

Keynote 2: “Keeping it Real”: A Brief Primer on the Law of Art Authenticity¹

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INTRODUCTION³

From old masters to contemporary art, questions of authenticity arise as scholarship changes and new methods for producing art force us to question what it means to say that a work of art is “authentic.” Is the painting “by” Leonardo?⁴ What makes a work produced in multiples “a Warhol”?⁵ What of “ready made” works like Duchamp’s famous urinal or Flavin’s more recent light sculptures?⁶

Artists, philosophers and even attorneys have wrestled with issues of authenticity for ages. Their varying responses include the following:

*When I am finishing a picture, I hold some God-made object up to it—a rock, a flower, the branch of a tree in my hand—as a kind of final test. If the painting stands up beside a thing that man cannot make, the painting is authentic. If there is a clash between the two, it is bad art.*⁷

*Art begins with craft, and there is no art until craft has been mastered. You can’t create unless you’re willing to subordinate the creative impulse to the constriction of a form. But the learning of a craft takes time, and we all think we’re entitled to short cuts.*⁸

1. This Paper was written in conjunction with a keynote address given on October 28, 2011 at Columbia Law School’s Kernochan Center Symposium during a conference entitled “For Real? Legal and Economic Perils of Art Authentication.”

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3. Laws vary by jurisdiction and are subject to change. This Paper is not intended to provide legal advice; there is no substitute for consulting with an attorney where legal advice is required.

4. *Marchig v. Christie’s Inc.*, 762 F. Supp. 2d 667 (S.D.N.Y. 2011), *aff’d in part, rev’d in part*, 430 F. App’x 22 (2d Cir. 2011). See also MARTIN KEMP & PASCAL COTTE, *LA BELLA PRINCIPESSA*, (2010).

5. *Simon-Whelan v. The Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177, at *1 (S.D.N.Y. May 26, 2009).

6. *Ars longa, vita brevis* notwithstanding, Dan Flavin (whose works are comprised of mass-produced, replaceable fluorescent lights that are deemed authentic only with an *original, irreplaceable* certificate from the artist) apparently intended his artworks to be objects of impermanence and their authenticity of even lesser duration. Greg Allen, *The Dark Side of Success*, N.Y. TIMES, Jan. 2, 2005, at 2.28. He has been quoted as saying, “I did my certificates on a pulp paper because therefore I knew they would disintegrate.” *Id.*

7. Marc Chagall (1889–1985), Russian Painter.

8. ANTHONY BURGESS, *BUT DO BLONDES PREFER GENTLEMEN?* 101 (1986).

*Art is not a handicraft, it is the transmission of a feeling that the artist has experienced.*⁹

*In my own version of the idea of "what art wants," the end and fulfillment of the history of art is the philosophical understanding of what art is, an understanding that is achieved in the way that understanding in each of our lives is achieved, namely, from the mistakes we make, the false paths we follow, the false images we have come to abandon until we learn wherein our limits consist, and then how to live within those limits.*¹⁰

*We value great art most fundamentally not because the art as product enhances our lives but because it embodies a performance, a rising to artistic challenge. The object—the work of art—is wonderful because it is the upshot of a wonderful performance; it would not be as wonderful if it were a mechanical replica or if it had been created by some freakish accident.*¹¹

This Paper, however, is not concerned with such profound matters. It addresses instead the practical issue of what it means for an artwork to be authentic as a matter of law and legal practice.¹² The stakes can nonetheless be high as an artwork's value can increase or decrease exponentially based on a change in attribution.

I. STEVE MARTIN: A BRIEF CASE STUDY

Known as a comedian, actor, director, author,¹³ playwright and banjo player, Steve Martin once humorously remarked about his success:

I love money. I love everything about it. I bought some pretty good stuff. Got me a \$300 pair of socks. Got a fur sink. An electric dog polisher. A gasoline powered turtleneck sweater. And, of course, I bought some dumb stuff, too.¹⁴

Among the "dumb stuff" that Mr. Martin—who is also an avid and discerning art collector—bought was a painting entitled "Landschaft mit Pferden (Landscape with Horses)", attributed to the modernist artist Heinrich Campendonk. Mr. Martin purchased the painting for approximately \$850,000 in 2004 from a Parisian gallery, and then sold it at a loss in February 2006 through Christie's New York auction house.¹⁵

9. LEO TOLSTOY, WHAT IS ART? 153 (Richard Pevear & Larissa Volokhonsky trans., Penguin Books 1995) (1898).

10. ARTHUR C. DANTO, AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY 107 (1998).

11. Ronald Dworkin, *What is a Good Life?*, N.Y. REV. OF BOOKS, Feb. 10, 2011, at 42. Although neither artist nor art historian, Professor Dworkin, in the author's view, gives the best accounting of what makes a work of art "authentic."

12. Just as engineering is sometimes denominated applied science, we will content ourselves here with using law as a kind of applied philosophy.

13. Mr. Martin's published works include several that take place in an "art world" setting, including AN OBJECT OF BEAUTY (2010) and PICASSO AT THE LAPIN AGILE AND OTHER PLAYS (1996).

14. STEVE MARTIN, LET'S GET SMALL (Warner Bros. Records 1977).

15. David Itzkoff, *Forged Painting Was Once in Collection of Steve Martin, German Police Say*,

The artwork was apparently created through a German forgery ring. Mr. Martin observed that "[t]he fakers were quite clever in that they gave it a long provenance and they faked labels, and it came out of a collection that mingled legitimate pictures with faked pictures."¹⁶

News accounts quoted the presiding judge at the sentencing of the forgers (a day before this symposium) as stating that the forgery ring was "organized in great detail, you could say with military precision."¹⁷ In addition to the faked provenance and labels, it was revealed that the forgers also created fake "vintage" photographs with one of the forgers posing as a grandmother next to fake paintings in photographs purporting to date to the 1930's. Vintage canvasses dating from Campendonk's most productive period were secured and scraped clean if necessary, so that the materials would be beyond question.¹⁸ Wolfgang Beltracchi, the leader of the forgery ring claimed for his part that he was doing the artist and the art world a favor: "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."¹⁹

Mr. Martin was apparently pleased that the forgers went to jail, and somewhat philosophical as this was not the first forged work he purchased. Two points Mr. Martin raised in an interview about this matter frame the scope of this Paper: What is the liability of those in the chain of inauthentic artworks? What can a cautious person do to guard against purchasing inauthentic works?²⁰

To address the first issue, this Paper will briefly cite to and explain the most important statutory sources that bear on the authenticity of artworks.²¹ In doing so,

N.Y. TIMES (May 31, 2011), <http://artsbeat.blogs.nytimes.com/2011/05/31/forged-painting-was-once-in-collection-of-steve-martin-german-police-say/?gwh=04F10C24E4B9E72F2646FF71198EF4AC>.

16. *Id.*

17. David Itzkoff, *Art Forgers Whose Victims Included Steve Martin are Sentenced*, N.Y. TIMES (Oct. 27, 2011), <http://artsbeat.blogs.nytimes.com/2011/10/27/art-forgers-whose-victims-included-steve-martin-are-sentenced/>.

18. Catherine Hickley, *Germany's \$14 Million Art Forgers Jailed for Total 15 Years*, BLOOMBERG (Oct. 27, 2011), <http://www.bloomberg.com/news/2011-10-26/german-forgers-face-prison-sentences-for-scam-worth-more-than-22-million.html>.

19. Kate Deimling, *In Germany's Largest Art Forgery Trial, Master Swindler Laments Only That His Fakes Were "Too Good"*, BLOUIN ARTINFO (Sept. 28, 2011), <http://www.artinfo.com/news/story/38729/in-germanys-largest-art-forgery-trial-master-swindler-laments-only-that-his-fakes-were-too-good/>. This defense is not unique. A notorious forger of Vermeer works who fooled leading museum experts claimed that he produced the forgeries "not for money, but for art's sake." *Art: Truth & Consequences*, TIME, Nov. 24, 1947, at 65. See also JONATHAN LOPEZ, THE MAN WHO MADE VERMEERS: UNVARNISHING THE LEGEND OF MASTER FORGER HAN VAN MEEGEREN (2008).

20. From N.Y. TIMES reporting on Mr. Martin's reaction:

Though Mr. Martin was unsure if he had any legal liability resulting from the sale of the painting, he said, "The gallery that sold me the picture has promised to be responsible to me, if I'm responsible, but it's still unclear."

Mr. Martin said he had purchased forged artworks "once or twice in my life" previously, "and each time you become more and more cautious."

"You always have to guard against it," Mr. Martin said.

Itzkoff, *Forged Painting Was Once in Collection of Steve Martin, German Police Say*, *supra* note 15.

21. For the sake of convenience (not least the author's) and because of New York's self described

I will highlight some of the leading court decisions concerning disputes over authenticity and the policy implications arising therefrom. Finally, I will touch on (via a checklist) some of the practical matters of contracts, expertise and other diligence that may help eliminate (or at least diminish) authenticity risks for those who wish to be cautious.

II. STATUTES THAT CONCERN AUTHENTICITY

It comes as a surprise to many that the principal statutory sources for the laws relating to art authenticity are commercial laws. Notwithstanding Tolstoy's view that the "artist of the future will not even understand how it is possible to sell a work of art . . . only in exchange for a certain payment," when we speak of the law of authenticity, we speak mostly of the language of commerce—especially warranties.²²

A. THE UNIFORM COMMERCIAL CODE (U.C.C.)

The relevant section of the U.C.C. provides the following:

(1) Express warranties by the seller are created as follows:

(a) *Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.*

(b) *Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.*

(c) *Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.*

(2) *It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.*²³

In essence, the U.C.C. gives an art buyer a warranty of authenticity with respect to the authorship of artwork as long as the fact of the artist's creation is part of the "basis of the bargain." No magic—or, as the U.C.C. puts it—"formal" words are necessary as long as the buyer can show that she and the seller made the description concerning the creator of the artwork part of the "bargain." In general, a dealer who sells a "Picasso" is warranting that the work was created solely by Pablo

reputation as a "preeminent cultural center," *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (1991), this Paper will principally discuss New York law.

22. TOLSTOY, *supra* note 9, at 153–54.

23. N.Y. U.C.C. LAW § 2-313 (McKinney 2011) (emphasis added).

Picasso. *Caveat emptor*: let the buyer beware that not every "fact" or "description," however, will necessarily be part of the "basis of the bargain." For dealers transacting among themselves, even a description that refers to the artist may not always be deemed a part of the "basis of the bargain" if, for example, the selling dealer says that the artist's having created the work was not part of her deal with the buying dealer (e.g., for reasons of price, expertise, etc.). Disputes over such matters are the stuff that lawsuits are made of. To avoid putting ordinary art buyers in the position of having such arguments with dealers, New York (as well as some other states) has passed additional laws that give art-buying consumers additional protections not afforded by the U.C.C.

B. THE NEW YORK ARTS AND CULTURAL AFFAIRS LAW § 13.01

This statute answers the question of whether the authenticity of a work (i.e., its creation or attribution to an artist or "author") is part of the "basis of the bargain" by removing it from the original equation. It provides in part:

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 written 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.²⁴

For those who are *not* art merchants (in other words, galleries and other dealers need not apply for the protection of this law), the warranty is "*presumed*." As a matter of law, there can be no quibbling about whether a description of a work that included a statement that the work is by an artist was part of the "basis of the bargain." Basically, if the art dealer supplied a writing to an art buyer with such a description, a warranty is created.²⁵ Period.

There are a number of nuances, and even a right, that allow an art dealer to disclaim a warranty. The nuances include the right of an art dealer to describe an

24. N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 2011).

25. *But see* Dawson v. G. Malina, Inc., 463 F. Supp. 461, 467 (S.D.N.Y. 1978) (positing that a breach of warranty should be ascertained not by examining the writing with the representations of fact, but rather by weighing expert testimony as to whether the warranty of authenticity had a "reasonable basis in fact" at the time that the authenticity representations were made). This holding appears to be at odds with the unequivocal requirement in N.Y. ARTS & CULT. AFF. LAW § 13.01(1)(b) that an art dealer's writing "[s]hall create an express warranty for the material facts stated as of the date of such sale or exchange." There is no apparent exception created in the New York Arts & Cultural Affairs Law for an art dealer who had "a reasonable basis" for believing a material fact (e.g., the authorship of an artwork) to be true, but turns out to have been wrong. Indeed, even under the U.C.C., it is the reasonable reliance of the buyer (not the seller) that determines whether a warranty has been breached. *See, e.g.,* Daley v. McNeil Consumer Prods. Co., 164 F. Supp. 2d 367, 376 (S.D.N.Y. 2001) ("In order for an express warranty to exist, there must be an affirmation of fact or promise by the seller, the natural tendency of which is to induce the buyer to purchase.") (emphasis added) (citations omitted).

artwork more narrowly than as having been created "by" an artist.²⁶ That is a perfectly lawful warranty that may have enormous economic consequences. For example, a work definitively "by" Picasso may have a very high value, while a work "attributed to" Picasso may have little to none. Any disclaimer by an art dealer must be "conspicuous" and clearly state that the dealer assumes no responsibility for authenticity.²⁷ How long does the warranty last? Except for certain major auction houses (e.g., Sotheby's and Christie's), which provide a five-year warranty of authenticity as defined in their terms and conditions, the warranty lasts for four years from the date of delivery to the buyer.²⁸ Efforts to extend warranties of authenticity based on the issuance of appraisals (which typically assume authenticity) have generally been unsuccessful.²⁹ More successful are claims of fraud, which can be difficult to have dismissed at the pleading stage.³⁰

C. THE NEW YORK FINE ART "MULTIPLES" LAW

Section 15.03 of the New York Arts & Cultural Affairs Law requires every art dealer who sells a work of fine art produced as a "multiple" to provide certain information including, by way of example, the name of the artist; whether the artist signed the work; the size of the edition; the number of the edition; when it was produced; whether it was produced posthumously and like information. The information required can vary based on when the artwork was produced (e.g., pre-1900 works require less information pursuant to section 15.09). The information provided creates an express warranty as required by section 13.01 and, pursuant to section 13.05, even applies to transactions between art dealers involving multiples (with a minor exception). A breach of warranty or other violation of the Multiples Law subjects the art dealer to treble damages and attorney's fees.

26. It can, for example, be warranted as being "*attributed to him, but not with certainty, by him.*" See N.Y. ARTS & CULT. AFF. LAW § 13.01(3)(b) (emphasis added).

27. Additionally, counterfeits must be specifically identified as such. N.Y. ARTS & CULT. AFF. LAW § 13.01(4)(b).

28. See, e.g., *Foxley v. Sotheby's, Inc.*, 893 F. Supp. 1224 (S.D.N.Y. 1995). But see *Balog v. Center Art Gallery-Haw., Inc.*, 754 F. Supp. 1556, 1571 (D. Haw. 1990) ("Since artwork does not 'perform' in the traditional sense of goods covered by the U.C.C., and since the authenticity of a work of art, i.e. its 'performance,' would not change over time, Center Art's warranty necessarily guaranteed the present and future existence of the art as authentic works of Salvador Dali.").

29. *Rosen v. Spanierman*, 894 F.2d 28, 32 (2d Cir. 1990) ("[T]he appraisals themselves contain no warranties and the appraisals were completely separate transactions from the sale of the painting. The appraisals therefore could not, as plaintiffs maintain, revive Spanierman's original warranty.").

30. *Id.* at 34-35 ("[The] pleadings and other evidentiary materials clearly assert that the Rosens relied on Spanierman's misrepresentations. [This is not merely] an attempt to extend the statute of limitations on their breach of warranty claims . . ."). See also *Tony Shafrazi Inc. v. Christie's Inc.*, No. 112192-07, 2008 WL 4972888 (N.Y. Sup. Ct. Nov. 7, 2008), *reh'g granted*, No. 112192-07, 2009 WL 1433049 (N.Y. Sup. Ct. Apr. 14, 2009) (holding an auction house potentially liable for defrauding a subsequent purchaser with whom it had no privity based, among other things, on a variation of the "stream of commerce" product liability theory, but without specifically discussing whether a unique work of fine art is a consumer product placed into the stream of commerce).

D. THE VISUAL ARTISTS RIGHTS ACT—AN ARTWORK'S CONDITION CAN AFFECT ITS AUTHENTICITY

Although artists in the United States do not enjoy the same moral rights (sometimes referred to as *droit moral*) available in some European countries,³¹ a federal statute found at 17 U.S.C. § 106A, the Visual Artists Rights Act of 1990 ("VARA"), gives artists certain rights that can affect the authenticity of an artwork.

Essentially, the artist can prevent or disclaim the attribution of artworks that she (a) did not create or (b) believes to be damaged or modified in a way that is prejudicial to her reputation. The author is aware of a number of anecdotal reports of artworks being removed from auction based on an artist's VARA claim, as well as contemplated—but not filed—claims against artists for wrongfully asserting such claims.

Although he did not do so under VARA, the artist known as Balthus disclaimed authorship of a lovely painting entitled "Colette de Profil." Despite Balthus's fervent denial of authorship, the Court held it to be authentic based on its provenance—it was sold by Balthus's former wife to Gertrude Stein—and a suspicion that Balthus might have been acting "from personal animus against his former wife."³² The artist Giorgio de Chirico is alleged to have engaged in similar actions and also to have participated in a different sort of authenticity mischief by backdating what he described as "self-forgeries" to profit from the higher values ascribed to his earlier works.³³ Artists are not alone in raising authenticity challenges based on a work's condition. The author is aware of *catalogue raisonné* committees refusing to recognize artworks because of excessive or inappropriate conservation.³⁴

III. EVIDENTIARY MATTERS AND CASE LAW: THE MARKET, NOT COURTS, DECIDES

Despite the fairly straightforward nature of the applicable statutes, disputes concerning the authenticity of artworks do end up in courts from time to time. Such cases typically hinge on the proverbial "battle of the experts." In some cases,

31. Often including the right of an artist or her heirs to declare a work a fake and even seize it.

32. *Arnold Herstand & Co., Inc. v. Gallery: Gertrude Stein, Inc.*, 626 N.Y.S.2d 74, 78 (N.Y. App. Div. 1995).

33. See Judd Tully, *Real and Unreal: The Strange Life of de Chirico's Art*, ARTNEWS, Summer 1994, at 154, 156.

34. See, e.g., *Ferrari v. Comm'r, of Internal Revenue*, 58 T.C.M. (CCH) 221, 222 (1989) ("Moreover, at some point, excessive restoration takes a piece of this art out of the category of an original and turns it into a reproduction."). In the United Kingdom, a mural painted by Egon Schiele was deemed inauthentic by an English court due to extensive overpainting of the original work, including the "E" and "S" attributed as Schiele's signature. *De Balkany v. Christie Manson & Woods, Ltd*, 16 Tr. L.R. 163 (United Kingdom, Queen's Bench 1995).

scientific expertise can be virtually dispositive.³⁵ In others, courts find the need to hear and weigh testimony. In a case involving an allegation by then legendary art dealer, Joseph Duveen, that an artwork was not a Leonardo, a preeminent expert (Bernard Berenson) was flummoxed during this famous cross-examination:

Q: You've given a good deal of study to the picture in the Louvre.

A: All my life; I've seen it a thousand times.

Q: *And is it on wood or canvas?*

A: *I don't know.*

Q: What, you claim to have studied it so much, and you can't answer a simple question?

A: It's as if you asked me on what kind of paper Shakespeare wrote his immortal sonnets.³⁶

The case subsequently settled for a large sum paid by Duveen. Ultimately, however, Duveen and Berenson were vindicated as that painting was determined not to be a Leonardo—although it still brought a tidy sum when sold by Sotheby's in 2010.³⁷

Another expert of great stature, Klaus Perls, was unable to persuade a court that his opinion on the authenticity of a Calder sculpture was correct. The court was unimpressed with the Perls's "cursory" examination of the putative Calder (it lasted a "maximum of 10 minutes") and skeptical because his opinion rested on his view that the work "quite apparently . . . does not fit into the feel of a real Calder."³⁸

Perls also had a vindication of sorts: the sculpture never sold despite the Court's holding that it was authentic.³⁹ The art market put its money on Perls (or, rather, refused to put any money near the sculpture that he disavowed), and completely disregarded the opinion of the court. That fact contributed to a subsequent court's

35. See James Martin, *Are They Pollocks? What Science Tells Us About the Matter Paintings: What Materials Tell Us About the Age and Attribution of the Matter Paintings*, 10 IFAR J. (2008), available at http://www.ifar.org/publication_detail.php?docid=1228414310; Randy Kennedy, *Scientist Presents Case Against Possible Pollocks*, N.Y. TIMES, Nov. 29, 2007, at B3 ("[A] large group of paintings discovered several years ago and thought by some to be by Jackson Pollock included many containing paints and materials that were not available until after the artist's death in 1956.").

36. An entertaining account of the Duveen case can be found in MERYLE SECREST, DUVEEN: A LIFE IN ART 233 (2005) (describing the Berenson cross-examination) (emphasis added).

37. Carol Vogel, *Mona Lisa She Is Not, but Coveted Nonetheless*, N.Y. TIMES, Jan. 28, 2010, at C21, available at <http://www.nytimes.com/2010/01/29/arts/design/29vogel.html?pagewanted=all>.

38. Greenberg Gallery, Inc. v. Bauman, 817 F. Supp. 167 (D.D.C. 1993), *aff'd*, 36 F.3d 137 (D.C. Cir. 1993) [hereinafter *Calder I*]. Although they often generate skepticism (see, e.g., the arguably unfair treatment of Thomas Hoving in the film WHO IN THE #\$\$% IS JACKSON POLLOCK? (New Line Cinema 2006)), such "cursory" examinations are quite possibly the norm (MoMA's former esteemed curator, Kirk Varnadoe, was said to be able to spot a fake Rodin drawing from "100 yards away in a dense fog") and well founded in science. See, e.g., MALCOM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

39. Case Summary—*Greenberg Gallery, Inc. v. Bauman*, INTERNATIONAL FOUNDATION FOR ART RESEARCH, http://www.ifar.org/case_summary.php?docid=1184350851 (last visited Feb. 22, 2012).

recognition that court rulings on the authenticity of artworks are, for all practical purposes, immaterial.⁴⁰

Authenticity has, in effect, been held to be subject to a determination by the market, not by the courts. The following excerpts from *Calder II* (which also involved a Calder work that a foundation—recognized by the art market as the definitive source for the authentication of Calder works—simply refused to consider are illustrative:

The “negligible value” of the artwork involved in *Calder I* demonstrates that “it will be immaterial to the art world that a court has pronounced the work ‘authentic.’”⁴¹

[C]ourts are not equipped to deliver a meaningful declaration of authenticity. For such a pronouncement to have any validity in the marketplace or the art world, it would have to be supported by the level of justification sufficient to support a pronouncement by a recognized art expert with credentials in the relevant specialty.⁴²

[A] declaration of authenticity would not resolve plaintiff’s situation, because his inability to sell the sets is a function of the marketplace. 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.⁴³

IV. POLICY MATTERS: EXPERTS ARE AFRAID, VERY AFRAID

With so much depending on the opinion of recognized experts, it would be reasonable to infer that qualified experts are very busy addressing matters of authenticity. Collectors, it should be assumed, are eschewing what the German court sentencing the “Steve Martin forgers” called the “frivolity” of their past purchasing practices and engaging in the “serious” investigations that ought to be undertaken before entering into what are, after all, major financial transactions.⁴⁴

But there is a catch. Just when they are arguably most needed by the market, many experts do not wish to be found. For some, to greatly (and perhaps unfairly) oversimplify the remarks of Professor Kanter at the Symposium, the sort of authentication that interests the market is a pointless exercise that ignores the hard earned connoisseurship and scholarship needed for what are often nuanced and complex matters of attribution.

Other experts, however, simply appear to be afraid. Consider the standards and guidelines issued by the leading association of art historians in 2010. Although successful lawsuits against art experts are rare to the point of near extinction, the College Art Association’s recommended practices amount essentially to an instruction not to venture an opinion without consulting a lawyer.⁴⁵

40. *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 26 (N.Y. App. Div. 2009) [hereinafter *Calder II*].

41. *Id.* at 26.

42. *Id.* at 24–25.

43. *Id.* at 26 (emphasis added).

44. See Itzkoff, *Art Forgers Whose Victims Included Steve Martin are Sentenced*, *supra* note 17 and accompanying text.

45. *Standards and Guidelines: Authentications and Attributions*, COLLEGE ART ASSOCIATION

Perhaps most remarkable is this statement in the CAA Guidelines: "Although every art historian must be aware of professional responsibilities of acting on his or her expertise, there is no obligation to act individually or publicly—or to *put oneself and one's family in harm's way*."⁴⁶ To avoid such harm, the CAA recommends that:

[O]pinions be rendered for collectors only when there is a written request by the owner of the work, and that the owner provides all parties involved in rendering the opinion with a release signed by the owner and appropriate indemnification. An art historian rendering an opinion may wish to consult a lawyer regarding the elements of such a release.⁴⁷

Despite the lack of success enjoyed by those who have sued art experts, it is hard to quarrel with such advice.⁴⁸ Its implications, however, are potentially quite stark, echoing a *New York Evening Post* editorial from 1929 following the Duveen case excerpted below:

How can anyone outside of a comic opera expect the authenticity of a painting to be settled by a lawsuit? . . . A verdict against Sir Joseph Duveen might have meant the silencing of all expert comments in our country. This would have been a very real calamity.⁴⁹

Of course, avenues for pursuing research into matters of authenticity still exist. Some, including the International Foundation for Art Research (commonly known as IFAR) are thriving.⁵⁰

V. PRACTICAL ADVICE: A BRIEF CHECKLIST

If Steve Martin is right to say that those in the art world "always have to guard

(adopted Oct. 25, 2009), <http://www.collegeart.org/guidelines-authentications>.

46. *Id.* (emphasis added).

47. *Id.*

48. See, e.g., *Lariviere v. Thaw*, No. 99 Civ. 100627, 2000 WL 33965732, at *2 (N.Y. Sup. Ct. June 26, 2000) (upholding an agreement which provided "in relevant part: 'I agree to hold the Authentication Board and its directors and officers in their representative and individual capacities harmless from any liability towards me or others because of its rendition of an opinion (or its refusal to render any opinion)'"). But see *Simon-Whelan v. The Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177, at *1 (S.D.N.Y. May 26, 2009) (in which a similar release was present but not sufficient for the court to dismiss all claims against the Andy Warhol Foundation). Ultimately, the plaintiff-owner of a work not authenticated by the Andy Warhol Foundation gave up the suit for lack of funds. The Andy Warhol Foundation, however, spent \$7 million defending itself. Linda Sandler, *Warhol Foundation's \$7 Million Defense Beats Lawsuit*, BLOOMBERG (Nov. 16, 2010, 5:35 PM), <http://www.bloomberg.com/news/2010-11-16/warhol-foundation-for-the-visual-arts-wins-lawsuit-with-7-million-defense.html>. The distinguished panel recommending the adoptions of the guidelines included attorney, Ronald D. Spencer, the editor of *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* (2004).

49. SECREST, *supra* note 36, at 242.

50. INTERNATIONAL FOUNDATION FOR ART RESEARCH, <http://www.ifar.org/> (last visited Jan. 26, 2012).

against” authenticity issues, then what can and should be done?⁵¹

There are, of course, no complete answers and no guarantees that all problems can be entirely avoided. Some, however, may find the following quick checklist a useful guide for addressing authenticity issues, particularly before acquiring an artwork that has a material value.

No.	Suggested Actions	✓
1	a. Diligently research provenance , using a professional researcher if necessary. b. Carefully examine original documentation when possible. c. Verify provenance when possible; do not assume that an invoice is complete or correct.	
2	a. Consult an up-to-date <i>catalogue raisonné</i> if available. b. Confirm acceptance by authenticating committee or foundation if applicable.	
3	a. Identify and consult scholars, connoisseurs , dealers and other experts to the extent possible. b. Document advice in writing if possible; keep careful notes when not. c. Consult the artist if living and available.	
4.	a. Consult a conservator or other qualified professional and obtain a careful analysis of the condition of the artwork.	
5.	a. Consider consulting a forensic or other scientific expert to test the artwork for anachronistic or incongruent materials.	
6	a. Get detailed representations and warranties in a signed writing, including: <ol style="list-style-type: none"> i. A representation that the artwork is “by” an artist, etc. ii. A representation about the provenance of the work and that all documents and information has been provided. iii. A representation that there are no known claims or information tending to cast doubt on authenticity. iv. A representation about the condition of the artwork and any known conservation and restoration. v. A representation about the number in the edition and the number of the artwork if possible. vi. A representation about the date of the creation of the artwork. vii. A representation about exhibitions of the artwork. viii. A representation about publications concerning the artwork. ix. A representation that key details (<i>e.g.</i>, signatures, foundry marks, etc.) are as depicted in accompanying detailed photographs. 	

51. See Itzkoff, *Forged Painting Was Once in Collection of Steve Martin, German Police Say*, *supra* note 15.

	<ul style="list-style-type: none">x. Details about the materials used in creating the artwork.xi. Specifics about the dimensions of the work.	
7	<ul style="list-style-type: none">a. Get a signed writing from a reliable party that includes the right to:<ul style="list-style-type: none">i. Cancel and rescind the sale during a specific time period if the artwork is found to be inauthentic by specified criteria (<i>e.g.</i>, by forensic testing, etc.).ii. Recover costs, including attorneys' fees, if legal proceedings must be brought to enforce a warranty or other legal right concerning authenticity.iii. Be indemnified if claims are brought concerning the authenticity of the artwork including, <i>e.g.</i>, by the artist.iv. Avoids or limits disclaimers of warranties, etc.	