Current Cases and Issues: A Roundtable Discussion

Moderator: Jane Levine, Lecture-in-Law, Columbia Law School
and Director of Worldwide Compliance, Sotheby's

Participants:
Jo Backer Laird, *Patterson Belknap Webb & Tyler LLP*
Michael Salzman, *Hughes Hubbard & Reed LLP*
Donn Zaretsky, *John Silberman Associates PC*

Jane Levine: This is the last panel of the day, and I should first thank all of you for coming and especially for staying until the end of the day. This is going to be a roundtable panel. I am hoping to engage the panelists in a discussion rather than sequential presentations. I am Jane Levine and I am currently the Director of Compliance at Sotheby's. Before I came to Sotheby's, I was at the U.S. Attorney's Office in the Southern District of New York, where I worked on a lot of different kinds of art crime matters, including forgery cases. I have the pleasure of having this great panel of lawyers talk about some of the issues we've touched on today and some new ones. I am going to introduce them now. To my immediate left is Jo Laird who is now of counsel at Patterson Belknap. Jo has a varied practice in all kinds of art law matters, representing collectors, museums, galleries and dealers. She was, prior to joining Patterson Belknap, the General Counsel of Christie's, Inc., which is how I first met her because in my previous job at the U.S. Attorney's office we had a lot of dealings with one another. So, I know Jo to be an expert on many matters of art law. She is also a Columbia Law School graduate—so we are really happy to have her here. To her left is Michael Salzman who is the co-head of the art law practice at Hughes Hubbard & Reed and also known to many of you in the room as an art lawyer with a lot of experience in a lot of different cases. Last is Donn Zaretsky, who is actually an alumni of Paul, Weiss—another thing we have in common—but now with John Silberman Associates where he has an art law and entertainment practice. Donn represents a lot of artists and I am hoping that that is one perspective we can bring out today. In addition, Donn is the author of the Art Law Blog, which—if you are not familiar with it—you should check out. It is a really wonderful blog and resource and worth reading.

One preliminary threshold thing I'd like to say is that as lawyers and litigators we are here to discuss a lot of issues that are related to real cases that are pending. Some of us may have had involvement in them or they may have important implications for our work. We're here just expressing our views—not in our official capacity. It's not exactly that it's off the record, but we will be articulating views that are not necessarily our own but rather those that we have heard people articulate. I'll let the panelists give any other disclaimers they want. So with that, I

wanted to see if we could pick up on a theme that we have heard today. I think early in the morning we started out listening to a little bit about the warranty of authenticity that is often extended with the sale of a work of art. I think John Cahill mentioned for example that both major auction houses issue a pretty detailed warranty of authenticity that is in the catalogue backmatter. It extends for a five-year period and it is essentially what the buyer is getting with the work of art from the seller. But there seems to be a tension between the warranty that you might get from the seller and the concept of authentication, which we've heard a lot of talk about—the question of why the authentication is bound by time. It either is authentic or not, and there seems to be some tension between the concept of a warranty on the one hand and that of an authentication on the other. In fact there is some litigation that has taken place where this question has come up. For example, there is a case where a dealer purchased a work of art from an auction house—Dealer One—sold it to another dealer—whom I'll call Dealer Two—and that sale took place within the five years.[1] But Dealer Two, fifteen to twenty years later, wants to resell that work of art and takes it to the artist's authentication board and they refused to authenticate that work. Both dealers then brought a lawsuit against the auction house. The first dealer's claims were thrown out on many grounds—one being that there were no damages because Dealer one sold the work successfully to Dealer Two.[2] But the court sustained and let the claim of Dealer Two survive against the auction house.[3] This second dealer had no direct transaction with the auction house. The court held this despite the fact that the auction house's warranty of authenticity says that it only extends to the direct buyer in the transaction not to others, and that it is limited for five years and the only remedy is to undo the transaction.[4] Despite those provisions in the warranty, the court is allowing this claim to go forward.[5] As a first question to the panelists: What does that concept mean for the market and for art sellers?

Donn Zaretksy: If I could just make one distinction: In that case, it was not that the court extended the warranty to this third person who had no contact with the auction house, but that it allowed a fraud claim to be brought by that person based on a fraud on the market theory that the auction houses, when they speak, are so powerful that you can be affected—you don't have to prove direct reliance or any contact for a fraud claim.[6] You are dispensing with the reliance requirement in a fraud claim. But I don't think that case stands for the extension of warranties—

1. Ms. Levine is referring to the facts of *Tony Shafrazi Gallery, Inc. v. Christie's, Inc.* For the most recent order for that case, *see* No. 112192/07, 2011 WL 6002677 (N.Y. Sup. Ct. Nov. 22, 2011).

2. *See* Tony Shafrazi Gallery, Inc. v. Christie's, Inc., No. 112192/07, 2008 WL 4972888 (N.Y. Sup. Ct. Nov. 7, 2008).

3. *See id. See also* Tony Shafrazi Gallery, Inc. v. Christie's, Inc., No. 112192/07, 2009 WL 1433049 (N.Y. Sup. Ct. Apr. 14, 2009).

4. *See generally Tony Shafrazi Gallery*, 2008 WL 4972888; *Tony Shafrazi Gallery*, 2009 WL 1433049.

5. *See Tony Shafrazi Gallery*, 2009 WL 1433049, at *3 n.2.

6. *See Tony Shafrazi Gallery*, 2008 WL 4972888 (denying Christie's motion to dismiss as to the fraud claims and dismissing the others). *See also Tony Shafrazi Gallery*, 2009 WL 1433049 (granting Christie's motion to reargue its motion to dismiss but denying the motion to dismiss on the fraud claim).

and I'd be interested to hear if anyone else has a different take on this—to people who don't have a direct relationship with the auction house.

Michael Salzman: On that narrow point I guess I do agree that there is a distinction between who can be the subject of a fraud and who has the benefit of a warranty. Of course, it is easy to allege fraud, but it is much harder to prove it, and so that is kind of a limitation. But the fundamental issue of somebody inheriting a work, after that work sat on a wall for decades, and finding out that it is not what they thought it was when they turn around to sell it is pervasive. At least to my mind, the limitations period—the doctrine—is pretty well established in the Second Circuit, the First Circuit and elsewhere. The only case that I know of to the contrary is one in Hawaii—which said that the warranty ought to run from the date of the sale, rather than from the date of discovery, and at least to my mind that makes sense in the context of the law overall because the law overall treats art like other things—the Uniform Commercial Code (U.C.C.) does, and limitations periods do have a big say in allocating the risk as between a buyer and a seller. In general it seems to me that art ought to follow other commercial transactions in having a clock and having it end.

Jo Backer Laird: I think that there is also a particular reason why there ought to be a statute of limitations on authenticity warranty issues and that is because, as we have heard today, it is art—not science—and attributions will change. You can never get what somebody earlier this afternoon said they would want—an absolute guarantee of authenticity. Things change. Warranties are limited by time. Authenticity is limited simply by changes in scholarship and if you give a warranty it cannot be for all time—it is unfair. The issue is then, as Michael said, "Who is responsible?" And Patty raised the issue this morning of whether the responsibility is really market driven, or culturally driven. Either way, at least as a legal matter, it is driven by the Uniform Commercial Code and other statutes.

Salzman: I guess I would disagree a little bit with what Steve said on the earlier panel when he was focusing so much on how authenticity is about opinion, opinion, opinion instead of fact and how the law sees it that way. I think a lot of American law—different from European law—does treat selling art under the U.C.C. as a factual proposition. Also, the New York Cultural Affairs Law says that if you sell something to a nonart merchant, and you put a name on it without qualification—like "Picasso" rather than "after Picasso" or "circle of Picasso"—that you are making a representation of fact that indeed, for the time of the warranty, it is.[7] The way that the law protects sellers is by saying that there is a certain period of time—so that the statute of limitations works hand in hand with the fact that you can sue on warranty within the time period and there is no defense from the seller's point of view that, "Well, it was just my opinion."

Zaretsky: It is important to point out that a warranty is just an allocation of risk. It is like a little insurance policy and the law will pick a period of time, but there is no reason that the parties cannot contract around that for either a shorter period of time or for no warranty at all by saying, "You take this work as it is; I

7. *See* N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 2011).

make no representations about it." In that situation, by contract you are allocating the risk to the buyer from day one. If you say nothing, you have the four-year statutory period, but there's no reason you couldn't bargain for a longer period—say, for a twenty-year warranty or a perpetual one—and if you don't, there is sort of an invisible adjustment to the pricing that is going on. When you buy a work, if you had a four-year warranty, you might be willing to pay X dollars. If you had an eight-year warranty you might be willing to pay X plus something and if you had a perpetual warranty you would pay even more. It is implied, but there is an allocation of risk and there is an insurance premium being paid. When you get the warranty, to some extent you are paying the seller to insure it for some period of time and thereafter you are self-insuring it.

Laird: Both the facts of the hypothetical and the facts of the underlying case involve an auction house as the defendant and I think that may make a difference in the way people look at the case and maybe in the long run in the way the case is decided.[8] There is no analytical difference, though in the opinion or no analytical way to distinguish the auction house from a museum, a major gallery or a major collector. What the case says is that the second dealer had the right to rely on the fact that Christie's sold it because Christie's is a major artistic institution.[9] Why wouldn't they then be able to say that it was in the Metropolitan Museum's collection, and that they rely on the collection to indicate that it was sold by Larry Gagosian or Bill Acquavella or somebody in whom the market places real trust? It seems to me that the only defense would be: "Hey, everybody knows you can't rely on me, and therefore I shouldn't be liable."

Levine: It seems like the tension that I was trying to get at is between what you have all just talked about it—I think Donn put it as the warranty being like buying an insurance policy where the buyer has a period of time within which perhaps to figure out: "What did I get? I have to figure it out in that time period because that's when my claim lives." But in the case that we are talking about, and the way that I am positing the facts, we have a subsequent purchaser who did not buy from the auction house, but who has been allowed at least by one court to proceed with the claim based on representations that were made not directly to him and that were way beyond the statutory limitation period.[10] What policy is advanced by that? Is that a good or a bad development in your views?

Salzman: I think it is a bad development. I think that to some extent that decision went contrary to a lot of people's expectations, but beyond that I think it

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8. *See supra* note 2 and accompanying text.

9. *See Tony Shafrazi Gallery*, 2008 WL 4972888.

Plaintiffs have submitted affidavits to the effect that art purchasers rely on the expertise of a prestigious auction house such as Christie's, which they term a "market maker" and that when Christie's provides a warranty concerning the authenticity, or provenance of a painting, the custom and practice of the art industry is that the provenance of the work of art has been firmly and permanently established.

Id.

10. *See id.* (holding that plaintiffs' claims for negligent misrepresentation, deceptive and misleading business practices and breach of warranty were time-barred).

went contrary to a principle of American law. It is not that the judge said this, but in effect he was following, what I would call, a French or Continental view that somehow there are official imprimaturs, and that in this case there was an auction house and it therefore had some quasi-official status and some quasi-official duties as a result: "Well, you put it in your catalogue, and people can have a right to rely on that, regardless of whether they ever did business with you or not." That's not the American view in general, and I think it's a mistake.

Zaretsky: I get to disagree finally. I think it's important to emphasize that we are only talking about fraud—not about contract claims or breach of warranty. With fraud, we have an interest in discouraging fraudulent behavior and people should be punished if they perform fraudulent acts. But, we also have the practical matter that a large percentage of warranty claims get barred by the statute of limitations. If you don't allow the downstream buyers—and I am not sure that I agree with this, but I disagree with the argument against it and I am agnostic on whether it makes sense—then the initial purchaser often does not go immediately for the second opinion in four years. Later, when they go to sell it, they find out that it was not authentic and that there was a breach of the warranty. But it is too late to sue for that, and so the person who committed fraud basically gets away with it. I would also add that it just reminds me of the fraud-on-the-market theory, which basically says that in securities fraud cases, if a corporation releases a press release or an SEC filing and there is fraud in it, the person who bought stock in that company—even if they've never read the filings or heard the press release—can still bring a claim because there is an efficient market in the stock market, and the price of that company's stock was affected by this misrepresentation.[11] So it is not a completely alien concept. The art market is not as efficient as the stock market, but it is still fairly efficient. If somebody is, as Jo said, a major player in the market or, as the court said, a "market maker," and injects a fraudulent misrepresentation into the market, it is not to me an alien concept to say that they can be liable to people who they have never even heard of.[12]

Salzman: One effect of these circumstances—because they do rub up against the statute of limitations—is that, unfortunately, I think it has channeled people who really don't have fresh claims to get around it by pleading fraud no matter how improbable that is. I had a case in Delaware a number of years ago—I think it is listed in the materials, the *Krahmer* case—where someone came into Christie's and bought a picture, and many years later attempted to get it authenticated by an art gallery in Boston that had within its confines an authentication committee for that artist.[13] The people in Boston declined to authenticate it and said that they thought it was a fake.[14] The net of it all was that the only way they could sue Christie's was to say it was a fraud, and that it was supposedly a fraud twenty years ago.[15] Lots of

11. For more on the fraud-on-the-market theory, *see* Basic v. Levinson, 485 U.S. 224 (1988).

12. *See Tony Shafrazi Gallery*, 2008 WL 4972888.

13. *See* Krahmer v. Christie's Inc., 911 A.2d 399, 402–03 (Del. Ch. 2006), *aff'd*, 925 A.2d 504 (Del. 2007).

14. *See id.* at 403–04.

15. *See id.* at 404 (discussing the fraud claim).

people had died in the meantime. All the witnesses were gone or if they weren't gone they were being asked to remember events that had occurred twenty years ago.[16] We won that case, but the danger of channeling everything or leaving it out for fraud does strain the ability of the court to get to the truth.

Levine: Donn, just to come back to what you were saying about what you called the fraud-on-the-market and the relation to securities law. What strikes me about that is that when you read some of the cases that have come down about appraiser liability—something we've talked a lot about, something of concern to many in the audience . . . There's sort of a good line of case law—and I am thinking of the *Mandarin* case in particular—where there have been allegations by third parties who are not in contract with an appraiser, but who learned of an appraisal, relied on it because it was may be out there, and the courts have been pretty clear in saying, "You have no basis to rely on it—that appraiser owes you nothing."[17] How do you square the line of cases regarding the appraisers with the holding of the auction house having a duty to the market?

Zaretsky: No, it's not easy to square them and you can imagine that it is limited in two important ways. You would have to have a claim of fraud against an appraiser, and it would have to be the kind of appraiser who you could plausibly claim plays a role in the market the way Christie's or Sotheby's does in sales. It is not impossible that there would be some appraisers, especially if it is a foundation or somebody in the artist's family, where you could make out a claim that once that person opines, the market then reflects those views and even if you have never read the appraisal, you could be harmed by it. It is hard to distinguish the cases on the facts.

Salzman: I think an important distinction for authentication boards and committees to think about—because the law to some degree turns on this—is whether somebody is paid for the appraisal or whether it is just a free opinion. I think that—not in the question of indirect reliance, but just in general—if a board or committee is charging money, the courts are more comfortable saying, "Well in return you have some duties," as opposed to volunteers. I think that in the *Thome* case and other cases, the court wants to encourage scholarship and that's probably why that case came out that way.[18] But once you charge, then the law is more comfortable saying that you have duties.

Laird: On the *Mandarin* case that Jane raised as part of the hypothetical, I think it differs a little bit. Now we get to disagree just a little bit. In that case, Guy Wildenstein was not getting paid by the person who relied on the appraisal; he was getting paid by a broker, or presumably, he was retained by somebody who was brokering a deal. He wasn't getting paid in that way by the buyer of the work, but in fact he was involved in the work itself. At the time that the appraisal was done,

16. *See id.* at 405 (granting summary judgment for Christie's because the plaintiffs did not provide sufficient evidence from which the court could infer scienter).

17. *See* Mandarin Trading Ltd. v. Wildenstein, 944 N.E.2d 1104, 1108–11 (N.Y. 2011) (affirming an order to dismiss fraud, negligent misrepresentation, breach of contract and unjust enrichment claims in a case against an appraiser).

18. *See* Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16 (N.Y. App. Div. 2009).

the Wildensteins, or an affiliated organization, actually owned the work, which he did not disclose. The court nevertheless said, "Hey, there wasn't privity between the buyer and the appraiser, and so he couldn't have relied."[19] Here are the Wildensteins, who were recognized experts in the artist and who had a direct interest in the piece and yet the court said, "You can't rely—you have no claim against these people."[20] One judge dissented and said that the buyer could have made out at trial a claim of fraud by the appraiser, but the majority of the court simply disagreed.[21]

Levine: Interesting that you mentioned two contrasting cases where, very surprisingly, judges have come out different ways on what seems to be a similar issue—how far can the liability run. Jo mentioned the holding in the appraiser case, where the appraiser was held not to have the liability to the downstream buyer; the court said there was no privity between the appraiser and the buyer.[22] In the auction house case—and maybe the auction houses are always getting a bad reputation—the court deals with the privity argument and rejects it, saying—quoting the New York Court of Appeals—

> The world of merchandising is, in brief, no longer a world of direct contact; it is, rather, a world of advertising and, when representations expressed and disseminated . . . prove false, and the user or consumer is damaged by reason of his reliance . . . it is difficult to justify denial of liability on the sole ground of the absence of technical privity . . . .[23]

So, you have one court basically saying that it doesn't matter whether you are dealing directly with the seller or not; if they make the representations, they are out there."[24] And, you have another court saying "No, no, no."[25]

Zaretsky: Again, with the two limitations—that the person making the misrepresentation has to be someone who carries this enormous authority, and they have to not just be wrong or negligent, but fraudulent.

Levine: Well, they have the recognized authority qualification—but I think there were some questions earlier of how you determine that. Is it a balance of who has more authority—the buyer or seller? There are so many permutations of that. I don't know if you have any thoughts.

Salzman: In my view, I think the court probably was wrong about how, at least in the art world, the auction houses might be viewed relative to scholars and dealers who deal primarily in the work of a particular artist. I think that the court was

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19. *See Mandarin*, 944 N.E.2d at 1109–10.

20. *Id.*

21. The judge whom Ms. Laird is referencing dissented from the decision by the Appellate Division. *See* Mandarin Trading Ltd. v. Wildenstein, 884 N.Y.S.2d 47, 55 (N.Y. App. Div. 2009) (Nardelli, J., dissenting).

22. *See supra* notes 18–20 and accompanying text.

23. *See* Tony Shafrazi Gallery, Inc. v. Christie's, Inc., No. 112192/07, 2009 WL 1433049 (N.Y. Sup. Ct. Apr. 14, 2009) (quoting Randy Knitwear v. Am. Cyanamid Co., 181 N.E.2d 399, 402 (N.Y. 1962)).

24. *See id.*

25. *See Mandarin*, 944 N.E.2d at 1109–10.

under the misapprehension that, because they are bigger and their names are more famous to the general public, the auction houses somehow are more authoritative than everyone else in the art world.[26] I think there are plenty of art dealers who would disagree with that.

Laird: Let's also remember that with these cases that go back so many years, or the cases that allege wrongdoing so many years before, as Michael pointed out, it is very hard to gather evidence and very hard to put together exactly what happened. So sometimes it is difficult to defend, and litigation is expensive. We always talk about the results of the litigation and say, "Don't worry, foundations and authentication boards are not held liable." But to get from here to there can cost hundreds of thousands or millions of dollars. People are essentially being asked to insure the art market. As Donn said, the warranty, which has some limitation of time, is essentially narrowing the insurance policy. Narrowing what somebody has to be liable for.

Levine: I was going to change topics a little bit to go to something I actually think we haven't really talked about today—although John Cahill did show a photo of a Dan Flavin sculpture. It actually provoked some interesting questions, particularly with regard to conceptual art and maybe more modern art and their authentication. For example, Flavin is known to have made these sculptures comprised of fluorescent tubes—light bulbs some call them—in different colors. During his lifetime he issued certificates with each of his sculptures. He died in 1996. He was known to not acknowledge the authenticity of his work if a person did not have the certificate—regardless of whether he actually made it. He regarded that certificate as important and it is my understanding that the estate will not issue—he wouldn't during his life, and the estate will not issue now—duplicate certificates, even if the owner could indisputably show that the work is a Flavin. I wanted to talk a little bit about that, and maybe Donn can answer this. First of all, why would an artist take that position?

Zaretsky: Well, the answer lies in the question: What happens if the original certificate still exists? You come to the artist and you say, "I lost my certificate. Can you give me a new one?" But how does the artist know that you really did lose your certificate? Maybe you gave it to your kid or your spouse or your ex-spouse or your girlfriend. Maybe you sold it and you enjoyed the experience so much you figure, "I'll sell it again." If you replace the certificate, you run the risk of ending up with two certificates for the same work, which is a problem on a lot of levels, including the legal level. Let's say I sold you the work, and you paid me a million dollars on the understanding that it was a unique work—it was the only one of its kind in the world. Then you turn around later and see someone else has the same work. Aren't you going to want your money back or come after me? It is legally a problem to do that. As background, those cases are a little different. Here, we are talking about authenticity. You have an object and you take it to someone like an appraiser, a foundation or a committee to tell you that it is really what it purports to be. With a Flavin—with an artist like that or like Félix

26. *See supra* notes 7–8 and accompanying text.

Gonzáles-Torres—you are not asking if this light bulb really is the Flavin or if it is what it purports to be. Rather, the certificate *is* the work. If you don't have the certificate, you don't have the work. There is nothing to compare it to. Really, what you are authenticating is sort of the signature: Is it a genuine certificate? So there's a good reason to do it. It is a different category of works. But I get this a lot in my practice where people are kind of outraged: "Why won't you just issue me a new certificate? It's so simple. It is a piece of paper. Why are you being so difficult?" To me, it's no different than if you have a painting and it is destroyed in a fire. You don't go back to the painter and ask, "Can you paint it for me again?" You have lost it. It's gone. File an insurance claim.

Levine: I am particularly interested in your concern about the issuing of duplicates because, in fact, the use of duplicate certificates—some real and some forged—is a common method of perpetrating forgery. In fact, I prosecuted a case involving a very clever use of appealing to authentication entities for duplicates—claiming that the original was lost, which enabled the forger to pass off a fake as the real one.

Zaretsky: Was it the kind of certificate in those cases that was attesting to the genuineness of an independent object in the world?

Levine: Yes. This maybe is a question for the panelists. We are talking about a certificate of authenticity *as if* it is a defined known thing. What is the legal significance of it? Does it have a legal significance? It can have an impact . . . .

Laird: Like most other things in life, it is worth as much as the opinion of the person who signed it. If it is signed by somebody who has the authority, perhaps under French law—for example, the *Droits Moraux*—or is recognized as the expert in the United States, then it's worth something. I don't know that there's any particular form of it, but it is essentially saying, "Look, in my opinion, I am telling you that this is authentic." And until scholarship changes, that's it.

Salzman: I think that Flavin falls on one side of a line that conceptual artists go just slightly beyond. There are artists like Sol LeWitt, where the work of art consists of instructions on how to make the work, but not the work itself. Flavin did make an object and say, "This is the object." I think that Flavin, in a way, illustrates an anxiety about craftsmanship. He is the author, but you can go to the hardware store. He is saying that he has a hard time telling yours from his, and so you better have the certificate.

Levine: What about that trip to the hardware store? What if your Flavin light bulb burns out? What do you do? Do you have nothing? Do you now have a worthless sculpture?

Salzman: I think that the artist's position—or, now that he's dead, his children's position—is that once the bulb burns out, the work . . .

Zaretsky: No, that's not true. They replace it. You can just call the studio, and they will send you bulbs.

Levine: But first do you need to prove yourself with your certificate?

Zaretsky: Yes, you have to prove that you're the owner of the work.

Laird: Okay, so then what happens? They will stop making fluorescent light bulbs, and they will stop making at some point every kind of technology—

machine, computer, installation, television set—on which a lot of technologically-based art is built. What happens then? One issue is: if under a regime of artists rights, like the Visual Artists Rights Act (VARA), where an artist can disclaim any attribution of the work to him or herself, if the technology has become obsolete, and so the work doesn't look the same as it looked before, is it now inauthentic?[27] Or is it something that was anticipated by the artist, giving the art some kind of temporal quality? I purchased something at a school auction once that was a combined work by Stephen King and Susan Rothenberg that had a timer on it. My husband assured me, "Don't worry that the timer isn't working anymore. That's part of the art." I relied on him. He said, "Yes, let's buy it." It was a good buy. But what happens if King or Rothenberg comes and says, "No, that isn't our work at all. You can't display this or sell it anymore and attribute it to us because they don't make that particular timer"?

Zaretsky: There would be some interesting VARA cases within that issue, and whether they fall under the conservation exception to VARA. The Guggenheim is doing a whole study on that generation of artists with regard to what to do when the materials are obsolete.[28] But I think that although in that case, you can argue about a lot of different things and a lot of different problems, you would not have a dispute over authenticity. Rather, you would have your King-Rothenberg work and the question would be, "Has it been altered or changed?" But it does not become inauthentic by virtue of that.

Laird: Well, it becomes something that I can't sell as a King-Rothenberg. Once an artist sits back and says, "No, I'm sorry" . . . . I have actually had a case like this, where something was a major piece of work by a major artist, but the sorts of computer technology that had been used in the creation of the art was no longer available. Some of the lights were working and some of the LEDs were okay, but not all of them. In that circumstance, when my client was trying to put the work up for auction, the artist simply said, "It's not mine. It's not authentic." There was another circumstance when it was meant to be sold to a major collector and the artist said, "Yeah, okay, let's fix it." The artist is given an extraordinary amount of power, which I am not arguing that he or she should not have, but it does make the ownership of the art somewhat riskier.

Zaretsky: It is interesting to wonder whether an artist could be liable for product disparagement of her own work, if she disowns early work and that then affects the value. There has never been such a case to my knowledge, but could they come back and say, "You have now deprived me of the value of the work"?

Salzman: There certainly have been instances where a court had to face the fact that an artist in his lifetime disavowed work—they are cases where a court basically found that an artist had spitefully decided to disavow work because he was no longer a friend of the current owner. The court said, "Ordinarily, what the

27. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128–33, codified as amended in scattered sections in 17 U.S.C. (2006). In particular, *see* 17 U.S.C. § 106A.

28. *See The Variable Media Initiative*, GUGGENHEIM, http://www.guggenheim.org/new-york/collections/conservation/conservation-projects/variable-media (last visited Feb. 9, 2012).

artist says goes. But the artist is not the last word, and the court can find otherwise."

Laird: It will be interesting to see what happens to the market for that work. If an artist is saying, "Look, for whatever reason, spiteful or not, that's not mine," will the market respond, "Fine, you're saying that, but the Southern District of New York said otherwise"?

Salzman: Sure, the market is the last word and I think that is also an important distinction I would draw between American law and European law where they are talking about having official court appointed experts and so on. Here, pretty much the market—or the court of public opinion, at least—decides what is what. There is no official expert. At least from my point of view—maybe from American law training—that seems to be the way it ought to be. The truth emerges from competing views and there is no official version.

Zaretsky: Of course, the artist could probably in that situation accomplish the same thing if he wanted to punish the collector without declaring the work to be inauthentic and not his by just saying, "It's not good work. It was unsuccessful and I wish it weren't shown anymore." And then the value would go way down in the same way.

Levine: You mention product disparagement claim against the artist for his or her own work, which is one I hadn't thought of, but the film case that we heard about earlier does actually talk a little bit about product disparagement. We know that the antitrust claims were rejected and that there was the court's reluctance or refusal to issue a declaratory judgment with its own opinion. But it kind of leaves the door open, if I'm remembering the case correctly, to a product disparagement claim. What do you think of that? Are there facts that you can posit—not to scare everybody out in the audience with how they could be sued. It didn't happen—it was not alleged adequately in that case—but could it be, and what would it look like?

Zaretsky: The audience *should* be scared. That is an interesting case because I think everyone sort of received that case as a victory for the foundations and the authentication boards and I read it as the complete opposite—as very scary—because it did leave open the possibility of a product disparagement claim just for not including the work in the *catalogue raisonné*.[29] Omitting a work from the *catalogue* is equivalent for legal purposes as declaring, "This work is not authentic." And you could be sued for that. In this case, it was too late; they lost on statute of limitations grounds. But if you bring the claim within a year—it's a short statute for product disparagement—there is no reason under *Thome*, which is the only authority out there right now, that that case wouldn't survive.[30]

Laird: I am not so sure that works because, first, the court in *Thome* essentially

29. "A *catalogue raisonné* is regarded as a definitive catalogue of the works of a particular artist; inclusion of a painting in a *catalogue raisonné* serves to authenticate the work, while non-inclusion suggests that the work is not genuine." *See* Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 20 (N.Y. App. Div. 2009) (quoting Kirby v. Wildenstein, 784 F. Supp. 1112, 1114 (S.D.N.Y. 1992)).

30. *See Thome*, 890 N.Y.S.2d 16, 29 (suggesting in dictum that a product disparagement might have survived the motion to dismiss if the case did not fail on statute of limitations grounds).

says, "We can't do this. This is not what courts are for. We can't opine on authenticity."[31] Correct me if I'm wrong but in order to prove a product disparagement case you have to allege and prove that the person who was saying that it is not authentic is wrong—that he is saying something wrong. How do you prove that somebody is wrong? By a court adjudicating one way or another or finding that the work is authentic. In order to get to a successful product disparagement case, you have to have a court do exactly what that judge said the court could not do. It seems kind of scary on its face, but ultimately I think it was just sort of conjecture. I think that ultimately at least that judge would get to the same place.

Zaretsky: I think it is different because I think what the judge was saying we cannot force the market to accept the work as real: "If people want to just listen to the authentication committee or the *catalogue raisonné*, they are going to do that and they are not going to listen to me. So injunctive relief is pointless. But if they are wrong"—and you have to prove they are wrong in any authenticity claim—"I cannot force them to correct it but I can award you damages equal to the value of the work—which could be millions of dollars."[32]

Laird: Right, it is like I was saying before: when it is simply a dispute between two parties rather than an authentication for all purposes, the courts will do it.

Zaretsky: Yes.

Salzman: I would say, subject to correction, that the law of product disparagement in general is very undeveloped and there is a reason for that. People don't bring these claims and they don't succeed. The risk we are talking about is very hypothetical.

Zaretsky: Except the risk and the real problem—someone mentioned this in an earlier panel—is not winning the lawsuit. It is just defending the lawsuit.

Laird: Right.

Zaretsky: And what *Thome* did was open a very wide door to bring the claims and survive the motion to dismiss and run up the seven million dollars in legal fees.[33] Whether they would be successful or not is an entirely different story, but I think now those claims are pretty easy to plead.

Salzman: But it hasn't happened.

Zaretsky: No. Not that we know of.

Laird: Be afraid. Be very afraid.

Salzman: Call your lawyer.

Zaretsky: There is something we can all agree on.

Levine: We have been talking a little bit about the decision in this case—the court (and other courts) essentially saying, "This is not what we do. We don't

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31. *See id.* at 22, 24 ("[C]ourts are not equipped to deliver a meaningful declaration of authenticity.").

32. *See id.* at 26 ("The point is that a declaration of authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace.").

33. *See id.* at 29 (suggesting in dictum that a product disparagement claim could potentially be supported by the circumstances in the case).

authenticate; we are not good at it and we should not be doing it."[34] Earlier, we heard Pierre talk about what they do in France, where the court retains experts to come up with these assessments. Should we do that here? Is that a good thing? Is the French model good? Bad?

Laird: I think it really comes down to—as we mentioned before—the total disconnect between the art side of this and the legal side of this. As a lawyer, it goes against the grain for me that there isn't some reliable process through which we can adjudicate the truth, where everybody can agree, for example, that: "Okay, is this an antitrust violation of fixing prices on widgets? Let's go to court. Regardless of what the court says, we abide by that; it is the way we resolve disputes." That is not what goes on here. It just isn't what goes on here. So I think that there are facts about authenticity. Yes, it relies on opinion and connoisseurship. But at some point there is some nugget of truth there, and it is not something that can simply be resolved for all time the same way a legal dispute is resolved. So you may in fact be left with people who own things that they cannot sell. You may in fact be left with things being put on the shelf for a long time, or destroyed by authentication boards—sort of a death sentence that cannot be retrieved. But I am not sure there really is any way to resolve it by legal process.

Zaretsky: There is a practical problem with that in that the *Thome* court almost can't believe that the art world just surrenders its authority to this one board to make these determinations of yes or no.[35] The judge just doesn't get it. But there is a reason that everyone does that. It is a convention—a game—because it is too hard to find the truth. And who is the judge going to pick? Five different experts could have five different views, so that the art world—and particularly the world that you both come from—has decided almost just to pretend to go along with whatever the experts say to bring some structure to this market. The reason that you surrender your power is to make the market work. So from the commercial side of the art world, they need a single authority. You cannot wait two years every time you want to sell something at auction. So you need somebody to go to who will tell you whether you have the thumbs up or thumbs down.

Levine: What will happen? The foundations are going out of that business. So what is going to happen?

Zaretsky: That's right; that's right. We saw one go out of business just last week.[36]

Levine: But what do you think is the implication of that? You just articulated really well the surrender and the need for it. We have some problems with it, but if the market over-relies on it, and consequently drives authenticators underground . . . people don't want to say what they think, and people are getting

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34. *See id.* at 22, 24.

35. *See generally Thome*, 890 N.Y.S.2d 16.

36. "The Board of Directors of The Andy Warhol Foundation for the Visual Arts, Inc. announced on October 19, 2011 that the Foundation will dissolve the Andy Warhol Art Authentication Board, Inc. in early 2012." Statement from the Board of Directors, *Authentication Procedure: Andy Warhol Art Authentication Board, Inc.*, THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, http://www.warholfoundation.org/legacy/authentication_procedure.html (last visited Feb. 9, 2012).

out of the business. The courts don't want to do it.

Zaretsky: The Warhol Foundation will be a good case study to watch over the next couple of years to see what replaces it.[37] What will Christie's and Sotheby's look for before they will take on a work?

Salzman: I think that the *Thome* case is illustrative of the fact that the court essentially says, "It's not our business—let the court of public opinion or the market decide who the experts are. We as a court should not be doing that."[38] I agree with that as compared to a model where the court appoints experts, that approach does not strike me as the best way to actually get to the truth of the matter if that is what we are looking for. I think, in my view, it would be healthy to not necessarily have a single board. If there are competing views, they ought to be expressed. And the market will decide. I think that the Pollock-Krasner Board had splits in it and people left. The idea of an official board doesn't appeal to me.[39]

Laird: I am also not at all sure yet what the dissolution of the Warhol authentication board is going to mean—especially since the foundation will continue to prepare and publish the *catalogue raisonné*. They are sort of saying, "We are not going to authentic anymore, but we are going to continue to determine which works are authentic." I haven't been able to unwind those two angels on the head of the pin. I think some of it will have to do with procedure. Are they simply going to wait to surprise the market at some point—"Okay, here is the *catalogue raisonné*"—after which everyone will quickly thumb through it or use their computer to search for their picture? I don't know.

Zaretsky: And then they have one year to sue under *Thome*.[40]

Laird: If that is the case, what happens to everybody in between, who the market perhaps relies upon, or who gives opinions? What happens when the *catalogue raisonné* comes out, and they all get sued if the foundation is wrong? Or they sue the foundation? Some of these lawsuits have not been against authentication committees; they have been against the authors of *catalogues raisonnés*. I am not sure what the foundation really has in mind in terms of this saving them legal fees. They talked about the waivers people sign in all the cases; most of the authentication committees are experts and—I think, justifiably—require a waiver of any suits against them for whatever opinion they issue. If all they are going to do is publish the *catalogue*, then they potentially create a whole array of plaintiffs of the people whose works do not appear and who have never signed a waiver. I don't understand how this is going to work, and I think that the foundation simply has not made it clear yet.

Salzman: I think it could be viewed as a pretty smart move by those people

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37. *See id.*

38. *See generally Thome*, 890 N.Y.S.2d 16.

39. The Pollack-Krasner Authentication Board operated for six years (1990–1996) before it dissolved after the completion of the Pollock *catalogue raisonné*. Sheppard Mullin, *Authentication Board to Death by Lawsuits*, ART LAW GALLERY BLOG: NEWS AND UPDATES ON LEGAL ISSUES FACING THE ART WORLD (Nov. 8, 2011), http://www.artlawgallery.com/2011/11/articles/miscellaneous/authentication-board-to-death-by-lawsuits/.

40. *See Thome*, 890 N.Y.S.2d at 29.

who are on that board. First, they have the problem of Warhol himself doing so much to challenge the idea of authorship as craftsmanship where he would have other people finish the work for him or give people permission to do different things. The *Double-Denied* Simon-Whelan case was all about that.[41] It was a little bit of a no-win proposition for them if you got into Warhol's conversations with people. As opposed to the board trying to impose uniform standards, they were sort of being a little bit more holy than the Pope about what constituted originality and authorship. I think that was a pretty good move. Also, again—to repeat what was said before—once people start taking money, in return, you sign a waiver and you pay your fee. I think that adds a layer of danger for people that they don't have if they're just publishing a book.

Zaretsky: The same waivers will go out to people who want to submit their work to the *catalogue* but I guess you are saying that there are people who can lay back. If you take *Thome* seriously, you don't really need to submit it.[42] You can just wait and when it is not included, you have a year to sue.[43]

Laird: There are people in the room who know much more about this than I do, but my understanding is that when someone is preparing a *catalogue raisonné*, you call out to the market: "Do you have a work by Warhol? Do you have a work by Basquiat?" so that we can consider it.

Salzman: My view would be that if all you do is publish a book, you are going to have pretty good First Amendment protection and I don't think you are going to be subject to suit.

Zaretsky: So *Thome* is wrong?

Salzman: Yes.

Levine: While we're on the Warhol theme, I just wanted to ask the panel if you have any thoughts about another interesting scenario that was in the news a little bit about what they call the Brillo boxes—something that was authenticated, but then becomes unauthenticated after the market had already passed it around as authenticated.[44] Is that just the same variation of the same problem?

Laird: In a way it is, but in a way I think that it's a situation that really points out the difficulty that some contemporary art poses for authenticity issues. Is everybody aware of what the Brillo box situation was? In 1964, Warhol created the first series of works of sculptures that were Brillo boxes—you are all familiar with them. In 1968 at a museum in Sweden . . . ?

Levine: Stockholm.

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41. *See generally* Simon-Whelan v. Andy Warhol Found. for the Visual Arts, No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *3 (S.D.N.Y. May 26, 2009).

42. *See generally Thome*, 890 N.Y.S.2d 16.

43. *See Thome*, 890 N.Y.S.2d at 29.

44. *See, e.g.*, Julia Halperin, *Warhol Authentication Board to Dissolve Due to Millions of Dollars in Legal Fees*, BLOUIN ARTINFO (Oct. 25, 2011), http://www.artinfo.com/news/story/38912/warhol-authentication-board-to-dissolve-due-to-millions-of-dollars-in-legal-fees (stating that the Andy Warhol authentication board "made waves when it reauthenticated 100 Brillo boxes that maverick curator Pontus Hultén made in Sweden three years after Warhol's death"). *See also Warhol Brillo Boxes in Sweden Are Fakes*, BLOUIN ARTINFO (Nov. 19, 2007), http://www.artinfo.com/news/story/26121/warhol-brillo-boxes-in-sweden-are-fakes.

Laird: Stockholm. The director there named Pontius Holton, almost said Pontius Pilate but that wouldn't have been exactly the right reference . . .

Audience: Pontus Hultén

Laird: Pontus Hultén—thank you very much—was doing an exhibit of Warhol works and wanted to have Brillo boxes. He met with Andy Warhol in New York. Andy Warhol said "Okay, fine," handed him a Brillo box and basically said, "You can use this as a template, and you are authorized to make 100 of them"—just picking the number out of the air. As it turns out, after investigations, it appears as though instead of creating 100 boxes based on that template, they actually just went to the Brillo company and got 100 boxes, and folded them and put them up so that they were all over the museum as part of this exhibit.

Levine: They were actually authentic Brillo boxes.

Laird: Yes, subject to the Executive Committee of the Board of Directors of Brillo. Later, Pontus Hultén decided, "Well, 100 is good, maybe another hundred is better." And this time he used the template and had somebody create a large number of these boxes—this time, wooden boxes—and ultimately these found their way into the market, and were called into question—I think for the first time in 2007, and I think by that time they had been authenticated. The Warhol Board took that up and even though they had been warned by others that there might be some questions about it, they interviewed Hultén and he told the whole story. They accepted that and so these were accepted as authentic by the Board. Then in 2007, some of these facts started coming to light, and people started suing each other over it. The Board was really faced with the question that Jane posed, but really in a much more—existential is the wrong word—but as a much more central issue of why this is not authentic. These are exactly the same as ones that were made that were authorized, although at the end of they day they weren't because one was wood and one was cardboard. So is it really just that Andy authorized these and didn't authorize those? How do you determine once they get into the market which ones are right and which ones weren't? Yes?

Audience Member: But the second set was made posthumously.

Salzman: That is an issue that arises all the time with sculptures and casts of sculptures. Degas's posthumous casts are well-known, as well as Rodin's and many other artists'. That part of art selling involving sculpture is a very important issue. There have been numerous cases about casts that are authorized versus unauthorized, and who had the authority to authorize the casts because from the very beginning the artist usually did not have anything to do with being at the foundry making the casts. So that is an issue all by itself.

Laird: The issue was really that they were being passed-off as works that had been created in 1968.

Audience Member: And he was selling them as somebody who was greatly respected. He had been the director of the Georges Pompidou Center in Paris—the first director. Possibly the first non-French director of any major French museum . . . .

Laird: And see what happened . . . .

Audience Member: And it turns out they were right! Their xenophobia was

well-founded! But seriously, he was a very highly regarded person and then it turned out that he was committing this fraud. He had these things made posthumously, said they were lifetime and was selling them for his own profit as I understand it.

Laird: Right. I gather that some of his friends and acquaintances said, "Well he didn't need the money," and that what he was really doing was just a sort of great big joke on the market. My bet is on the money—

Audience Member: It's always on the money.

Laird: —because it usually is. But really it creates real issues. When the news broke—and I was still at Christie's—we immediately got to looking at how many Warhol Brillo boxes we had sold over the last twenty years: What was their provenance and what was their type? But we sold boxes that had been authenticated by the Board. What happens now when the board goes back—and they took the longest time to deal with it—and what do we do when they now—as of last fall—downgraded these to copies?[45] Again, who is liable? Should the board be held liable? They would say no. Should then people within the chain of custody or chain of possession back into the provenance be liable? They were relying on the board as well. I don't think there is a real answer to that question.

Salzman: Another reason why it was smart of that Board to dissolve.

Zaretsky: But Jo's point earlier is that they are going to face the same issue when they come out with a *catalogue*—when they decide how to categorize this.

Audience Member: Jane, are you taking questions now?

Levine: Well, I am feeling the movement and since the audience is becoming part of the panel . . . I was just going to ask if any of you had anything you wanted to say before I opened it up for questions.

Zaretsky: It opened itself up.

Levine: Okay, so sure.

QUESTIONS AND ANSWERS

Audience Member: Hi. I am Al Daniel—private attorney in New York City. Two quick questions for Jane. One, what is the name of the case that your original hypothetical was based on? I don't think you ever mentioned the name of the case—maybe deliberately . . . .

Levine: Isn't that funny I didn't mention the name. No, no—it's a reported case. I was playing around with the *Shafrazi* case involving Basquiat.[46]

Al Daniel: The second question is about your work as an Assistant U.S. Attorney. You prosecuted art fraud cases?

Levine: Yes.

Al Daniel: Wasn't the issue of authenticity an issue in those cases? Didn't you

45. Clemens Bomsdorf & Melenie Gerlis, *Warhol Brillo Boxes Downgraded to Copies*, THE ART NEWSPAPER, Oct. 2010, at 1, *available at* http://www.theartnewspaper.com/articles/Warhol-Brillo-boxes-downgraded-to-copies/21573.

46. *Tony Shafrazi Gallery, Inc. v. Christie's, Inc.*, No. 112192/07, 2011 WL 6002677 (N.Y. Sup. Ct. Nov. 22, 2011).

have to prove that the works the defendant was selling were not authentic?

Levine: And do so beyond a reasonable doubt.

Al Daniel: Yeah. So, why can't civil courts resolve that?

Levine: That is a good question, and not to hijack the panel back to my favorite subject, art crime, but no. That is a big issue, I think, in bringing criminal cases against forgers and in forgery cases.

Al Daniel: But people go to jail on the basis of a jury verdict—on the basis that something is not authentic, right? So why can't civil courts decide those issues?

Levine: Let me answer the question, though. That is a good question, but there must be proof; you cannot often develop proof beyond a reasonable doubt that someone is guilty. In the cases that I worked on involving forgery, it was actually an issue. We did not want to go into court relying on expert opinion to put before a jury because it was going to be very hard to get a jury to cite beyond a reasonable doubt based on conflicting expert testimony. It wasn't very palatable. So, in one of my cases we made a decision that the best proof we could have was to find the forgery and the original and have the evidence trace right back to the same person. Even better than that, we found the artist who created the forgery who was willing to say, "I did that for that guy." That kind of proof you can go into court with and get a conviction. You don't always have that but . . . .

Al Daniel: I understand. In the other case we were discussing, Judge Ramos seems to say, "Oh no, this is completely outside of our universe. Courts will not decide these kinds of issues because that is for the art market."[47]

Salzman: I think the distinction that I would make is that—whereas you can imagine the law being and maybe the law is elsewhere that this is the regular business of the court—as Jo was saying before, there ought to be a process, and here we are. I think that the way the courts look at it in the United States is that they will decide it if they have to. For example, to send someone to jail. But it won't be a regular feature of our system that we are going to criticize people out in the market for having opinions.

Zaretsky: They are very different cases. The one that we were talking about—I think you were referring to the Calder stage set thing—there is not a lot of dispute as to what that object is, right? So, it is not that someone went and forged it. But does that rise to the level of an authentic Calder? It is a different question than, "Did someone create fake paintings?"

Levine: Just to carry this theme a little further . . . it is not an element of the crime. The crime that gets prosecuted is not forgery. There is not a crime in the federal criminal statute that says it is a crime to forge a work of art. Rather, it's a fraud. The elements of fraud do not involve proving that someone created a fake. They involve a material misrepresentation that someone relied on to take the property of another using interstate facilities, like mail or wire. By the way, in the case that I am thinking of there was a guilty plea, so it actually never went to trial.

47. Mr. Daniel is referring to the judge who decided the trial court order, which was later affirmed. *See* Thome v. Alexander & Louisa Calder Found., No. 0600823/2007, 2008 WL 1943609 (N.Y. Sup. Ct. Apr. 17, 2008), *aff'd*, 890 N.Y.S.2d 16 (N.Y. App. Div. 2009).

But, if I could bring two or three versions of the same work of art into the courtroom, I wouldn't need to tell the jury which one was authentic and which one was not. It would speak for itself that this person committed the elements of fraud. I wouldn't even need necessarily to have the experts come in and say, "It's this one and not that one." It was obvious that it was one or both of the three.

Laird: It's a good thing you didn't have to do that because Jane and one of her colleagues were good enough to bring some of the evidence into an art law class that I was teaching at the time, and there was no way of telling the difference. You'd have to have a much better eye than I do to be able to distinguish between the two.

Levine: You would need Jamie Martin—

Laird: There you go.

Levine: —and an electromicroscope-something-or-other.

Audience Member: My name is Adam Yokell. I am a private attorney in New York. I wanted to go back to the issue of product disparagement in the context of the Calder case.[48] As I remember it, there was no liability for product disparagement if the foundation declined to see or evaluate the work. I just wanted to draw that out a little more clearly. As I recall, on that issue there was no liability placed on the Foundation simply for denying it. If they had taken it on and then made a statement that would have been something different. I just think that for the people in the room who represent that part of the industry it would be helpful to be clear.

Zaretsky: My recollection of the case is that you are right; there was no liability for refusing to look at the work.[49] But once they issued a *catalogue raisonné*, there was a possibility that by not including the work they could open themselves up to a product disparagement case.[50] You don't have to create a *catalogue raisonné*. You don't have to have an authentication committee. You can just say we are out of that business altogether. But once you either authenticate or issue a *catalogue raisonné*, I don't see any way to feel completely safe from a lawsuit under the current law.

Levine: I think the question raises a practical problem that could come up. What does a seller/owner do when the work is "shunned," and no one wants to look at it because nobody wants to opine? You're left in a no-man's land.

Laird: You make a movie about it.

Audience member: Hi, I am Christine Vincent. I am the Study Director for the Aspen Institute's National Study of Artist-Endowed Foundations. This is for Jo. The Warhol stance is not a precedent; it's not new. We have a very interesting example of this shift working in this way with respect to authentication and *catalogue raisonnés*, and that would be the Georgia O'Keeffe *catalogue raisonné*,

48. *See generally Thome*, 890 N.Y.S.2d 16.

49. *See id.* at 22–23 (denying injunctive relief to compel the authentication board to respond to an authentication request).

50. *Id.* at 29 (leaving open the question of allowing a product disparagement suit where the foundation refuses to examine a work for authentication).

which was produced using this approach.[51] There was a specific decision. The *catalogue* was produced by a partnership between the National Gallery and the Georgia O'Keeffe Foundation, and from the outset there was a specific decision made that there would be no one-by-one authentication of works issued during the course of this research. The *catalogue* itself would be the issuing of the authentication.

And during the course of the research a number of forgeries came to light. There were interesting stories. The "Canyon Suites" would be a classic case. After the *catalogue* was published, my recollection is that there was an exhibition that took place at the Georgia O'Keeffe Museum in which a number of the non-O'Keeffe works were exhibited that had been identified during the research. I think the number was over 200 that had been identified during that process. There was litigation around "Canyon Suites."[52] It was not directed toward the foundation or the museum. But that would be the precedent, and I think that it is a known precedent that has very much been in the minds of people considering things now.

Zaretsky: Christine, how long was the gestation period from when they started on those works until the publication?

Christine Vincent: I have those dates in the chapter on this subject in the study report; I don't have it right here at hand. It was—I'm guessing—four to six years. It is certainly not the Warhol Foundation circumstance, which had an enormous gestation period and very long delay. It stands as intentional an example of working in this way. So there is that precedent.

Laird: Thank you for that. I didn't know that. Joel Wachs said in one of the art reporters that the complete *catalogue raisonné*—in multivolumes—will take twenty years.[53] As an ex-auction house person and still working in the market, it's going to be fascinating to see what happens in the meantime. There are a number of major collectors who have huge stock of Warhol—and forgive me for calling it stock, but that is the way they look at it. Who now will be willing to sell except for things that are already in the *catalogue raisonné*? Who will be willing to buy without—as Donn says—discounting the price, which is not going to be happy news for those who have great big stores of Warhols? And what happens in between? And with Warhol in particular being one of the shooting stars—maybe that's the wrong analogy because that implies it goes down—but really, one of the superstars of the market—for whatever reason, what happens now to that part of the market? I think that it is going to be incredibly interesting to watch. What sorts of disclaimers of liability are going to start going into seller side draft agreements?

Audience Member: I just wanted to mention that as I was preparing for this conference and doing some research I asked one of my assistants to ring the Bacon

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51. For more on the creation of the Georgia O'Keeffe *catalogue raisonné*, *see* Sascha Scott, *Georgia O'Keeffe: Catalogue Raisonné*, 27 NO. 2 WOMAN'S ART J. 49 (Fall–Winter 2006).

52. For information on this litigation, *see* Donn Zaretsky, *Tax Deductions for Fakes?*, THE ART LAW BLOG (May 1, 2006), http://theartlawblog.blogspot.com/2006/05/tax-deduction-for-fakes.html.

53. Charlotte Burns, *Warhol Foundation Shuts Its Authentication Board*, THE ART NEWSPAPER (Jan. 29, 2012, 7:52 PM), http://www.theartnewspaper.com/articles/Warhol+foundation+shuts+its+authentication+board/24869.

Estate to find out what they were up to. She did and she reported back that the Bacon estate had set up a committee called The Francis Bacon *Catalogue Raisonné* Committee.[54] And she said, "It's so strange that this guy kept repeating that the committee is a separate legal entity totally unconnected to the estate." I guess what they are doing is setting up an empty shell that is just issuing certificates and they are saying to the market, "Well if we get it wrong, you can sue us, but you are wasting your time because there are no assets there." Is that something that the Warhol Estate or the Warhol Foundation might be thinking about?

Laird: No.

Salzman: It strikes me offhand that that won't work as long as there are human beings who are doing it and who at least have some money in the bank. I don't think that dodge works.

Laird: They have kind of reversed that. They are going in exactly the opposite direction. They have always held the authentication board out as a separate legal entity and now they are dissolving it, but continuing the *catalogue raisonné* within the foundation.

Audience Member: Hi. Ellen Shepard from the Estate of David Smith. Question for Michael. Before, you sort of gratuitously threw out something about the First Amendment. Were you serious about that? If so, would you comment on it please?

Salzman: I was serious. I think that a scholar writing a book and expressing his view about whether a work of art is or is not authentic has a very strong argument that he is immune from liability—at least as long as he is proceeding in good faith.

Laird: He's never gratuitous.

Levine: He is very serious about the First Amendment.

Zaretsky: I don't know of any cases where a scholar was held immune from suit under the First Amendment.

Levine: Scholarly immunity—new doctrine.

Audience Member: Maybe not under the First Amendment, but they might have a lot of leeway if it's an opinion.

Zaretsky: *If* it is an opinion, that's right. That goes back to the question of whether it is an opinion or not.

Audience Member: But isn't the law of defamation really an outgrowth of the First Amendment? You are expressing an opinion and a kind of freedom of speech. I am not sure if they are entirely distinct. Maybe they are, but I think it is pretty much the same elements.

Laird: Affiliated doctrines.

Audience Member: Can you address the question from the other side? What cases do you know of where, based *solely* on the publication of a *catalogue raisonné*, someone was sued for leaving a work out?

Salzman: I'm sorry—they were held liable or they were sued?

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54. *See New Developments in Francis Bacon Research and Scholarship*, FRANCIS BACON (Apr. 22, 2009), http://www.francis-bacon.com/news/press-release/?c=News.

Audience Member: They were sued.

Salzman: I think I was in that case and the court didn't have much of a problem just getting rid of that case. I think it's a truism—at least within any law school—that anybody can sue anybody about anything.

Zaretsky: Again, one of the things we are talking about here is the risk of the suit—not the success. There aren't a lot of cases that we know of that have gone all the way to trial that have been successful.

Audience Member: Right, but my question was: How many occasions have there been where some group has published a *catalogue raisonné*, and has had lawsuits filed just based just on that? No statements from authentication committees, but sued just from the act of publishing the book?

Salzman: I'm not aware of any.

Laird: I don't know.

Audience Member: Good. Let's push on.

Audience Member: I was just wondering if anyone could comment on how risk and responsibility shift as *catalogues raisonnés* might start to be online rather than in print such that the definition of publication changes. It could be a situation where there isn't a finite end to the *catalogue raisonné*.

Laird: You mean for statute of limitations purposes?

Audience Member: When we talk about the *catalogue raisonné*, it is as if there is a publication. There is a feeling of, "Here it's finished; it's done." But people are starting to move them online, so now, perhaps you can say, "Well we are still working on it indefinitely."

Laird: What is interesting about that is that it brings them more in line with authentication committees. Lawyers talk about pocket parts at the back of the book—at least we used to when we weren't looking at everything online. If the *catalogue raisonné* committee can continually update, then it becomes more and more like an authentication committee. Real time.

Audience Member: Hi. Sharon Flescher at IFAR, otherwise known as the International Foundation for Art Research. I just wanted to make a couple of comments about a few of the things that were said. First of all, regarding the *catalogues raisonnés*, almost every committee has a waiver in submission—and I almost don't know of any that do not—so that whether it is included or not included, there is a question as to whether the waiver will hold up. In general, the waivers have held up. Indeed in the third lawsuit against the Pollock-Krasner people, it was the waiver and just pure contract law that held up and the question was not whether the work was a piece of junk or an obvious fake.[55] That never even entered into the ultimate decision. Rather, it was the waiver that held up in New York. The waiver didn't hold up in the Simon-Whelen case because he successfully alleged fraud for that first step of the dismissal.[56] But in the Pollock-

55. *See* Lariviére v. Thaw, No. 100627/99, 2000 WL 33965732, at *3 (N.Y. Sup. Ct. June 26, 2000) ("In the instant case, the written agreement between the plaintiff and the Authentication Board, by its terms, clearly bars this action.").

56. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, No. 07 Civ. 6423(LTS), 2009 WL

Krasner case, which was in New York state court, it held up. Secondly, regarding the O'Keeffe *catalogue raisonné*—that was, in fact, even longer than Christine indicated; it was close to nine years. Barbara Buhler Lynes, the scholar working on that, was actually very, very criticized during that period because O'Keeffe's paintings—like some of the other artists we have been talking about—sell for a lot of money and everyone was waiting for that publication to come out. It really did have an effect during that period of what was happening to O'Keeffe's works. She was heavily criticized and consequently became very defensive because she refused to come out with an opinion until the actual *catalogue* came out.

In terms of Warhol, who was even more prolific an artist: the timeline is greater, but in fact the *catalogue raisonné* has already been published. There are already three volumes out. The fourth volume I believe is underway. But he also has ephemera and other things and so it is many, many, many volumes. It is going to take a long time. I am not sure what the exact timeline is for the paintings, but unaddressed is the question of what is going to happen with supplements. The day any *catalogue raisonné* is out, it is obsolete; there is always the other work that you don't know about. And so what will happen? Are they going to do supplements, which then will effectively be the same as an authentication board, but only with a longer timeline? I just wanted to raise those points.

Salzman: On the supplement point, I think that the earlier question about online publication—I think that is the wave of the future. Fixing *catalogues raisonnés* and declaring it over is itself probably a thing of the past.

Zaretsky: That goes back to Jo's point earlier, which is that the distinction between authenticating and working on a *catalogue raisonné* is not quite as bright a line as people might think.

Sharon Flescher: Personally, I think that there is a distinction without a difference to start with, and many *catalogue raisonné* committees have a sort of fiction. First of all, they don't give you the reasons that it is or is not going to be included. They just say, "As of this moment,"—in France they say "à ce moment"—"this is the opinion." It could change in two minutes. But beyond that, the Wildensteins actually have a line on their *catalogues raisonnés*—and you know that they have almost cornered the market on *catalogues* for late Nineteenth Century and Twentieth Century French artists—which says that this is not to be considered a statement about authenticity. And I have always looked at that and wondered, "Well, what is it supposed to be a statement about?" I don't understand that distinction, frankly. Actually, I would be interested to see what the panel of attorneys thinks about that distinction.

Salzman: The fine art of writing a disclaimer is something we can all appreciate. Lawyers instructed them to say, "Black is white." I think it is similar to all of the statements that you do see of people saying, "It's by Picasso, but this is my opinion. This is a statement of opinion only." Frankly, at least for artists in the traditional model, either he did it or he didn't do it. It is not a matter of opinion—it is a matter of fact. In the classic American legal sense—for defamation purposes,

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1457177, at *9 (S.D.N.Y. May 26, 2009) (denying defendants' motion to dismiss as to the fraud claim).

where opinions are immune but statements of fact are not—I think that saying Picasso painted it, at least in the mind of a judge in America, ordinarily would be a statement of fact. He either picked up the paintbrush or he didn't. In the "Warhol and After" Era, we say, "well that is not the way it is;" and we can say, "Well it is not really the way it was in the Renaissance either." But between the Renaissance and Warhol that *is* the way it was. I don't think saying that it is a statement of opinion ultimately holds up in America unless a judge wants to give somebody a break.

Zaretsky: I agree with that and I agree with you largely, Sharon, that there is not really a distinction, although there may be a feeling that couching it as a *catalogue raisonné* is more scholarly and feels less connected to the market and business, so that if you do end up being sued, it just feels more like a First Amendment scholarship thing and less like a function of the marketplace. So even if you drill down deep enough, there really is not a big difference, perhaps that is what is motivating the movement in that direction.

Levine: I think we will have time for two more questions.

Audience Member: I just have a follow-up. This is Judy Kassel. Isn't the difference between a *catalogue raisonné* and the authentication committee sort of a privity issue? Someone comes in, you get the waiver, you have a contract and you agree to do something. This, as opposed to a *catalogue raisonné* where you are a scholar and you are giving an opinion and issuing something to the world. What kind of relationship do you have to the public out there that would give rise to a lawsuit? That kind of goes back to your discussion about auction houses like Christie's and Sotheby's.

Laird: I think that is a really good point and the only caveat is the comments that people have made about the *catalogues raisonnés* committees, or authors of *catalogues raisonnés*, seeking contractual waivers from people who submit. I don't know how far that gets you back on the road to privity.

Salzman: So paradoxically, you could be safer without the waiver than with the waiver.

Levine: Yes, and you could be safer not soliciting people to submit their works. But then what is the quality of your *catalogue* if you are not really the definitive *catalogue*?

Laird: Start calling them "Ten Works by Bosco."

Levine: Yes, call it, "Some Works We've Found."

Jane Levine: Okay. One more. Yes?

Audience Member: But in a *catalogue raisonné*, which is a book, you can in the introduction say what your procedure was and what your criteria are; you take no money from anybody; there is no charge for having works studied; and you can also decide what to include, and in the waiver you can make it very clear that the question is whether the work will be included in a scholarly publication. This is an opinion; it is not a certificate. If you don't give certificates and don't take money—well, hopefully you can tell me—but there is a difference between an authentication board and this kind of a scholarly *catalogue raisonné* . . . hopefully. In your opinion?

Zaretsky: You are still at risk.

Laird: I think you are, but I also think it remains to be seen. As the Warhol Foundation dissolves the authentication board, and as other foundations or artists' estates start refusing or declining to give opinions, it may be that the lawsuits simply shift elsewhere.

Zaretsky: You do not get to decide whether it's an opinion by declaring that it's just an opinion. If I say, "In my opinion, Jo is a thief," that goes back to being a statement of fact. So, as Michael said, most courts will say that the statement—"In our view, this is a Picasso"—is just as likely to be perceived as a statement of fact—that it is a Picasso—as it is to be perceived as an opinion. Again—especially depending on who says it—if it's an authoritative source, it is going to be taken as fact.

Levine: Okay, just one last comment. I would echo what Steve Reiss was saying when these similar questions arose. I, as the Director of Compliance at Sotheby's, like to say that transparency is good. I think it is always helpful to lay out the ground rules and who is making them in order to be as transparent as possible—not that that is an inoculation against the lawsuit, but I think generally that helps a lot. On that note, it is 5:30, so I'm going to thank Pippa very much for organizing this wonderful symposium.

Pippa Loengard: I want to thank Jane for all of her help and I want to thank our fabulous last panel for their wonderful contributions.