Panel 2: The Rights and Responsibilities of Authenticating Art

Moderator: Pippa Loengard, Kernochan Center for Law, Media and the Arts

At One's Peril: The Concerns of the Collector
Richard Altman, Richard Altman P.C.

When An Authentication Is Denied
Steven Reiss, Weil, Gotshal & Manges LLP

An International Perspective: Differences Abroad
Pierre Valentin, Withers LLP

Pippa Loengard: I want to introduce our speakers for our first afternoon panel. To my left is Richard Altman. Richard is in private practice and has been the lawyer on many, if not most, seminal copyright and art law cases. He is currently representing Jeanne Marchig in her suit against Christie's. To his left is Pierre Valentin. Pierre heads Withers LLP's international art law practice and is based in London. And to Pierre's left—and actually, Steve is going to talk before Pierre—is Steven Reiss, who is a partner at Weil, Gotshal & Manges. There are more thorough biographies in your materials. Also in the materials are some readings that Pierre recommended for those of you with less background in EU and British laws. I just want to highlight those materials. I'll turn it over to Richard.

Richard Altman: Thank you to Pippa for inviting me to speak. I'm going to talk about a couple of cases that I've had the fortune, or misfortune, to be involved in. The first one I want to talk about is the Thome against the Calder Foundation case, which raises a lot of fascinating issues, especially in light of the Warhol Foundation going out of business and what that all means for the art market.[1] The case has a fascinating history. In the 1930s, Alexander Calder was very good friends with Virgil Thomson, the composer, and they worked together on a set design for the production of a piece by Erik Satie called "Socrate," a very beautiful half hour opera. This was put on to considerable acclaim. It was staged at the Hartford Atheneum and attracted a lot of attention, but there were only about two performances and after that the work was destroyed.[2]

Sometime in the 1970s, my client Joel Thome—who is a composer and conductor of mostly new music and very well known in his field—was a close friend and colleague of Virgil Thomson, and they were talking about this original

1. Thome v. Calder Found., 890 N.Y.S.2d 16 (N.Y. App. Div. 2009).
2. *Id.* at 18.

production and decided that it would be a nice thing to put on again. Thomson wrote a letter to Calder who was in France, and he said "We want to do this," and asked, "Do you remember this production from forty years earlier?" Of course Calder wrote back, "This is wonderful; I'd be delighted. I'll be in New York because there's a show of mine at the Whitney, and we can talk about this then." So they all get together; they draw up plans; Calder signs off on the recreation of this; they begin work on it; and they schedule the concert.[3] It was going to take place with one of Thomson's operas—I think he wrote with Gertrude Stein in "Four Saints in Three Acts." A couple of weeks before the concert—which I believe was in 1975 or 1974—Calder died. They canceled the performance, and about a year later, they decided at that time to put it on subsequently as a memorial to Calder.[4] So about a year later they put it on, and it became quite a story at the time. A committee was formed, which consisted mostly of Calder's family, a number of people who knew people—and it was quite a concert. In fact, as it turns out, I actually went to the concert in 1975 or 1976 when I was a young person. A lot of famous people were there: Leonard Bernstein, Martha Graham, Jerome Robbins and so forth and so on. It's a wonderful piece—there's a YouTube video, which you can find if you just put in a couple of these names like "Satie" or "Calder" or "Virgil Thompson"—and it's about seven or eight minutes long, and it shows the set which consists of a large red circle and a white column. Over the course of the piece, the column shifts from vertical to horizontal. The piece—the music itself—is about the death of Socrates, so it's very moving to see it. The piece moves off and at the end it's horizontal, signifying the death of Socrates. So it was a very major success. By the way, I should say that Thome got some money to fabricate and store this piece, and over the next twenty-five years or so, it remained in storage.

Sometime in the 1990s, Thome had a stroke and he found himself in a lot of financial difficulties because he couldn't work for a long time, so he eventually wanted to sell the piece. At some point in the late 1980s the Calder Foundation was formed. Thome figured, "Well, since there are all of these people who are actually on the board of this Foundation—since some of them were actually present at the concert and able to put this on," he figured, "it shouldn't be much of a problem to get them to authenticate it." By this time, he had a couple of art dealers working with him and he received a couple of very serious offers for approximately half a million dollars each. The piece itself was not just this large stage set—it was also a smaller stage set, which was suitable for smaller stages. In addition, there was a maquette and a lot of documentation that went along with this. So he assumed he wouldn't have a problem getting authentication, so sent in all of the materials. He later received a postcard from the Foundation saying, "Thank you very much. We have all the materials and we'll let you know." But he heard nothing, and he had these offers—very carefully documented offers—where his

3. *Id.* at 19.
4. *Id.*

putative buyers were saying, "All I need are the numbers for this piece to show that it's in the *catalogue raisonné*." He had a conversation with the head of the Foundation, related to Calder by marriage, who told him, "It's a stage set. We have no problem. You'll be hearing from us, and we're going to do this." But he still heard nothing. His buyers were asking, "What's the story?" He got in touch with the Foundation and they did not respond.[5]

At that point, I got involved and I tried to arrive at some resolution, but nothing happened. So I brought a suit and the appellate division essentially said—as the cases in the materials indicate—"Well, this is really a function of the art market, and if the art market considers this stamp of approval from the Foundation to be something that is essential to its purchase, there's nothing we can do about this, and a ruling from us as to the authenticity of this art work wouldn't help you because they wouldn't buy it anyway and we have no way of forcing the Foundation to issue a ruling about this one way or the other."[6] My arguments were essentially that since you, Foundation, have this power in the market place and since, furthermore, not only do you have this power in the market place, but as a not-for-profit foundation—one of whose stated purposes is to compile a *catalogue raisonné* of Calder's works—you have an obligation to say something about this. You can't just say nothing and thereby essentially deprive my client of the value of his property.[7] So the court, as I told you, said, "Well there's nothing much that we have to say here. It's too bad and we're sorry that you didn't get a response from the Foundation, but we can't force them to tell you anything one way or the other. This is the way the market works."[8] So, of course, this raises the whole question tied to the Warhol Foundation deciding to go out of business because they ran through all their money by paying lawyers—if the market recognizes these foundations—which, again, they are nonprofit, so it seems to me that they have a public obligation—but if they won't do anything and yet the market relies upon them, then where are we? I feel that essentially you have a situation where it actually has the power to drive down the price of art because it increases the uncertainty that any buyer who has to go to a foundation would have. If I have to go to the Pollock-Krasner Foundation or the Calder Foundation, and they won't say anything, then why in the world should I buy this piece? Or should I just cut them out entirely? I don't think there's an answer to this yet, and I think that the demise of the Andy Warhol Foundation, or at least the aspect of it that does this authentication . . . I think this is raising a very serious problem, and I don't know what the answer to this really is except I do think that it drives down the price of art.

A while ago, I was consulted by someone who had a Matisse drawing. Someone made a claim that it wasn't authentic, and there were only the owners of the moral

5. *Id.* at 28.
6. *Id.* at 35.
7. *Id.* at 29.
8. *Id.* at 35.

rights, a small group in Paris, who didn't want to say anything about it one way or the other. So again, you have this kind of unaccountable power and it's also, as I would repeat, a not-for-profit organization. It's not as if you're having the fight between experts, who would opine one way or the other about the authenticity or the attribution of the art. You have a public institution that is being brought into this, and in my view, they are failing to discharge their responsibilities.

So the piece remains unsold. We are trying to find people in Europe who have an interest in purchasing it, and there has been some interest. Given the provenance of the piece, and given the involvement of some of the exact same people who are on the Foundation's board with this memorial performance, it's hard for me to see how anyone can doubt its authenticity. Nonetheless, this is where we are and we have no claim for what's obviously a lost deal for him.

The other matter that I'll talk about—I don't want to be sort of circumspect about it because it's still pending—is the Marchig against Christie's case.[9] I will limit my remarks to what's in the public record because it is still pending and it has become a bit contentious, so I want to be cautious about what I say. The story is that Mrs. Marchig—who I just saw a few days ago in Geneva—married her husband sometime in the 1950s. They were actually, as it turns out, very good friends with Bernard Berenson. Her husband was an artist of some note—a very fine artist, and an art restorer. He lived in Florence, and was there during the last years of the Second World War. He met Jeanne on a train somewhere in Italy, I think, and they married and were together until he died sometime in 1983. He had a large collection of art—including this piece—and around 1966, they met Noel Annesley, who was working at Christie's at the time. Mr. Annesley subsequently became the Chairman of Christie's. Mrs. Marchig, Mr. Marchig and Mr. Annesley developed a relationship, which lasted for about forty years, during which time Mrs. Marchig and her husband consigned works on thirty or thirty-five separate occasions over those years, and had sales. Mr. Marchig died, as I said, in 1983, and, sometime in 1997, she consigned a group of drawings including this one, and there were a couple of Tiepolos and some other pieces. They're really beautiful stuff. An expert from Christie's came to her house and looked at it, and he examined it and said he thought it was a German drawing from the Nineteenth Century. She said, "My husband always thought that this was probably by Ghirlandaio." The Christie's expert said, "No, no, no, it's a German drawing from the Nineteenth Century, and, by the way, I would like to change the frame because it has this Florentine style." I have a photo of the drawing in her house—it had a Florentine frame that was somewhat ornate. I have a letter from him saying, "We want to change the frame because it will look like an Italian pastiche." But, of course, if it is Italian, it is not a pastiche.

But, anyway, she allegedly shipped it to them with the frame, and it was sold at a Christie's auction in early 1998 for about $22,000 to a dealer named Kate Ganz.

9. *See generally* Marchig v. Christie's, Inc., 430 Fed. App'x 22 (2d Cir. 2011).

She held onto the drawing for about nine or ten years, and then she sold it to a gentleman named Peter Silverman for about the same amount of money—for about $22,000. Mr. Silverman had his suspicions about this drawing, so he took it around to some people, and it turned out—after a number of people looked at it, including a laboratory in Paris—that this might very well be by Leonardo da Vinci, and that was really the basis of the claims that I brought on her behalf.[10]

There was some scholarly analysis of this: there was a very interesting article written by someone who was an expert in Milanese hairstyles of the Fifteenth Century, who reported that the hairstyle depicted in the drawing was in fact a kind of hairstyle that was prevalent at that time. Just recently new research has come out from Martin Kemp, a professor at Oxford—he wrote a book about this, along with the scientist who had examined the drawing, making the case for the attribution to Leonardo Da Vinci.[11] Since then it has been widely reported, particularly in the European press, that there has been additional research performed on this drawing. Apparently, down the left side, there are some irregularly spaced pinholes and Professor Kemp thought that perhaps this was taken from a book.

Well, it turns out that the investigation and the report of the investigation are like this: the subject of the portrait was a fourteen-year-old girl who had been betrothed to the son of the Duke of Milan, whose name is Ludovico Sforza. He was quite a powerful figure in Milan from about 1460 until about 1490-something. He had five illegitimate children by five different women. This girl in the picture was one of those women. She was betrothed to somebody at the age of about fourteen, but died only a few months later, possibly in pregnancy. So it's unclear whether this drawing is intended as a wedding portrait; or, because it's sort of somber, perhaps it is a memorial to her after her death.

In any event, the Duke of Milan commissioned four books, which would consist of the family histories of each of the four children that he wanted to give these to, and he commissioned them around 1490. Considering that the Gutenberg Bible was from about 1465, one can imagine what it must have cost in order to have commissioned four copies of a book printed at this time. In any event, the four books were scattered. One is in Paris, one is in the British Museum in London, one is in Florence, I believe, and the fourth one is in Warsaw. So Kemp went to Warsaw—this all happened within the last year—and they retrieved the book, and not only found that there was a missing page in the book, but also that the pinholes in this drawing matched the book perfectly. So it does seem like pretty strong evidence. This, again, has been published. There's going to be a documentary about this from the National Geographic, which will be out in awhile on television. It looks quite certain that it is, indeed. However, that's of course not really what the case is about. The case is about what Christie's responsibilities might have been in connection with their sale of this drawing. Again, I have to be very careful

10. *Id.*

11. MARTIN KEMP & PASCAL COTTE, LA BELLA PRINCIPESSA: THE STORY OF THE NEW MASTERPIECE BY LEONARDO DA VINCI (2010).

what I say because it's still going on, but I brought various claims including breach of fiduciary duty and negligence.[12]

It's well established, and I think most people recognize, that an auction house is a fiduciary with respect to any consignor. They represent that they have specialized knowledge. They represent that they can correctly attribute works that are presented to them, and given to them for sale, and so the basis of the claim was that they breached this fiduciary duty by failing to correctly attribute the authorship of the drawing. At this point—maybe four weeks ago—the Second Circuit affirmed the dismissal of all of the claims in the complaint, save one. I brought a claim for the return of the frame.[13] The allegations by Mrs. Marchig are that she shipped the drawing herself, that it had a frame and that Christie's sold it without the frame—and so, she now asks of Christie's, "May I please have my frame back?" The frame has not been returned, and so the Second Circuit upheld the frame claim. So presumably—and we're doing some discovery now—we're eventually going to go to trial on the issue of whether Mrs. Marchig actually shipped the frame; what happened to it; and if it's not returned—and if, in fact, I can survive summary judgment—what the frame is worth. So it's kind of the tail wagging the dog because I'd much rather be fighting over whether this is a true Leonardo. That would be the battle of the experts—the most exciting one since Hahn against Duveen[14]—but I don't think that's going to be, and so the question now is really what happened to the frame and what's going to happen to the drawing. I've had a lot of communications with Mr. Silverman, who is connected somehow with the ownership of the drawing, and that's sort of where we are. Unfortunately, the issues as to the responsibility of the auction house under these circumstances are foreclosed, and that's the end of it, so it's a kind of an odd dénouement for this story, but there it is. It's quite a beautiful piece of art, and I shouldn't say any more about it than I've already said. Thanks for listening to this.

Pippa Loengard: Thank you, Richard. Steven's now going to talk a little bit about the other side of the coin. Steve, it's up to you.

Steven Reiss: Sure. So, I think my part of this presentation is titled: "Why is it So Hard for Richard to Win?" And this is going to be the more legal part of the presentation, but I think it's important for folks to understand the legal playing field that these claims are brought on; once you understand that, you understand that the bottom line is usually that unless you can show someone did something really bad, you're not likely to win, and what that is will hopefully become a little bit clearer by the end of my talk. I'm actually going to commit one of a litigator's cardinal sins: I don't think I'm going to use all of my time, but let's see. If you take the first situation that Richard was talking about, it seems incredibly unfair, right? You've got an authentication body. They seem to have virtual control over whether a work can be authenticated as by the artist or not, and the value of that

12. *Marchig*, 430 Fed. App'x at 24.
13. *Id.* at 25.
14. *See* Hahn v. Duveen, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

piece lives or dies by what that authenticating body does—whether it's a foundation like the Calder Foundation; whether it's the, now out-of-business, Warhol Foundation—and it would seem that if that body or those institutions that have such control over authentication do something wrong, you ought to be able to haul them into court and fix it; make them account for that. Well, I'm going to explain to you why that is so hard to do, and why the law has evolved to make it pretty clear that it is really hard to do. So, sort of a very, very basic primer on antitrust law. It's the last thing you wanted to be hearing at 2:20 on a Friday afternoon, but it actually is quite interesting, and it will actually explain to you why these claims so rarely succeed. Antitrust law is a basic law, and it is all over the world—every country in Europe has it; Japan, Korea and the United States also have it—so, it's not a foreign body of law internationally. In the United States, there are basically two kinds of claims you can bring. Let's assume you've got a claim where the foundation has refused to authenticate a piece, or—another situation—you take your piece to the auction houses, and neither of them will authenticate the piece. They say, "Well, we're just not sure enough. We can't sell it as a Pollock." You're unhappy because you think you've got a legitimate Jackson Pollock. What do you do?

There are two basic kinds of claims under antitrust law. One is called a monopolization claim and another is basically an unfair restraint of trade. Again it may make intuitive sense—if you've got to get your work authenticated by a foundation or by the folks whose imprimatur counts solely—that you're encountering a monopoly because they have a monopoly on authentication. So, why isn't it true that when you complain that the foundation hasn't done something, they refuse to act or they have acted improperly that you don't have a monopolization claim? Let me give you some of the legal problems that float up when you claim monopolization or attempted monopolization.

The first one is, under antitrust law, you need something called a market. You can't monopolize in thin air; you need to monopolize a market. So, what is the market? Is the market contemporary art? Is the market contemporary art sold at auction? Is the market Warhols? Is it Warhols sold at auction? What is the market? And there has been a fair amount of back and forth in litigation about what actually constitutes the relevant market because if you can't figure out what the market is, you can't possibly have a monopolization claim. In the way the law has evolved—and this I think is favorable to Richard's position—a number of courts have recognized that, in fact, an artist's work—a single artist's work—can constitute a submarket. Therefore, Warhol's works may in fact actually be a market or submarket capable of being monopolized. That's a good thing. Not all courts have recognized that. Here is what they said is not a market, however.

This goes to the scenario where you bring your work to the two auction houses—you bring it to Sotheby's, you bring it to Christie's. Neither of them thinks it's authentic; neither will take it. And you say, "Well, I'm in the soup right? I can't sell this piece, or at least I can't sell it for anything nearly close to what I think it ought to earn." So, maybe we have a monopolization claim because the

sale of Warhols at auction should be a market, right? No. Wrong. And it's not a market because you can sell Warhols in a lot of other ways than through the auction houses. Lots of dealers will sell your Warhol. You may not get as much money, or you may. But that's why sales through auction houses are not a market. That has been established. So, when you've got these monopolization claims those are a couple of the things you have to deal with. You also have to deal with the following: under the law, a natural monopoly is okay. As long as the monopolist isn't doing anything bad and isn't doing anything wrong, then it's okay to have a monopoly. In order to bring a monopolization claim you actually have to point to a bad act that the monopolist—in this case the authenticator, the Foundation—has done. Have they lied? Do they have some collusive interest in not authenticating the piece? Maybe that's an avenue. And that's often very difficult to show. That is the reason why these claims that intuitively have so much appeal—the foundation as a monopoly that is misusing its monopoly power, and we should therefore be able to bring an antitrust claim.

By the way, there are a lot of other technical reasons under the antitrust laws. You have to show something called antitrust standing, which shows that you are a competitor being injured. You're going to have to show damages. All those things, frankly, are technical. But it is the reason why monopolization claims against foundations have uniformly failed. There is a second kind of antitrust claim, and that's the kind of claim that alleges that there are just unfair competitive acts. The most common kinds of antitrust claims of that nature are where competitors get together and they conspire to fix prices, or divide markets, to keep the markets as they want. Those claims are more interesting and actually at least one of those claims, in reported decisions, has survived. What do you have to show? There is a case involving the Warhol Foundation and the Warhol authentication board.[15] The claim was that the Warhol Authentication Board made its authentication decisions based on the interests of the Warhol Foundation; they had an interest in limiting the number of authenticated Warhols. The Foundation and the authentication board worked together—in the language of the antitrust laws, they had an agreement; they had a conspiracy—to deny authentication of certain pieces even though the pieces were authentic. That claim survived a motion to dismiss. That's the only one I think I know of. There, you have an allegation that two market players were agreeing to do something for the bad reason of artificially limiting the number of Warhols that were in the market place and that claim survived.

Why is that claim difficult to bring in most circumstances? For starters, you need what they had in that case. You need an agreement between two market players. You would need an agreement between a foundation and an auction house or between a foundation and a dealer—you need some agreement between at least two parties to do something that's going to affect the market. The second reason

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

why those claims are hard to bring is that the agreement has to actually make sense from a motive standpoint. There is law out there that says that you can't just claim that two actors in the market are acting in the same way, and therefore they must have an agreement. So, for example, go back to my auction houses case. You go to Christie's, and they say, "We're not comfortable that it's authentic." You go to Sotheby's, and they say, "We are not comfortable that it is authentic." You say, "Ha! They must have reached an agreement on this because they would both really want this piece. It's a great piece. It would sell for thirty million bucks if it were authentic. They must have decided together that it isn't authentic." Under the antitrust laws, you need more than just two actors in the market acting the same way. Because they may be acting the same way for entirely independently justified self-interested reasons. And the reasons in that scenario are obvious.

Christie's doesn't want to sell an unauthentic piece or they might find themselves on the side of one of Richard's lawsuits. Sotheby's doesn't want to do that either. They each have an independent interest in making sure the authentication is genuine. So, you can say, "I took my piece to Sotheby's, and they wouldn't authenticate it. I took it to Christie's, and they wouldn't authenticate it." That's not going to be enough to make out an antitrust claim for unfair competition or competitive acts precisely because they're acting in their independent interest. It may also say it's almost an irrational agreement because the auction houses would actually have an interest in increasing the number of works that they could get to sell.

There are many other reasons under the antitrust laws why these claims are difficult, but unless you can show that there is some agreement and you have some evidence other than the fact that actors acted in the same way, you're not going to have an antitrust claim survive. And those are sort of the foundational claims. They are the big claims. They are the claims that affect the entire market, and that's why those claims can be powerful. That's why they are so often brought, and you've heard a number of reasons why they often fail.

There are a number of other claims that can be brought by folks who think that the market isn't treating them fairly. There can be fraud claims. The problem with most fraud claims is that if you take your work to a dealer who gives you an opinion that it's not authentic, and it subsequently turns out that your work was authentic and you sold it somewhere else for a much lower price—unless there is a relationship between you and the person who's giving you an opinion, you've got no legal right to sue them. The fact that the most fights in the art world are over opinions is the other major reason why it's so hard to win these suits. For most fraud claims—for most other kinds of causes of action that can be brought against dealers, auction houses or foundations—you need to show that something was false, that it was wrong. Well, the authentication business is a business of opinions, right? It's all about someone's opinion. That opinion may not be good—it may be bad or it may be sort of shaky—but as long as it's an opinion, it's not *false*.

I'll give you the perfect example outside the market of the art world. Moody's and rating houses like Standard and Poor's have come under a lot of fire because of

the mortgage backed securities crisis. They give ratings—they rate a bond AA, AAA or B+. They have been sued countless times by people saying, "How could you possibly rate that junk AAA? I lost a lot of money because I relied on your AAA rating, and it turns out the bonds were junk and I lost a fortune." In every one of those cases, the rating houses get out. Why? Because it was just their opinion. The AAA rating is their opinion. It could be dumb, it could be wrong, and certainly we've seen it has been in a lot of recent cases. But the fact that authentication turns out to be nothing more than opinion makes it extremely difficult for virtually every legal cause of action that can be brought based on those authentication decisions.

Loengard: Thank you Steven. Since you are under time, I'm going to ask you one quick question.

Steven Reiss: Sure

Loengard: What about negligence?

Reiss: That's going to depend. It's a very good question, and now I'll be a little longer. Where there is an established relationship—and a consignor relationship under the law certainly is established—and where there is a contract that has established certain rights, then you're in a very different situation. Contractual rights can give rise to all sorts of obligations. And negligence may well be a cause of action where there is an established relationship, but proving that it was negligent where an opinion is involved is still very difficult.

Loengard: Pierre, if we cross the pond, what happens? Do we have the same problems?

Pierre Valentin: It depends, as a lawyer would say. It's really fascinating to hear Richard and Steven. There are obviously similarities between how you do things over here and how Europeans do things over there, but there are also significant differences. The first thing I would say is that it's important to realize that, of course, Europe is not a country, but a collection of countries. Each country does it differently, so you can't really talk about Europe. You have to look at how each country does it.

This afternoon, I'll focus on the United Kingdom because that's where I live and I'm qualified to practice English law. I'm not French by the way; I'm from Belgium. But I'll also look at France. Belgium is not really very interesting. And by the way, Belgium and France's laws are very similar. So I'll say a few things about how the French do it. An example of a significant difference: in France, for example, if you sell an artwork which is described as "studio of," or "copy of," and it transpires that it is an authentic work by a given artist, you can obtain rescission of the sale and recover the artwork on the ground of mistake and there are several very important cases in France on the point. That cause of action is not available in the UK. So, there are significant differences between the various countries.

This presentation will be in two parts. First of all I'd like to look at artists' committees—I call them artist committees, but they are basically authentication boards or committees—and particularly the bases upon which they rely to justify their authority to decide whether a work is by the artist or not. And then I'd like to

give a brief overview of how the English courts look at or deal with authenticity disputes. Focusing first on artists' committees, I see them as falling within three categories. The first category is common committees claiming to have inherited the artist's moral rights. As many of you will know, moral rights are protected by the Berne Convention.[16] They are the right to claim ownership—also known as the right of paternity—and the right to object to the distortion, mutilation or transformation of the artwork—also known as the right of integrity. Each European country protects moral rights in a different way. In the UK, we have the right of paternity and the right of integrity, but they are applied fairly restrictively—they only last for the period of copyright, which is seventy years from the year of the artist's death—and it's not often that you see parties in litigation rely on moral rights. In addition to the right of paternity and the right of integrity in the UK, we also have the right of the artist to object to an artwork being falsely attributed to him. That right, however, only lasts for twenty years from the year of the artist's death.

In other European countries, moral rights are much more extensive. France is often referred to as a jurisdiction that loves moral rights, but France is not the only European country to be in that position. In France, they are much wider, they are relied upon quite often and they last forever. The moral rights in France are obviously the right of paternity and the right of integrity; but also the right to decide when the work is first released to the public; the right to withdraw a work from circulation; and a very generic, general right to an entitlement to protect one's honor and reputation as an artist.

In France and other European continental countries, artists' committees generally rely on the moral rights to assume authority over the artist's body of work. I'll give you three examples. There's the Magritte Foundation committee in Belgium—it was founded by Charly Herscovici, who claims moral rights through the artist's widow, Georgette, who died in 1986.[17] In France, there is the Succession Picasso—it's the Picasso Estate, which was recognized by the French courts as the lawful owner of the artist's moral rights.[18] In Italy, you have, for example, the De Chirico Foundation, which was established by Isabella De Chirico before she died.[19] The artist inherited De Chirico's moral rights through her.

The second category of the artist committee is what I would call the natural heir of the artist. This may be a charitable entity that was constituted by the artist before he died, or it could be the estate of the artist. The natural heir generally holds the artist's archives. An example of the first charitable entity is the Henry

16. Berne Convention for the Protection of Literary and Artistic Works, 6*bis*(1), September 9, 1886, 828 U.N.T.S. 222 (as revised at Stockholm on July 14, 1967).

17. THE MAGRITTE FOUNDATION, http://www.magritte.be/ (last visited Feb. 14, 2012).

18. FONDAZIONE GIORGIO E ISA DE CHIRICO, http://www.fondazionedechirico.org/en/ (last visited Feb. 14, 2012).

19. *Pablo Picasso: Questions of Rights*, PABLO PICASSO OFFICIAL WEB SITE, http://www.picasso.fr/us/picasso_page_right-copyright.php (last visited Feb. 14, 2012).

Moore Foundation.[20] An example of the second type is the Bacon Estate, which has established an independent body called the Francis Bacon *Catalogue raisonné* Committee.[21] It's a little bit like the Warhol Foundation and the Warhol Authentication Board—they're separate, although they are kind of part of the same thing.

Then you have the third category of the artist committee, where you find experts, or a group of experts, recognized by the market as having the most knowledge on the artist's body of work. Often the expert, or group of experts, will have written the *catalogue raisonné*. For example, you have the Wildenstein Institute in Paris, which is a fairly controversial organization because it sets itself up as the authority over the body of work of quite a few famous artists such as Modigliani, Fleming, Caillebotte and Monet.[22] However, when the Wildenstein Institute says, "This is not an authentic work by of one of our artists," the market listens. And then another example is the Rodin Committee. There is a gentleman in Paris, Jerome le Blay, who is acknowledged by the market as being the foremost expert or authority on the work of Rodin.

Has the authority of an artist committee ever been challenged in the courts? Not in the UK, to my knowledge, but in France, there have been several court decisions challenging the authority of experts who the market recognizes as the authority over the body of work of artists. The one case that I will mention is a 1999 case involving the Wildenstein Institute. In that case, the artist was Kees van Dongen, and the painting had been bought by the claimant, a Mr. Dumenil, with a certificate by a well-known expert on the artist, Paul Pétridès. Subsequently, he decided to sell the painting, and he assigned it to Christie's, who said they would be delighted to include it in one of their sales of van Dongen until they changed their mind because they were advised by the Wildenstein Institute that the Institute did not propose to include the painting in their forthcoming *catalogue raisonné*. The owner, Mr. Dumenil, commissioned two court appointed experts to examine the painting and both concluded that the painting was by the artist. Mr. Dumenil sued the Wildenstein Foundation. Unfortunately, he lost because the court decided that he hadn't suffered any damage because the *catalogue raisonné* had not yet been published. But, said the court, the painting is clearly authentic and the Wildenstein Institute cannot publish its *catalogue raisonné* without including the painting in it. So, he lost, but he won at the same time. There are a number of reported cases—both before this one and subsequently—which indicate that, in France, if experts appointed by the court deem an artwork authentic, they prevail over whomever the market recognizes as the expert by that artist.

What happens if a work submitted to the French artist committee is deemed a

20. THE HENRY MOORE FOUNDATION, http://www.henry-moore.org/ (last visited Feb. 14, 2012).

21. *The Francis Bacon* Catalogue Raisonné, THE ESTATE OF FRANCIS BACON, http://www.francis-bacon.com/news/?c=Catalogue-Raisonne (last visited Feb. 12, 2012).

22. THE WILDENSTEIN INSTITUTE, http://www.wildenstein-institute.fr/spip.php?page=accueil&lang=en (last visited Feb. 12, 2012).

forgery by the committee? This is like a parenthesis, but it's quite an important point because there have been quite a few instances in which French artist committees, having declared that the work by the artist is a forgery, not only refuse to return it, but have it destroyed. The basis for that is a French law, which makes it a criminal offense to handle forged artworks. The committees will also rely on the alleged contract that they get the owner to sign when the owner submits the artwork for authentication. The contract generally will say that if the committee deems the work a forgery, the committee can destroy it. If the owner is not happy and does not want the committee to destroy it, which is generally the case, then the committee would simply call the police. The police would then come and take the artwork away, and a public prosecutor would handle the matter.

Not many months ago I was contacted by an insurance company here in the United States, following an insurance claim by one of their clients, who had a drawing by Giacometti. He wanted to sell it. The buyer was interested, but said, "I want a certificate by the Giacometti Committee," so the drawing was duly sent off to Paris to be examined. The Committee decided that it was a forgery and called the police. The police came to seize it and off it went. The owner of the drawing proceeded to make an insurance claim on the ground that the drawing was lost. In the end, I understand that the underwriters did pay under the policy, but the reason they contacted me is that they had no idea what was going on. On what basis is it possible for an artist committee to have a drawing seized because they say it's a forgery? That's the risk you take if you send an artwork to a French artist committee.

I'd like to turn our attention to how the English courts deal with issues of authenticity of artworks. There are surprisingly few cases—I'd say about half a dozen in the last forty years. The reason behind that is that the English courts rarely attach contractual force to statements about the authorship of works of art. Statements on authorship are deemed matters of opinion. You cannot sue someone for expressing an opinion unless you can prove that the opinion was a contractual condition, warranty was given or the person expressing the opinion was negligent.

Now, we shall look at three cases. In the first one, the claim was primarily based on contract. In the second case, the claim was in negligence. And the third case was based on an auction house guarantee. Now, the first case in 2002 involved Agnew's, a well-known firm of old master dealers in London, who sold a painting to a Texan billionaire called Drake. They described the painting as "James Stuart, 4th Duke of Lenox and 1st Duke of Richmond as Paris," and attributed it to Van Dyck. After the sale it was suggested to the buyer that the painting was not by Van Dyck. He sued Agnew's claiming that it was, what we call in England, a sale by description. Drake relied on the implied condition in our Sale of Goods Act, which says that if the sale is by description, the goods must accord with their description.[23] The painting was described as a Van Dyck, it's not a Van Dyck, so

23. Sale of Goods Act 1979, 1979, C. 49, §13.

Drake wants the sale rescinded.

Agnew's replied that the attribution to one Van Dyck was merely a statement of opinion, and not a contractual term, therefore Drake had no claim.[24] The background to the painting was that Agnew's had bought it at auction—I think at Sotheby's. In the auction catalog the painting was catalogued as being after Van Dyck, but Agnew's thought that it might have been by Van Dyck himself.[25] They paid £300,000 for it.[26] After it was restored they showed it to several scholars. Most agreed that it was by Van Dyck, except one, Sir Oliver Miller, a great Van Dyck scholar, who did not agree that it was by Van Dyck, although he thought that it was almost certainly painted in Van Dyck's studio under the master's eye.[27] Agnew's was sufficiently persuaded that the painting was by the master himself, so they priced it at £2 million, and stated in the marketing brochure that it was a Van Dyck, but they did mention the fact that Sir Oliver Miller had certain reservations.[28] The final price to Drake was £1.5 million and on the invoice the painting was described as a Van Dyck.[29] The court held that mere expressions of opinion are not contractual unless the parties agreed that they are.[30]

At the end of the day it is a matter of interpretation. The court is really asked to construe the contract and decide whether or not the parties did intend for the expression of an opinion to be a contractual term. In this case, the court's premise—and that is generally the premise in England—is that the attribution to Van Dyck is an opinion because Agnew's was not around during Van Dyck's time. As a matter of construction in this case, there was no evidence that the parties intended for the attribution to become a contractual term. This meant that this was not a sale by description and the buyer had no remedy.[31] Interestingly, the judge, having heard the expert evidence, concluded that the painting was not by Van Dyck.[32] This was the worst possible outcome for Mr. Drake. He ended up with a painting that had been publicly trashed by the judge without any remedy against the seller.

The next case is more recent. It went first to the High Court and then to the Court of Appeal. It arose following a sale at Christie's London in 1994.[33] The buyer of the vases in question was a Miss Thomson, who is the daughter or Lord Thomson, the famous Canadian media mogul. She bought this pair of vases, which were described in the catalog as a pair of Louis XV gilt-bronze vases designed by

24. Drake v. Thos. Agnew & Sons Ltd., [2002] EWHC 294 (QB).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Thomson v. Christie Manson & Woods, [2004] EWHC 1101 (QB).

Petitot for the Duke of Parma.[34] This is a summary of the description. The estimate was £400–600,000.[35] She paid a total of nearly £2 million.[36] The vases were sold by Lord Cholmondeley, who had inherited them from his mother who bought them before 1921.[37] There was no other provenance.[38] After the sale, having paid her £2 million, Miss Thomson heard from a French dealer that in fact these vases were not Eighteenth Century, but had probably been made in the latter part of the Nineteenth Century and were worth about £20–30,000. She was not amused.[39] She went to Christie's, and asked for her money back. They refused. So, she sued.[40]

In this case, there were lots of limitation issues because time had passed, but her claiming negligence against Christie's was still alive. She claimed that Christie's owed her a duty of care and acted in breach of that duty.[41] The issue as to whether an auctioneer owes the buyer a duty of care is much debated in the UK. Understandably, auctioneers have so far refused to accept that they owe the buyer a duty of care. Under English law, and I believe it is the same in the United States, if you want to bring an action in negligence, you have to show duty of care in the first place. But here Miss Thomson said there's no doubt that Christie's in this instance owed a duty of care, and she said they breached it.[42] Christie's maintained that they owed no duty of care to Miss Thomson by sending her a catalog or charging her a buyer's premium, but they accepted that they owed her a limited duty of care in making statements to her about the date and quality of the vases before the auction.[43] So that paved a way to her action in negligence against Christie's. The first court, in 2004, considered expert opinions and ruled that the vases were probably from the Eighteenth Century.[44] The judge said there was a seventy percent chance that the vases were from the Eighteenth Century, which suggests that there was a thirty percent chance that they were not.[45] He didn't explain his arithmetic, but I think the reason is that he thought that it was more likely than not that the vases were Eighteenth Century.

Then he turned to Christie's duty to Miss Thomson, and the court asked itself two questions: was Christie's description of the two vases as Louis XV negligent, and if it was not, did Christie's duty to Miss Thomson require Christie's to say to her that the description might be wrong?[46] The judge found that Christie's had not

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

been negligent.[47] He considered the reasons Christie's put forward for describing the vases as they did and found that, on balance, they had not been unreasonable in reaching their conclusion.[48] They expressed an opinion—it was not a statement of fact—and acted reasonably in reaching that opinion. And that was the end of that. Turning to the question of whether Christie's owed a special duty to Miss Thomson, which required them to say that the description might be wrong, the court answered that yes, they did owe a special duty to her.[49] That was because of her special standing as a rich lady, effectively. Because she was so rich, she was a VIP client of Christie's. She had a special advisor appointed to help her buy what she wanted to buy, and she had made clear that she only wanted museum quality pieces.[50] "And on that basis," said the judge, "I rule that she should have been told that there was no provenance for these vases." Their description was based purely on visual inspection and research, and because there were good quality replicas made in the Nineteenth Century, she should have been informed of the risk that she was running when paying such a large sum of money.[51] "They failed to do that, therefore," said the first judge, "they are liable."[52] "Nonsense," said the Court of Appeal, "there is no such thing as a special duty to rich ladies." If Christie's is found not to have been negligent in how they catalogued these vases . . . well that's the end of the case, and so Miss Thomson lost.[53] She ended up with a legal bill which must have been vastly in excess of the price she paid for these vases, and was left with a pair of vases for which there was only a seventy percent chance that they were from the Eighteenth Century, so this was not a great outcome for her.

The last case I'd like to mention today arose after Ms. de Balkany—this is an earlier case from 1997—had acquired a painting from Christie's London in 1987.[54] The painting was described as a work by Egon Schiele, and she was very happy with it until three years later. Jane Kallir produced her *catalog raisonné* and did not include the painting in the *catalogue*. Ms. de Balkany was not amused, so she went to Christie's and asked for her money back, but Christie's refused. So, she sued. The court in this case, having heard the expert evidence, was prepared to accept that the painting had originally been created by Schiele. However, the evidence showed that the painting had been significantly over-painted to a very large extent—in fact, measured to be ninety-four percent—and the over-painting had not been applied by Schiele. The evidence also showed that the monogrammed "ES," the initials of the artist, had been applied by someone other than Schiele. The judge concluded that the painting fell within the definition of forgery and Christie's, like Sotheby's, gives a five-year contractual warranty that if they sell a

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. De Balkany v. Christie Manson & Woods Ltd., (1997) 16 Tr. L.R. 163.

forgery, the buyer is entitled to his or her money back. So the court said, "Well, this to my mind is a forgery within the definition set out in Christie's conditions of business," and therefore the judge ruled that Christie's was liable to take back the painting and repay Ms. de Balkany.[55] She won the case purely on the back of the contractual warranty, and that is because Christie's had expressly and independently assumed liability in contract to her if the painting were a forgery. The intention to deceive was a vital ingredient of the definition of forgery, and it was in this instance where it was clear that the new monogram had been applied by someone other than the artist that the court was able to conclude that there had been an intention to deceive.

To conclude, the starting point in England is that any statement on authenticity is a statement of opinion, and you can't sue on the back of that unless you can show that the parties intended that the statement of opinion should be a condition of the contract, or there is an express warranty—for example, of the type given by Sotheby's or Christie's—if your claim is in contract. Or, if you want to sue in negligence, you can, provided you're able to show that the defendant owed a duty of care and acted negligently. To finish off, I'd like to just mention how the English Courts evaluate the standards of the duty of care. In a 1986 case called Luxmoore-May, the Court of Appeal drew an analogy with the medical profession.[56] This case involved a painting by George Stubbs.[57] The Courts made a distinction between general practitioners—your local doctor—and specialist consultants. The duty of care imposed on the specialists, they said, is greater than the duty imposed on the general practitioner. In this case, Mrs. Luxmoore-May was suing a provincial auctioneer.[58] The court found that the provincial firm of auctioneer fell squarely within the general practitioner group.[59] The test, said the Court of Appeal, was not whether the auctioneer had got his diagnosis wrong, but whether he was guilty of such failure that no auctioneer within his peer group would be guilty of.[60] A similar test was applied in the *Thompson* case, although of course, Christie's, as an international auction house, was deemed to fall into the specialist-consultant category. Thank you.

Loengard: I have one question to follow up on that, Pierre, before we open to general questions. I am not an expert on British law, but I do recall a case that you sent—*Leinster Enterprises v. Christopher Hull*—where there was an issue of reliance on an auctioneer's description of a work, and it was a question of how there was a greater duty if someone relied on the auction materials.[61] A distinction was made between whether the purchaser was a dealer or a plain rich lady—an individual—who had no reason to have knowledge of the work at issue, and I

55. *Id.*
56. Luxmoore-May v. Messenger May Baverstock, [1990] 1 All ER 1067.
57. *Id.* at 1068.
58. *Id.* at 1075.
59. *Id.* at 1075–76.
60. *Id.* at 1076.
61. Harlingdon & Leinster Enters. Ltd. v. Chistopher Hull Fine Art Ltd., [1991] 1 Q.B. 564.

wondered whether that is a distinction and how would you decide if someone relied on it? And if they did, where's the line between just someone who knows a little bit about art and someone who knows a lot about art?

Valentin: This case involved a painting by a German Expressionist, which a dealer had sold to an expert on that particular artist.[62] What apparently happened was that this individual—the claimant in this case—walked into the dealer's shop one day, spotted the painting, and said, "Oh, I'm very interested in this artist." The selling dealer replied, "I have no idea who this is by or what it is, but you are welcome to have a look." The buying dealer inspected the painting and said, "Oh yes, this is by the artist and you know I want to buy it."[63] So he bought it and eventually it was discovered that it was a fake.[64] So the question that was put to the court was not, "Is it a fake or not?" It was: "Okay we have a fake here,"—and it was a contractual claim—"so is the buyer entitled to rescind the contract and recover the purchase price?" The court found that because the buyer knew much more about this artist than the seller—and indeed the invoice described the painting as painting X by Artist Y—the fact that the selling dealer had attributed the painting to that particular artist on the invoice . . . well, the buyer had not relied on that statement, and therefore was not entitled to the remedy he was seeking.[65] So yes, reliance is material, absolutely, and if you are the defendant and you can show that the claimant knew a lot more about this particular artist than you did, then on the basis of that case, you have a good chance of defeating the claim.

QUESTIONS AND ANSWERS

Loengard: Does anyone have any questions? I guess I have a follow-up question for Richard, which is: so, then, Jean Marchig isn't innocent and Christie's is the one who has knowledge? Are you thinking you can find a venue change?

Altman: I have no claim any more. I would say that she's innocent—she's knowledgeable about art, but she's certainly not an expert. And I will express no opinions about Christie's.

Audience Member: Jack Flam from the Dedalus Foundation. My question concerns the opinions of the English judges in court where they made some sort of a decision about the authenticity of a work. Does that happen with any frequency in the United States?

Altman: I'm not aware of any case where judges here have appointed, as the French courts did, their own experts. This seems to me to be a perfectly reasonable solution to these problems. There's a wonderful dictum from Oliver Wendell Holmes in 1912 about judges being too incompetent to express any opinions about

62. *Id.* at 568–69.
63. *Id.* at 569.
64. *Id.* at 571.
65. *Id.* at 575, 585.

the merits of a piece of art.[66] But of course, it's not about the judges—they're not acting as the experts; they could appoint an expert who would tell them what they think.

Jack Flam: I believe the judge in the *Calder* case sort of said that. Doesn't he say, at least indirectly, that the court does not make judgments about authentication?

Altman: Yes, and even if we did, it wouldn't make any difference. I suppose that's true, but it seems to me that there are other remedies that could have been . . . I was asking for a declaration that the stage set was a genuine Calder.

Jack Flam: I have a question about the stage set also, please.

Altman: Sure.

Jack Flam: Is it claimed that Calder made the stage set himself with his own hands?

Altman: No, he didn't. There's no claim that he made it with his own hands. He signed off on the drawings and the fabrication, and it was fabricated by someone else. But he clearly was involved in it. I think one of the last things he did was actually to get involved with the lighting of the piece as it was to be used in the production. So he was quite involved.

Jack Flam: I mentioned that because it seems that, as with Warhol, there are some authentication cases that have to do with works by artists that the artist may not physically have made by him or herself. I think that's an interesting kind of subgroup of authentication claims having to do with artists where you're not dealing with a work made by the artist's own hands.

Altman: Maybe you can draw a distinction between a drawing and a Richard Serra sculpture that weighs several tons. Or with this particular piece by Calder where you can't say that he went out there with a hammer and a welding and welded the piece himself—you wouldn't necessarily expect that as you would in a drawing.

Jack Flam: Right.

Audience Member: Caroline Moustakis from Christie's, the 800-pound gorilla in the room. I just wanted to make a comment, more than a question, that with regard to the *Marchig* case, Christie's was not asked to speak on this panel. Not surprisingly, we do disagree with many of the things that Richard has said, and it is our understanding that many experts also disagree with some of the conclusions that have been drawn. So just a friendly reminder that there are at least two sides to every story or every case.

Altman: I agree with you. Even if I had won the motion to dismiss, I think it's fair to say that that would certainly be a triable issue. It's of course, at the moment, utterly irrelevant to my claims. I certainly don't think it's irrelevant to the art world, which is obviously agog at the possibility that there's a new Leonardo floating around. But that is not going to be determined by expert testimony, on one

66. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

side—or it's not going to be Hahn against Duveen, let's put it that way. The legal issues were primarily the statute of limitations, after all, which leaves all of this unresolved. I hope I made that clear—you're smiling, so obviously I hope I haven't offended.

Caroline Moustakis: I think you did make that clear. Thank you.

Altman: It's very important for me to do that because, as I said, the case is ongoing, and it's becoming a bit contentious, so I want to be very careful.

Audience Member: Hi, Jo Laird from Patterson Belknap. There is at least one case in which the court made a determination of authenticity. This was a prior Calder case involving a sculpture called the "Rio Nero."[67] It's referred to in the *Thome* case. And the difference between the two—in the prior case, the judge really did have an array of witnesses including Klaus Perls, who was the recognized expert on Calder. The court held, hearing all of the experts, that on a preponderance of the evidence, the Calder was authentic, even though Klaus Perls had said that it wasn't.[68]

Altman: It was an action to rescind the sale. And I think what the judge said was that the plaintiff had not proven by a preponderance of the evidence that it was a fake. I think this might have been a meaningful distinction, and therefore he couldn't get his money back.

Jo Laird: The court, however, was opining, on the authenticity issue, and felt comfortable doing that as opposed to where the court said it wouldn't because the dispute was really between two parties. It decided the issue as between two parties; it didn't declare authenticity or lack of authenticity for the broader market. I think John referred to this case before in his keynote. We said, "Well that's great." And the court said, "Yeah, it's authentic" or, "They haven't proven that it's not authentic." But, the picture has still not been sold because the market would not accept anything that Klaus Perls had not authenticated—which leads to something that we'll probably talk about in the next panel, which is the disconnect between the legal system and the system of authentication.

Altman: It's a total disconnect. I don't know why anybody would pay this kind of money for a piece of art given the flimsiness of what they stand on in terms of a remedy against the seller, if it turns out that the attribution is not what it was stated to be. It just seems so thin to me that I can't understand why anybody would part with that kind of money without an absolute, ironclad guarantee that it is by who you tell me it is. But I'm in a different position in the art market than everybody else.

Audience Member: Hi, Peter Stern from McLaughlin and Stern. Question for Pierre. A question that comes up here all the time is: to what extent in England do the courts uphold the right of an authentication committee to express an opinion where nobody asked them. In other words, they see something at an auction house and say, "That's a fake."

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67. Greenberg Gallery v. Bauman, 817 F. Supp. 167 (D.D.C. 1993).
68. *Id.* at 176.

Valentin: Right, so, just to make sure I understand your question, are you talking about a situation where, before sale, somebody says this a fake and therefore the sale doesn't go ahead? No.

Peter Stern: Well, at any time.

Valentin: I'm not aware of any case law, or at least any recent case law, on that. Certainly not falling within my knowledge in the last twenty years. If such a case came up, would you as the owner of the disparaged painting have a remedy? I would need to think about that.

Altman: Wouldn't you have a defamation claim?

Reiss: Perhaps.

Valentin: Possibly. Although, you can defame an individual—can you defame a work of art? Again, I would need to look it up.

Reiss: You can't.

Peter Stern: Well, in this country, we have *Hahn v. Duveen*, so really the question is whether there is something similar in England?[69]

Reiss: As I understand U.K. law, it's just like the U.S. You can't defame with an opinion. Opinions are not defamatory. It has to be a false statement of fact. You have the same problem there that you do here.

Valentin: Yes, it would depend on the intention of the person. If you could prove that the opinion was expressed maliciously, you may have a claim. But that would be very difficult to prove.

Loengard: Would you have to prove, Steven and Pierre, that the statement was false? And that the person saying it knew it was false at the time?

Reiss: In classic defamation—whether it's commercial defamation or not—you need falsity and there are a gazillion cases that say opinions aren't false.

Altman: It has to be a factual statement.

Reiss: Yeah.

Altman: Well, but this is what happened in Hahn against Duveen. He said, "Everybody knows this is a fake painting." The reporter called him up when the painting was on the ship, as the ship was landing in New York, and said, "Everyone knows this is a fake, and the real one is in the Louvre."[70] So is that an opinion? It sounds like a statement of fact to me.

Reiss: That is a statement of fact. Of course, you could just show that not everybody knows that. Right?

Altman: I suppose.

Reiss: You have to be careful how you give the opinions.

Altman: Well, yeah.

Audience Member: Hi, I'm Gina Guy. I'm with the Rauschenberg Foundation, and we occasionally get requests from people from auction houses to, not necessarily authenticate, but to add information when things come up for auction. Sometimes things come up that we know are not authentic, and we've

69. 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

70. *Id.* at 187.

been advised not to say anything, other than, "It's not in our database." So, if we were to say, "In our opinion this is not a Rauschenberg," would we be liable? What would we be opening ourselves up to?

Reiss: Well, it's America, right? So anybody can sue you for anything. And that frankly is the risk, right? There's always a litigation risk. The fact that these suits are almost never successful doesn't really dissuade people from bringing them. So, if you ask me—free advice—if you framed it exactly that way, in terms of an opinion, I think legally—and your lawyers would make sure it was done the right way—you'd probably be okay, but it doesn't mean you wouldn't be sued.

Altman: I think one of the problems that has always been touched on is the nature of these authentication boards. One of the claims against both the Warhol Foundation and, in my case, the Calder Foundation was that under all the circumstances it was plausible and was alleged that the Foundation had a conflict of interest in that they were trying to minimize, or not unduly expand, the number of genuine works by these artists.[71] All you have to show in that case is that the Foundation members, or the Foundation board, have their own collections. Perhaps the solution to the problem is a foundation comprised solely of scholars, none of whom own any works by the artists that they purport to authenticate. That would seem to solve the problem. And because they are disinterested scholars . . . I've had several conversations with Martin Kemp who was involved in this Marchig drawing—very heavily involved in it—and he absolutely refuses to have any involvement whatsoever in the sale or contingent fee. He just wants his time paid and he'll give you his answer.

So that seems to me to be a question of integrity, or lack thereof, which is really the issue here. I'm astounded sometimes by what I see happening in the art market when you have a lot of money chasing small objects that are readily portable. It's not a piece of real estate where I can go downtown and I can tell you what happened with this piece of real estate for the last four hundred years. I can tell you every conceivable person who had any dealings with this piece of real estate and then I can decide whether to buy it; and furthermore, I can get insurance on top of it. Regarding a piece of art that costs millions of dollars—I can put it under my arm and I can take it out of the country. So I think that's really what the problem is.

Audience Member: Hi, John Cahill. I sense there are a number of foundations in the room and I'm just wondering—not for legal advice, although Steve was very nice to give it for free—if you have thoughts about what foundations should think about and do from all of your different perspectives when they do get requests for information? Especially for a smaller foundation that might be the only source of information, and they want to be helpful, but they hear things—they hear lawyers talking and they're having concerns. If you could even offer some thoughts on

71. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, No. 07 Civ. 6423, 2009 WL 1457177 (S.D.N.Y. May 26, 2009); Thome v. Calder Found., 890 N.Y.S.2d 16, 29 (N.Y. App. Div. 2009).

things they should think about. I think any of you could do that. Pierre, you could explain what thoughts they'd have in Europe—or at least France and England.

Reiss: Good question, John. I think there are a couple of things to think about if you were designing what the foundation should do from scratch. I do think there is a disinterestedness aspect of this that is real. I think some of the problems arise because the questions are whether the foundation has some other axe to grind—either the people running it or for market reasons they want to limit the supply of the authenticated pieces. I think having a clear process makes it legitimate, and it's obviously important that it's an uninterested process. I think making clear the basis on which you're giving whatever information you're giving, and giving factual information that has a basis—I think those are all sort of good practices. I'm sure you do that already. The flip side of this is that there is probably the larger segment of the market in any artist's work . . . it's a good thing that foundations authenticate, right? It's a good thing to know that there is an established body of work out there by a particular artist that's been vetted, authenticated and everyone's happy with it. And you're talking about, in most cases, ninety-nine percent of the artist's work. The problem is because of the way the American legal system works, we are always reacting to the very, very small percentage of cases where there's a problem. I think—and these guys may have other thoughts—but having a process that's vetted, legitimate and disinterested; being clear about the basis on which you're giving the information you give; and if you are giving opinions, stating the limitations of those opinions and basis for them. You should be okay, but as I said before, and as everyone knows, it doesn't mean you wouldn't avoid a lawsuit.

Audience Member: Thank you for that. I'm also from a foundation. I'm just curious as to what happens when you know you're not authenticating, you're saying nothing, but you think something is not authentic. I think foundations have a hard time with what to do when someone's out there making forgeries. I agree that having a body of validated work is great. But especially for an artist that's very prolific, who may have produced tons of things that are out there that won't circulate when a *catalogue raisonné* is published—it's pretty easy for someone to start forging things. When does anyone go after the perpetrator?

Altman: You mean the forger? Well it's a crime, so that's about all I can say.

Audience Member: I know, but it's interesting that you're mostly talking about people with good intentions battling each other.

Altman: I didn't say that. And I reject your characterization.

Audience Member: From my perspective, it's unfortunate that a lot of times—

Altman: You are talking about something here which is so inchoate and so difficult. It's really a philosophic question about what a work of art is. We all agree that this is a bottle of water. Mrs. Marchig's drawing has not changed; it's still the same physical object that it was and that it has always been. Yet putting something on to it has this enormous impact on its value. But it's the same object. So how do you deal with that from a philosophic point of view? We are no longer agreeing on the essential characteristic of this object.

Reiss: If the situation is bad enough, there are other remedies. There are

authorities that have as their law enforcement function, as Richard said, the goal of stopping forgeries. Jane Levine was an Assistant United States Attorney and she did that for a long time. If you know there is someone out there forging stuff, you can complain and know that the authorities will do something if it's bad. The harder problem that you are talking about is the one-off or one piece, and if you're aware of that then what do you do. And those are very difficult questions because once you take on the action—once you actually take on the responsibility of stopping something—you are likely to get embroiled in a dispute. So you've got a cost-benefit analysis. But if it's really bad—someone's there with a printing shop turning out fake Warhols—you can report that to the authorities, and they will do something.

Audience Member: I'm Dick Grant from the Diebenkorn Foundation. Couple of points. One in response to what you just said: you can't always get the authorities to do something within your lifetime. The authorities are often sympathetic and require resources well beyond what they have. As I'm sure you know, the FBI has one agent to cover the entire Northeast region for art fraud. They are very nice, but don't have a lot of time on their hands. The second thing is that with regard to an authentication committee, what if the clear experts, the acknowledged experts, are by definition interested parties? And just so that I'm not being obscure, our authentication committee's primary members are the three family members of Richard Diebenkorn. His widow and two children who pretty much saw everything that he ever made, and who are absolutely the experts. What I've been hearing from many advisors is to get them off that committee.

Altman: Well what's the problem? If they have greater knowledge than anybody else, that's one thing. If they own a lot of pieces by Mr. Diebenkorn, that's another thing.

Dick Grant: All of the above.

Altman: Okay. But then I think the point that I made before is valid. There is perhaps an intrinsic conflict of interest there. They are not, by definition, disinterested scholars, and yet, no one wants to accuse them. One has to acknowledge that they probably have knowledge that exceeds that of a Diebenkorn scholar as to what he did. But unless you are worried about being sued . . . well, I don't know.

Dick Grant: Based on everything I've heard here today and what I've heard from other advisors—frankly, yes.

Altman: Well, I think I'll defer to Steven Reiss's point that ninety-nine percent of all the transactions do not lead to any problems. Lawyers tend to think that nobody ever pays the bills and nobody ever gets through the day without either creating or getting involved in an accident. But of course, our experiences tell us that's not so.

Reiss: You've got legitimate people on the board because they are the most knowledgeable folks. That's obviously valid criteria. There could be the conflict that Richard mentioned. The lawyer's solution would be to get one or two other people on that board who are Diebenkorn scholars. If you've got some sort of

unanimity requirement, I think that's an additional protection.

Dick Grant: Well, yes, but the board is a lot bigger than that.

Loengard: We are almost out of time and we have one more question that we should probably get in.

Audience Member: My name is Kibong Kim from the Sotheby's Institute. I have a question about the court appointed experts in France. Are they appointed on an ad hoc basis or is there some sort of a licensing system? And can any liability attach to their opinions? That is to say, if they are proven wrong, and some incontrovertible scientific evidence emerges later, can they be held liable?

Valentin: I can answer your first question, not your second question simply because I don't know the answer to your second question. The answer to your first question is that there is a big difference between how it's been done in the U.K., and I believe in the U.S., and on the continent of Europe. In the U.K., the experts are appointed by the parties. So the parties present their own experts, and the experts are paid by the parties. In France, it's the court that appoints the experts. And you have experts accredited to the courts. It's like a club of experts, and there is a test that you have to pass to be accredited. It's the court's office that will appoint the experts. The parties have no say in that. In terms of liability, I'm not sure. I expect that in France—with it being France—these experts are immune from any liability whatsoever. But you know, I don't know.

Loengard: And with that, I want to thank Steven, Pierre and Richard.