 2010, at 51–71, *available at* http://www.newyorker.com/reporting/2010/07/12/100712fa_fact_grann. A different disputed da Vinci painting, known as "La Belle Ferronnière," was the subject of perhaps the earliest lawsuit alleging negligence in the giving of an expert opinion concerning authenticity. The suit was brought against the well-known international dealer, Joseph Duveen, who opined, without having ever seen it, that a portrait owned by American collectors Andrée and Harry Hahn was not an original da Vinci, whereas the original was in the collection of the Louvre. *See* Hahn v. Duveen, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929). *See generally* JOHN BREWER, THE AMERICAN LEONARDO (2009). An alleged third version of this portrait was the subject of recent litigation involving the entrustment doctrine. *See* Kozar v. Christie's, Inc., 929 N.Y.S.2d 200 (N.Y. Sup. Ct. 2011). The Hahn portrait sold in January 2010 at Sotheby's, which attributed it to a follower of da Vinci, for $1.5 million. Carol Vogel, *Mona Lisa She Is Not, but Coveted Nonetheless*, N.Y. TIMES, Jan. 29, 2010, at C21.

11. Merryman, *supra* note 2, at 28–33. Han van Meegeren was a Dutch artist who produced fakes of several Dutch artists—most notably Johannes Vermeer—some of which were so convincing that he was able to sell a fake Vermeer to Hermann Göring. Van Meegeren's forgeries were revealed when he was tried after World War II as a Nazi collaborator; he demonstrated that the painting was not an authentic Vermeer by producing another "Vermeer". *Id.* at 28. Repeated scientific testing of van Meegeren's works over the years has produced a reliable list of his forgeries, yet there remain questions over these identifications, as well as with those produced by Myatt. For more on Han van Meegeren, *see* Denis Dutton, *Han van Meegeren*, *in* ENCYCLOPEDIA OF HOAXES 26–28 (Gordon Stein ed., 1993), *available at* http://www.denisdutton.com/van_meegeren.htm. As Merryman also points out, many do not seem to view art forgery as a serious crime. Merryman, *supra* note 2, at 27–28, 37–42. The subsequent careers of both van Meegeren and Myatt show that they became accepted painters in their own right after their forgeries were unmasked and that their "escapades" likely contributed to the popularity of their own works. *See infra* note 13.

12. Merryman, *supra* note 2, at 29. Brewer discusses the relationship among art historians, dealers and the newly wealthy American upper class at the turn of the Twentieth Century, a time when many of the great American art collections were built and increases in the value of art works, as they changed hands, were the result of the promotion of art, including art as an investment, by major dealers, such as the flamboyant Joseph Duveen. BREWER, *supra* note 10, at 92–102.

forger.[13] The third element is that aesthetic philosophy focuses only on the aesthetic value of a work.[14] The rejection of the inauthentic work is viewed as the product of an overly academic or intellectual approach to art in place of a more aesthetic appreciation. Accordingly, from the perspective of aesthetics, it does not matter whether the work is authentic since the authentic and forged works have the same aesthetic appeal and meaning. If, from an aesthetic perspective, the fake is indistinguishable from the authentic work, then perhaps they are the same.

However, Merryman does an effective job of refuting this false question by focusing on the cultural and historical value of authentic art—the search for truth about the past. Only by examining and viewing authentic art works and cultural objects can we truly understand the perspective of the original creator of the work and the historical and cultural context in which the work was created.[15] Only in this way can knowledge of ourselves, our past and different places and people be expanded and better understood. Furthermore, where it becomes difficult or even impossible to determine with certainty which paintings are authentic and which are not, this creates the significant problem of possible acceptance of fakes into and rejection of authentic works from the artistic, cultural and historical record. Like Merryman, we would probably prefer to think that we care about authenticity because of the historical and cultural considerations that flow from a determination of authenticity. But one cannot deny that, if a work is deemed to be "authentic" (or conversely to be a "fake"), then significant economic consequences result, and it is suggested here that the law concerning authenticity has arguably developed to protect the economic value of a work of art and the functioning of the art market. This may be illustrated by the ways in which the law may be changing to take a more serious approach to forgers and forgeries, but perhaps this motivation comes primarily from the desire to protect the market value placed on art works, especially

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13. *See* Saner, *supra* note 6 (discussing *Fame in the Frame*, an exhibit of Myatt's paintings that are copies of famous paintings but with contemporary celebrity subjects inserted into the scene). Beltracchi also seems to be planning to sell his own paintings once he is released. *See* Tony Paterson, *High Life Ends for Couple Who Conned Art World*, N.Z. HERALD (Oct. 27, 2011, 5:30 AM), http://www.nzherald.co.nz/crime/news/article.cfm?c_id=30&objectid=10761909.
See also Merryman, *supra* note 2, at 30, 41–42, 47 (suggesting that the reluctance to punish art counterfeiters is the result, at least in part, of the public's failure to understand the negative consequences of fake art). Merryman also raises the question of what should be done with known forged works, as these could eventually be resold, either intentionally or unintentionally, as authentic works. *Id.* at 57–61. The Art Loss Register recently announced that it would be willing to register for free fakes and forgeries that are being sold or transferred by museums. *See* Geraldine Kendall, *Art Loss Register Offers to Register Fakes After Talks with MA Fellow*, MUSEUMS ASSOC. NEWS (Dec. 14, 2011), http://www.museumsassociation.org/news/14122011-art-loss-register-offers-to-catalogue-fakes.

14. *See* Merryman, *supra* note 2, at 30.

15. "Work of art" implies a work of fine art, such as a painting or a sculpture. While the term "cultural object" is broader, encompassing ethnographic objects and ancient or archaeological objects, which are bought and sold on the world market regardless of whether they have attained the judgment of constituting "art," these terms will be used interchangeably in this Paper, except where specifically noted otherwise. For discussion of the different meanings of "culture," *see* Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURIS. 249, 259–60 (1993). Because of the nature of this topic, this article addresses only the status of movable objects.

as the values of those works continue to increase at a significant pace.[16]

This Paper aims to demonstrate that there are two distinct reasons why authenticity matters—one is for cultural and historical reasons, the other for economic and market reasons. Ideally, these reasons should converge and the law should develop to protect both these interests equally and at the same time. However, it seems (perhaps not surprisingly) that in some of the more difficult "corners" of the law, legal doctrine has developed more to protect the economic and market concept of authenticity than to protect the cultural and historical values inherent in authenticity.

I. SOME DEFINITIONS

Before addressing the legal and cultural significance of authenticity of art works, it is necessary first to take account of three terms that are sometimes used interchangeably and that relate to each other, but which have distinct meanings: authenticity, originality and attribution. "Authenticity" (defined by the OED, as "the quality of being authentic, or entitled to acceptance) is generally taken to mean that an object is what it is said to be.[17] The word "authentic" may be most easily contrasted with the terms "fake" or "forgery".[18] While an authentic work should be distinguishable from the intentional fraud, there are works that are not intentional

16. The current trend seems to be to prosecute, convict and give prison time to the forger, once detected, as in the Sakhai, Myatt and Beltracchi prosecutions and the current investigation of the Knoedler affair. *See* Cohen, *supra* note 4. Beltracchi and his associates were at first viewed favorably, as people who were "stealing" only from the rich and had succeeded in duping an art world that clings to its elitism. *See* Julia Michalska, *Sympathy Grows for Alleged Forgers*, THE ART NEWSPAPER, Nov. 2011, at 89, *available at* http://www.theartnewspaper.com/articles/Sympathy-grows-for-alleged-forgers/24952. However, the plea bargain deal and relatively light sentences given to Beltracchi and his associates received negative reactions, particularly when it was later revealed that the number of his forgeries was greater than presented at trial and because the plea bargain prevented information concerning the other alleged forgeries from becoming public. *See* Michalska, Burns & Rivetti, *supra* note 3. That said, it seems that the statute of limitations for the prosecution of Beltracchi and his many alleged forgeries had expired. *See* Catherine Hickley, *Cologne Court Lets Art Fakes Stay, Group Says*, S.F. CHRON., Nov. 10, 2011, at A8.

17. *Authenticity Definition*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 143 (1981) (hereinafter "OED"). The OED gives as the only currently used definitions of "authentic": "entitled to acceptance or belief, as being in accordance with fact, or as stating fact; reliable, trustworthy, of established credit"; "real, actual, 'genuine'"; "really proceeding from its reputed source or author; of undisputed origin, genuine." *Id.* Older usages and the Greek and Latin roots of the word further indicate an origin based on the concept of authority with the Greek root, *authentikos* αυθεντικος, defined as "of first-hand authority, original." *Id.* Authenticity is therefore inextricably linked with the idea of authority, which in the context of art works is further linked to the authority to authenticate. For varying perspectives on the meaning of authenticity from cultural and historical perspectives, *see* Lowenthal, *supra* note 1, at 82–86.

18. "Fake" and "forgery" also do not mean the same thing. Forgery in its earlier meanings simply meant something made or fabricated, without any negative connotation. Today, however, forgery means "[t]he making of a thing in fraudulent imitation of something," OED, *supra* note 17, at 1057, and, in its legal meaning, the intentional making of an imitation. Blackstone's Commentary defined forgery as "the fraudulent making or alteration of a writing to the prejudice of another man's right." *Id.* (quoting Blackstone Comment. IV 245). The definitions of "fake" include "contrivance, dodge, trick, invention." *Id.* at 953.

forgeries, and yet are also not the works that they purport to be.[19]

"Original" (meaning something that is characterized by "originality") means that the work originates or comes from a specific source or artist.[20] The concept, however, blends in with the concept of "original" as used in copyright law—that is, for a work to qualify for copyright protection it must be original or not copied. According to Justice O'Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co*, "original" means that the work must contain some spark of creativity, which is further defined as containing elements that are not obvious.[21] But the definition of originality also indicates that the source of the work is the named author and is thus closely related to authenticity and authorship.

Professor Jane Ginsburg, in a comprehensive analysis of the meaning of authorship in copyright law, both posited and concluded that in copyright law, "an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work."[22] While the meaning of "original" for authenticity purposes may seem to vary from its meaning within the copyright context, this is not always the case.

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19. There are different ways of categorizing nonauthentic art. For example, Merryman begins by delineating two categories based on the intentions of the maker and the ease with which a work can pass as the original. Merryman, *supra* note 2, at 43. Merryman then lists as falling between the extremes of harmless reproductions and intentional forgeries close enough to pass as the original: photomechanical reproductions, exact reproductions, study copies, style studies and simulationist art. *Id.* at 43–47. One court has discussed the methods of producing counterfeit artworks including faked signatures, completing unfinished canvases, misrepresentation, reproduction, pastiche and completion of unfinished drawings. *See* Balog v. Ctr. Art Gallery-Haw, 745 F. Supp. 1556, 1560–61 (D. Haw. 1990).

20. "Originality" is defined as "[t]he fact or attribute of being primary or firsthand;" "[t]he quality of being independent of and different from anything that has appeared before; novelty or freshness of style or character." OED, *supra* note 17, at 2010. The nonlegal definition of "author" is "[t]he person who originates or gives existence to anything." *Id.* at 143. Thus, concepts underlying authorship and originality are shared in both the legal and nonlegal definitions of these terms.

21. The Copyright statute states that "[c]opyright protection subsists . . . in original works of authorship . . . ." 17 U.S.C. § 102 (2006). Justice O'Connor described the constitutionally mandated requirement for copyright protection as originality.

> To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure the requisite level of creativity is extremely low; even a slight amount will suffice . . . . Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citations omitted).

22. Jane C. Ginsburg, The Concept of Authorship in Comparative Copyright Law, 52 DEPAUL L. REV. 1063, 1064 (2003). Ginsburg identifies six characteristics common to different copyright systems that help to define who is an author. The third characteristic concerns "originality." While acknowledging that the different legal systems all require originality for authorship, they differ as to what they mean by originality. She concludes that "'intellectual creation' arising out of selection or arrangement, 'originality,' and authorship may be coming to mean the same thing," *id.* at 1079, and that "originality's primary meaning today seems to designate a minimum of personal creative activity." *Id.* at 1081. The other five elements for defining authorship are: the author is the "person who conceptualizes and directs the development of the work;" authorship involves intellectual labor, which must direct any mechanical device used in creating a work; the author must exert skill and labor; the author must intend to be an author; and the author may be the employer or commissioning party, at least for copyright purposes. *Id.* at 1072–90.

When we say that a work is an "original" by a named artist, this connotes that the artist originated the work—that is, that the artist did not copy the work from someone else's work. A determination of originality therefore also subsumes what it means to be an author.

An example of this intersection between "originality," for copyright purposes, and "original," from an authenticity perspective, is illustrated by an exhibit of Bob Dylan paintings, *The Asia Series*, on display at the Gagosian Gallery in New York in the fall of 2011. Questions were raised as to whether the paintings were based on Dylan's "own experiences and observations" or whether they were based on photographs that he did not take and that are widely available.[23] Those commenting on the resemblance seemed to encapsulate much of the debate as to the value of originality in artworks. One commentator wrote:

> The most striking thing is that Dylan has not merely used a photograph to inspire a painting: he has taken the photographer's shot composition and copied it exactly. He hasn't painted the group from any kind of different angle, or changed what he puts along the top edge, or either side edge, or the bottom edge of the picture. He's replicated everything as closely as possible. That may be a (very self-enriching) game he's playing with his followers, but it's not a very imaginative approach to painting. It may not be plagiarism but it's surely copying rather a lot.[24]

Other commentators, relying on the concept that all artists borrow from earlier art, were less critical. The Gagosian Gallery took the position that while Dylan's paintings were based on a variety of earlier sources, "the paintings' vibrancy and freshness come from the colors and textures found in everyday scenes he observed during his travels."[25]

It is not clear whether the Dylan paintings constitute copyright infringement of the underlying photographs—and no one seems to be asserting infringement—or whether they demonstrate sufficient originality to qualify as copyrightable derivative works, but the resemblance, at least in some cases, seems striking.[26]

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23. Dave Itzkoff, *Dylan Paintings Draw Scrutiny*, N.Y. TIMES, Sept. 28, 2011, at C1, *available at* http://artsbeat.blogs.nytimes.com/2011/09/26/questions-raised-about-dylan-show-at-gagosian/.

24. Michael Gray, *That Bob Dylan Asia Series Again*, BOB DYLAN ENCYCLOPEDIA: A BLOG 2006–2012 (Sept. 23, 2011), http://bobdylanencyclopedia.blogspot.com/2011/09/that-bob-dylan-asia-series-again.html?m=1 (quoted by Itzkoff, *supra* note 23). A comment, posted anonymously, on this blog notes that the underlying photographs are all public domain commercial prints and glass slides of the late Nineteenth and early Twentieth Century that he had posted to his Flickr account. While explaining that the photographs are public domain works and that he had posted them with an automatic "Creative Commons" permission, so that Dylan broke no laws, Dylan "seems to have violated a common 'social ethic' that for most of us in the graphics world involves giving credit for sources of inspiration, or direct credit for material upon which a 'derivative work' is based." Anonymous, Comment to Michael Gray, *That Bob Dylan Asia Series Again*, BOB DYLAN ENCYCLOPEDIA: A BLOG 2006–2012 (Sept. 23, 2011, 8:11 PM), http://bobdylanencyclopedia.blogspot.com/2011/09/that-bob-dylan-asia-series-again.html?showComment=1316833882978&m=1#c3048409507375435921.

25. Itzkoff, *supra* note 23, at C8.

26. Whether these paintings would contain enough creativity to qualify as copyright-protected derivative works—even if they are not infringing works—is difficult to answer. In *Gracen v. Bradford Exch. Ltd.*, Judge Posner suggested that a higher degree of originality is required for a derivative work to merit copyright protection than for an original work, even when the derivative work did not violate any

Dylan himself seems to deny much of the reliance of his paintings on these earlier sources. Nonetheless, this controversy raises questions as to what is the value placed on the art works. Is the value of these artworks that they were painted by a famous musician or is their value intrinsic in themselves?

If we are looking for intrinsic value, then it would seem that the extent to which these paintings copy other works should influence the historic and even aesthetic value that we place on these works. If, however, their significance comes from the fact that a famous personality created them, then their lack of originality may not affect their market or even cultural or historical value. This type of copying also implicates an aspect of originality that is particularly relevant to modern (or post-modern) art in that modern artists seem to accept a higher degree of reliance on earlier works. It was always the case that great artists were influenced by earlier art works and that we can clearly discern repetition of particular motifs over centuries of art works.[27] But a high degree of copying or quoting from earlier works seems to be accepted in postmodern art, without diminishing its aesthetic or market value.[28]

The third concept is "attribution."[29] Most simply, to attribute a work of art is to assign it to a particular artist, but it can also mean assigning a work to a particular group of people (or culture), time period or geographic origin. A work that is misattributed may or may not be an inauthentic work, and yet the attribution may have as great legal and economic consequences as a determination of

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copyright in the underlying work. 698 F.2d 300, 305 (7th Cir. 1983). *See also* Ginsburg, *supra* note 22, at 1076–77; 1081–82 (suggesting that the reason for requiring greater creativity in a derivative work, as with a photograph, is to prevent "lock-up" of the underlying work or material).

27. The art historian, H.W. Janson, commented:

> Originality, then, is what distinguishes art from craft. We may say, therefore, that it is the yardstick of artistic greatness or importance. Unfortunately it is also very difficult to define . . . . [O]riginality is always relative: there is no such thing as a completely original work of art. Thus, if we want to rate works of art on an 'originality scale' our problem does not lie in deciding whether or not a given work is original . . . but in establishing just exactly how original it is.

H.W. JANSON, HISTORY OF ART 12 (1969). Janson traces a motif of the arrangement of three seated figures from an ancient Roman sarcophagus, to a Raphael engraving, to Manet's "Luncheon on the Grass." *Id.* at 14–15.

28. Merryman discusses "simulationist" or appropriation art popularized as early as the 1980s. Merryman, *supra* note 2, at 46–47. The implications of appropriation art for copyright infringement and the fair use defense have been considered in several cases, including Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011). *See also* Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105 (2009) (discussing the evolution of copyright law's treatment of postmodern art, particularly the appropriation art of Jeff Koons as illustrated in the *Blanch* and *Rogers* decisions); Matt Williams, *Silence and Postmodern Copyright*, 29 CARDOZO ARTS & ENT. L.J. 47, 66–73 (2011) (noting the trend in copyright decisions to expand the fair use defense to excuse appropriation art from copyright infringement).

29. "Attribution" is defined, inter alia, as "[t]he action of bestowing or assigning;" "[t]he assigning or ascribing of a character or quality as belonging or proper to any thing;" "[t]he ascribing of an effect to a cause, of a work to its author, date, place, or of date and place to a work". *Attribution Definition*, OED, *supra* note 17, at 140. In art criticism, "attribution" means "[t]he ascription of a work or art to its supposed author." *Id.*

inauthenticity.

That these terms and consequences have great significance to the functioning of the modern art market is clearly demonstrated by the growth in the value of art works whose attribution to certain artists is clearly accepted and by the matching increase in the litigation concerning these issues. When a work can one day be sold for a few thousand dollars, but then possibly valued at $150 million soon after, one can only wonder at the significance attached to a determination of authorship. While no one can doubt the legal and economic consequences of these determinations, we must also ask what it means to be an artist or creator of a work of art and how this definition has changed over time.

II. THE RISE OF THE ARTIST: WHAT DOES IT MEAN TO BE AN ARTIST?

In today's art world, the artist is viewed as the primary, if not sole, creator of a work of art. Yet this is a relatively recent phenomenon in the long history of the development of artistic and cultural creations. In the earliest known forms of "art," such as the cave paintings at Lascaux in France and Altamira in Spain,[30] there seems to be little indication of individual identity of the creators.[31] Virtually no names of individual artists survive before the classical Greek and Hellenistic periods.[32] A few of the best known ancient Greek vases were signed by the artist and/or the potter.[33] Further, we know the names of the architect (Iktinos) and

30. While the Lascaux and Altamira paintings are dated 10–20,000 years ago and the paintings in the more recently discovered Chauvet Cave date to about 30,000 B.C., recent archaeological research has pushed the date for the earliest known paintings considerably earlier to approximately 100,000 years ago. Evidence of a workshop with tools and ingredients for mixing paints, based on the red pigments found in processed ocher, was found in a South African cave. While it is unclear whether the paints were used to decorate the body or artifacts, the researchers concluded that this was evidence "of early conceptual abilities" that were "'a benchmark in the evolution of complex human cognition.'" John Noble Wilford, *In African Cave, Ancient Paint Factory Pushes Human Symbolic Thought 'Far Back'*, N.Y. TIMES, Oct. 14, 2011, at A14, *available at* http://www.nytimes.com/2011/10/14/science/14paint.html?pagewanted=all.

31. It is possible that this lack of identification is more the result of our inability to discern patterns or the lack of survival of necessary information. The presence of handprints among the Paleolithic cave paintings may indicate an attempt to "sign" a work. See Jean Clottes, Chauvet Cave (ca. 30,000 B.C.), HEILBRUNN TIMELINE OF ART HISTORY, THE METROPOLITAN MUSEUM OF ART (2002) http://www.metmuseum.org/toah/hd/chav/hd_chav.htm. Given the recesses of time in which these works were created, it is unlikely that we will ever know the purpose.

32. Some of the earliest artists whose names are preserved for us are Bezalel, according to the Biblical tradition, the designer of the Tabernacle and its equipment and of the priests' vestments during the Israelites' wandering in the desert (Exodus 31:1–11; 36–39), *see* "Bezalel" in 4 ENCYCLOPEDIA JUDAICA 786–87 (1971), and the Egyptian prince Ankhhaf (ca. 2520–2494 B.C.), who may have been an architect associated with the building of the Sphinx and the second pyramid of Giza during the Old Kingdom. A representation of Ankhhaf, currently at the Boston Museum of Fine Arts, is considered to be one of the earliest realistic portraits depicting individualized characteristics, but the name of the sculptor of the bust is unknown. *See* Catalogue Entry—Bust of Prince Ankhhaf, MUSEUM OF FINE ARTS BOSTON, http://www.mfa.org/collections/object/bust-of-prince-ankhhaf-45982 (last visited Feb. 10, 2012). *See also* Dows Dunham, The Portrait Bust of Prince Ankh-haf, 37 BULL. MUSEUM OF FINE ARTS 42 (1939).

33. Attic vases, particularly of the second half of the sixth and first half of the fifth centuries B.C.,

sculptor (Pheidias) of the Athenian Parthenon and of other works on the Acropolis constructed as part of Pericles's major building program celebrating the defeat of the Persians.[34] Names of individual Greek sculptors of both the Classical and Hellenistic periods, such as Praxiteles and Lysippus, are known. However, with the exception of sculptures preserved in situ, such as the Parthenon sculptures, it is difficult for us to link these names to specific original extant works.[35]

Despite the extent to which the names and occasionally specifically-identified works of ancient Greek and Roman artists are known to us today, this type of knowledge decreases dramatically in medieval Europe, until we see the identity of the individual artist re-emerge at the end of the medieval period and the transitions to Romanesque, Gothic and then Renaissance art. In late Romanesque and early Gothic art, we begin to have specific artists associated with their works and, in some cases, the works are signed by the artist. In the case of the Italian Romanesque sculptor, Benedetto Antelami, the works are not only individuated through a signature but also, as exemplified by the façade of Fidenza Cathedral in Lombardy, ca. 1180–90, mark the emergence of a "considerable degree of individuality, so that, for the first time since the ancient Greeks, we can begin to

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were signed either by the potter, or the painter or both. The potter signed after the word "epoiesen" (εποιεσεν "made") and the painter signed after the word "egrapsen" (εγραπσεν "painted"). Thus, the famous Sarpedon krater that was acquired by the Metropolitan Museum and subsequently returned to Italy was signed by Euphronios as the painter and by Euxitheos as potter, although Euphronios was also known as a potter.

> This profusion of signatures and of explanatory inscriptions on vases in the decades at the turn of the 6th and 5th centuries provides eloquent testimony both to the pride of artists, potter and painters, and to the value which was attached not only to the works of sculpture and major painting (where artists' names have come down to us through literary sources), but also to the humbler products of vase painter and potter.

P.E. ARIAS & MAX HIRMER, A HISTORY OF GREEK VASE PAINTING 16 (B. Shefton trans., 1962). One wonders whether the high market value of these ceramic pieces today is because they are signed and therefore attributable to specific artists or whether they carry an intrinsic greater historical or aesthetic value.

34. Iktinos and a collaborator, generally named as Kallikrates, are identified as the architects of the Parthenon. Mnesicles is named as the architect of the Propylaea, the monumental entrance to the Acropolis and also a part of the Periclean building plan. Pheidias was both the primary sculptor of much of the Parthenon's elaborate sculptural program and also considered the general overseer of Pericles' building program. Barbara A. Barletta, *The Architecture and Architects of the Classical Parthenon*, *in* THE PARTHENON: FROM ANTIQUITY TO THE PRESENT 67, 88–95 (Jenifer Neils ed. 2005). Many of the modern identifications of architects and artists rely on descriptions and attributions given by Roman writers, such as Pausanias, and are therefore not always reliable.

35. Most ancient bronzes were melted down and survive only in Roman marble copies. Efforts to assign these copies as reflecting specific ancient sculptures are difficult at best. An example of this difficulty in attribution is illustrated by the bronze sculpture of the Apollo Sauroktonos acquired by the Cleveland Museum of Art in 2004. Its attribution has ranged from an original by Praxiteles of the late Fourth to early Third Century B.C. or to the Roman period dating as late as the Fourth Century A.D. Steven Litt, *Apollo: Art Museum's Global Coup*, CLEVELAND PLAIN DEALER, June 22, 2004, at A1, *available at* http://www.wkyc.com/news/story.aspx?storyid=20073. The appearance of ancient sculptures that have not survived is typically deduced based on representations in other media, generally smaller figures, such as statuettes and coins. *See, e.g.*, the reconstruction of the appearance of the Athena Parthenos given by Kenneth Lapatin, *The Statue of Athena and Other Treasures in the Parthenon*, *in* THE PARTHENON: FROM ANTIQUITY TO THE PRESENT 261 (Jenifer Neils ed. 2005).

speak (though with some hesitation) of a personal style."[36] With the northern Italian Gothic artists of the mid-Thirteenth to mid-Fourteenth Centuries, such as Nicola and Giovanni Pisano, Cimabue, Giotto and Duccio, who signed his masterwork the "Maestà" in Siena, we see the full-fledged reemergence of the artist as an individual with a large number of clearly associated and reliably attributed extant works.[37] The individuation of the artist continues to ascend with the recognition of master artists of the Renaissance, such as Leonardo da Vinci, Michelangelo and Raphael.

A perhaps ironic, and certainly entirely different, conception of the "artist" is the modern construction of an artist based not on any knowledge of an historical individual who created a particular work, but rather on the identification by a modern scholar of a particular "hand" or style around which the scholar creates the persona of an individual artist. This notion of connoisseurship began with the identification of a known artist with a particular work; the scholar then studies unattributed works of the same time period and determines, based on stylistic similarities, sometimes of minute details, but sometimes also on similarity in technique and materials, whether a known artist is the author of the previously unattributed work.[38] The further back in time one goes, the less likely it is that

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36. JANSON, *supra* note 27, at 224. Janson comments that it was not unheard of for Romanesque artists to sign their works, and links the appearance of individual, known artists to classical influence on artistic styles. Examples of identified artists who preceded Antelami include the baptismal font of Renier of Huy, c. 1107–18, at St-Barthélemy at Liège. *Id.* at 223–24. Janson comments:

> The emergence of distinct artistic personalities in the twelfth century is a phenomenon that is rarely acknowledged, perhaps because it contravenes the widespread assumption that all medieval art is anonymous. It does not happen very often, of course, but it is no less significant for all that. Antelami is not an isolated case; he cannot even claim to be the earliest. Nor is the revival of individuality confined to Italy. [In northern Europe in the Meuse River valley], the revival of individuality is linked with the influence of ancient art . . . [T]his influence did not produce works on a monumental scale. "Mosan" Romanesque sculpture excelled in metalwork, such as the splendid baptismal font of 1107–1118 in Liège, which is also the masterpiece of the earliest among the individually known artists of the region, Renier of Huy.

Id. at 224. Nicholas of Verdun, the contemporary of Antelami but located in the same area of northern Europe as Renier of Huy, displayed a similar classicism and a new humanizing effect in his depictions embodied in metalwork such as in the engraved and enameled plaques of the Klosterneuburg altar, completed in 1181 and viewed as transitional to Gothic art. *Id.* at 228.

37. *Id.* at 262–74.

38. The analysis of stylistic aspects of a work of art, combined with the function and techniques used to create the work, is known as connoisseurship. The desire of the Enlightenment era in the mid-Eighteenth Century to bring order to and classify the natural world evolved into the desire to do the same with cultural material remains. This led, in turn, to development of "connoisseurship"—that is, a "method by which quality could be determined empirically." Luke Syson, *The Ordering of the Artificial World: Collecting, Classification and Progress*, *in* ENLIGHTENMENT: DISCOVERING THE WORLD IN THE EIGHTEENTH CENTURY 118 (Kim Sloan ed. 2003). Specific criteria for evaluating objects were developed based on analysis of quality and authenticity, and this evaluation could then indicate and judge the society to which the object belonged. By the middle of the Eighteenth Century, "it was believed that connoisseurship, understood as a scientific, even philosophical system, might become an essential ingredient in arriving at a system for mapping the past." *Id.* at 120. Also consonant with Enlightenment philosophy, the notion of human progress became engrained into this classification system and into a unifying theory that explained past civilizations and empires. This notion of ordering of the past based on careful observation and analysis of the style, form and

named artists are known, and the more likely that one will find this methodology utilized to identify particular artists. Successive attributions are based on prior attributions for which virtually the only basis is the scholar's stylistic analysis from which the scholar then makes further attributions.

The furthest extreme of this is the situation in which there is no known artist or attributed work. Yet, based on a well-known exemplar, the scholar imagines an artist, who is named after that exemplar. Other works that are viewed as displaying similar characteristics are then attributed to that artist. Perhaps the field where this practice is best illustrated is the study of Attic Black and Red-Figured vase painting based on a pioneering methodology developed by John Beazley in the early Twentieth Century. In 1910, Beazley published a list of unsigned vases that he attributed to an anonymous artist, whom he dubbed the "Master of the Berlin amphora." Beazley then discerned how the life and skill of the artist developed over a long period of time.[39] Thus, we can perceive that, based on the modern scholar's analysis, the artist is reconstructed or flows from the work, rather than the work flowing from the artist. While Beazley's method is perhaps most widely applied to ancient Greek pottery, it is used in other areas of art, particularly from periods in which a relatively high degree of anonymous works are preserved.[40]

Even as the artist was emerging as a recognized individual, many artists functioned within a guild system so that a work might have been the product of a group, thus making it difficult to discern the individual contributions of each artist. Apprentices and journeymen worked for a master who directed the guild's production; had responsibility for the creative vision and the final work; and who might be viewed as the author of the work, although, in reality, it was the product

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function of ancient artistic works led to the development of a chronology based on the evolution of artistic styles in Greek and Roman art. This approach formed the theoretical basis for the work of the German art historian Johann Joachim Winkelmann, who developed a taxonomic or classificatory system of ancient art in his book *The History of Ancient Art*, published in 1764. From this classification, Winkelmann built a chronology of ancient art based on what he characterized as a development from the archaic phase of early Greek art of the Sixth Century B.C., to the high classical ideal of the Greek sculptor Phidias of the Fifth Century B.C., to the idealized naturalism of the sculptor Praxiteles of the Fourth Century B.C., and finally to the decadent and largely imitative phase of Roman art.

39. *Sir John Beazley*, CLASSICAL ART RESEARCH CENTRE AND THE BEAZLEY ARCHIVE, UNIVERSITY OF OXFORD, http://www.beazley.ox.ac.uk/tools/pottery/collection/johnbeazley.htm (last visited Feb. 10, 2012). Beazley was influenced by the studies of Giovanni Morelli, who was in turn influenced by the art historian Bernard Berenson.

40. In December 2010, Christie's auctioned a marble Cycladic sculpture, dated to ca. 2400 B.C. It sold for $16,882,500, more than three times its presale high estimate. The sculpture is known as the "name-piece of the Schuster Master." The catalogue entry describes the process of identification and attribution to "named" sculptors:

> Each artist developed his own unique personal style, allowing modern critics to identify the individual hand of a specific craftsman, and where significant numbers survive, even trace their development from a novice to a consummate carver. Once a collected body of work by a single hand is identified by modern scholarship, the anonymous artist is given an identity, a name by which their works can be categorized, such as the Naxos Museum Master, after the location of one or more of his works, or, as here, the Schuster Master after a previous owner.

A Cycladic Marble Reclining Female Figure, ANTIQUITIES, INCLUDING PROPERTY FROM THE PALEVSKY COLLECTION AUCTION CATALOGUE, CHRISTIE'S (Dec. 9, 2010), http://www.christies.com/LotFinder/LotDetailsPrintable.aspx?intObjectID=5385394.

of many people.[41] The perpetuation of the guild system can be seen in the studio system that has persisted in modern times with varying degrees of prevalence, and which includes many contemporary artists, such as Jeff Koons and Andy Warhol. These works may be the product of many people, but are often attributed to the master or head of the studio or atelier. Nonetheless, as will be discussed below, the distinction as to whether a particular work of art is the product of the master's own hand or of the master's studio (or even "circle") can have significant legal and market consequences.

Another form of group or communal production of artworks or cultural objects is recognized for indigenous cultures. Communal ownership of objects of cultural patrimony is embedded in the Native American Graves Protection and Repatriation Act (NAGPRA), which defines such objects as

> items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated or conveyed by any individual tribal or organization member . . . . Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.[42]

While NAGPRA specifically addresses ownership of Native American and Native Hawaiian cultural items, it contains an implicit recognition that sacred objects and objects of cultural patrimony are often the creations of the Native American or Native Hawaiian group.

Some indigenous cultures view the relationship between the individual and the society in which the individual functions differently. Thus, a work of art may be the product of an individual, yet that individual may deny the singleness of authorship. Conversely, and perhaps of greater concern to the functioning of the Western art market, is the possibility that a work that was communally produced will be signed by, or in some other way claimed by, an individual who happens to have received recognition as the author of the work. The person who signs such a work may not see him or herself as creating a forgery, yet that is how it might be viewed by the Western art market system. Cultural differences can make attribution with certainty difficult. The practice among aboriginal artists in Australia to allow those who are part of the artist's family or tribe to sign a work with the artist's name has led to considerable confusion and to what those who are accustomed to Western notions of authorship would consider to be forgery and

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41. Evelyn Lincoln, *Invention and Authorship in Early Modern Italian Visual Culture*, 52 DEPAUL L. REV. 1093, 1097 (2003).

42. 25 U.S.C. §§ 3001–13 (2006). One of the purposes of NAGPRA is to vest ownership of "cultural items" (a term that includes human remains, associated and unassociated funerary objects, objects of cultural patrimony and sacred objects) in a lineal descendant or a Native American tribe or Native Hawaiian organization, depending on a variety of circumstances. *Id.* §§ 3002, 3005. *See also* 43 C.F.R. § 10.2(D)(4) (West 2012) (effective July 5, 2011).

fraud.[43] On the other hand, we might analogize it to the workshop, guild or atelier system so commonly known in the Western art tradition.

Despite the emergence of the artist or architect as an individual personality between the end of the medieval period and the beginning of the Renaissance, there is an alternate and persistent perception that the patron of the artist is the true author of the work. For example, the name of the architect of the French cathedral where the Gothic architectural style was born, the Abbey Church of St.-Denis in Paris, is not known, whereas to Abbot Suger is attributed the inspiration, theological and aesthetic underpinnings, and ultimately the selection of the architect who would carry out his vision.[44] Artists in all media typically worked for a wealthy patron, sometimes working on specific commissioned projects, sometimes taking a position in the court or retinue of a monarch or aristocrat.[45] The patron was often considered equal to or even superior to the artist as the author or creator of the work and the work might be attributed to the patron.[46] This concept of the relationship between artist and patron continued until the development of the Romantic concept of the author as an individual creative genius.[47] The fact that some artists, such as Michelangelo, were able to achieve

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43. Elizabeth Burns Coleman, *Aboriginal Painting: Identity and Authenticity*, 59 J. AESTHETICS & ART CRITICISM 385, 388–91 (2001). Coleman contrasts the question of whether a work is authentic, if the artist who produced it is not an aborigine, with the question of whether a work is authentic if it is produced by an aborigine but not by the person who signed it, as happened with prominent Australian aboriginal artists, such as Clifford Possum, Turkey Tolson and Kathleen Petyarre. *Id.* The former would make a work inauthentic according to aborigine standards, while the latter makes a work inauthentic by Western art market standards. *See also* Ella Delany, *Artworks Lost in Confusion: Aboriginal Market Fights Global Financial Crisis and Questions of Authenticity*, INT'L HER. TRIB., Nov. 5, 2011, at 204, *available at* http://www.nytimes.com/2011/11/05/arts/05iht-rartabor05.html?pagewanted=all. The question of whether a work is the authentic product of a Native American person or tribe is addressed in the Indian Arts and Crafts Act. *See* 25 U.S.C. §§ 305–305f (West 2012). A determination of "authenticity" of Native American and other indigenous groups, once they incorporate elements of and are influenced by the majority culture surrounding them, is addressed in James Clifford, *Identity in Mashpee*, *in* THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 277, 336–44 (1988), and by Lowenthal, *supra* note 1, at 86.

44. JANSON, *supra* note 27, at 229–33. Janson captures this conundrum in commenting:

> [I]n order to know what constituted beauty, harmony, and fitness, the medieval architect needed the guidance of ecclesiastical authority. Such guidance might be a simple directive to follow some established model or, in the case of a patron as actively concerned with architectural aesthetics as Suger, it might amount to full participation in the designing process. Thus Sugar's desire to "build Dionysian theology" is likely to have been a decisive factor from the very beginning: it shaped his mental image of the kind of structure he wanted, we may assume, and determined his choice of a master of Norman background as the chief architect. This man, a great artistic, must have been singularly response to the Abbot's ideas and instructions. Between them, the two together created the Gothic style.

Id. at 232–33.

45. Susan P. Liemer, *On the Origins of* Le Droit Moral: *How Non-Economic Rights Came to Be Protected in French IP Law*, 19 J. INT. PROP. L. (2011) (in press); Evelyn Lincoln, *supra* note 41, at 1095–97; Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 166 (1983).

46. *See* Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2440 (2001) (describing the "dependency relationship" between artist or writer and patron) [hereinafter Note, *Exploitative Publishers*].

47. *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*,

recognition and some semblance of what we would call moral rights for their creative works, does little to change the reality in which most artists functioned.[48]

The importance of the patron as the economic and sometimes intellectual source of a work is perpetuated in the designation of the author of a work for copyright purposes. Ownership of the copyright in a work is initially vested in the author or authors of the work.[49] However, this right of the author or artist, in the case of a "work-made-for-hire," is denied and the "employer or other person for whom the work was prepared is considered the author . . . ."[50] While there are obvious economic repercussions, in addition to an economic rationale, for this denial of rights to the artist, it seems also to be a descendant of the notion that it was the patron of the artist, whether royal, noble or ecclesiastical, who received recognition for the artistic production, rather than the artist.

The artist working within an employment relationship not only loses the initial ownership of copyright, which embodies the pecuniary value of the work, but also forfeits the personality rights in the work embodied in those moral rights recognized by United States copyright law.[51] This latter result is particularly ironic

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41 DUKE L.J. 455, 466–72 (1991) (discussing the development of primarily literary authors as individual creators from the mid-Seventeenth Century and connection to the gradual protection of the author's rights through copyright law).

48. Michelangelo reportedly carved his name into a sculpture in a chapel in St. Peter's, rather than have his work attributed to his patron. Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1206 (2002) (citing GIORGIO VASARI, THE LIVES OF THE PAINTERS, SCULPTORS AND ARCHITECTS (A.B. Hinds ed. 1927)). In the late Gothic period, we see what may be a depiction of the sculptor of the pulpit of Stephansdom in Vienna peeking out of a window under the pulpit and not far away a sculpture of the architect. Although there are earlier self-portraits of artists, this depiction seems unusual in presenting the artists in such a public and permanent location clearly associated with their creations. *Stephansdom*, VIENNA 147–48 (Michelin Guide 2000).

49. 17 U.S.C. § 201(a) (2006). Copyright law recognizes the possibility of joint ownership of a copyright, when two or more people intend to be authors of a single work. *Id.* § 101 (defining a "joint work" as "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"). The development of copyright law shifted the author's primary economic relationship from writer and patron to writer and publisher. Although copyright initially vested in the author, economic reality typically resulted in the quick transfer of the copyright to the printer. Note, *Exploitative Publishers*, *supra* note 46, at 2441–42.

50. 17 U.S.C. § 201(b) (2006). A "work made for hire" is defined as:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (2006). For discussion of how the relationship of an employee acting "within the scope of his or her employment" is defined, see Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

51. The Visual Artists Rights Act (VARA) was enacted in 1990 and is codified as part of the Copyright Act. VARA applies only to a narrow category of artistic works, limited to works of visual art defined to include:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a

or jarring because the reason for moral rights is to protect the personality of the artist or creator that becomes embodied in the work.[52] The employment or other monetary relationship in which the artist is working should be irrelevant to whether the artist has a reputational or dignity interest in ensuring proper attribution, or in preventing the damage or destruction of the work.[53]

In particular, the right of attribution relates to questions of authenticity. The right of attribution, as recognized by the Visual Artists Rights Act (VARA), gives the author the right to claim authorship of a work created by the author and to disclaim authorship of a work that he or she did not create or of a work that has been changed in a way that would injure the artist's honor or reputation.[54] This right of attribution is, essentially, a right of authentication belonging to the artist, although in the United States, the law strictly confines the parameters of the author's right to authenticate. The right to authenticate as embodied in European, and particularly French, moral rights law is much broader and stands in stark contrast to the way this right is viewed in the United States.[55]

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sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101 (2006). However, the extent of VARA protection is even more limited in that it excludes works made for hire from the definition of a work of visual art. *Id.* It should also be recognized that not all works of art may meet the criteria for copyright protection and any work that does not qualify for copyright also does not qualify for moral rights. *Id.* § 106A(b). Creators of such works are denied both their pecuniary and personality rights in the work. *See, e.g.*, Kelley v. Chi. Park Dist., 635 F.3d 290, 303–06 (7th Cir. 2011) (denying the creator of a flower bed arrangement moral rights because the work lacked the stable fixation and expressive authorship to qualify for copyright protection). The First Circuit has held that VARA protections are denied to site-specific art. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 140–43 (1st Cir. 2006).

52. The purpose of VARA is to "protect[] both the reputations of certain visual artists and the works of art they create. It provides these artists with the rights of 'attribution' and 'integrity' . . . . The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation." H.R. REP. NO. 101–514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

53. Subject to numerous exceptions, some of which are discussed in note 51, VARA grants author the rights of integrity and attribution, as follows:

> [T]he author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) . . . shall have the right—(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a) (2006).

54. *See id.*

55. In contrast to the European version of moral rights, however, the U.S. artist does not have the right to disavow authorship simply when the artist is dissatisfied with the work. As will be discussed in greater detail *infra*, the French version of moral rights is perpetual. This means that the author's right to

III. DETERMINING AUTHENTICITY AND THE POWER TO AUTHENTICATE

The power or right to authenticate and the means of determining authenticity have become increasingly controversial and the subject of more frequent litigation as foundation boards, authentication boards, preparers of *catalogues raisonnés*, art historians and holders of the French *droit moral* (which extends beyond the life of the artist) continue to raise questions of how a work can be authenticated. In some cases, the authenticator has refused to authenticate a work that seems to have impeccable provenance and, in other cases, has simply refused to make a decision one way or the other.[56] While litigation has generally not succeeded, this has proven to be very troubling to all concerned with questions regarding the authenticity of art, from the art historian to the market.

There are three methods by which the authenticity and attribution of a work may be determined: connoisseurship, scientific analysis and provenance (or provenience).[57] Each of these methods plays a crucial role in the attempt to determine which works are authentic, yet each has also its drawbacks. Connoisseurship is the study of works of art, based on form, decoration and other aesthetic criteria to determine their authenticity.[58] The ability to discern these qualities in a work derives from a comparative study of a particular work with others of a similar style and contemporary period. However, connoisseurship alone cannot reliably determine authenticity as the acceptance or rejection of particular works as authentic has been known to change over time.[59]

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authenticate a work passes through the artist's estate and may be handed down from one generation to the next.

56. *See, e.g.*, Simon-Whelan v. The Andy Warhol Found, No. 07 Civ. 6423 (LTS), 2009 U.S. Dist. LEXIS 44242, at *7–9 (S.D.N.Y. May 26, 2009) (plaintiff alleging that the Foundation refused to authenticate a painting that it had previously authenticated and whose provenance had been carefully vetted); Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16 (N.Y. App. Div. 2009) (foundation refusing to make a determination of authenticity of stage sets allegedly the work of Alexander Calder).

57. James Martin, *Testing Objects: Scientific Examination and Materials Analysis in Authenticity Studies*, *in* FAKES AND FORGERIES: THE ART OF DECEPTION 141 (Gerald C. Zeigerman ed., 2007).

58. *See supra* note 38 and accompanying text.

59. For example, several deauthenticated Rembrandt paintings were subsequently reauthenticated after undergoing scientific analysis. *See* Kristine Wilton, *Deauthenticated Rembrandts Real After All*, ARTNEWS, March 2006, at 84. The legitimacy of connoisseurship as a method of determining authenticity was at the heart of the controversy over the Hahn Leonardo and Duveen's assessment of the painting. BREWER, *supra* note 10, at 136–62. Particularly as practiced in the late Nineteenth and early Twentieth Centuries, connoisseurship depended on the trained eye of the expert and, to a large extent, his or her instinctive reaction to a work of art. Duveen's loss in the trial can be largely attributed to distrust of this method and its rejection of technical and documentary evidence. The judge told the jury: "There are two ways that experts in this case can help you with their opinions. One is their study of the authentic history of a painting['s] [provenance]. The other by their study of the methods used or materials employed by the painters or schools of painting of the period in which it is claimed the pictures were painted." *Id.* at 144. A recent experiment comparing the brain activity of viewers when they were told they were looking at authentic or fake Rembrandts seems to indicate that the viewer reacts to the information known about the work, rather than to the work itself. *See* Sean Coughlan, *'Fake' Paintings Trick Viewers in Brain Scan Test*, BBC NEWS (Dec. 6, 2011), http://

The second prong, scientific analysis, can be of significant assistance in determining whether a work is not authentic.[60] The use of sophisticated testing methods, such as infrared imaging, allows the scientist to analyze the microstructure, tools and materials in a work. The use of incorrect materials, such as paint pigments, canvas or other backing materials, can indicate that a work was made more recently than its purported date.[61] Other testing methods, such as radiocarbon dating or thermoluminescence dating, can be used on older works to achieve a rough estimate of date, although such dates can easily vary by several hundred years. Thus, use of incorrect raw materials or methods can rule conclusively that a work is not authentic. However, the use of correct materials, tools or methods cannot prove that a work is authentic. There are known examples of contemporary artists using ancient techniques—such as contemporary Peruvian potters making pottery using the techniques and styles as ancient Inca craftsmen.[62] The same is known of Greek sculptors who make what appear to be ancient Cycladic idols.[63] If the contemporary artisan is sufficiently careful to use the correct techniques and materials, a new "ancient" work can be produced and it is extraordinarily difficult to tell them apart. These works also raise the question of whether they are intentional forgeries or merely modern works that are continuations of ancient artistic traditions.

The third prong is provenance—that is, the history of ownership of an artwork. In addition to the fact that provenance documentation can itself be faked, as was described in the case of the Beltracchi and Myatt forgeries, questions remain.[64] How long of a history can the contemporary scholar develop and is it long enough to give reasonable assurance that the work is authentic? The ideal provenance would trace the work back to the hand of the artist, although this is generally unrealistic, even in the case of many contemporary artists, and certainly so for older works. In the case of archaeological objects, though, the ability to trace a work to its find spot is perhaps the only way of determining the authenticity of an object.[65]

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www.bbc.co.uk/news/education-16032234. Lowenthal points out that a work of art or an artifact seems more authentic if it conforms to the viewer's idea of what an authentic object should look like rather than to what an authentic object would be. *See* Lowenthal, *supra* note 1, at 88–89.

60. *See generally* Martin, *supra* note 57.

61. Detection of incorrect pigments in the paints has unmasked many forgeries, including those of Beltracchi. *See* Sven Röbel & Michael Sontheimer, *Forgery Scandal Embarrasses International Art World*, SPIEGEL ONLINE INT'L (June 13, 2011), http://www.spiegel.de/international/zeitgeist/0,1518,druck-768195,00.html

62. *See* Charles Stanish, *Forging Ahead*, ARCHAEOLOGY, May/June 2009, at 18, 58–66 (describing the growth in sales of forged antiquities on eBay, and asserting that it helps to preserve archaeological sites from looting by providing a ready market for reproductions).

63. *See* Peter Landesman, *A Crisis of Fakes*, N.Y. TIMES MAG., Mar. 18, 2001, at 36, 52 (describing the alleged modern manufacture of a Cycladic sculpture).

64. *See supra* notes 6–9 and accompanying text.

65. The find spot is the place where an archaeological object is discovered or excavated. Several studies have been conducted of antiquities in museum and private collections to determine the extent to which these objects have documented provenance. *See, e.g.*, Christopher Chippindale & David W.J. Gill, *Cycladic Figures: Art Versus Archaeology?*, *in* ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL & CONSERVATION ISSUES 131, 132 (Kathryn W. Tubb ed., 1995) (concluding that ninety percent of known Cycladic figures do not have a provenance); Christopher Chippindale & David W.J.

Decontextualized objects that appear on the market without a provenance (or provenience—that is, a modern history back to the find spot) have a reasonable likelihood of being inauthentic or, at the least, objects about which we will never know for sure. The inability to determine which art works are authentic and which are not leads to a conservative trend in our understanding of an artist's canon. An inauthentic work may become accepted, and a genuine work, if it does not sufficiently resemble other known works of that artist, may be rejected. Professor Andrew Stewart summarized the dilemma: "There are two sins a curator or scholar can commit . . . . One is to accuse a genuine work of art as fake, and the other is to authenticate a forgery. The first is much more heinous, to condemn something that someone made in antiquity."[66]

The expert who gives an opinion as to the authenticity of a work of art bears the risk of being sued by those who are adversely affected by the opinion. In most cases, such a suit would be based on either a breach of warranty/breach of contract claim[67] or on a professional malpractice/negligence theory.[68] Most of these causes of action require a preexisting relationship between the parties from which a duty flows, such as a contractual relationship or a fiduciary relationship.[69]

Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 477 (2000) (concluding that seventy-four percent of the objects included in classical collections exhibited in the 1990s had no archaeological find spot, and only nine percent had a lengthy documented history or could be traced back to the ground). Greater attention is now paid to provenance in the market for antiquities not only to avoid acquiring a fake but also to avoid legal problems concerning title and proper import.

66. *See* Landesman, *A Crisis of Fakes*, *supra* note 63. However, Stewart also pointed out that if a work "looks like something we have already, then it's easy to condemn as a fake, as a simple knockoff . . . . Any innovation is likely to be anachronistic." *Id.*

67. A plaintiff can sue based on a variety of statutory (such as the Uniform Commercial Code (U.C.C.)) and common law bases. Under the U.C.C., a disappointed buyer can sue based on breach of an express warranty (§ 2-313), implied warranty of merchantability (§ 2-314) or implied warranty of fitness for particular purpose (§ 2-315). Warranties may be excluded or modified, pursuant to § 2-316. One of the questions is typically whether the seller's statement concerning authenticity or attribution constituted a warranty (in which case the statement is actionable) or whether it was a statement of opinion (in which case it is not actionable). The most common type of warranty on which a buyer is likely to sue is breach of an express warranty. Under some state art market legislation, if the seller is an art merchant, selling to a non-art merchant, then the statement is conclusively to be part of the basis of the bargain and therefore actionable. *See infra* notes 84–86 and accompanying text. In *Boule v. Hutton*, 328 F.3d 84 (2d Cir. 2003), the causes of action included claims under the Lanham Act, unfair competition by disparagement, defamation or libel and breach of contract and of the implied covenant of good faith and fair dealing. The cause of action in *Hahn v. Duveen*, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929), was labeled slander of title, but would today be characterized as a claim in tort for product disparagement based on injurious falsehood. *See* Greg Kitchen v. Sotheby's, No. SC 2259/07, 2008 WL 440422, at *6–7 (N.Y. Civ. Ct. Feb. 19, 2008). *See also* Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, *in* THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 143 (Ronald D. Spencer ed., 2004). For a summary of the English Sale of Goods Act (1979) as applied to art market transactions, *see* Ulph, *supra* note 7, at 268–77.

68. For example, in *Foxley v. Sotheby's*, 893 F. Supp. 1224, 1236 (S.D.N.Y. 1995), the court held that the owner of an art work stated a claim for gross negligence when Sotheby's appraised a painting attributed to Mary Cassatt at $650,000 when Sotheby's knew at the time of the appraisal that the painting might not have been authentic.

69. To sue for breach of contract, the plaintiff either has to be a party to the contract or stated in the contract to be a third party beneficiary of the contract. Mandarin Trading Ltd. v. Wildenstein, 944

As discussed previously, the right to authenticate a work may be part of the artist's *droit moral*, depending on how moral rights are formulated in a particular jurisdiction. While in the United States, federal moral rights are limited to the life of the artist, under some state statutes, and those of other nations, the right may extend beyond the life of the artist.[70] For example, in France the right to authenticate a work, which derives from the French *droit moral* and includes the right to claim or disclaim authorship, may be held by the artist's estate and thus pass to someone related to the artist or someone who was close to the artist during his or her lifetime.[71] However, it is possible for this right to devolve to individuals who neither are expert in the artist's work nor were involved with the artist during his or her lifetime. Although in such cases it is difficult to understand why the

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N.E.2d 1104, 1110 (N.Y. 2011) (stating that in a breach of contract claim, the contract must either state the parties to the contract or the plaintiff must establish that "the contract was intended for their benefit"). To sue in fraud or for negligent misrepresentation, the defendant needs to intend for the plaintiff to rely on the defendant's statement. *Id.* at 1108 (stating one element of a fraud claim as the defendant made the false statement "for the purpose of inducing the other party to rely on it"); Krahmer v. Christie's Inc., 903 A.2d 773, 784 (Del. Ch. 2006) (stating that one element of a claim for negligent misrepresentation is that the defendant knew the plaintiff wanted the information supplied for a "serious purpose"). Finally, a claim based on fraudulent concealment requires that the defendant owe a duty to the plaintiff to disclose material information. *See* Mandarin Trading Ltd. v. Wildenstein & Co., No. 602648/06, 2007 WL 3101235 (N.Y. Sup. Ct. Sept. 4, 2007). *See also Krahmer*, 903 A.2d at 784 (stating that for a claim of negligent misrepresentation the plaintiff must establish that "the defendant had a duty, as a result of a special relationship, to give correct information"). However, a recent decision in New York held that a subsequent purchaser of a painting could state a claim against Christie's for fraud and fraudulent inducement, although there was no relationship between Christie's and the purchaser. Tony Shafrazi Gallery Inc. v. Christie's Inc., No. 112192/07, 2008 WL 4972888, at *6–7 (N.Y. Sup. Ct. Nov. 7, 2008), *aff'd*, No. 112192/07, 2009 WL 1433049 (N.Y. Sup. Ct. Apr. 14, 2009). The court stated, "If . . . Christie's fraudulently misrepresented the Painting's provenance, and published that misrepresentation in its catalogue, which Christie's could reasonably anticipate would be relied upon by bidders at its auction, as well as subsequent purchasers, it may be liable to those who relied upon its misrepresentation." *Id.* The plaintiffs described Christie's as a "market maker" in that "when Christie's provides a warranty concerning the authenticity, or provenance of a painting, the custom and practice of the art industry is that the provenance of the work of art has been firmly and permanently established. *Id.* at *6. The court subsequently dismissed the claim because the plaintiff was unable to establish that Christie's knew at the time of the sale that the painting was not authentic. Tony Shafrazi Gallery Inc. v. Christie's Inc., No. 112192/07, 2011 WL 6002677, at *6–8 (N.Y. Sup. Ct. Nov. 22, 2011).

70. The New York moral rights statute seems to grant moral rights in perpetuity. These rights include "the right to claim authorship, or, for just and valid reasons, to disclaim authorship of such work." N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney 2011). The California statute contains similar language. *See* CAL. CIV. CODE § 987(d) (West 2011). *See also* Seth Tipton, *Connoisseurship Corrected: Protecting the Artist, the Public and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 289–94 (2009). These state-based moral rights are preempted during the life of the artist by the federal Visual Artists Rights Act, 17 U.S.C. § 301(f)(1) and (2)(C) (2006). *See* Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2003 U.S. Dist. LEXIS 10221, at *47–48 (S.D.N.Y. June 17, 2003). *But see* Tipton, *supra*, at 295–99; Elizabeth Dillinger, *Mutilating Picasso: The Case for Amending the Visual Artists Rights Act to Provide Protection of Moral Rights after Death*, 75 UMKC L. REV. 897, 915–23 (2007).

71. *See* Dillinger, *supra* note 70 at 900–03; Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 6–35 (1988); Tipton, *supra* note 70, at 285–89. *See also* Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986).

power to determine both the market value and historical significance of a work should be accorded to the holder of the *droit moral*, this has nonetheless been given credence.[72]

The task of authenticating works of art, particularly those of modern and contemporary artists, has in recent years been assumed to varying extents by foundations and authentication boards that were created by the artist or from the artist's estate.[73] A foundation may either authenticate works on an individual basis or may be responsible for producing a *catalogue raisonné*, which is a definitive compilation of the works of a particular artist.[74] Although artist-endowed foundations have produced only eleven *catalogues raisonnés*, they have been involved in a relatively high number of lawsuits, perhaps because these suits involved activities of the foundation in authenticating individual works as well as the more comprehensive approach of preparing a *catalogue raisonné*.[75] Suits against foundations or the authentication boards that may be set up by the foundation, but separately incorporated, have been based on allegations of antitrust activity,[76] refusal to authenticate a work[77] and refusal to issue an opinion as to

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72. In *Greenwood v. Koven*, 880 F. Supp. 186, 189 (S.D.N.Y. 1995), Claude Laurens held the *droit moral* for the artist Georges Braque, including the right to authenticate his works. However, when Christie's was attempting to authenticate a Braque pastel, it sent the pastel to Claude's son, Quentin. *Id.* While Claude had "'assumed th[e] moral right, particularly by certifying the authenticity of Georges Braque's works[,] . . . [m]ore recently this authentication ha[d] been accomplished (in agreement with his father) by Quentin Laurens, only son of Claude Laurens.'" *Id.* at 189 n.3. When Quentin refused to authenticate the pastel, Christie's rescinded the sale, even though the work had an impeccable provenance. *Id.* at 189. When the original owner refused to refund the purchase price, the court held that although Christie's had a fiduciary duty to the consigner, its actions in rescinding the sale were in good faith and did not violate the terms of the consignment agreement. *Id.* at 201.

73. For extensive treatment of artists' foundations, *see* The Aspen Inst. Program on Philanthropy & Social Innovation, *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (2010), http://www.aspeninstitute.org/policy-work/nonprofit-philanthropy/Publications/The-Artist-as-Philanthropist (hereafter "*The Artist as Philanthropist*").

74. In *Krahmer v. Christie's Inc.*, 911 A.2d 399, 403 n.9 (Del. Ch. 2006), the court defined a *catalogue raisonné* committee as "a group of scholars who are intimately familiar with the work of a particular artist. Normally, either an art gallery or a group of art collectors will raise and commission such a committee to create an exhaustive list of an artist's authenticated works . . . ." Inclusion or exclusion from a *catalogue raisonné* is often considered determinative of the work's authenticity and acceptance in the market place. The role of artist-endowed foundations in creating the artist's *catalogue raisonné* is treated extensively in *The Artist as Philanthropist*, *supra* note 73, at Vol. II, 195–213. While foundations have supported the creation and publication of *catalogues raisonnés* throughout much of the Twentieth Century, the first directly produced by a foundation was the Barnett Newman prints *catalogue raisonné* published in 1983. *Id.* at 196.

75. 2 *The Artist as Philanthropist*, *supra* note 73, at 196–97, 200. However, some two dozen foundations are reportedly in the process of producing catalogues. *Id.* at 199.

76. In *Kramer v. The Pollock-Krasner Found.*, 890 F. Supp. 250, 253 (S.D.N.Y. 1995), the plaintiff, a fine art and antiques dealer in Arizona, bought a painting privately for $15,000, which he alleged would be worth $10,000,000 if it were authenticated as a Jackson Pollock and sold at auction. The Pollock-Krasner Foundation refused to authenticate it and it was not included in the *catalogue raisonné* of Pollock works, after which Christie's and Sotheby's refused to auction it. *Id.* Kramer alleged antitrust violations, conspiracy to create a monopoly, common law unjust enrichment and interference with advantageous business relationships, as well as deceptive acts under New York state law. *Id.* Kramer alleged that the antitrust conspiracy began at Pollock's death in 1956. *Id.* The goal of the conspiracy was to exclude certain authentic Pollock pieces from the accepted canon of his work, and

whether a work is authentic.[78] Given that the foundation may own a significant

thereby from the market, in an attempt to increase the value of Pollock paintings owned by the Foundation. *Id.* The antitrust and monopoly claims depended on establishing that the auction houses had a monopoly on the market in Pollock paintings in a specific geographic region. The plaintiff's claims, all of which were dismissed, failed in large part because of inability to prove that a monopoly existed for the sale of Pollock paintings within any specific geographic area, whether in New York or the entire United States. *Id.* at 254–58. Other avenues of sale for the plaintiff's painting were available, including a private sale through a dealer. *Id.* at 255. *See also* Galerie Enrico Navarra v. Marlborough Gallery, Inc., No. 10 Cv. 7547, 2011 U.S. Dist. LEXIS 67765, at *14–17 (S.D.N.Y. June 21, 2011) (rejecting plaintiff's Sherman Act claim because the works sold by plaintiff and defendant were not in the same market).

77. In *Simon-Whelan v. Andy Warhol Found.*, No. 07 Civ. 6423, 2009 WL 1457177, at *3 (S.D.N.Y. May 26, 2009), the plaintiff, whose paintings had been rejected by the Andy Warhol Foundation, sued alleging conspiracy to control the market in Warhols and thereby artificially inflate the value of works in violation of the Sherman Act, the New York Donnelly Act, the Lanham Act and claims for fraud and unjust enrichment. *Id.* at *4. The court invalidated an exculpatory provision contained in the submission agreement that would have prevented the plaintiff from suing. The court held that an exculpatory provision cannot protect a party that engages in intentional wrongdoing as was alleged in the complaint. *Id.* The court further held that the plaintiff's conspiracy in restraint of trade claims survived a motion to dismiss because the plaintiff had sufficiently alleged a conspiracy between the Board, which authenticates individual works, and the Foundation, which produces the *catalogue raisonné*, and had identified a relevant geographic area. *Id.* at *5. Conversely, however, the plaintiff did not allege sufficiently that he had suffered any damages from artificial inflation of the price of Warhols. *Id.* at *6. In 2010, Simon-Whelan dropped the lawsuit against the Andy Warhol Foundation stating that he lacked the money to pursue his claim. Randy Kennedy, *Warhol Board Lawsuit Is Finally Dropped*, N.Y. TIMES, Oct. 27, 2010, at C3.

More recently, Killala Fine Art Ltd. sued the Dedalus Foundation, which is the art foundation for the works of Robert Motherwell. The basis for the suit was that Killala purchased a Motherwell, which the Foundation allegedly authenticated at the time of the sale; the Foundation subsequently withdrew its statement of authenticity and refused to include the painting in its *catalogue raisonné*. *See* James Panero, *Behind the Veil: Questions About Art Authentication*, WALL ST. J., Mar. 23, 2011, at D5, *available at* http://online.wsj.com/article/SB10001424052748704608504576208622894968298.html. Part of Dedalus' defense is that it gave an opinion concerning the painting and that it should be able to change its opinion without incurring liability. The case was subsequently settled with the painting being marked as a forgery and Killala receiving compensation from Julian Weissman, the dealer from whom Killala purchased the painting, and from Glafira Rosales, the dealer from whom Weissman purchased the painting. *See* Patricia Cohen, *Motherwell Painting Declared a Forgery*, N.Y. TIMES, Oct. 12, 2011, at C3, *available at* http://www.nytimes.com/2011/10/12/arts/design/motherwell-painting-declared-a-forgery.html?_r=2&ref=todayspaper. Weissman used to work at the Knoedler Gallery, while Rosales is the dealer who supplied Knoedler with alleged forgeries. *See supra* note 4 and accompanying text.

78. In *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16 (N.Y. App. Div. 2009), the plaintiff sought inclusion in the Calder catalogue or issuance of a *catalogue raisonné* number for stage sets based on sets designed by Calder in 1932 and approved by Calder shortly before his death. The Foundation refused to respond to the plaintiff's requests, but the court held that the Foundation owed no particular duty to the plaintiff that would require it to respond. *Id.* at 21–22. While conceding that inclusion in or exclusion from a catalogue might affect the market value of a work, the court rejected this as a basis for a legal duty on the part of the authenticator, concluding "[w]hether the art world accepts a *catalogue raisonné* as a definitive listing of an artist's work is a function of the marketplace, rather than of any legal directive or requirement." *Id.* at 22. The court also emphasized that a determination of authenticity must be made by experts and not by a court; while a determination of authenticity may need to be made by a court in resolving a dispute between two parties, such as where one seeks rescission of a sale or damages for breach of warranty and such decisions may have an incidental market effect, courts should not issue general pronouncements that would amount to advisory opinions and that are intended to have primarily a market effect. *Id.* at 24–25.

number of the artist's works and that the foundation boards often include members of the artist's family, who themselves likely own works, the potential for conflicts of interest abounds when the foundation engages in the process of authentication. This is particularly the case in light of the significant market and economic role that the authentication process plays.[79] Despite this fairly extensive litigation, the foundations and authentication boards have generally prevailed, although at considerable cost in both legal fees and reputation.

In response, the Andy Warhol Foundation recently announced that it would discontinue its Art Authentication Board and no longer issue certificates of authenticity, preferring to focus its attention and finances on preparing definitive *catalogues raisonnés* of the artist's work and other charitable endeavors. In explaining this decision, Joel Wachs, president of the foundation, said that the "*catalogue raisonné* serves a non-market purpose . . . . The market seems to want to use the authentication board, but that can't be our concern."[80] While this decision was undoubtedly motivated by the expense and negative publicity caused by the lawsuits and accusations against it, the Foundation seems to want to step back from the market function of authentication to focus, instead, on art historical scholarship, while admitting that even a *catalogue raisonné* may serve market

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79. As private charitable foundations, these boards and foundations are subject to stringent legal requirements to provide a public benefit and to avoid conflicts of interest and self-inurement for board members and insiders. *See* 2 *The Artist as Philanthropist*, *supra* note 73, at 80–90. Nonetheless, doubts remain given that the decisions of the foundations on authentication seem unreviewable, the significant market effect of their decisions concerning authenticity and the potential for personal benefit in restricting the market in the works of a particular artist. One commentator has stated:

> Artist foundations have come to serve as the art market's rating agencies, with *catalogues raisonnés* providing triple-A stamps of approval. As such, these foundations regularly make determinations that can have a significant monetary impact on the value of art, as the Killala lawsuit maintains. At the same time, because these same foundations derive income from the sale of work in their possession by the same artist, there is the potential for conflict of interest, in fact or appearance, in their evaluations of works submitted for authentication.

Panero, *supra* note 77. The Aspen Institute study recommends:

> to the extent that it potentially increases the economic value of artworks, a foundation generally should not authenticate works owned by its insiders or make grants to organizations designated for activities to authenticate works owned by insiders. Likewise, where it potentially increases economic value, a foundation generally should not exhibit or publish about works owned by its insiders or make grants to organizations designated to support such activities.

2 *The Artist as Philanthropist*, *supra* note 73, at 86. As the authentication boards and foundations are constituted in different manners, one should not generalize as to whether they engage in prohibited conduct. However, one should consider whether the authenticating body is composed of recognized experts with appropriate qualifications; the extent to which board members and insiders own works of the artist; the extent to which board members and insiders are involved in the authentication process and the extent to which the authenticating group, even if nominally independent, is subject to direct or indirect control of individuals who may derive personal benefit from either the inclusion or exclusion of particular works from an artist's recognized corpus. Without greater transparency in the processes by which these foundations and boards make their determinations of authenticity and without greater judicial scrutiny, it will not be possible to determine whether the board members and insiders of these institutions are carrying out their fiduciary and public obligations.

80. Charlotte Burns, *Warhol Foundation Shuts Its Authentication Board*, THE ART NEWSPAPER, Oct. 20, 2011, http://www.theartnewspaper.com/articles/Warhol-foundation-shuts-its-authentication-board/24869.

purposes.[81]

Tension among the discipline of art history, art market practice or trade usage, and the law in identifying the author of a work is also revealed in the technical terminology of attribution of a work of art which may vary depending on the time period and category of art to which the work belongs. An interesting example of this is presented in the case, *Levin v. Gallery 63 Antiques Corp.*, in which the plaintiffs purchased five Nineteenth Century Italian statues to decorate their new home.[82] Four of the five were listed in an invoice as an "original" sculpture signed by a particular sculptor.[83] Later dissatisfied with the purchases and the price they had paid, the purchasers sued the gallery for breach of warranty of authenticity.[84] One expert retained by the plaintiffs to appraise the works concluded that, although the signature of each artist on the sculpture was genuine, "because of the workshop system characteristic of Nineteenth Century Italian academic marbles, . . . the term 'original' can only be applied to such statues with qualification."[85] In contrast, the defendant's expert, Victor Weiner, concluded:

> [A]s it relates to Nineteenth Century academic sculpture, "'original'" means that the work was produced at the time and by the artist's studio in which the master artist could supervise and ascertain that the finished work met his design and creative vision." Thus, . . . Gallery 63's invoice did not misrepresent that the statues the Levins acquired were originals. Weiner also challenged Sorlein's opinion that the sculptures were "damaged" as the term is used by the trade, because "dealers in [Nineteenth] Century sculpture usually do not list any damage and restoration unless it is truly significant."[86]

The experts did not disagree as to how the works were produced—that the sculptures were produced by the workshop of the named sculptor and under his supervision but not necessarily by his own hand; rather, they disagreed as to what

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81. In *Thome*, the court also seemed to reject or at least severely criticize the market function of the *catalogue raisonné*, implying that this represented an abdication by the market of any responsibility for authenticating art works:

> If buyers will not buy works without the Foundation's listing them in its *catalogue raisonné*, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work 'authentic.' Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the Work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusion in its *catalogue raisonné* to dictate what is worthy of purchase.

890 N.Y.S.2d at 26. However, denial of the market function of attribution or reattribution seems entirely unrealistic. *See* Ulph, *supra* note 7, at 264.

82. No. 04-CV-1504 (KMK), 2006 U.S. Dist. LEXIS 70184, at *4–5 (S.D.N.Y. Sept. 28, 2006).

83. *Id.* at *15–16. The fifth sculpture was also listed as signed by a named artist, but the artist was unknown. *Id.* It turned out that the reading of the name was incorrect and that the work was signed by a known artist—a factor which allegedly increased the value of the sculpture. *Id.* at *21–22.

84. *Id.* at *1–2. The purchasers paid a total of $970,000 for the five sculptures, of which $622,725 was paid directly to the seller Gallery. At the time of the suit, the purchasers' appraiser valued them at $125,000. *Id.* at *17 n.6, *19.

85. *Id.* at *20.

86. *Id.*

"original" means as applied to a particular category of art works. One expert believed that the term "original" must be interpreted in light of the artistic practices of the period in which the work was produced and as understood by art historians and professionals in the trade.[87] The other expert believed that the term should be interpreted more in line with how it is commonly understood.[88] The defendant maintained that any warranty was not breached because the plaintiffs had received "original" sculptures under the "prevailing terminology used in the trade."[89] The question, then, is with which perspective the law would agree.

New York's special art market legislation applies specifically when an art merchant sells a work of art to a non-art merchant.[90] This legislation "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 specific period, the statement 'shall create an express warranty.'"[91] The court characterized the invoices given to the buyers as certificates of authenticity because they stated the authorship of the statues.[92] The New York legislation provides specific definitions of what a statement of authorship in a certificate of authenticity means and whether the statements in the warranty are material or part of the basis of the bargain so that any divergence from the statement would constitute a breach of the warranty. Here again, the New York statute provides additional guidance:

> 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar instrument it:
>
> (a) Shall be presumed to be part of the basis of the bargain; and
>
> (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.
>
> 2. [S]uch warranty shall not be negated or limited provided that in construing the degree of warranty, due regard shall be given the terminology used and the meaning

87. *Id.* at *44–45.

88. *Id.*

89. *Id.* at *32.

90. Another element of the dispute depended on whether the buyer's agent would be categorized as an art merchant under the statute. The defendant argued that the agent held himself out as having knowledge and should therefore be considered to be an art merchant. *Id.* at *40. The statute defines an "art merchant" "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." N.Y. ARTS & CULT. AFF. LAW § 11.01(2). While the buyers' agent was an interior decorator, the court concluded that he was not an art merchant, as defined by the statute, because he did not have any "skill *peculiar* to such works." *Id.* at *39 (quoting the N.Y. ARTS & CULT. AFF. LAW § 11.01(2)) (emphasis added).

91. Levin v. Dalva Bros., 459 F.3d 68, 77 (1st Cir. 2006) (quoting N.Y. ARTS & CULT. AFF. LAW § 13.01(1)).

92. The statute defines a certificate of authenticity as "a written statement by an art merchant confirming, approving, or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage of disadvantage of some person." N.Y. ARTS & CULT. AFF. LAW § 11.01(6).

> accorded such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place.
>
> 3. Language used in a certificate of authenticity or similar written instrument, stating that:
>
> (a) The work is by a named author or has a named authorship, without any limiting words, means unequivocally, that the work is by such named author or has such named authorship;
>
> (b) The work is "attributed to a named author" means a work of the period of the author, attributed to him, but not with certainty by him; or
>
> (c) The work is of the "school of a named author" means a work of the period of the author, by a pupil or close follower of the author, but not by the author . . . .[93]

The three subsections of this portion of the statute seem somewhat contradictory. The first section provides that any statement of material fact in a certificate given by a merchant to a non-merchant is conclusively considered to constitute an express warranty and is part of the basis of the bargain. The second paragraph, however, seems to allow that such statements should be understood in light of prevailing trade usage, which presumably incorporates standard art historical terminology. The third paragraph seems more consonant with the first paragraph in that words used in a certificate will be given specific meanings, regardless of trade usage and specialized terms.

The disagreement between the plaintiffs' and defendants' experts goes to the heart of the question of how we identify an artist or author of a work and what the purpose is of an attribution. The plaintiffs' expert distinguished between a work made by the hand of an artist and a work made under the supervision of the artist and asserted that a signature on a work indicated only the former, regardless of what trade usage or expert terminology might connote. The defendants asserted that

> "in the case of multiples" . . . an artist is defined as 'the person who conceived or created the image which is contained in or which constitutes the master" from which the individual print was made . . . . Thus, . . . under the prevailing trade customs and usage, a statue created by an artist and his workshop is considered an original created by the named artist.[94]

The court, in part, answered the question of whether the statement of originality in the certificate was actionable by turning to market value. Because there might be cases in which an expert *could* identify the first version or master of a sculpture and because such a work would be more highly valued, then a description of the

93. N.Y. ARTS & CULT. AFF. LAW § 13.01.

94. *Gallery 63*, No. 04-CV-1504 (KMK), 2006 U.S. Dist. LEXIS 70184, at *46 (quoting N.Y. ARTS & CULT. AFF. LAW § 11.01(1)). As this excerpt from the statute indicates, the problem of defining the author or artist of a work that is typically created in multiples can apply to works in various media including statues, particularly those that may be cast, as well as photographs and prints.

work as an original without qualification would constitute a warranty that the work was the first version.[95] The court thus ultimately adopted the stricter usage given in the third subsection of the statutory provision, which, although not necessarily entirely in line with what common usage might indicate, undoubtedly comes closer to a plain meaning interpretation of the statement in the certificate than to accepted art historical and market terminology.

IV. CHANGING MEANINGS OF AUTHENTICITY

Thus far, this Paper has been discussing the definition of the artist and questions of authentication from market, art historical and legal perspectives. However, the fundamental issue remains that the law should be promoting, to the fullest extent possible, an accurate understanding of human history and the past—in this case, as discerned from movable artistic and cultural works that have been created by past artists and preserved for us and future generations. The market—merchants, buyers and sellers—have much to protect as well. As the prices at which art works can be traded steadily increase, there is an ever-greater investment in maintaining the status quo or, even better, promoting the future escalation of prices.[96] To do this, certainty and finality of sales are desirable aims, as is protecting the art merchant, whether art dealer or auction house.[97] However, the smooth functioning of the art market should not be the ultimate goal of the law. The more important goal is preventing corruption of the historical and cultural record of human history through

95. *Id.* at *48.

96. *See* BREWER, *supra* note 10, at 92–102 (describing manipulation of the art market and marketing of art works as investments by sophisticated dealers in the 1920s); Raul Jauregui, *Rembrandt Portraits: Economic Negligence in Art Attributions*, 44 UCLA L. REV. 1947, 2018 (1997) (describing Duveen's ability to control the market). Current owners, including museums, have a clear interest in preventing a work in their collection from being revealed as a fake or incorrectly attributed. However, museums have recently embraced the issue of authenticity and designed exhibits in which authentic, fake and uncertain works of a particular artist are juxtaposed. *See, e.g.*, Lowenthal, *supra* note 1, at 79; Fred Wasser, *Exhibit Focuses on Fake, Authentic Rembrandt Paintings*, WFAE NEWS (Nov. 4, 2011), http://www.wfae.org/wfae/1_87_316.cfm?action=display&id=7947.

97. From a traditional perspective, a dealer is a person who owns a work of art and sells it on his or her own account. An auction house, on the other hand, typically does not own the work but sells the work on behalf of the owner who consigns the work to the auction house. The auction house has relatively little financial investment at stake in the sale transaction, other than the commission, which is paid by the buyer. One should note, however, that the auction house is in a fiduciary relationship with the seller and therefore may be presumed to favor the seller over the buyer. *See, e.g.*, Digiulio v. Robin, No. 01 Civ. 1675(CBM), 2003 WL 21018828, at *4 (S.D.N.Y May 6, 2003). *But see generally* Greenwood v. Koven, 880 F. Supp. 186 (S.D.N.Y. 1995). The dealer has a greater financial investment in the work and is often the seller. That the law has therefore evolved to favor the seller is predictable, although the balance has been minimally altered under special art market legislation, such as that of New York. *See supra* notes 84–87 and accompanying text. These stereotypical descriptions have been changed somewhat in that dealers may also be selling works on consignment from the owner (and therefore functioning more like an auction house), while auction houses may also have a financial interest in the works they sell (and therefore resembling a dealer). Along with these typical descriptions of a dealer and an auction house, there has been an assumption that the buyer at auction assumes a greater risk and therefore pays a lower price. *See, e.g.*, Krahmer v. Christie's, 903 A.2d 773 (Del. Ch. 2006); Weisz v. Parke-Bernet Gallerie, Inc., 351 N.Y.S.2d 911 (N.Y. App. Term 1974).

reducing the presence and acceptance into that record of inauthentic works.

Inauthentic works of art result from two broadly defined causes. One is the case of the intentional forger who creates a work with the goal of inserting it into the historical record as the work of a different artist and typically for the purpose of making a large profit. The second is the case of an innocent misattribution. Particularly in the latter case, accepted opinion may change over time, although uncertainties may abound in the former as well.[98] But even in the case of deliberate forgeries, by the time these surface in the legitimate market, their improper authentication is typically the result of innocent error as well. Thus while questions of authentication and attribution of a work have great economic consequences, they typically involve an innocent or, at worst, negligent error on the part of the authenticator. Nonetheless, of the three parties engaged in an art market transaction—seller, buyer and merchant—under current law, the buyer bears most of the loss, but the merchant is in the best position to reduce the likelihood that inauthentic works will gain acceptance, and to spread the loss when this occurs. Two legal issues need to be examined—whether a purchaser's suit will be barred, and what standard determines whether the buyer will be compensated.

The difficulty of determining authenticity of a work relates to whether a disappointed purchaser will be able to sue an art merchant for breach of a warranty of authenticity if the work turns out not to be as promised. At the time a purchaser buys a work of art, he or she will likely be prompted to question whether the work is authentic. However, once the purchaser acquires the work, it is unlikely that the purchaser will undertake additional research unless prompted to do so by some external development. More typically, the purchaser next confronts the question of authenticity when he or she turns around to resell the work. This can be many years, even decades, after the initial purchase. This presents the scenario of surmounting the statute of limitations. One of the key elements in analyzing the application of a statute of limitations is determining when the statutory period starts to run—which is generally defined as the accrual of the cause of action.

Causes of action generally fall into one of two broad categories—contract law, including breach of a warranty of authenticity, and tort law, including claims of fraud, gross negligence, negligent misrepresentation and simple negligence. The advantage of suing on a tort-based theory is that a court is more likely to use a discovery rule to determine when the cause of action accrued.[99] However, the tort-based claims generally require a duty owed to the purchaser and, in the case of fraud, scienter on the defendant's part and reliance on the plaintiff's part.[100] In

98. It is unclear exactly which works are forgeries among those allegedly produced by Myatt, Beltracchi and van Meegeren, *see supra* notes 3–9 and accompanying text. However, as scientific testing becomes ever more sophisticated, it is to be hoped that the methods can stay ahead of the forgers and it will ultimately be possible to determine definitively which works are forgeries and which are authentic.

99. Spencer, *supra* note 67, at 167–70.

100. *Id. See also* Rosen v. Spanierman, 894 F.2d 28, 34–36 (2d Cir. 1990) (holding that buyers had demonstrated sufficient reliance on seller's alleged misstatement to establish elements of fraud and the accrual of their cause of action was subject to a discovery rule); Jauregui, *supra* note 96, at 1977–78.

other words, the merchant would need to know that the work was not authentic at the time the statement was made for the statement to be actionable under a tort-based theory. Fraud is therefore of no help in the case where neither the buyer nor the seller is in the position to determine the work's authenticity at the time of the sale. Even more relevant is the situation in which the evaluation of a work's authenticity changes over time, something that happens from an art historical perspective, at least, with a surprising amount of regularity. Breach of contract or breach of a warranty of authenticity may be easier to prove,[101] but courts have held almost uniformly that the cause of action for breach of the warranty of authenticity accrues at the time of tender of delivery of the goods.[102] These decisions have

101. The New York art market legislation clarifies when a statement from an art merchant seller to a non-merchant buyer constitutes an actionable warranty. *See supra* notes 85–87 and accompanying text. However, to determine whether the warranty has been breached requires establishing that the seller's statement did not have a reasonable basis in fact at the time the statement was made. Expert testimony provided at trial determines whether the statement was reasonable. *See* Dawson v. Malina, 463 F. Supp. 461, 467 (S.D.N.Y. 1978); Levin v. Dalva Bros., 459 F.3d 68, 75–76 (1st Cir. 2006).

102. U.C.C. § 2-725(2) (2010) states:

> [A] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of deliver is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Decisions holding that the cause of action accrues from the time of the sale include *Rosen v. Spanierman*, 894 F.2d 28 (2d Cir. 1990); *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3 (1st Cir. 1988); *Potiker v. Gasiunasen Gallery*, No. 09-82356-CIV-MARRA/JOHNSON, 2010 Dist. LEXIS 74892 (S.D. Fla. July 26, 2010); *Krahmer v. Christie's*, 911 A.2d 399 (Del. Ch. 2006); *Firestone & Parson, Inc. v. Union League*, 672 F. Supp. 819 (E.D. Pa. 1987). *See also* Margaret E. Garlikov, *Jurisdictional Inconsistency in the Interpretation of Original § 2-725 Statute of Limitations and Amended § 2-725's Selective Solutions*, 59 ALA. L. REV. 1685, 1698–1701 (2008). Both Sotheby's and Christie's give a warranty for five years that applies only to the description of the property sold that is listed in the catalogue in upper case type. *See, e.g.*, Christie's, Important American Future and Folk Art Sale, Jan. 20, 2012, at 315, *available at* http://www.christies.com/eCatalogues/index.aspx?i d=EE24E927CA64F47B852578EE006B797F (Important Notices and Explanation of Cataloguing Practice).

The one exception to this refusal to delay accrual of the cause of action is presented in *Balog v. Ctr. Art Gallery-Haw.*, Inc., 745 F. Supp. 1556, 1572 (D. Haw. 1990), in which the court allowed the statute of limitations to run from the time the purchasers discovered their Dali prints were fakes on the grounds that the warranty was a warranty of future performance. The court interpreted the seller's warranty as "necessarily guarantee[ing] the present and future existence of the art as authentic works of Salvador Dali. To force buyers to secure an additional warranty of future performance after an expert had certified a piece as genuine would be not only redundant, but ridiculous." *Id.* at 1571. However, while the court relied, in part, on the idea of a warranty of future performance, this case may be distinguishable from others because the court also relied on subsequent appraisals and certificates of authenticity given by the seller, which the court interpreted as constituting a reiteration of the original express warranty. *Id.* at 1572. Further, the court relied on fraudulent concealment to delay the running of the statute of limitations. *Id.*

In *Lawson v. London Arts Grp.*, 708 F.2d 226, 228–29 (6th Cir. 1983), the Sixth Circuit held that a buyer's suit against a dealer for the sale of an inauthentic Remington pastel was not barred by the four-year statute of limitations. However, the court relied on a Michigan statute, which provided in actions for damages for breach of a warranty of quality or fitness, the claim accrues "at the time the breach of the warranty is discovered or reasonably should be discovered." *Id.* The court looked, in part, to the buyer's reliance on the dealer's expertise in authenticating the work. *Id.* at 229.

refused to impose a discovery rule or an inherently unknowable standard in the determination of an artwork's authenticity.[103]

This paradigm returns us to the central question—whether the law serves the purpose of promoting cultural and historical values in these situations, even where these may diverge from market purposes. Here one must conclude that the law serves market purposes, arguably at the expense of cultural and historical values. In the case where a dealer or auction house sells a work of art, believing it to be authentic at the time of sale, and the judgment later is that the work is not authentic, the buyer bears the full loss if it takes more than a few years for the lack of authenticity to be discovered. This provides stability to the market and certainly protects the financial interests of the art merchant but does little to encourage the kinds of research that are required to make informed decisions concerning authenticity.

We can analyze this issue by asking the question: when does a work of art "perform"? One court stated that a work of art "performs" when the buyer turns around to sell the work; this is often the time at which the new determination of inauthenticity is discovered.[104] But we can also think of the work as continuously performing—performing throughout the time period in which the opinion of the work's authenticity derived from art historical research (of all types) continues to evolve and change. While some might criticize this as imposing endless potential liabilities on the art merchant, this can be resolved by looking at the underlying

103. In *Krahmer v. Christie's*, 903 A.2d 773, 779–83 (Del. Ch. 2006), the court discussed at length why the "inherently unknowable injury" standard did not apply to sales of artworks. The court stated that this standard should "apply only in the narrow circumstances which involve an inherently unknowable injury sustained by a blamelessly ignorant plaintiff." *Id.* at 779. If the exception applied, the cause of action would accrue and the statutory time limit start to run "'only upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person or ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of the injury.]'" *Id.* at 778–79 (quoting Wal-Mart Stores v. AIG Life Ins. Co., 860 A.2d 312, 318–19 (Del. 2004)). Examples of situations in which the inherently unknowable injury standard applied include medical malpractice, accounting malpractice, purchase of a defective septic system, and installation of a defective roof. *See id.* The court characterized the determination of whether an artwork is authentic as not involving a "practical impossibility," relying on the idea that the purchasers had access to information concerning the painting and that they could have obtained an independent appraisal from another expert. *Id.* at 781. However, the court's attempt to distinguish this from the example of the client suing an accountant because the client did not know he had suffered an injury until informed by the Internal Revenue Service seems tenuous. *Id.* at 780. Further, in concluding that the auction house should be excused from the burden of consulting experts or of commissioning a *catalogue raisonné* committee, the court seemed to believe that the full of burden of either researching the authenticity of the work or bearing the full cost of a lack of authenticity should be placed on the buyer. 911 A.2d at 406. However, if the auction house (in the court's view) is not equipped to handle these costs and burdens, the purchaser is even less able to do so. *See also* Jauregui, *supra* note 96, at 1984 (criticizing the presumption that "any defect that causes the breach in warranty will be detected soon after the purchaser's receipt of the goods" when applied to the "vastly different situation of a misattributed piece of art").

104. In *Balog v. Ctr. Art Gallery-Haw.*, Inc., 745 F. Supp. at 1571, the court interpreted the warranty to be one of future performance—primarily, performance at the time of resale. While the work itself does not change over time, its reception in the scholarly and market communities might well change over time.

policies—to impose the cost on the party in the best position to avoid the loss and/or spread the loss throughout an industry.[105] In light of these policies, we should conclude that the art merchant should bear this cost. This would also reduce the incentive to avoid learning the truth about a work, which serves the cultural and historical values of a work of art, rather than the market purposes.

At least in the case of the intentional forgery, the buyer, seller and art merchant are all relatively innocent. The forger created the problem and the loss. The forger clearly has no interest in maintaining the accuracy of the cultural and historical record. However, the forger may not be available for suit or may not have sufficient assets to compensate for the investment that a disappointed buyer has lost in the transaction. Therefore, the loss needs to be placed on one of several parties, all of whom are relatively innocent, but who may not be equally innocent—in the sense that not all are equally able to avoid the loss or to spread the cost of the loss throughout the market. A seller would have at one point been a buyer and therefore could sue his seller, thus extending liability back up the chain. While the first buyer would then be in a position of attempting to recover from the forger, that buyer bears the greater responsibility for having purchased the artwork under more questionable circumstances and likely also has made the smallest investment. Placing responsibility on the seller also discourages the buyer from attempting to resell the forgery as an authentic work.[106]

The crucial element in achieving this goal would be to impose longer-term liability on the art merchant when it turns out that a work is not authentic, thereby giving relief to the current owner. There would arguably be two ways of accomplishing this change in the law. One is to provide for wider use of tort-based remedies by removing the scienter requirement.[107] This, however, would involve a

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105. *See, e.g.*, Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U.L. REV. 345, 370–72 (2003). Garvin seems uncertain of the extent to which the discovery rule should be applied more generously in cases involving authentication of art works:

> [P]erhaps the time-of-sale accrual rule does rough justice as a means of apportioning risk. A quick invalidation of a seller's authentication may be evidence that the seller should have done a better job initially. Even if this is so, setting the default as a discovery rule and allowing parties to contract around it through an express warranty might better signal the willingness of a seller to stand behind its authentications . . . . One can thus speak for either the discovery rule, though it may be too generous, or the time-of-sale accrual rule, though it may be too mingy.

Id. at 371–72. *See also* Jauregui, *supra* note 96, at 1985–87 (criticizing the idea of implying a discovery rule into breach of warranty claims). The recent extension by a New York court of potential liability to a purchaser who did not deal directly with the defendant (Christie's) is an example of one court's willingness to extend the traditional rules of liability. *See supra* note 69 discussing *Tony Shafrazi Gallery Inc. v. Christie's Inc.*, No. 112192/07, 2008 WL 4972888, at *6–7 (N.Y. Sup. Ct. Nov. 7, 2008), *aff'd*, No. 112192/07, 2009 WL 1433049 (N.Y. Sup. Ct. Apr. 14, 2009).

106. *See* Ulph, *supra* note 7, at 264–65. An example of pushing liability back to the first seller who dealt with the forger and who is therefore arguably more responsible may be illustrated in the recent allegations of Knoedler's dealings with a dealer who supplied alleged forgeries. *See supra* notes 4 and 75. In the sales of the Beltracchi's forgeries, it seems that Christie's and Sotheby's have agreed to reimburse purchasers, although it is unclear whether they will do so without regard to the statute of limitations; neither has confirmed this publicly. *See* Michalska, Burns & Rivetti, *supra* note 3.

107. Jauregui argues that the buyer should be able to recover from the art merchant in tort based on

drastic change in the way in which tort-based remedies are understood. The other means would be to incorporate a due diligence or discovery rule into the statute of limitations for suits alleging breach of a warranty or other contract-based claims. This longer-term liability would mean that the art merchant would have a greater incentive to learn the truth about a work before selling it. It would also mean that in cases where one party must suffer a loss, the merchant would suffer that loss, but would be able to recoup it by spreading the cost throughout the many transactions in which the art merchant engages.

There are parallels for use of a discovery rule in the art world where a work of art is stolen and later reappears, perhaps decades after the initial theft, in the collection of an innocent owner.[108] Every jurisdiction in the United States that has addressed the question of the running of the statute of limitations to bar the replevin action by the original owner has used either a "demand and refusal" rule[109] or a due diligence/discovery rule[110] in order to extend the time period until the original owner has a realistic opportunity to learn the current location of the stolen work and the identity of the current possessor.[111]

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strict liability. Jauregui, *supra* note 96, at 2023–28. He characterizes the relative degree of fault of the different parties as:

> While the good faith dealer may deserve little moral blame for this negligent sale, the policy of preventing future harm embodied in imposing the liability on the dealer remains a powerful alternative. The dealer not only is at fault, but also is the best person in the transactional chain to bear the cost of loss or potential loss. The dealer enjoys the upper hand in all of the asymmetries: the dealer has the most information, the most experience, and the greatest capacity to prevent the loss and spread the cost of this prevention.

Id. at 2017. Jauregui also points out that the dealer is in the best position either to internalize the risk of misattribution by qualifying an attribution and receiving a lower price for the work or to externalize the cost by acquiring insurance to cover the risk and passing on that cost to the purchaser. *Id.* at 2018.

108. Under the Anglo-American law of property, a thief cannot convey title to stolen property and even a subsequent good faith purchaser does not acquire title. *See, e.g.*, U.C.C. § 2-403 (2010) (stating that a thief cannot transfer title to stolen property).

109. New York defines accrual as the time when the claimant demands return of the stolen property and the current possessor refuses. However, New York courts also permit a defendant to use the equitable defense of laches, which examines unreasonable delay on the part of the claimant balanced against legal prejudice caused to the possessor by the delay. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991); Bakalar v. Vavra, 05 CIV 3037 WHP, 2011 WL 165407 (S.D.N.Y. Jan. 14, 2011).

110. Most states have adopted a due diligence/discovery rule to define accrual of the cause of action for recovery of stolen art works and other cultural objects. O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980). *See also* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (affirming use of due diligence/discovery rule). This rule states that the cause of action accrues when the owner discovers or, with the use of due diligence, should have discovered the current location of the stolen artwork. California takes a unique approach, most recently in extending the statutory time period for recovery of works of fine art stolen during the past 100 years. CAL. CIV. PROC. CODE (West 2006) § 338(c)(3). As for other objects of "historical, interpretive, scientific, or artistic significance," the pre-existing California statute specifically provides that the cause of action accrues from the time of discovery, and this was further clarified in the recently adopted legislation. CAL. CIV. PROC. CODE (West 2006) § 338(c)(2).

111. However, if a purchaser who has to return a stolen artwork to the original owner sues the seller from whom it was purchased, the courts apply the same U.C.C. statute of limitations provision to bar the claim if more than four years have passed. Doss v. Christie's, 08 CIV. 10577LAP, 2009 WL

A few jurisdictions, most notably New York, have adopted specific art market legislation. Some elements of art market legal reform are already found in existing art market legislation. The most important of these is the clear definition of what statements by an art merchant constitute an express warranty without further need to analyze whether the statement is part of the basis of the bargain and whether the buyer relied on the statement. However, one element that these statutes do not address is the accrual of the cause of action for breach of warranty claims.[112] It should be possible to draft an amendment to the art market statutes that would add a discovery rule to the accrual of a cause of action for a claim that is otherwise covered by the statute.[113] The alternative is for a court to achieve this result through its decision making process, but the former is the clearer and preferable route.

A second element that is not clearly addressed in art market legislation is the standard for determining whether the warranty has been breached.[114] The standard is whether the seller's statement as to authenticity had a reasonable basis in fact at the time the statement was made. As the First Circuit in *Levin v. Dalva Bros.* noted, this was a judicial gloss on the statute given by the court in *Dawson v. Malina*, rather than a part of the statute itself.[115] It is unclear whether this standard should be retained and, even if it is, what constitutes a reasonable basis for making a statement of authenticity. In hindsight, many of the forgeries that were originally accepted by the market have been judged to be sloppy and unconvincing from a connoisseurship perspective, easily detectable by scientific testing, or accompanied by unreliable provenance or no documentation at all.[116] The proliferation of these fakes and their acceptance until someone questions them indicate that the market is not being sufficiently careful.

While it is possible that adding a discovery rule into the statute of limitations for breach of the warranty of authenticity would be sufficient to prompt the market to be more cautious, it is also possible that courts will need to take a closer look at what constitutes reasonableness in the giving of such warranties. For example, more frequent scientific testing could be deemed reasonable when a work of art is valued at several million dollars. More careful provenance research, the skill for which has developed significantly in response to claims for recovery of art works looted during the Holocaust, can be applied more rigorously for the purpose of determining authenticity as well as title issues.[117] Perhaps a better understanding of

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3053713 (S.D.N.Y. Sept. 23, 2009). This result would seem to discourage voluntary restitution to the proper owner and use of alternative dispute resolution methods, goals that the law otherwise seems to support.

112. *See* Rosen v. Spanierman, 894 F.2d 28, 33 (2d Cir. 1990) (stating that the New York art market legislation does not alter the operation of the statute of limitations in breach of warranty cases).

113. *See, e.g.*, the Michigan statute discussed in Lawson v. London Arts Grp., 708 F.2d 226, 228–29 (6th Cir. 1983).

114. *See supra* note 101.

115. *Id.*

116. *See supra* notes 2–9 and accompanying text.

117. Geoff Edgers, *A Detective's Work at the MFA*, BOS. GLOBE, Dec. 11, 2011, Living Arts, at 1 (describing the task of the curator of provenance at the Boston Museum of Fine Arts).

the psychological factors that contribute to aesthetic judgments of authenticity would make determinations based on connoisseurship more reliable.[118] A determination of reasonableness should be based on an objective, not subjective, standard, but such an inquiry would permit the court to have greater flexibility in determining reasonableness based on the value of the artwork at issue and other factors specific to each case. However, this issue has not been well explored in the case law because most claims are dismissed on statute of limitations grounds without the court reaching the merits.

If these modifications were adopted, several limitations on recovery should apply. If a discovery rule were applied more generously to warranties of authenticity for art works or if liability were imposed even when the merchant has acted in good faith, the remedy afforded the buyer should be limited to a rescission of the sale—that is, damages should be limited to the purchase price of the art work, plus interest calculated at the statutory rate, rather than an award of the current fair market value of the art work.[119] A second limitation should be that, similar to the New York art market legislation, these expansive benefits should be available only when a non-merchant buys from an art merchant.[120] Use of a discovery rule also means that the purchaser must undertake reasonably diligent efforts to investigate the authenticity of the work. Depending on the circumstances, this may mean using an outside expert to examine the work before acquiring it. The cause of action would accrue once the buyer with reasonable diligence should have discovered the lack of authenticity. Thus, the buyer would need to remain cognizant of developments and new research concerning the art works in his or her collection.

This exploration of the meaning of authenticity of art works takes many paths, while pointing out the need for greater accountability and transparency in art market transactions if the presence of inauthentic works is to be minimized. The

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118. *See* Coughlan, *supra* note 59.

119. Some states with specific art market legislation address the question of damages. The Iowa statute sets out specific remedies for the buyer depending on the extent of the seller's fault in breaching the warranty of authenticity. If "the warranty was untrue through no fault of the art merchant," the buyer is limited to the remedy of rescission and refund of the original purchase price. IOWA CODE §715B.4(1)(a) (2003). If "the buyer is able to establish that the art merchant failed to make reasonable inquiries according to the custom and the usage of the trade to confirm the warranted facts about the work, or that the warranted facts would have been found to be untrue if reasonable inquiries had been made," the buyer is entitled to refund of the original purchase price with statutory interest. IOWA CODE §715B.4(1)(b) (2003). If "the buyer is able to establish that the art merchant knowingly provided false information on the warranty or willfully and falsely disclaimed knowledge of information relating to the warranty," then the buyer is entitled to three times the original purchase price and statutory interest. IOWA CODE §715B.4(1)(c) (2003). In all cases, the buyer must return the work in substantially its original condition to the seller. IOWA CODE §715B.4 (2003). *See also* FLA. STAT. ANN 686.506(3) (West 2003); MICH. COMP. LAWS ANN. 442.324(3) (West 2011); Garvin, *supra* note 105, at 371. In cases where the warranty of title is breached, the court may award appreciation damages—that is, the value of the artwork at the time the current possessor must relinquish it to the true owner. *See* Menzel v. List, 298 N.Y.S.2d 979 (N.Y. 1969).

120. *See supra* note 84 and accompanying text. This is in line with the cost-spreading justification in that only a merchant is in the position to spread the costs of this additional liability through the market.

modest suggestions proposed here for changes in legislation and judicial interpretations that apply to art market transactions would impose some additional burdens on art merchants and would likely meet significant resistance. However, the art merchant is the party in the best position to reduce the risk of loss through improper authentication or to spread the cost of that loss throughout the market. More importantly, these changes would prompt the art merchant to undertake more detailed investigation and thereby encourage excluding from the market those works that are inauthentic or whose origins raise significant questions. These changes would promote the preservation and accuracy of the cultural and historical record—a goal that benefits both those who participate in the art market and the rest of society.