



JIPeL

NYU Journal of Intellectual Property
& Entertainment Law

VOLUME 10

NUMBER 2



Statement of Purpose

Consistent with its unique development, The New York University Journal of Intellectual Property & Entertainment Law (JIPEL) is a nonpartisan periodical specializing in the analysis of timely and cutting-edge topics in the world of intellectual property and entertainment law. As NYU's first online-only journal, JIPEL also provides an opportunity for discourse through comments from all of its readers. There are no subscriptions, or subscription fees; in keeping with the open-access and free discourse goals of the students responsible for JIPEL's existence, the content is available for free to anyone interested in intellectual property and entertainment law.

The *New York University Journal of Intellectual Property & Entertainment Law* is published two times per year at the New York University School of Law, 139 MacDougal Street, New York, New York, 10012. In keeping with the Journal's open access and free discourse goals subscriptions are free of charge and can be accessed via www.jipel.law.nyu.edu. Inquiries may be made via telephone (212-998-6101) or electronic mail (law.jipel@gmail.com).

The Journal invites authors to submit pieces for publication consideration. Footnotes and citations should follow the rules set forth in the latest edition of *The Bluebook A Uniform System of Citation*. All pieces submitted become the property of the Journal. We review submissions through ExpressO Bepress (<http://law.bepress.com/expresso/>) and through electronic mail (submissions.jipel@gmail.com).

All works copyright © 2020 by the author, except when otherwise expressly indicated. For permission to reprint a piece or any portion thereof, please contact the journal in writing. Except as otherwise provided, the author of each work in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed to students free of cost, (2) the author and the Journal are identified on each copy, and (3) proper notice of copyright is affixed to each copy.

A nonpartisan periodical, the Journal is committed to presenting diverse views on intellectual property and entertainment law. Accordingly, the opinions and affiliations of the authors presented herein do not necessarily reflect those of the Journal members.

The Journal is also available on WESTLAW, LEXIS-NEXIS and HeinOnline.

NEW YORK UNIVERSITY
JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW

VOLUME 10

SPRING 2021

NUMBER 2

RISKY BUSINESS: FRAUD, AUTHENTICITY, AND
LIMITED LEGAL PROTECTIONS IN THE HIGH ART
MARKET

KATIE DIXON* & ZACHARY SHUFRO**

Heus, tu insidiator, ac alieni laboris et ingenii surreptor, ne manus temerarias his nostris operibus incicias cave. Scias enim a . . . nobis concessum esse ne quis suppositiciis formis has imagines imprimere, seu impressas per imperii limites vendere audeat; [qui] per contemptum seu avariciae crimen secus feceris, post bonorum confiscationem tibi maximum periculum subeundum esse certissime scias.[†]

* J.D. Candidate 2021, University of North Carolina School of Law. Ms. Dixon is an associate at Ropes & Gray, LLP, in New York City.

** LL.M. Candidate 2021, New York University School of Law; J.D. 2020, University of North Carolina School of Law. Staff Editor, N.Y.U. Journal of Intellectual Property and Entertainment Law. The authors would like to thank Professor Deborah Gerhardt, professor of law at the University of North Carolina School of Law, for extensive revisions during the drafting process; Dr. Dorie Reents-Budet, curatorial consultant for the Museum of Fine Arts, Boston, for first introducing the authors to the risks of provenance in art acquisition; Professor Patty Gerstenblith, professor of law at DePaul University, for her insights into the importance of provenance and provenience; Leila Amineddoleh, founding partner of Amineddoleh & Associates, LLC, for her thoughtful guidance into the risks associated with authentication; Dr. Jennifer Mass, resident of Scientific Analysis of Art, LLC, for her thoughtful explanations of the science behind art authentication; and Monica Dugot, director of restitution at Christie's New York, for her insight into the practical risks and priorities of the art authentication market.

[†] “Woe to you, ambusher of other people’s labor and talent. Beware of laying your rash hands on our work. Do you not know what . . . has [been] conceded to us? – that no one shall be allowed to re-print these pictures from spurious blocks, nor sell them within the imperial realm. And if you do so, through spite or covetousness, not only will your goods be confiscated, but you will also

The art market is a high-risk industry in which authentication is the sine qua non of merchantability. In an era of increasing market valuations and ever-growing demand for fine art—either for the status it confers on its owners or its investment value—authentication is the art collector’s most frequent stumbling block. Recently, authentication technology has become incredibly sophisticated, enabling scientists and historians to authenticate works based on minutiae as discrete as the lead in white paint or the weave of an individual bolt of canvas. Simultaneously however, savvy art forgers are developing new ways to evade detection, through both artificial intelligence and already-present weaknesses in the market. Nevertheless, American law has lagged behind in providing adequate protections for buyers. Existing protections—a patchwork of contract, tort, and state statutory provisions—are incomplete and leave buyers bearing the risk of purchasing a forgery.

This Note examines the art market’s reliance upon authentication as the most significant indication of value in a work; provides an overview of the risks associated with authentication; and considers the rights, obligations, and remedies when an owner of art—be it an individual, a gallery, or a museum—discovers that the art he or she owns is a forgery or a fake. This Note then examines the role of artificial intelligence and blockchain technology in both ensuring authenticity and creating further problems for the provenance of presently unauthenticated works. Analysis also examines the current allocation of risk between buyers, sellers, and authenticators. Finally, the Note considers the ethical and normative obligations of collectors of fine art.

Ultimately, this Note demonstrates the extent to which authentication is a double-edged sword. On one hand, authentication drives up the value of paintings, creates publicity that benefits owners, and adds prestige to institutions and individuals whose art has been authenticated. On the other hand, authentication can destroy the value of an artwork just as easily as it can bolster it, with risks ranging from situations where the mere question of a work’s authenticity makes it impossible to sell, to situations where authentication leads to a legal duty to destroy the work in question upon proof that it is a forgery. While technology can streamline, reinforce, and guarantee the authenticity of a work, it can also create the opportunity for

find yourself in the greatest danger.” *Imperial Privilege for Albrecht Dürer, Nuremberg (1511)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900), (Lionel Bently & Martin Kretschmer eds.), (Germanisches Nationalmuseum trans.), http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_d_1511b&pagenumber=1_1&imagesize=middle (last visited Mar. 20, 2021); *see also* JOHN JACKSON ET AL., A TREATISE ON WOOD ENGRAVING: HISTORICAL AND PRACTICAL (Project Gutenberg 2d ed. 2013) (1848) (ebook). This is one of the first recorded copyright warnings, first printed in 1511. JOHN JACKSON ET AL., A TREATISE ON WOOD ENGRAVING: HISTORICAL AND PRACTICAL (Project Gutenberg 2d ed. 2013) (1861) (ebook). The warning was directed against Venetian forgers like Marcantonio Raimondi, who illicitly re-created Albrecht Dürer’s woodcuts. *See* 6 GIORGIO VASARI, LIVES OF THE MOST EMINENT PAINTERS, SCULPTORS AND ARCHITECTS, 96 (Gaston du C. de Vere trans., Project Gutenberg 2009) (1913) (ebook).

nefarious actors to perpetrate fraud on a massive scale. Until the art market adapts ways to address these risks, the old adage of caveat emptor—buyer beware—will continue to be the hallmark of the market.

INTRODUCTION	248
I. WHY THE ART MARKET DEMANDS AUTHENTICITY	250
A. <i>The Significance of Authenticity in Fine Art</i>	251
B. <i>The Historical Background of Art Fraud: The Rise of the Genius Artist</i>	256
C. <i>Historical Legal Protections for Bona Fide Buyers</i>	258
II. THE AUTHENTICATION PROCESS	260
A. <i>Connoisseur Authentication</i>	261
B. <i>Forensic Authentication</i>	265
C. <i>Provenance Authentication</i>	269
III. ALLOCATING RISKS FROM AUTHENTICATION AND LEGAL REMEDIES FOR BONA FIDE PURCHASERS	272
A. <i>Reasons Authentication Goes Awry</i>	273
1. <i>Authenticators' Conflicts of Interest</i>	275
2. <i>Lack of Professionalization for Authentication</i>	277
3. <i>Human Error, Negligence, and Fraud</i>	278
4. <i>Continued Influence of Artist</i>	281
5. <i>Lingering Uncertainty: Discovering Unsuspecting Forgeries</i>	282
B. <i>Risks to Authenticators</i>	284
C. <i>Remedies for Bona Fide Purchasers</i>	288
1. <i>Uniform Commercial Code</i>	289
2. <i>Tort Claims</i>	291
3. <i>Contract Law</i>	293
4. <i>Specialized Protections under State Law: New York as a Case Study</i>	293
IV. PUBLIC HARMS FROM ART FRAUD	294
CONCLUSION	296

INTRODUCTION

The most expensive painting in the world is missing.¹ Once considered lost, Leonardo da Vinci's masterpiece, *Salvator Mundi* (*Christ as Savior of the World*),

¹ Jonathan Jones, *The da Vinci Mystery: Why is His \$450m Masterpiece Really Being Kept Under Wraps?*, GUARDIAN (Oct. 14, 2018), <https://www.theguardian.com/artanddesign/2018/oct/14/leonardo-da-vinci-mystery-why-is-his-450m-masterpiece-really-being-kept-under-wraps-salvator-mundi>.

was authenticated in 2008 and exhibited at The National Gallery, London in November 2011.² Since 2011, the panel painting underwent significant conservation and analysis by da Vinci experts.³ As far as all were concerned, “it was indeed a Leonardo masterpiece, which would make a valuable addition to the hitherto 14 known Leonardo oil paintings.”⁴ The panel’s provenance dates back to 1649, when it was recorded in the art collection of King Charles I of England.⁵ The painting later became part of the Duke of Buckingham’s collection.⁶ After a 1763 auction, the painting disappeared until 1900, when it reappeared “poorly blemished and disfigured” in the property of a Sir Frederick Cook.⁷ In the 1950s, it was sold by one of Cook’s descendants to an American collector for approximately \$60, where it was described as a copy of *Salvator Mundi* completed by one of da Vinci’s students.⁸ In 2005, the painting was brought to an art historian for research, and in 2007, renowned conservator Diana Modestini took over conservation of the work.⁹ Post-restoration, the painting appeared to be of “astonishingly high quality[.]”¹⁰ In particular, “the uncovering of *pentimenti* indicating that Christ’s thumb had a more upright position than in the completed artwork[.]” i.e., a trace of an earlier painting between layers of paint, and examination by infrared reflectography served as sufficient grounds for da Vinci specialist Martin Kemp to authenticate the work.¹¹ After six years of significant restoration efforts, the painting was sold in an auction at Christie’s on November 15, 2017.¹² Bidding “rapidly escalated to a final \$450.3 million . . . followed by applause from people in the auction house cheering this historic purchase[.]” which made it the most expensive painting ever sold.¹³

Despite uncertainty over who purchased the painting—it is believed to have been purchased by a Saudi Prince connected to the royal family¹⁴—news coverage

² *Id.*

³ See JEHANE RAGAI, *THE SCIENTIST AND THE FORGER: PROBING A TURBULENT ART WORLD* 65 (World Scientific Publishing Europe Ltd., 2d ed. 2018).

⁴ *Id.*

⁵ *Id.* at 66.

⁶ *Id.*

⁷ *Id.*

⁸ RAGAI, *supra* note 3, at 66; see also Sara Friedlander, *Salvator Mundi*, CHRISTIE’S <https://www.christies.com/en/lot/lot-6110563> (Mar. 21, 2021) (describing past sales for *Salvator Mundi*, including a 1958 sale in London for £45).

⁹ RAGAI, *supra* note 3, at 66.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 67.

¹⁴ *Id.*

of the purchase unanimously agrees on two details: first, the painting was slated to be the crown jewel of the new Louvre Abu Dhabi museum,¹⁵ and second, the painting's attribution and authentication were questionable at best even before the painting was sold at the Christie's auction.¹⁶ After the painting's sale, these doubts gained traction across news cycles worldwide, and the painting went dark; it has not been publicly exhibited since its 2017 sale.¹⁷ Such is the power of authentication in the art market: the price of a painting can balloon from \$60 in 1958 to \$450.3 million in 2017, and then lose legitimacy overnight, based on one authenticator's statement about its attribution.¹⁸

Analysis proceeds in four parts. Part I examines why the art market demands authentication and provides a brief overview of the centuries of art fraud that created that need. Part II explains the authentication process itself. Part III provides an overview of the risks associated with authentication and considers the rights, obligations, and remedies when an owner of art—be it an individual, a gallery, or a museum—discovers that a purchase is forged or fake. It also provides a comprehensive explanation of existing statutory and common law protections for owners and authenticators, which demonstrates critical gaps in protection but also possible ways forward. Part IV considers the public harms created by art fraud, as well as ethical and normative obligations of collectors of fine art.

I

WHY THE ART MARKET DEMANDS AUTHENTICITY

Forgeries and fake art are nothing new to the art market.¹⁹ Instead, “[f]orged art has been corrupting the Western art market ever since artist patronage extended

¹⁵ David D. Kirkpatrick, A Leonardo Made a \$450 Million Splash. Now There's No Sign of It., N.Y. Times, Mar. 30, 2019, at A1, <https://www.nytimes.com/2019/03/30/arts/design/salvator-mundi-louvre-abu-dhabi.html>.

¹⁶ See Nadja Sayej, *Artistic License? Experts Doubt Leonardo da Vinci Painted \$450m Salvator Mundi*, GUARDIAN (Nov. 20, 2017), <https://www.theguardian.com/artanddesign/2018/sep/03/louvre-abu-dhabi-postpones-display-of-worlds-most-expensive-painting-leonardo-da-vinci>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ A forged work of art may not necessarily be a fake work of art; rather, to call a work a forgery implies that some aspect of that work was modified in order to make the work appear to be something it is not—the addition of a signature, or of false lacquer to make the work appear older than it is, for example. To call a work a fake, by contrast, implies that it was wholly created in order to deceive, and that there is no underlying work independent from the fraudulent purposes for which the work was created. See *infra* Part I(A). The words are used interchangeably in

beyond the royal classes and art became accessible to middle class connoisseurs.”²⁰ Many hoaxes and forgeries throughout history have been “enjoyed and mistaken for the originals.”²¹ These “deceptive fakes” have provided “aesthetic pleasure for the average person,” with experts and laypeople alike unable to spot the difference.²² The aesthetics of a perfectly reproduced work in the style of Johannes Vermeer, for example, would not change after a painting’s provenance is called into question, and yet its monetary value would be significantly diminished.²³ Clearly, then, the value of a painting is not merely derived from its aesthetic quality—there must be something else about an original work that places it at a premium in the market. As discussed further below, these other characteristics might include a work’s authenticity, i.e., a work’s age and origin, and its attribution, i.e., who created the work.²⁴ But why does the modern art market put such value into a work’s authenticity or its attribution? As one expert asks, “if a fake is so expert that even after the most thorough and trustworthy examination its authenticity is still open to doubt, is it or is it not as satisfactory a work of art as if it were unequivocally genuine?”²⁵ These questions are interrogated below, with a focus on a work’s authenticity.

A. *The Significance of Authenticity in Fine Art*

From a formalist perspective, it is difficult to understand why the art market places such a premium on authenticity. Visual art is the only form of expression that is singular, unrepeatable, and requires proof that the artist created the piece with his own hand in order to determine authenticity.²⁶ In contrast, the literary world only requires that letters on the page be assembled in the correct order for a work to be “authentic.”²⁷ A reproduced copy of Jane Austen’s *Pride and Prejudice*, for example, is no less authentic or valuable in the eyes of consumers than an original manuscript

literature on the topic, and in this Note they should be viewed in such a manner, with any particular import to the distinction between them noted when relevant.

²⁰ Justine Mitsuko Bonner, *Let Them Authenticate: Deterring Art Fraud*, 24 UCLA ENT. L. REV. 19, 20 (2017).

²¹ Peter Barry Skolnik, *Art Forgery: The Art Market and Legal Considerations*, 7 NOVA L. REV. 315, 316 (1983).

²² *Id.*

²³ Michael J. Clark, *The Perfect Fake: Creativity, Forgery, Art and the Law*, 15 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 33–35 (2004).

²⁴ *See infra* Part II. *See also* Bonner, *supra* note 20, at 30 (“Authenticity, as it pertains to art, means that the alleged authorship of a work has been confirmed.”).

²⁵ NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 115–16 (1st ed. 1968).

²⁶ *Id.*

²⁷ *Id.*

as far as its content is concerned.²⁸ Yet for fine art, the premium for authentic work persists, even when the forgery's aesthetic value is on par with that of the original. Hans van Meegeren, arguably one of the greatest art forgers in history, was able to recreate Vermeer's works with such expertise that—even upon admission of his actions—experts refused to believe him.²⁹ It was not until van Meegeren recreated one of his Vermeer-styled works under the watchful eye of a court that he was credited with his famous forgeries.³⁰ Nonetheless, once the paintings were uncovered as fraudulent, the prices they commanded were only a small fraction of that of an authentic Vermeer.³¹ Thus, it could be said that the differences between an authentic work and a deceptive forgery are aesthetically irrelevant, or at least not closely linked.³²

Instead, the value that an original work commands in the market must derive from another source. Walter Benjamin theorized in his famous essay, *The Work of Art in the Age of Mechanical Reproduction*, that original or authentic works have a unique quality that he coined the work's "aura."³³ Benjamin described, "[e]ven the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be."³⁴ This "aura," then, includes aspects of history, ownership, changes with time, and tradition—elements Benjamin described as unable to be replicated in even the most perfect reproduction.³⁵ Later scholars have traced this concept of Benjamin's aura to the value that the art market places on authentic works, describing how the modern art market appreciates "the values, psyche, and structure of the people and society in which [the art] was created."³⁶ That is not to say that aesthetic features are insignificant, but authorship and provenance are of equal, if not greater importance, for a painting's perceived value.³⁷ Indeed, perhaps these concepts inform each other: "the signature affixed, the period of creation, and the expert's determination of

²⁸ *See id.*

²⁹ Clark, *supra* note 23. *See also infra* text accompanying notes 232–34.

³⁰ Clark, *supra* note 23.

³¹ *Id.*

³² *Id.* at 10.

³³ WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 217–51 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1969) (1935).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Skolnik, *supra* note 21, at 317.

³⁷ *See id.*

authenticity are inextricably interwoven with the aesthetic appeal[]” of a given work, through affecting the work’s aura.³⁸

Demonstrative of this concept: the *Mona Lisa* is one of the most famous paintings in the Louvre’s collection, as well as in the world.³⁹ People travel from far away countries to visit the Louvre, especially to see da Vinci’s masterpiece.⁴⁰ But they are not traveling across oceans to see a small framed portrait of a woman; rather, they are traveling to experience everything that the painting represents: the history and grandeur of the Italian Renaissance.⁴¹ If the *Mona Lisa* were suddenly discovered to be a forgery, that it was instead the creation of a master forger in the 1950s, its aura would shift to one that conjures the feeling of theft and lies. Despite having aesthetic significance, the experience of even the most deceptive fake cannot match that of the real thing.⁴² Therein lies the necessity of authentication in the art world—the market places a premium on the creative genius of the original creator and the history that a painting evokes.⁴³

While not the dominant position in scholarship on authenticity and art, some experts—referred to as formalists—have argued that aesthetics alone should determine the value that society assigns to a piece, not authorship or authenticity.⁴⁴ Philosopher of art Alfred Lessing characterizes this strict formalist position as follows:

Considering a work of art aesthetically superior because it is genuine, or inferior because it is forged, has little to do with aesthetic judgment or criticism [I]t is impossible to understand what is wrong with a forgery unless it be first made quite clear that the answer will not be in terms of its aesthetic worth.⁴⁵

³⁸ Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 973 (1976).

³⁹ See *Leonardo da Vinci’s Mona Lisa*, ITALIANRENAISSANCE.ORG (June 21, 2012), <http://www.italianrenaissance.org/a-closer-look-leonardo-da-vincis-mona-lisa/>.

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See Clark, *supra* note 23, at 6 (contemplating the consequences of a forged Mona Lisa and whether museum goers would have “experienced” the work).

⁴³ Michael Findlay, *The Value of Art: Money, Power, Beauty*, ARTNET.COM (Nov. 1, 2012), <https://news.artnet.com/market/defining-the-value-of-art-27673> [<https://perma.cc/L5UH-8Y5M>].

⁴⁴ Clark, *supra* note 23, at 9 (describing how for a formalist, “a work is an embodiment of images and symbols separate from historical contingency.”).

⁴⁵ Alfred Lessing, *What is Wrong with a Forgery?*, 23 J. AESTHETICS & ART CRITICISM 461, 461 (1965).

Formalists argue that focusing on a work's aesthetics divorced from history or an artist's biography is the only way for the concept of a "timeless masterpiece[]" to make any sense, concluding, "[i]t is only the work – what we see or experience on canvas – that matters."⁴⁶

More dramatically, there are even some art world outliers who praise fake or forged works for their aesthetic value.⁴⁷ Ernst Beyeler, a famous Swiss collector, called one of the fraudulent Knoedler & Co. Gallery "Rothkos" a "sublime unknown masterwork" and hung the painting in his namesake museum.⁴⁸ The Musée Jacquemart-André in Paris exhibited two versions of *Mary Magdalene in Ecstasy* to let viewers decide which one they believed to be the authentic Caravaggio.⁴⁹ Although these are interesting case studies, they stand in the minority. The fact still remains that forgeries are of little worth in today's art market, either monetarily or in terms of renown for institutions and individual owners.⁵⁰

The idea of art *qua* art has long been superseded by art's commodification.⁵¹ Instead, "[i]n the contemporary art world[,] it has become virtually impossible to separate aesthetic from economic concerns."⁵² This is especially true as new investment-minded buyers have flooded the art market and original works remain scarce commodities. Since the 1970s, a number of mega sales have driven investors toward purchases of art for investment purposes; indeed, from 1960 to 1975, the Dow Jones rose approximately 38% in value, whereas certain Impressionist works rose 230%.⁵³ These deep-pocketed purchasers then affect purchasing decisions and prices across the market, as "art collectors often acquire works less for their intrinsic aesthetic merit than for their investment potential."⁵⁴ In addition to growing demand,

⁴⁶ Clark, *supra* note 23, at 9 (internal quotations omitted).

⁴⁷ Blake Gopnik, Opinion, *In Praise of Art Forgeries*, N.Y. TIMES, Nov. 3, 2013, at SR5, <https://www.nytimes.com/2013/11/03/opinion/sunday/in-praise-of-art-forgeries.html>.

⁴⁸ *Id.* See *infra* text accompanying notes 313–23 (discussing the Knoedler & Co. Gallery forged works).

⁴⁹ Musetta Durkee, *WYWH: Tricking the Art Market – On Forgery, Beltracchi, and Scientific Technology*, CTR. ART LAW (Dec. 18, 2018), <https://itsartlaw.org/2018/12/18/wywh-tricking-the-art-market-on-forgery-beltracchi-and-scientific-technology/>.

⁵⁰ See generally Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks & Legal Remedies for Buyers*, 22 INT'L J. CULTURAL PROP. 419 (2015) (describing the risks that collectors face in the modern art market).

⁵¹ See NOËL CARROL, *Four Concepts of Aesthetic Experience*, in BEYOND AESTHETICS: PHILOSOPHICAL ESSAYS 43 (2001).

⁵² Clark, *supra* note 23, at 11.

⁵³ *Id.* at 11–12.

⁵⁴ Bonner, *supra* note 20, at 24 (quoting Denis Dutton, *Art Hoaxes*, in ENCYCLOPEDIA OF HOAXES 21 (Gordon Stein ed., 1993)).

the scarcity of original art affects the pricing for works as well.⁵⁵ Only one buyer can own a certain coveted item, driving bidding wars at highly publicized sales.⁵⁶ In this highly commodified, market economy for art sales, authenticity is linked to a work's monetary value in several ways.⁵⁷ As one practitioner described, “[t]he relationship is circular: as prices escalate, the need for a connoisseur's opinion rises; and as connoisseurs vouch for works and their authenticity, the works are more coveted, leading art market prices to soar even higher.”⁵⁸ Thus, authentication is essential to guarantee that artwork is what it purports to be.

The Metropolitan Museum of Art's *Odalisque en Grisaille* exemplifies the impact of authentication. *Odalisque en Grisaille* had been attributed to Jean-Auguste-Dominique Ingres for many years, but after it was determined to be the work of Armand Cambon, one of his apprentices, the painting's value fell from approximately \$1,000,000 to \$100,000.⁵⁹ This tenfold decrease may seem extreme, but it is certainly not the exception. In the seminal case of *Hahn v. Duveen*, for example, André Hahn claimed to own *La Belle Ferronnière*, a genuine da Vinci painting, and was in the middle of negotiations with the Kansas City Art Museum to sell the painting.⁶⁰ Duveen, a bona fide art expert, told newspaper reporters that the painting “was not a genuine Leonardo da Vinci; that any expert who pronounced it genuine was not an expert, and that the genuine *La Belle Ferronnière* by Leonardo da Vinci was in the Louvre[.]”⁶¹ At the time he made the statement, Duveen had not seen the painting in person nor even in a photograph, and his only reasoning was that he believed *La Belle Ferronnière* was housed in the basement of the Louvre.⁶² Thus, Duveen reasoned that Hahn's painting was not plausibly an original da Vinci.⁶³ Hahn sued Duveen for disparagement but the damage had already been done.⁶⁴ The slightest question as to the authenticity of the work rendered the painting practically worthless, and the Kansas City Art Museum quickly called off the sale.⁶⁵ Whereas Duveen's statements were purely speculative, they had a tremendous impact on the

⁵⁵ Steven Murphy, *Art Explained: How Do Art Auctions Really Work?*, CNN (Aug. 30, 2018), <https://www.cnn.com/style/article/how-do-art-auctions-work-steven-murphy/index.html>.

⁵⁶ *Id.*

⁵⁷ Amineddoleh, *supra* note 50, at 424.

⁵⁸ *Id.*

⁵⁹ DuBoff, *supra* note 38, at 977.

⁶⁰ *Hahn v. Duveen*, 234 N.Y.S. 185, 187 (Sup. Ct. 1929).

⁶¹ *Id.* at 189.

⁶² Amineddoleh, *supra* note 50, at 421.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Hahn*, 234 N.Y.S. at 187.

painting's value.⁶⁶ Translating the results of *Hahn* to authentication of other works, where a work cannot be definitively authenticated, i.e., the reality for most works on the market, art remains in limbo, at the mercy of whichever expert is hired to authenticate the work.⁶⁷

B. The Historical Background of Art Fraud: The Rise of the Genius Artist

Art forgery is an activity as old as the art market itself. However, “forgery” in the modern sense of the word implies an inherent value in that which is authentic or original—a work by an independent painter.⁶⁸ Yet this was not always the case. In the Middle Ages, European art was designed for systematic and identical distribution to the masses; iconography and Byzantine artistic tropes dictated not only taste, but also the forms, appearance, and prevalence of direct *copying* of art.⁶⁹ Through the fourteenth century, Western European art contained “recurring Byzantine iconographies” that belied the “iconographic dependence” of artistic expression across the West on the tastes in Constantinople.⁷⁰ Entire compositions were copied from the Byzantine East, and artists who diverged from this norm were outliers.⁷¹

The market for independent painters and novel artistic compositions began during the Renaissance. Even so, it was common for masters in this era to produce works with the aid of apprentices and employees.⁷² “Masters” were known for their particular style of painting, but buyers “made no demand that the master should execute every aspect of the creative process.”⁷³ Noteworthy artists even made replicas of each other's works to please a patron.⁷⁴ During the Renaissance, it was common practice in Italy for new artists to train in the workshop of a master, practicing their skill by copying the style and compositions of their master.⁷⁵ Among the students of Andrea del Verrocchio, one such master, were da Vinci and Pietro

⁶⁶ Amineddoleh, *supra* note 50, at 421.

⁶⁷ *See id.* at 421–22.

⁶⁸ *See generally* Patty Gerstenblith, *Getting Real: Cultural, Aesthetic, & Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 326–27 (2012) (defining “authentic” and “original” in the context of art forgery).

⁶⁹ *See generally* WILLIAM D. WIXOM, *Byzantine Art & The Latin West*, in *THE GLORY OF BYZANTIUM: ART & CULTURE OF THE MIDDLE BYZANTINE ERA, A.D. 843–1261* 435–508 (Helen C. Evans & William D. Wixom eds., 1997).

⁷⁰ *Id.* at 444.

⁷¹ *Id.* at 444–45.

⁷² Skolnik, *supra* note 21, at 321.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ GÜNTER PASSAVANT, *VERROCCHIO: SCULPTURES, PAINTINGS & DRAWINGS* 45–51 (Katherine Watson, trans., 1969).

Perugino, whose earlier works were at times indistinguishable as between master and apprentice.⁷⁶ Even Michelangelo may have started his career with a forgery: as one scholar wrote, legend has it that Michelangelo sculpted a sleeping cupid in the style of Roman masters, buried it in dirt “so that it would pass for an antique, and [he] would thus obtain much more for it[,] . . . and then sold it as an antique to Cardinal San Giorgio for two hundred ducats.”⁷⁷ Forgery was clearly nothing new or disdainful: all the great artists from da Vinci to Michelangelo practiced it to some degree.⁷⁸

Toward the end of the sixteenth century, however, “creativity was elevated to a new position of recognition.”⁷⁹ As the status signifier of art shifted its focus from the art to the artists, “a work of art for the first time became subject to the laws of supply and demand.”⁸⁰ A talented artist might become “the companion and friend of princes.”⁸¹ Whereas the Protestant Reformation (1517) stalled the art market in much of Europe while the Church tightened its grip on what artists produced,⁸² the Dutch, who were freer from many religious restrictions, capitalized on the opportunity and began to form the foundations of the art market as we know it.⁸³ Dutch buyers, too, began to see art as an investment.⁸⁴ Artists became art dealers to make more money, and “speculation on the fame of artists was a natural outgrowth as it caught the imagination of almost all who could afford it.”⁸⁵ In France and Holland, kings like King Louis XIV of France “used art to enhance the splendor of his court . . . by making artists civil servants who had to satisfy the king to be paid.”⁸⁶ Also in this era, “[i]ntellectualism pertaining to art was born as men discussed theories of art, and the resultant ideas influenced the creativity of artists eager for recognition.”⁸⁷ The modern conception of an artist was born: “[a]s society more and more recognized the artist’s genius, the higher was his rise in social life and the more advanced his economic gain.”⁸⁸

⁷⁶ *Id.*

⁷⁷ 6 GIORGIO VASARI, LIVES OF THE MOST EMINENT PAINTERS, SCULPTORS AND ARCHITECTS, 423 (Gaston du C. de Vere trans., Project Gutenberg 2009) (1913) (ebook).

⁷⁸ *Id.*

⁷⁹ Skolnik, *supra* note 21, at 321.

⁸⁰ *Id.*

⁸¹ *Id.* at 322.

⁸² *Id.* at 322.

⁸³ *Id.* at 323.

⁸⁴ Skolnik, *supra* note 21, at 232.

⁸⁵ *Id.*

⁸⁶ *Id.* at 322.

⁸⁷ *Id.* at 323.

⁸⁸ *Id.* at 324.

Forgers grew hand in hand with the rise of the modern art market, as “[i]t was important in the development of art forgery and art fraud that this value was associated with the artist through development of a capitalistic market.”⁸⁹ Thus, because “[i]n today’s modern market originals draw higher prices and are more valued as trade commodities[,] . . . wherever art is disposed, traded, or collected there is the temptation for dishonest people to enrich themselves by forgery or fraud.”⁹⁰ The temptation for forgers seeking material gain is massive, as “[a]rt prices have multiplied phenomenally since the early 1950’s, and public interest in the sale of art has continued to bring exceptional prices.”⁹¹ As one commentator explained, “[e]veryone wants to get into the act, creating a ripe environment for fraud and forgery.”⁹²

C. Historical Legal Protections for Bona Fide Buyers

Most early legal protections against art forgery served to protect artists or the public writ large; these schemas did not protect private buyers. In the sixteenth century, art forgery and art fraud became criminally sanctionable under English law, with possible penalties including physical punishment and even death.⁹³ That said, sentences tended to be considerably more lenient, especially as time progressed.⁹⁴ While the first copyright statute to protect visual arts was enacted in England in 1735,⁹⁵ private guilds sometimes enforced limitations on direct copies before its enactment.⁹⁶

There have been few historical instances where the law has provided full protection for the bona fide purchaser of fine art when the work is later shown to be fake. In a forty-year period coinciding with the end of the Georgian Era and the reign of King William IV, English law began to address private disputes regarding art fraud and forgery, albeit in a limited manner. One of the first recorded English court cases to deal with the authentication of an artwork arose in 1797, when two paintings sold as the work of painters David Teniers the Younger and Claude Lorrain were

⁸⁹ Skolnik, *supra* note 21, at 324.

⁹⁰ *Id.*

⁹¹ *Id.* at 325.

⁹² *Id.*

⁹³ *Id.* 319–20.

⁹⁴ Skolnik, *supra* note 21, at 319–20.

⁹⁵ The Engravers’ Copyright Act 1735, 8 Geo. 2, c. 13 (Gr. Brit.), http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_uk_1735&pagenumber=1_1.

⁹⁶ H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1249 (2010); Skolnik, *supra* note 21, at 321.

discovered to be copies.⁹⁷ The case, *Jendwine v. Slade*, permitted the plaintiff to recover if he could show that he received a warranty from the defendant, not just an opinion upon which the defendant was meant to rely.⁹⁸ However, the court held that because the paintings were so old (“the pictures were the work of artists some centuries back”), any statement of authorship by the seller could only be a matter of his opinion.⁹⁹ Thus, the seller faced no liability for the sale.¹⁰⁰

The rule from *Jendwine v. Slade* was carried forward in future cases. Thirty-two years later, in a case involving two forgeries of the works of Nicolas Poussin,¹⁰¹ the English court permitted the jury to decide whether the purchaser bought the paintings believing that they were originals based on the seller’s representation that the paintings were “a couple of Poussin’s.”¹⁰² If the jury so found, the court wrote that it would find “the [purchaser] is not bound by his bargain.”¹⁰³ Three years later, another plaintiff brought a case to trial regarding the authenticity of a purported Rembrandt portrait.¹⁰⁴ In this case, the jury was permitted to determine whether the seller had made a representation or a warranty of the painting’s authenticity and set damages if they found a breach of warranty.¹⁰⁵ Finally, in 1836, an English court in *Powers v. Barnham* upheld a jury’s determination that the bill of sale for a more modern painter (in this case, Giovanni Antonio Canal, known as Canaletto) created an express warranty where it stated “Four pictures, Views in Venice, Canaletto.”¹⁰⁶ The reviewing court determined that the plain meaning of the words conveyed a warranty and upheld the jury’s determination of such, allowing the plaintiff to recover.¹⁰⁷

In the intervening nearly 200 years, art crime has risen to be one of the largest criminal enterprises in the world.¹⁰⁸ At present, “[a]rt historians, museum curators, and law enforcement officials tirelessly work to investigate and analyze works that

⁹⁷ (1797) 170 Eng. Rep. 459; 2 Esp. 572.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Lomi v. Tucker* (1829) 172 Eng. Rep. 587; 4 Car. & P. 16.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *De Sewhanberg v. Buchanan* (1832) 172 Eng. Rep. 1004; 5 Car. & P. 344.

¹⁰⁵ *Id.*

¹⁰⁶ (1873) 111 Eng. Rep. 865; 4 Ad. & E. 473.

¹⁰⁷ *Id.*

¹⁰⁸ *Art Theft*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/investigate/violent-crime/art-theft> (Dec. 8, 2019).

they suspect are not genuine.”¹⁰⁹ But despite their best efforts, forgeries continue to plague the art market.¹¹⁰ Technology has improved many methods of the authentication process from carbon dating to artificial intelligence; conversely, the same technology has made some forgeries even harder to detect.

II

THE AUTHENTICATION PROCESS

Modern art authentication is incredibly complex, incorporating expert analysis by art authenticators and technologically sophisticated methods.¹¹¹ “Today, a forger who creates a painting in the style of a known master and claims its authenticity is aware that the hoax may be uncovered as a result of the detection of features such as questionable underdrawings, the discovery of anachronisms in the pigments[,] or even something as simple as the scrutiny of surface cracks.”¹¹² Art authenticators who review works have generally received superb training and are experts in their fields of study.¹¹³ Thus, even with the availability of complicated tools, “[a] good connoisseur will frequently recognize a forgery even before it is subjected to scientific analysis by identifying the forger’s subconscious introduction of a detail that reflects personal style or of an element that is anachronistic with the artist’s period.”¹¹⁴ The chances that a forged painting survives the barrage of modern authentication tests undetected are accordingly very low, though not entirely impossible. Nevertheless, “[t]he road traveled so far in the art world indicates that a conclusive verdict *authentic* or *forgery* can only come from science in the following situations: (a) when it acts as a tool for *falsification* — in itself invaluable — through the revelation of anachronistic elements in the painting, (b) when it assists in *authentication*, with a parallel consensus and unified opinion emerging in the world

¹⁰⁹ *Faking It: Strategies for Reducing Art Fraud & Forgery*, FED. B. ASS’N BLOG (Oct. 11, 2017), <https://www.fedbar.org/blog/faking-it-strategies-for-reducing-art-fraud-forgery/>.

¹¹⁰ *Id.* See also *infra* text accompanying notes 349–50.

¹¹¹ For the purposes of this Note, the term “authenticator” should be read to encompass—but not be solely limited to—the term “connoisseur”. Connoisseurs, as explained *infra*, are one type of art authenticator; however, there are also other experts who authenticate art (e.g. scientists, historians, and restorers) who are art authenticators but are not connoisseurs.

¹¹² RAGAI, *supra* note 3, at 1.

¹¹³ See Susan Kendzulak, *Top 6 Organizations that Certify Fine Art Appraisers*, BALANCE CAREERS (last updated Nov. 20, 2019), <https://www.thebalancecareers.com/organizations-fine-art-appraisers-1295635> (describing how there is no one formal accreditation body for art authenticators in the United States, but several private organizations issue certificates to qualified individuals).

¹¹⁴ RAGAI, *supra* note 3, at 17; see, e.g., *id.* at 21–23 (describing the Umberto Giunti forgery *Madonna of the Veil*, in the style of Sandro Botticelli, but with the face of 1930s film star Jean Harlow).

of connoisseurship[,] and (c) when it confirms *authentication* as backed by either art historical evidence or by a documented proof of provenance.”¹¹⁵

There are three main procedures for accomplishing authentication, each of which is discussed in greater detail below: forensics, provenance, and connoisseurship.¹¹⁶ Forensics involves scientific analysis of a work and the search for “[t]he use of incorrect materials, such as paint pigments, canvas or other backing materials, [which] can indicate that a work was made more recently than its purported date.”¹¹⁷ Relevant testing methods include infrared imaging and radiocarbon dating.¹¹⁸ Provenance is the history of an artwork; it “may include the original source” of the work, “but is primarily concerned with a history of ownership.”¹¹⁹ Connoisseurship involves the “analysis of stylistic aspects of a work of art, combined with the function and techniques used to create the work[.]”¹²⁰ Often, all three of these authentication procedures are used together to determine a work’s authenticity, as results from one inquiry may inform or buttress another.¹²¹ Less commonly, a single method may be sufficient in it of itself to provide a compelling answer to an authentication inquiry.¹²² A brief explanation of how each of these three authentication procedures is accomplished follows.

A. Connoisseur Authentication

At its most basic, the connoisseur or expert who gives an opinion regarding authentication, “is someone who has developed a clear understanding of the style, imagery, palette, materials and processes that are characteristic of a specific

¹¹⁵ *Id.* at 130.

¹¹⁶ Amineddoleh, *supra* note 50, at 424 (describing how “[a]uthentication has been likened to a three-legged stool which relies on three prongs, bearing the weight on each leg: (1) forensics, (2) provenance; and (3) connoisseurship.”).

¹¹⁷ Gerstenblith, *supra* note 68, at 339.

¹¹⁸ *Id.*

¹¹⁹ Clemency C. Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT’L J. CULTURAL PROP. 52, 57 (1998).

¹²⁰ Gerstenblith, *supra* note 68, at 332 n.38.

¹²¹ Anne Laure Bandle, *Fake or Fortune? Art Authentication in the Art Market and At Court*, 22 INT’L J. CULTURAL PROP. 379, 380–81 (2015) (describing how “a connoisseur’s opinion-based result should be supported by archival evidence or scientific reports[.]” and often the various tools “complement each other[.]”).

¹²² Gerstenblith, *supra* note 68, at 339 (describing how, applying a forensics approach, “use of incorrect raw materials or methods can rule conclusively that a work is not authentic[.]” although “the use of correct materials, tools or methods cannot prove that a work is authentic.”).

artist.”¹²³ Connoisseurship can be described as “informed visual perception, based upon a trained scholar or other art expert having looked long and hard at hundreds, maybe thousands, of works by the artist in question — and absorbing their salient characteristics into visual memory — combined with an understanding of the artist’s method of working (known as ‘facture’).”¹²⁴ Upon completion of analysis of a work, “[t]his informed visual perception (supported by provenance and any available information on the work’s physical properties) is expressed in an expert judgment, usually referred to as expert opinion on authenticity.”¹²⁵ This opinion serves as one of the three prongs of authentication.¹²⁶

The most common type of connoisseurship for the past century is known as Morellian analysis, named after its inventor, physician and art collector Giovanni Morelli.¹²⁷ Morellian authentication “is based on the creation and mapping of formulae describing repeated stylistic details in the artwork and reflecting the particular approach of the artist in creating small features such as ears, eyes, collars,” and other details.¹²⁸ Early in the development of Morellian analysis, art expert Bernhard Berenson “codified the ‘Morellian method’ into sets of attributional rules of ostensibly near mathematical precision.”¹²⁹ Connoisseurship remains focused on trying to achieve scientific precision in its methodology.¹³⁰

However, connoisseurship is in the most basic sense entirely unscientific. Experts in the history of art authentication and art connoisseurs have both observed that “[c]onnoisseurship is a skill that . . . lacks both a comprehensive statement of method and a rationale for that method.”¹³¹ Whereas a scientific method would begin with a hypothesis and test that hypothesis with an experiment, connoisseurship tries to draw inferences about authorship from an observed result; it necessarily “treats style as evidence for an inferred cause.”¹³² Yet, it is not clear that style is a clear indicator for origin, nor that connoisseurs will know in advance which style markers

¹²³ Jean E. Brown, *The Legalities of Authenticity and Contemporary Art*, in AUTHENTICITY IN TRANSITION: CHANGING PRACTICES IN ART MAKING AND CONSERVATION 95, 100 (Erma Hermens & Frances Robertson eds., 1st ed. 2016).

¹²⁴ Ronald D. Spencer, *Protection from Legal Claims for Opinions About the Authenticity of Art*, 3 SPENCER’S ART L.J. 2, 2 (2012).

¹²⁵ *Id.*

¹²⁶ Amineddoleh, *supra* note 50, at 424.

¹²⁷ RAGAI, *supra* note 3, at 17.

¹²⁸ *Id.*

¹²⁹ Linda Young, *Significance, Connoisseurship & Facilitation: New Techniques for Assessing Museum Acquisitions*, 13 MUSEUM MGMT. & CURATORSHIP 191, 195 (1994).

¹³⁰ David Ebitz, *Connoisseurship as Practice*, 9 ARTIBUS ET HISTORIAE 207, 208 (1988).

¹³¹ *Id.* at 209.

¹³² Richard Neer, *Connoisseurship and the Stakes of Style*, 32 CRITICAL INQUIRY 1, 11 (2005).

are associated with a specific artist or production period.¹³³ In many respects, “the connoisseur who attributes a painting to Rembrandt is performing the same actions, and for the same reasons, as the field archaeologist who sorts her finds at the end of a day’s work.”¹³⁴ However, connoisseurship, unlike archeology, cannot stand alone as a means of authentication.¹³⁵ Whereas an archeologist can correlate her stylistic judgments to “hard” excavation data about the relative age of items found at different levels of a dig, a connoisseur lacks a comparable external reference point.¹³⁶ Thus, while the ultimate desire of authentication is the ability to state with *certainty* that a work is by a specific artist, because connoisseurship is inherently unscientific, this procedure alone is insufficiently reliable to provide that result.

Given shortcomings inherent to connoisseurship, one might wonder why it is still a valued means of authenticating artwork. In the non-legal setting, “[t]he value of connoisseurship to the history of art is judged by the practical result of the connoisseur’s activity, namely the attribution of works of art to a particular artist, school or workshop, and to a particular time and place.”¹³⁷ The sway that connoisseurs hold is largely due to their role in preparing the *catalogue raisonné* for an artist, i.e., a definitive listing of all works completed by a specific artist.¹³⁸ Such a “*catalogue raisonné* receives great consideration on the market when its author is considered to be the authority for the given artist[,]” and thus “the reliance on a single expert gives expert authorities enormous power as they decide works that are of cultural significance and those that are not.”¹³⁹ An artwork’s inclusion in a *catalogue raisonné*, or the willingness of the author of that *catalogue* to say that a work is plausibly by that artist, can make or break an authentication.¹⁴⁰ In the legal context, the value of a connoisseur’s opinion remains significant as well: in certain cases, judges have found connoisseur testimony so compelling that they have discounted contrary scientific or provenance evidence in favor of it.¹⁴¹

¹³³ *Id.* at 3.

¹³⁴ *Id.*

¹³⁵ *Id.* at 14 (describing how “[i]t may be possible to categorize rocks and artworks alike—to divide them into feldspars and granites, Rembrandts and Vermeers—but such categorization will not deliver the goods that art historians and archaeologists desire.”).

¹³⁶ *Id.* at 3.

¹³⁷ Ebitz, *supra* note 130, at 207.

¹³⁸ Bandle, *supra* note 121, at 381 (“[A] catalogue raisonné records all works its author, based on his connoisseurship, believes to be by a specific creator.”).

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, RAGAI, *supra* note 3, at 66 (discussing the market reaction to da Vinci connoisseur Martin Kemp’s statement that the *Salvator Mundi* painting was indeed by da Vinci).

¹⁴¹ Bandle, *supra* note 121, at 388 (citing *Avrora Fine Arts Inv. Ltd. v. Christie, Manson & Woods Ltd.* [2012] EWHC 2198 (Ch) [38] (Eng. & Wales)).

In recent years, artificial intelligence or AI technology has been embraced by the art world for its potential to assist connoisseurs in identifying fraudulent art.¹⁴² “Broadly defined, AI is computer technology that aims to simulate intelligent human behavior.”¹⁴³ Strong AI “attempts to replicate human reasoning” and to one day “create sentient machines[;]” examples of strong AI do not yet exist.¹⁴⁴ Weak AI, on the other hand, “focuses on performing specific tasks that require capabilities similar to human cognition,” such as Amazon Alexa, automated chat bot assistants, and smart cars.¹⁴⁵ The most successful branch of weak AI to date relates to “machine learning,” which uses algorithms to analyze large datasets and make predictions.¹⁴⁶

Several companies have experimented with neural networks trained to identify fraudulent art.¹⁴⁷ Two scientists working in Switzerland, Dr. Carina Popovici and Christiane Hoppe-Oehl, have developed an algorithm that can successfully identify fake works of art.¹⁴⁸ The algorithm “learns” the characteristics of an artist from a comprehensive set of original works, reviews the alleged forgery, and “produces an easy-to-read heat map that pinpoints which areas of the painting are most suspect.”¹⁴⁹ The AI detection algorithm has been used numerous times with much success.¹⁵⁰ In essence, the technology adopts the Morellian method of connoisseurship authentication but removes the risks of human error and subjectivity from the process.¹⁵¹ The analysis is highly accurate, relatively quick, and only requires images of the work in question, eliminating the issue of transportation for

¹⁴² Jason Bailey, *Can AI Art Authentication Put an End to Art Forgery?*, ARTNOME (Sept. 12, 2019), <https://www.artnome.com/news/2019/9/12/can-ai-art-authentication-put-an-end-to-art-forgery>.

¹⁴³ Jeffrey Greene & Anne Marie Longobucco, *Is Artificial Intelligence the Newest Trend in Fashion?*, N.Y.L.J. (Aug. 24, 2018), <https://www.law.com/newyorklawjournal/2018/08/24/artificial-intelligence-the-newest-trend-in-fashion/>. See also Nick Heath, *What is AI? Everything You Need to Know About Artificial Intelligence*, ZDNET (Feb. 12, 2018), <https://www.zdnet.com/article/what-is-ai-everything-you-need-to-know-about-artificial-intelligence/>.

¹⁴⁴ Greene & Longobucco, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* See also Joe McKendrick, *Artificial Intelligence Only Goes So Far in Today's Economy*, *Says MIT Study*, FORBES (Sep. 14, 2019), <https://www.forbes.com/sites/joemckendrick/2019/09/14/artificial-intelligence-only-goes-so-far-in-todays-economy-says-mit-study/?sh=7d4559f11162>.

¹⁴⁷ Bailey, *supra* note 142.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See also, RAGAI, *supra* note 3, at 17.

original works.¹⁵² Furthermore, the use of a computer algorithm eliminates the potential biases of an authenticator who stands to benefit from the outcome of a work's authenticity.¹⁵³

At the same time, however, AI's ability to gain insights from vast amounts of data also opens the door for highly sophisticated forgeries.¹⁵⁴ *Next Rembrandt*, a piece created entirely by AI, exemplifies the potential issues that may arise from AI-generated art.¹⁵⁵ *Next Rembrandt* was created from an algorithm that "could understand Rembrandt based on his use of geometry, composition, and painting materials."¹⁵⁶ The software "learned" Rembrandt's style and created a 3D printed, physical work that mimicked the artist's style to near perfection.¹⁵⁷ This type of technology could be used nefariously to create fakes that are so accurate that even the most experienced connoisseur would not be able to recognize the difference.¹⁵⁸

B. Forensic Authentication

The forensic prong of authentication involves subjecting a work to a barrage of scientific testing in order to confirm that everything is, to the degree verifiable, as it "should" be in a work of the claimed age and provenance.¹⁵⁹ An authenticator working with a painting, for example, would proceed in a measured and systematic approach from the least invasive analysis to further testing as warranted by anomalies.¹⁶⁰ Evaluation would begin by review of a painting's surface for brushwork and craquelure through use of a stereo-microscope or raking light across the surface, that is, placing light at an oblique angle to the painting.¹⁶¹ Ultraviolet fluorescence from a UV light can be useful for differentiating old and new additions as well.¹⁶² Further investigation into the body of the painting itself can be accomplished through techniques including pyrolysis-gas chromatography-mass

¹⁵² Bailey, *supra* note 142.

¹⁵³ *Id.*

¹⁵⁴ *Id.* Steve Schlackman, *Who Holds the Copyright in AI Created Art*, ARTREPRENEUR (Apr. 22, 2018), <https://alj.artpreneur.com/the-next-rembrandt-who-holds-the-copyright-in-computer-generated-art/>.

¹⁵⁵ Schlackman, *supra* note 154.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* The "painting" was even three-dimensionally printed on canvas using an AI projection of paint depth and stroke style in existing Rembrandt works, to perfectly mimic his use of layering, texture, and brushstroke. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ RAGAI, *supra* note 3, at 133–61.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 133.

¹⁶² *Id.*

spectrometry (Py-GC-MS), which allows analysis of synthetic polymers used as binding agents in paints, and proton-induced X-ray emission (PIXE), which permit non-destructive analysis of pigment composition.¹⁶³ The goal of these tests is to identify compounds included in paint which, by virtue of the age and/or provenance of a painting, should not be present, such as titanium white paint in a Renaissance panel painting.¹⁶⁴

Moving from entirely non-destructive analysis to *minimally invasive* techniques, an authenticator can take small samples of paint chips from a work and subject them to chemical analyses.¹⁶⁵ Authenticating a suspected Édouard Manet painting, for example, scientists compared paint samples from the work being analyzed to two known Manet paintings, and in all three paintings, pigments for white, blue and red colors in the works exhibited the same “atypical configurations,” suggesting that they were all painted by Manet.¹⁶⁶ In particular, the samples of lead white from the works showed the same nine trace elements in nearly the same proportions, which “could only have been the case if the two paintings had been prepared the same year, from identical production lots” or even “from the same tube of paint.”¹⁶⁷ Based on this overwhelming scientific evidence, the painting in question—Manet’s reproduction of Diego Velázquez’s *Infanta Margarita*—was definitively attributed to Manet in 2003.¹⁶⁸

Scientific testing has its limits, however. Works that have been retouched by curators can present unique challenges, as certain paint and brushwork will necessarily be newer than others.¹⁶⁹ Organic pigments, synthetic binders, and other additives used by contemporary artists are also more difficult to analyze than inorganic materials used by older artists, posing a challenge for dating more recent works.¹⁷⁰ As one workaround, radioactive isotope analysis through mass spectrometry techniques can accurately gauge the era or locale for both Old Master and modern works of art.¹⁷¹ This method was first used by Elena Basner, a former curator at the Museum of Fine Arts in St. Petersburg, who thought of using

¹⁶³ *Id.* at 134.

¹⁶⁴ *See* RAGAI, *supra* note 3, at 134, 146.

¹⁶⁵ *Id.* at 137.

¹⁶⁶ *Id.* at 52.

¹⁶⁷ *Id.* (internal quotation marks omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *See, e.g.,* Lisa Giombini, *But Is This Really Authentic? Revising Authenticity in Restoration Philosophy*, 12 *LEBENSWELT* 21 (2018) (discussing how authenticators address challenges unique to restored works).

¹⁷⁰ RAGAI, *supra* note 3, at 142.

¹⁷¹ *Id.* at 142–46.

radioactive isotopes created by the nuclear bombings in Hiroshima and Nagasaki in August 1945 to identify paintings as having existed before or after that date.¹⁷² Similarly, lead isotopic analysis of white paint “can help in identifying the locality of the lead ore from which the metallic lead was extracted before being converted into lead carbonate.”¹⁷³ Lead analysis has authenticated works such as Vermeer’s *Saint Praxedis* by conclusively demonstrating that the work was created using materials from Holland and not Italy.¹⁷⁴ Furthermore, when compared to the lead white in Vermeer’s uncontested work *Diana and Her Companions*, “the paint[s] so closely matched . . . that it was as if the same tube of [paint] had been used in both cases.”¹⁷⁵ *Saint Praxedis* thus became the thirty-sixth painting definitively attributed to Vermeer and sold at auction in 2014 for \$10.7 million.¹⁷⁶

In conjunction with analysis of the chemical components of a painting, scientists authenticating a work will use advanced imaging software to examine the panel of canvas on which the work was produced.¹⁷⁷ For example, scientists have developed computer algorithms that can automate the counting of canvas threads from X-rayed images of paintings and then map the density of both horizontal and vertical threads across a particular work.¹⁷⁸ Thread mapping in this manner produces a “weave map,” which can be used to compare results of an unknown painting against that of a known work by the same artist in the same period.¹⁷⁹ Similar “weave maps” suggests that two works were created from the same bolt of canvas.¹⁸⁰ In the case of pair paintings, which have been separated or scattered among different collections, this technology can be invaluable in arranging reunification, as many artists like Rembrandt tended to create companion pieces using the same bolt of canvas, prepared in a similar manner.¹⁸¹ Using this technology, scientists have authenticated and brought back together formerly united or paired works. For

¹⁷² *Id.* at 145.

¹⁷³ *Id.* at 146. Lead white in the form of basic lead carbonate was used in earlier works but replaced by zinc oxide towards the end of the eighteenth century. *Id.* By the early twentieth century, white paint more commonly contained titanium white, i.e., titanium dioxide. *Id.*

¹⁷⁴ *Id.* at 64. Lead isotope analysis confirmed that the painting was created with Dutch/Flemish-mined lead. *Id.*

¹⁷⁵ RAGAI, *supra* note 3, at 64.

¹⁷⁶ *Id.* at 64–65.

¹⁷⁷ *See id.* at 156.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ RAGAI, *supra* note 3, at 156.

¹⁸¹ Petria Noble, *From One Piece of Canvas: The Supports of the Eight Craeyvanger Children’s Portraits*, 127 OUD HOLLAND 25, 25 (2014). Canvas must be stretched and is typically painted with a priming agent before oil paint is applied. *Id.*

example, canvas weave analysis was used to authenticate eight unsigned portraits of the children of the Craeyvanger family, painted by Gerard ter Borch the Younger and his apprentice Caspar Netscher, where the analysis “confirm[ed] that the canvas supports of all eight children’s portraits are identical and that they were cut from a larger piece of primed, plain weave linen[.]”¹⁸²

Imaging analysis can uncover what lays between the canvas and the top layer of varnished paint as well. Many times, authentication of a work relies on the identification of *pentimenti*: changes in the composition of the painting throughout the creative process, such as a change in the position of a thumb, as was the case with Da Vinci’s *Salvator Mundi*.¹⁸³ This change may be shown through X-ray imaging of the underdrawings below the paint layers.¹⁸⁴ New technology has increased the precision with which scientists can examine these underdrawings. For example, “[s]ynchrotron-produced X-ray images of underdrawings in paintings have a much greater resolution than images produced by conventional X-rays tubes, revealing very fine details in the paintings.”¹⁸⁵ Further expanding the degree to which authenticators can examine the lower layers of a painting, Pascal Cotte and François Dupuy of Lumière Technology invented the first multispectral high-definition camera, which can be used for “a new analysis technique, the layer amplification method (L.A.M.), which allowed the inside of the paint layers [of a painting] to be seen one by one as if in a peeled onion, and [to have] their composition determined[.]” on a layer-by-layer basis.¹⁸⁶ Beyond examining the underdrawings with such a method, an authenticator can use cross-section analysis “if there is doubt” about the authenticity of the signature on a painting; for example, to “reveal a layer of dust between the signature and the paint beneath it, which would confirm a forged addition[.]” to the painting.¹⁸⁷

Imaging technology was integral in the very much still disputed attribution of *La Bella Principessa* to da Vinci, a vellum sheet portrait in silverpoint and dry chalk.¹⁸⁸ High-quality imaging revealed the former binding holes in the sheet, lending credence to its origin as a frontispiece in a book in the Polish National Library.¹⁸⁹ Furthermore, “[m]ultispectral imaging revealed a distinctive hatching in which the strokes are inclined towards the left at an angle close to 45 [degrees,]”

¹⁸² *Id.*

¹⁸³ See RAGAI, *supra* note 3, at 65–66.

¹⁸⁴ *Id.* at 151–52.

¹⁸⁵ *Id.* at 153.

¹⁸⁶ *Id.* at 157.

¹⁸⁷ *Id.* at 137.

¹⁸⁸ RAGAI, *supra* note 3, at 105–07.

¹⁸⁹ *Id.*

indicating that a left-handed artist like da Vinci had sketched the work.¹⁹⁰ In conjunction with the *pentimenti* observed under imaging and the carbon-14 dating of the paper to approximately 1450 A.D., da Vinci connoisseur Martin Kemp declared the work to be a da Vinci in 2010.¹⁹¹ Despite pushback from other experts due to the medium upon which the portrait is drawn, there has yet to be any scientific testing that disproves Kemp's attribution of the work.¹⁹²

C. Provenance Authentication

Of the three methods of authentication, provenance authentication is the most straightforward.¹⁹³ “Provenance is the history of a work of art, i.e., its chain of title, and whether it has been exhibited or included in a *catalogue raisonné*.”¹⁹⁴ In short, it is the entire chain of custody for the painting or work of art—its history, from inception to the present.¹⁹⁵ In the past, authenticators have greatly stressed the importance of a work's provenance, claiming that “[t]here is no substitute for an iron-clad provenance back to the hand of the artist touching the canvas.”¹⁹⁶ Nevertheless, the reality of the art market is such that “[i]t is safe to say that most works of art fall far short of having impeccable provenance[,] and that is where the interesting problems of authentication begin.”¹⁹⁷

In the past decade, the growth of digital provenance tracking has begun to emerge, with an emphasis on the use of blockchain technology to track art.¹⁹⁸ As one authentication expert explained, “[t]here is no doubt that in the very near future, *blockchain technology* will revolutionise [sic] the art world.”¹⁹⁹ Blockchain

¹⁹⁰ *Id.* at 106–07.

¹⁹¹ *Id.* at 107–08. Kemp is the same Leonardo da Vinci connoisseur who authenticated the *Salvator Mundi* panel painting. See *supra* text accompanying notes 11, 143.

¹⁹² *Id.*

¹⁹³ See Amineddoleh, *supra* note 50, at 424.

¹⁹⁴ Andrea Sobolewski, *The Authenticity Debacle: Why Art Authentication and Litigation Don't Mix*, 35 CARDOZO ARTS & ENT. L.J. 515, 520 (2017) (citing Ronald D. Spencer, *Art Law on Protection for Art Experts*, ARTNET NEWS (Feb. 1, 2013), <https://news.artnet.com/market/protection-from-legal-claims-for-art-experts-29980>).

¹⁹⁵ *Id.* See also Jennifer C. Grant, *Attributing Old Masters paintings and the Plight of the Expert in the Art Market* 28 (2012) (unpublished Masters in Art Business thesis, Sotheby's Institute of Art) (on file with the Sotheby's Institute of Art library system) (“For some paintings, if their provenances are uncertain for a period of time and the painting cannot be placed in a location or in a private collection, the loss of the chain of custody can lead to questions of attribution.”).

¹⁹⁶ Duane R. Chartier & Fred G. Notehelfer, *Authentication: Science and Art at Odds?*, 3315 PROC. SPIE 74, 76 (1998).

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., RAGAI, *supra* note 3, at 101–02.

¹⁹⁹ *Id.*

technology may provide the missing link to connect the art world with the digital, through allowing a unique means to track provenance.²⁰⁰ Blockchain technology came onto the scene as the ledger system used for bitcoin transactions.²⁰¹ Succinctly, “blockchain is a distributed, decentralized, public ledger.”²⁰² Generally, “blocks” on the blockchain store information about transactions, the blockchain consists of multiple blocks strung together, and when a block stores new information, it is added to the blockchain.²⁰³ To be added to the blockchain, a transaction must occur and be verified by a network of computers, the transaction must be stored with a specific digital signature, and the block must be given a hash (a unique identifying code).²⁰⁴ The purpose of blockchain technology is to maintain a vast record strung across a network of millions of computers to make information more difficult to manipulate.²⁰⁵ “In order to change a single block, then, a hacker would need to change every single block after it on the blockchain[,]” which “would take an enormous and improbable amount of computing power.”²⁰⁶ The result is that, “once a block is added to the blockchain it becomes very difficult to edit and impossible to delete.”²⁰⁷

Blockchain is currently used by the company Verisart, which provides a website and application for artists and collectors to create certificates of authenticity for works.²⁰⁸ The process for creating and later verifying a certificate of authenticity is as follows: “[t]he artist takes a picture of the work, adds its title and dimensions, the materials used and year of production[,] and signs off like a normal certificate.”²⁰⁹ Thereafter, “[t]he certificate is then given a URL allowing verification of provenance, as well as a cryptographically secure registry, which is time-stamped.”²¹⁰ The provenance of the piece is ultimately tracked through blockchain technology, making use of a decentralized, protected database.²¹¹ Technology

²⁰⁰ Jacqueline O’Neill, *Art Authentication Is Flawed. Here’s How Blockchain Can Fill in the Gaps*, MEDIUM (Apr. 30, 2018), <https://medium.com/blockchain-art-collective/art-authentication-is-flawed-heres-how-blockchain-can-fill-in-the-gaps-79cc1ec94a0f>.

²⁰¹ Luke Fortney, *Blockchain Explained*, INVESTOPEDIA (Nov. 18, 2019), <https://www.investopedia.com/terms/b/blockchain.asp>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Fortney, *supra* note 201.

²⁰⁷ *Id.*

²⁰⁸ RAGAI, *supra* note 3, at 101.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 101–02.

²¹¹ *Id.* at 102.

company Chronicled, Inc. has also developed “tamper-evident CryptoSeals[,]”²¹² which can affix to an artwork and create a direct link to the artwork’s digital identity on a blockchain.²¹³ In theory, “[i]f someone comes into possession of an artwork with a Cryptoseal in 20 years, that person will still be able to verify it on a website backed by Chronicled’s infrastructure.”²¹⁴

There are two significant downsides that reliance on such technology creates, however: first, the servers on which Verisart, Chronicled and other companies store information are just as at risk as any other technology to environmental damage over time (such as overheating, water damage, or other destruction), and second, blockchain, at this stage, does not have the ability to eliminate the need for experts.²¹⁵ Experts will still be necessary to identify a work’s origin before the Cryptoseal is affixed.²¹⁶ In addition, artwork that predates the internet—and even artwork that predates the invention of blockchain technology—will still have significant provenance records, and examining and verifying such records will accordingly remain a vital aspect of the authentication process.²¹⁷ Furthermore, blockchain’s benefits come into play after authenticity is confirmed, leaving room for forgeries to be registered if precautions are not taken.²¹⁸ The idea is that in years to come, more and more pieces of art will contain a Cryptoseal or something akin to it connected to a secure blockchain for easy authentication by anyone with the ability to access the network.²¹⁹ Reliance on blockchain-backed Cryptoseals could prove immensely beneficial to the time intensive process of authenticating art, but in order to impact

²¹² Press Release, Chronicled, Chronicled Launches CryptoSeal for Packaging, Physical Assets, and Supply Chain (Nov. 16, 2016), <https://www.prnewswire.com/news-releases/chronicled-launches-cryptoseal-for-packaging-physical-assets-and-supply-chain-300364192.html>. The CryptoSeal is a tiny computer chip with a cryptographic identity that slides into an adhesive seal strip allowing application to a variety of works. Each chip is embedded with unique identity information, which is immutably registered and verified on a blockchain. The CryptoSeal has the ability to securely verify sender identity and timestamp deliveries on a closed loop integration with the blockchain providing a secure chain of custody.

²¹³ O’Neill, *supra* note 200.

²¹⁴ *Id.*

²¹⁵ See Amy Whitaker, *Art and Blockchain: A Primer, History, and Taxonomy of Blockchain Use Cases in the Arts*, 8 *ARTIVATE* 21, 34 (2019).

²¹⁶ *See id.*

²¹⁷ Jason Bailey, *Why Use Blockchain Provenance For Art?*, *ARTNOME* (Jan. 29, 2018), <https://www.artnome.com/news/2018/1/26/why-use-blockchain-provenance-for-art>.

²¹⁸ *See id.*

²¹⁹ *Id.*

the authentication process, the art industry must begin to implement Cryptoseal technology.²²⁰

III

ALLOCATING RISKS FROM AUTHENTICATION AND LEGAL REMEDIES FOR BONA FIDE PURCHASERS

Despite the great degree of precision with which art authenticators can identify forgeries, the consequences of authentication are often difficult to predict with any accuracy. As such, the art market has developed a risk allocation framework between the parties providing authentication services—art authenticators or connoisseurs, auction houses, curators, and artist-specific authentication boards—and purchasers that on the whole leaves both parties at risk of otherwise unforeseen liability. In the event that an authentication goes awry, bona fide purchasers in particular can only seek the protection of a patchwork of contract, tort, and state statutory protections, likely providing inadequate compensation for their loss.

As relevant background to this next section, contemporary artworks are typically bought and sold in one of two markets, a primary market for new works and a secondary market for sales of works already in circulation.²²¹ These secondary market sales are mediated by private dealers and auction houses and are most customarily the site for transactions involving very high ticket value items.²²² In theory, “[a]uthentication supports the secondary art market by stamping out forgery and misrepresentation and providing a measure of certainty in the secondary market.”²²³ No such service would generally be necessary in primary market sales, as the artist or her heirs is likely to be alive and active in the sale.²²⁴

Due to their role as the main distributors in the secondary art market, auction houses and high-end galleries are often the defendants in disputes regarding authentication, though authenticators themselves are occasionally challenged in court as well. The fear of authenticity-related litigation looms large, and without the protection of an airtight indemnity provision, many authenticators and expert consortiums have opted out of authenticating controversial works altogether.²²⁵ This

²²⁰ *Id.*

²²¹ Gareth S. Lacy, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J.L. TECH. & ARTS 185, 189 (2011).

²²² *Id.*

²²³ *Id.*

²²⁴ *See id.* (describing how many primary market sales take place at galleries, which source works directly from an artist).

²²⁵ N. M. Neuhaus, *Art Authentication: Protection of Art Experts from a Swiss Perspective*, 19 ART ANTIQUITY & L. 59 (2014). Authenticators are often contracted by galleries and auction

section describes the main risks that accompany authentication efforts, explains the assignment of risk between the parties involved, and reviews whether the remedies available to parties are adequate to dispel latent risk. To do so, the Note considers reasons why an authentication may go awry, then discusses risks faced by authenticators, and finally examines the risks that bona fide buyers of fine art face.

A. *Reasons Authentication Goes Awry*

Given the complexity of the authentication process, it is unsurprising that, in some instances, the process fails. These failures can occur for a variety of reasons—misplaced trust, negligence, sheer mistake, or scientific or historical error—but the results of a failure can be wide-ranging in their fallout. Further, even when it appears that a piece is genuine, new evidence can always come to light after a sale that indicates that a work may be a forgery or was potentially misidentified. Just the rumor that a work is not authentic can have grave consequences for the buyer, rendering it virtually unsalable. This subsection describes some of the reasons that authentication can go awry, while noting that some such reasons for default are controllable and others, largely, are not. In either set of circumstances, it is unfortunately unavoidable that, sometimes, artworks slip through the metaphorical cracks. One example of such widespread and total failure, *in extremis*, is that of the Terrus Museum, in Elne, France.²²⁶ This museum, based in the south of France, had a “disconcerting discovery” in 2018: “[m]ore than half of the works in its collection were fakes.”²²⁷ This example affirms the importance of due diligence, especially a thorough investigation of provenance and authenticity in the acquisition process.

In another example of the extreme risks associated with authentication, a 1993 federal court case that questioned the authentication of a mobile sculpture rendered the piece unsalable even after the court ordered that it was a genuine piece by Alexander Calder. Rendering the court’s judgment, the judge conceded that the art market would nonetheless likely treat the work as suspect due to trial testimony by a respected Calder expert to this effect.²²⁸ Thus, solely by voicing her *opinion*, a connoisseur’s judgement of a work can be treated by the art market as a matter of

houses based on required expertise, typically these authenticators require owners to sign indemnity provisions protecting them from liability. Eileen Kinsella, *A Matter of Opinion*, ARTNEWS (Feb. 28, 2012), <https://www.artnews.com/art-news/news/a-matter-of-opinion-512/>.

²²⁶ See Elian Peltier & Anna Codrea-Rado, *French Museum Discovers More than Half Its Collection Is Fake*, N.Y. TIMES, May 3, 2018, A6, <https://www.nytimes.com/2018/04/30/arts/design/french-museum-fakes.html>.

²²⁷ *Id.*

²²⁸ Valerie Medelyan, *Says Who? The Futility of Authenticating Art in the Courtroom*, 36 HASTINGS COMM. & ENT. L.J. 1, 1 (2014).

indisputable *fact*, even in the face of a court decision that comes out contrary. Over 20 years after the court's decision, the work remains unsold.²²⁹ The basic setup of the contemporary art market thus assigns risk not to whoever is most likely to be able to prevent harm, but rather to the individuals with the most to lose: the owners of art with shaky attribution.²³⁰

Further, in some jurisdictions like France and Holland, forgery laws stipulate that any known forgery, once proven to be fake, must be destroyed under law enforcement supervision.²³¹ For example, in the case of Hans van Meegeren, the most infamous forger of the twentieth century, experts engaged in considerable hand-wringing while van Meegeren's trial was ongoing, fearful that genuine works might accidentally be destroyed.²³² Van Meegeren had spent the better part of the 1920s and 1930s forging works "so intimately in the style of Pieter de Hooch and Jan Vermeer that they would be received as authentic 'undiscovered' paintings by the masters."²³³ Even after he was caught and admitted to his crimes, van Meegeren was required to paint "another painting 'in the style of' Vermeer to prove his culpability," as some experts remained unconvinced that the paintings he had made were forgeries.²³⁴ Because Holland's art forgery laws require fake paintings to be destroyed by law enforcement, art connoisseurs feared that "[t]he court might, according to an ancient Dutch Law . . . order[] the destruction of *all* the pictures[,]” whereby "one could, officially, have destroyed two of the most moving works which Vermeer had created."²³⁵ The loss to the art world and humanity as a whole that such a destruction could have inflicted was such that ultimately, van Meegeren's paintings have been saved from destruction despite scientific analysis in the 1950s that accurately identified the majority of his works as forgeries.²³⁶ An art owner who seeks to authenticate their work must nevertheless be cognizant that such a risk can arise.

²²⁹ *Id.* at 2.

²³⁰ *See, e.g., id.*

²³¹ France and Holland have such laws. *See* RAGAI, *supra* note 3, at 36 (describing destruction of a forged Cranach painting by French authorities); Clark, *supra* note 23, at 34 (describing potential destruction of van Meegeren forgeries under Dutch law).

²³² Clark, *supra* note 23, at 34.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 34–35.

1. *Authenticators' Conflicts of Interest*

In performing a valuation or an authentication of a work, museums, artist foundations, and authenticators face significant conflicts of interest. When an authority in the art field—a curator at a museum, an artist foundation board, or a dealer in the artist's work—authenticates or declines to authenticate a work, their decision has an impact on the supply of works by that artist and thereby affects the price of other works by that artist.²³⁷ In such a scenario, all parties benefit from a higher valuation, but other owners of works by the same artist—such as museums, artist foundation boards, or gallery owners—can potentially be adversely affected by the authentication of another work by the same artist, as this reduces the scarcity of the artist's works.²³⁸ Among the parties who may authenticate works of art, conflicts of interest associated with curators, art dealers, and artist foundation boards are often insurmountable. Individuals must turn instead to individual authenticators or auction houses to take on this task—an imperfect solution to an already delicate situation in many circumstances.

Museum curators are often not permitted to render authentication opinions due to the risk that a conflict of interest could be imputed in an otherwise innocent interaction.²³⁹ As one commentator has explained, “[t]he museum curator has nothing to lose financially and everything to gain from valuing favorably [or authenticating] a work of art.”²⁴⁰ The main benefits of a favorable valuation or authentication run not to the curator as an individual, but to the museum: in this sort of favorable transaction, “the museum is more apt to become the donee of the work of art, as a ‘quid pro quo[,]’” and “a favor for a wealthy art collector enhances the museum’s chances of becoming a recipient of the collection in the future.”²⁴¹ As such, a serious “conflict of interest arises where a museum curator finds himself in the untenable position of being an expert for both the collector requesting the appraisal and his institution, regarding an art piece that the museum wishes to acquire.”²⁴² Because “[i]t is in the museum’s interest to accommodate a collector, who is a potential donor to the museum[,]” authentication may be more likely to come to the conclusion that a work is genuine and result in a generous valuation.²⁴³ Beyond the fear of a conflict of interest, “museum officials frequently refuse to

²³⁷ See, e.g., Debra B. Homer, *Fine Art Appraisers: The Art, the Craft, and the Legal Design*, 8 COLUM. J. ART & L. 457, 468 (1984).

²³⁸ See *id.*; see also, Lacy, *supra* note 221, at 189–91.

²³⁹ Homer, *supra* note 237, at 467.

²⁴⁰ *Id.* at 467–68.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 467–68.

perform art appraisals since it is inherently alien to them to treat art as an investment.”²⁴⁴

Conflicts of interest are also inherent in valuation estimates rendered by art dealers. Art dealers have an incentive to please their customers, rather than to be entirely candid in valuations: “[a] collector who desires to seek a high value for his art piece will most likely seek out an art dealer with whom he does business; it is not unusual for a dealer ‘to bend over backwards to please a client’ by valuing the work at the top range of possible prices.”²⁴⁵ Thus, dealers in such circumstances are incentivized to inflate a valuation estimate in order to satisfy and flatter their clients.

Artist foundation boards’ authentication opinions often implicate insurmountable conflicts of interest as well. In the past few decades, some foundations have been the subject of litigation related to the inherent conflicts of interest in their authentication—or their refusal to authenticate—privately-held works.²⁴⁶ In a 2007 case, the owner of an alleged Andy Warhol painting submitted the work to the Andy Warhol Authentication Board, non-profit organization that renders authentication opinions, for a determination of authenticity.²⁴⁷ The owner had purchased the work for \$195,000 in 1989 and now planned to sell it for approximately \$2 million.²⁴⁸ In response, the Board stamped “DENIED” on the painting without further explanation, thereby not rendering an official authentication decision but negatively affecting the value of the work.²⁴⁹ The owner spent a year documenting the work’s origin and history, but when he re-submitted it for authentication, the Board once again stamped it with “DENIED.”²⁵⁰ While the denial

²⁴⁴ Homer, *supra* note 237, at 468. As a general matter, it is true that museums *do* perform valuations of the works they own, particularly for insurance purposes. However, such internal (and strictly confidential) valuations are fundamentally of a different nature from valuations that are involved in preparing a fair market estimate of a work for sale purposes.

²⁴⁵ *Id.* at 469 (quoting William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 238–40 (1981)). A dealer who maximizes the valuation of an individual’s artwork would please that individual for two reasons: (1) to flatter them, and (2) because “[u]nder [S]ection 170(a) of the Internal Revenue Code, I.R.C. § 170 (1954), individuals who make charitable contributions of art are allowed to deduct the amount of the contribution from their taxable income.” *Id.* at 457 n.1. For further discussion of the tax implications of authentication, see *infra* Part IV.

²⁴⁶ See, e.g., Amended Class Action Complaint at 4–13, *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

²⁴⁷ *Id.* at 4–6.

²⁴⁸ *Id.* at 7.

²⁴⁹ See *id.*

²⁵⁰ *Id.*

was again a refusal to authenticate the work, not a negative determination on the merits of authenticity, it nevertheless reduced the work's market value to a fraction of that for a similar but un-stamped work.²⁵¹

The owner of the contested painting eventually filed a federal lawsuit alleging that the Board's refusal to authenticate his painting—thereby minimizing the amount of authenticated Warhol paintings in existence (of which the Board owned many)—violated the federal Sherman Antitrust Act and New York state antitrust law.²⁵² While the court ultimately dismissed the suit with prejudice for lack of standing, the court had previously denied the Board's motion for summary judgment—a sign that the plaintiff's claims of anticompetitive conduct were plausible.²⁵³ Recognizing the significant legal risks that continued refusals to authenticate works might incur, the Warhol Board and other foundations have shuttered their authentication committees.²⁵⁴ Thus, owners are left to seek authentication opinions from individual authenticators or auction houses—a solution not without its own inherent difficulties, as explained *infra*.

2. Lack of Professionalization for Authentication

In the United States, an “art expert” is simply someone who holds himself or herself out as such.²⁵⁵ That is not to say that art experts are unqualified—many have degrees in art history and have studied for years to be able to correctly identify a work's origin. But in practice, an expert's statement of authenticity is nothing more than an opinion.²⁵⁶ In the French market, by contrast, small auction houses dominate the art market and the auctioneers who run them rely on “independent professional experts to value and appraise a particular piece.”²⁵⁷ The independent experts in this

²⁵¹ Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *3 (S.D.N.Y. May 26, 2009)

²⁵² *Id.* at *5.

²⁵³ Simon-Whelan v. Andy Warhol Found, for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), *complaint dismissed per stipulation*, No. 07 Civ. 6423(LTS)(AJP) (Nov. 30, 2010).

²⁵⁴ See, e.g., Jennifer Maloney, *The Deep Freeze in Art Authentication*, WALL ST. J. (Apr. 24, 2014), [<https://perma.cc/VK7Q-39QM>]. See also Andreja Velimirović, *Art Authentication Board – An Idea That Fell Through*, WIDEWALLS (Nov. 3, 2017), <https://www.widewalls.ch/magazine/art-authentication-board>; Georgina Adam, *The high-stakes game of art authentication*, BBC (Oct. 21, 2014), <https://www.bbc.com/culture/article/20140325-high-stakes-in-hunt-for-fake-art>.

²⁵⁵ Raúl Jáuregui, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947, 1968–70 (1997).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1966–67.

model receive a percentage of the final sale from the purchaser, creating a greater incentive to serve the welfare of the client rather than the auction house.²⁵⁸ France has also implemented mechanisms to certify experts, requiring them to maintain a license from a recognized professional association.²⁵⁹

Considering the staggering effect authenticators can have on the value of artwork, it is a wonder that the United States has not implemented any sort of check aside from traditional legal remedies to ensure that authenticators are in fact expert connoisseurs and follow some unified code of conduct. Certification by private organizations, described above, creates a partway, patchwork solution that remains inadequate.²⁶⁰ Instead, the lack of formalization of the authentication process does little to guarantee fairness, honesty, or reliability.²⁶¹ The United States is no stranger to licensing requirements for professionals—doctors, lawyers, dentists, and real estate agents are just a few professions that require certain examinations of skill.²⁶² In order to remediate the unregulated, unsupervised “Wild West” of American art experts, the United States would be remiss not to consider taking a step in that direction for professional authenticators. Considering the substantial monetary risks art buyers face using unqualified authenticators, such a move could reduce uncertainty in the market to a non-negligible degree.

3. *Human Error, Negligence, and Fraud*

Other common reasons for errors to arise during an authentication include human error, negligence, and fraud. When an authentication goes wrong, a buyer may assert a case for negligence or fraud against either the authenticator or the seller. Ultimately, the vast majority of such cases will turn into a factual dispute in which a “battle of the experts” could arise.

One example of a case alleging fraud is that of *Aryeh v. Christie’s Int’l*.²⁶³ The plaintiff in the case, Eskandar Aryeh, purchased a Faberge imperial egg for \$250,000 in 1977, the highest price paid for such a work at the time.²⁶⁴ When he beheld the egg for the first time, however, Aryeh refused to accept the work, and he

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Jáuregui, *supra* note 255, at 1966–70 (describing how there is no formal organization that accredits authenticators, but several competing organizations including the International Society of Appraisers, American Society of Appraisers, and College Art Association of America do offer relevant certifications). *See supra* text accompanying notes 255–56.

²⁶¹ *Id.*

²⁶² *See id.* at 1965.

²⁶³ *Aryeh v. Christie’s Int’l*, Index no. 1030/86 (N.Y. Sup. Ct. 1986).

²⁶⁴ Clark, *supra* note 23, at 19.

communicated to Christie's—the auction house through which he purchased the egg—that it did not conform to the quality of Carl Fabergé's workshop.²⁶⁵ Christie's filed suit against Aryeh, but when the auction house provided an additional letter of certification from A. Kenneth Snowman, a renowned Faberge egg expert, that the work was authentic, Aryeh settled the suit, paying full-price for the egg and covering Christie's legal costs.²⁶⁶ About a decade later, in 1985, Aryeh sought to sell the egg through Christie's, but on the eve of the sale, the same Faberge egg expert, Snowman, declared the work inauthentic.²⁶⁷ Aryeh sued Christie's for fraud based on the 1977 sale, with alleged damages of up to \$37 million.²⁶⁸ The auction house settled for an undisclosed sum prior to trial.²⁶⁹

A quarter of a century after settling with Aryeh, Christie's was embroiled in another authentication dispute regarding alleged fraud.²⁷⁰ Guido Orsi sued Christie's in 2011 alleging that the auction house had sold him a painting advertised as by Jean-Michel Basquiat, despite knowing that the work was not authentic, and that Christie's had negligently misrepresented the authenticity of the work to him during the sale.²⁷¹ In 1990, Tony Shafrazi Gallery, Inc. purchased the painting from Christie's for \$242,000, which had represented the painting to be an original work.²⁷² The gallery subsequently sold the work to Orsi for \$185,000.²⁷³ In 2006, Orsi sought an authentication certificate from a Basquiat authentication committee, which informed him that the work was a counterfeit.²⁷⁴ In his case, Orsi presented evidence that Gerard Basquiat, the artist's father, and another representative had viewed the painting before its original sale at Christie's and described the painting as “not right.”²⁷⁵ Christie's argued that Basquiat's father had never expressed his concerns to Christie's before its original sale.²⁷⁶ The reviewing court granted Christie's motion to dismiss, finding that the plaintiff had failed to show a triable issue of material

²⁶⁵ See *id.*; see also Gordon M. Henry, *Rotten Egg*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,143038,00.html>.

²⁶⁶ Clark, *supra* note 23, at 19–20.

²⁶⁷ *Id.* at 20.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See *Tony Shafrazi Gallery, Inc. v. Christie's, Inc.*, No. 112192/07, 2011 WL 6002677 (N.Y. Sup. Ct. Nov. 22, 2011), *aff'd* 955 N.Y.S.2d 875 (2012).

²⁷¹ See *id.*

²⁷² *Id.* at 1.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1–2.

²⁷⁵ *Tony Shafrazi Gallery*, 2011 WL 6002677, at 2.

²⁷⁶ *Id.*

fact.²⁷⁷ Further, Christie's carried its own burden to show it had no knowledge or intent to defraud.²⁷⁸ The finding was upheld on appeal.²⁷⁹

In 2009, Christie's main rival in the art market, Sotheby's, faced a more convoluted lawsuit alleging negligence and breach of contract, stemming not from the auction house's improper authentication of a work, but rather from a connoisseur's unqualified attribution, announced in public only a year after the painting passed through Sotheby's hands at auction.²⁸⁰ The suit, brought in London, involved plaintiff Lancelot Thwaytes, who had suspected that the painting he inherited from his father's cousin was a genuine Caravaggio.²⁸¹ In 2006, Thwaytes had contacted Sotheby's to discuss different ways of researching the painting to determine if it was a genuine Caravaggio.²⁸² Thwaytes asserted he discussed using X-rays, which had helped authenticate another Caravaggio work, and that the Sotheby's representative stated that an infrared test would be done.²⁸³ The Sotheby's representative recalled stating that X-rays were not commonly done and claimed he was not aware of what an infrared test would entail, thus could not have suggested performing one.²⁸⁴ Sotheby's in fact used ultraviolet light, connoisseur opinions, and X-rays to evaluate the work, determined it was not genuine, and the work was sold for £42,000 in 2006.²⁸⁵ The work was gifted to a renowned Caravaggio connoisseur Sir Dennis Mahon, who proclaimed the work a genuine Caravaggio a year later, after he had performed certain cleaning, advanced imaging, and research of the work himself.²⁸⁶

Thwaytes sued Sotheby's, alleging negligence and breach of contract.²⁸⁷ The English High Court ruled for Sotheby's, finding that the auction house had not breached the ordinary standard of care due to its clients in carefully reviewing and preparing the work for sale.²⁸⁸ The court rejected imposing a higher standard of care due to Thwaytes's specific interest in certain tests being carried out or belief that the

²⁷⁷ *Id.* at 9.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Thwaytes v. Sotheby's* [2015] EWHC 36 (Ch).

²⁸¹ *Id.*

²⁸² *Id.* at ¶35.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Thwaytes*, [2015] EWHC 36, at ¶3, 35, 40–45.

²⁸⁶ *Id.* at ¶56–59.

²⁸⁷ *Id.* at ¶67.

²⁸⁸ *Id.* at ¶68.

work was genuine.²⁸⁹ Instead, the court found that Sotheby's was entitled to rely on its own and not outside experts and used sufficient care in its review of relevant X-rays.²⁹⁰ The court found that the auction house had no obligation to carry out infrared imaging.²⁹¹ Little of the court's analysis focused on Thwaytes's contract claim, as no issues regarding contract interpretation or validity were raised in the hearing before the court.²⁹²

4. *Continued Influence of the Artist*

While uncommon, in some circumstances the continued influence of an artist and their heirs poses a risk to even the most rigorous and unimpeachable of authentications, as some foreign jurisdictions permit the artist's moral rights to continue even after an artist's death.²⁹³ One example of such a circumstance occurred in 1989 when French citizen Jean Fabris disrupted auctions for the works of Maurice Utrillo at Christie's and Sotheby's in London, shouting "fake, fake" when the artist's works came up for sale.²⁹⁴ While this disruption appears innocuous, it was actually legally significant, as "Fabris, a close friend of Utrillo's deceased widow, inherited from her the artist's 'moral rights,' including the 'right of paternity,' that is, the legal right to claim or disclaim authorship."²⁹⁵ Therefore, from a formalist legal perspective, any painting that Fabris characterized as "fake" became just that—Fabris held the power to disclaim the artist's association with his works.²⁹⁶ While "the right to claim authorship is absolute and unqualified under most moral rights legislation . . . moral rights statutes generally require [a] 'just and valid reason' for disclaiming authorship."²⁹⁷ In the case of Fabris's disclaimer of these Utrillo

²⁸⁹ *Id.* at ¶68–71.

²⁹⁰ *Thwaytes*, [2015] EWHC 36, at ¶166.

²⁹¹ *Id.*

²⁹² *Id.* at ¶67.

²⁹³ In the United States, moral rights are relatively limited in scope, applying only to visual works and encompassing only a right to attribution and integrity of the work. *See* 17 U.S.C. § 106A(a)(3). In the U.S., these rights expire upon the artist's death. 17 U.S.C. § 106A(d). This is not the case in other jurisdictions, such as in France, where moral rights continue with the artist's heirs. *See* Code de la Propriété Intellectuelle [C. Prop. Intell.] [Intell. Prop. Code] arts. L121-1–L121-9 (Fr.); *see also* Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law 92-597 of July 1 1992 Relating to the Intellectual Property Code], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 3, 1992, Annex.

²⁹⁴ Steven M. Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 WIS. L. REV. 595, 631 (1991). *See also* Jonathan Randal, *Charges of 'Fake' Paintings Disrupt Christie's Auction*, WASH. POST, Apr. 6, 1989, at B2.

²⁹⁵ Levy, *supra* note 294, at 631.

²⁹⁶ *Id.* at 631 n.199.

²⁹⁷ *Id.* at 632.

paintings, his “just and valid reason”²⁹⁸ was that he was” [d]etermined to expose the hundreds of fake Utrillos in circulation[.]”²⁹⁹ While Fabris’s disclaimer of these works has not been challenged in court,³⁰⁰ the incident demonstrates that the very insinuation that works are forgeries can have drastic consequences for prospective buyers or current owners.

5. *Lingering Uncertainty: Discovering Unsuspecting Forgeries*

Although a rare occurrence in the art world, there are occasions when a painting is presumed to be authentic, comes from a reputable collection, has a relatively solid provenance, and yet is later discovered to be a fake. Some of these risks are unforeseeable—no reasonable amount of due diligence on the part of the art owner could have prevented them, while others could have been avoided had more advanced technology or increased oversight existed at the time of the authentication.

This is not to say that forgeries in and of themselves are rare: a 2014 estimate by Switzerland’s Fine Art Expert Institute concluded that approximately half of all art in the art market is forged or misattributed.³⁰¹ Shockingly, the Institute’s chief Yann Walther called this estimate “likely on the conservative end of the spectrum.”³⁰² Indeed, estimates of the percentage of forgeries included in the collections of major art museums worldwide range wildly, but the general consensus is that a sizable portion of museum holdings are fake. Art historian and forgery expert Noah Charney, for example, has reported “often hear[ing] the statistic that 10 percent of the art in museums is fake[,]”³⁰³ while a 2011 article from the United Kingdom claimed that “[a] reasonable estimate might be that at least 20 per cent [sic] of the paintings held by [British national] museums, some up on the walls, many

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 631.

³⁰⁰ Levy, *supra* note 294, at 631.

³⁰¹ *Over 50 Percent of Art Is Fake*, ARTNET (Oct. 13, 2014), <https://news.artnet.com/market/over-50-percent-of-art-is-fake-130821> [<https://perma.cc/6BR7-VZCY>]. A work that is knowingly misattributed, while not a fake, would still be considered a forgery insofar as it or its provenance were modified to render such a conclusion or misattribution inevitable. It is for that reason that many statistics on art fraud aggregate the two matters. For a further discussion of the difference between a fake and a forgery, see *supra* note 19.

³⁰² *Id.*

³⁰³ Noah Charney, *The Secret Lives of Works of Art: What Percentage of a Museum’s Holdings Are Likely to Be Fakes?*, SALON (Apr. 2, 2017, 10:00 PM), <https://www.salon.com/2017/04/02/the-secret-lives-of-works-of-art-what-percentage-of-a-museums-holdings-are-likely-to-be-fakes/>.

others in the vaults, will no longer be attributed to the same painter 100 years from now.”³⁰⁴

An art scandal like no other arose on March 4, 2016, when French authorities seized and later destroyed the panel painting *Venus*, which was previously attributed to German Renaissance painter and printmaker Lucas Cranach the Elder.³⁰⁵ At the time, the painting was in the collection of the Prince of Liechtenstein and was being exhibited at the Caumont Centre d’Art in Aix-en-Provence.³⁰⁶ Whereas the work had been purchased for €7 million just a few years before, an investigation by French authorities confirmed it was a forgery: “[a]nalysis of the *Venus* . . . [detected] artificially-aged paint on a panel created 200 years too late for the German Renaissance painter[.]”³⁰⁷ The forgery was only discovered due to an anonymous tip, which informed police that the work was completed by a highly advanced forger.³⁰⁸ In accordance with French law, the painting had to be destroyed.³⁰⁹

A similarly jaw-dropping scandal erupted in New York City in 2011 when the over 160-year-old and formerly venerable Knoedler & Co. Gallery abruptly closed after facing several high profile lawsuits against its owner and president, Ann Freedman, for selling forged works.³¹⁰ Suspicions first arose when hedge fund manager Pierre Lagrange, who had purchased a Jackson Pollock painting from the Knoedler for \$17 million, discovered that neither Sotheby’s nor Christie’s would sell his painting, because the work was not included in Pollock’s *catalogue raisonné*.³¹¹ Lagrange ordered forensic testing of the work, which “revealed the anachronistic Pigment Yellow 74, not commercially available during Pollock’s lifetime.”³¹² When Lagrange demanded a refund from Freedman within forty-eight hours of his

³⁰⁴ Michael Glover, *The Big Question: How Many of the Paintings in Our Public Museums Are Fakes?*, INDEPENDENT (Oct. 23, 2011), <https://www.independent.co.uk/arts-entertainment/art/news/big-question-how-many-paintings-our-public-museums-are-fakes-1946264.html>.

³⁰⁵ RAGAI, *supra* note 3, at 36.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 38.

³⁰⁸ *Id.* at 37–38.

³⁰⁹ *See id.*; *see also supra* text accompanying note 231.

³¹⁰ RAGAI, *supra* note 3, at 88. A 2021 documentary released on Netflix, *Made You Look*, discusses the Knoedler gallery scandal as well. Michael Rechtshaffen, Review, ‘*Made You Look: A True Story about Fake Art, a fascinating \$80 million con*,’ L.A. TIMES (Feb. 23, 2021), <https://www.latimes.com/entertainment-arts/movies/story/2021-02-23/review-made-you-look-true-story-fake-art>.

³¹¹ RAGAI, *supra* note 3, at 88.

³¹² *Id.*

discovery, the scandal broke.³¹³ Despite the high number of cases filed against the gallery, only Domenico and Eleanore de Sole's case survived to go to trial.³¹⁴ In 2004, the de Soles had purchased a red and black painting by Mark Rothko from the gallery for \$8.3 million.³¹⁵ Forensic testing confirmed that the painting was a forgery.³¹⁶ At trial, experts "unleashed a mountain of embarrassing evidence and incriminating testimony describing how dozens of collectors . . . were deceived into buying forged artworks attributed to Abstract Impressionist masters."³¹⁷ Freedman "wittingly or unwittingly ignored" what has been described as "a string of red flags" throughout her tenure at the gallery.³¹⁸ Before a verdict was reached, the parties settled for an undisclosed sum.³¹⁹ Nevertheless, the Knoedler scandal and Freedman's "irrational" decisions in "weigh[ing] information selectively, giving greater weight to facts that supported her belief and less weight to facts that cast doubt on the provenance of the paintings," created a stigma that still stains the American art market.³²⁰

B. Risks to Authenticators

As a general rule, "[t]here is relatively little litigation in the art market[.]"³²¹ That generality notwithstanding, when an authentication goes awry, the party responsible for the authentication opinion may face legal action. As detailed below, the standard system of risk allocation typically leaves the buyer bearing the risk when a transaction goes wrong; thus, the injured party is at best only partially protected from risk of loss. In such circumstances, the aggrieved party—usually the buyer—can bring suit against the authenticator.³²² Such a party could sue the independent authenticator directly, or sue both the authenticator and the auction house if the authenticator were under contract with the auction house and not

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 85.

³¹⁶ RAGAI, *supra* note 3, at 86.

³¹⁷ *Id.* at 88.

³¹⁸ *Id.* at 88–89.

³¹⁹ *Id.* at 89.

³²⁰ *Id.* at 91.

³²¹ Swift Edgar, *Standing by Your Man Ray: Troubles with Antitrust Standing in Art Authentication Cases*, 37 COLUM. J.L. & ARTS 247, 264 (2014).

³²² For examples, see *supra* Part III(A)(3). Authenticators make statements about the authenticity or attribution of a piece of art, thus expose themselves to liability where these authentications go awry.

otherwise indemnified.³²³ An auction house would usually be sued directly.³²⁴ Further, because an art authenticator's opinion continues to influence a work's value long after her opinion is rendered, "[a]rt authenticators exert continual power over artwork, meaning that owners of art may be subjected to adverse determinations of authenticity long after the statute of limitations has run for causes against the seller."³²⁵ Depending on the discovery rules and applicability of laches in the relevant jurisdiction, art authenticators can have litigation spring up related to an authentication that they made weeks, years, or even decades before with little to no notice.³²⁶

In general, authenticators do not have special protections under law. There have been some limited attempts by states to provide legal protection to art authenticators, but none have successfully done so thus far. The New York State Senate passed a bill in 2015 that "renders litigation against authenticators more difficult, and can considerably reduce the legal costs when authenticators are faced with a lawsuit."³²⁷ While this bill has passed state Senate votes in every legislative session since 2015, it has yet to be introduced for a vote in the State Assembly.³²⁸ The 2019–2020 legislative session version of the bill would require plaintiffs bringing cases against art authenticators to specify particular facts when pleading and prove elements of their claim by clear and convincing evidence, as well as entitle the defendant-authenticator to recover reasonable attorneys' fees if she prevails.³²⁹

The lack of significant statutory protections for art authenticators is likely linked to past court treatment of art transactions on the secondary market: "[t]raditionally, the principle of caveat emptor, or 'buyer beware,' was applied in auction transactions."³³⁰ That said, as auction houses increasingly sell pieces to the general public, not just institutions and expert buyers, and demand larger fees, courts

³²³ See Amineddoleh, *supra* note 50, at 427–30; Skolnik, *supra* note 21, at 331–37; DuBoff, *supra* note 38, at 1002–16. See also *supra* Part III(A)(3).

³²⁴ See Amineddoleh, *supra* note 50, at 427–30; Skolnik, *supra* note 21, at 331–37; DuBoff, *supra* note 38, at 1002–16. See also *supra* text accompanying notes 310–20.

³²⁵ Edgar, *supra* note 321, at 270–71.

³²⁶ See *id.*

³²⁷ RAGAI, *supra* note 3, at 96.

³²⁸ *Id.* at 97; see also A107, 242d Leg., 1st Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/A107> (demonstrating a bill to provide additional protections to art authenticators has been introduced in New York State Senate sessions since the 2013–2014 session and through to the 2020–2021 session).

³²⁹ A107, 242d Leg., 1st Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/A107>.

³³⁰ Medelyan, *supra* note 228, at 6–7.

have started to change their views.³³¹ Today, auction house commissions add a premium of about 25% to most buyers' purchases.³³² In light of this change, some "courts have altered their views regarding the buyer-auctioneer relationship," to impose greater protections for buyers transacting through these intermediaries.³³³ Auction houses therefore have a substantial interest in the authentication of works that they auction.³³⁴

Auction houses have notably been responsible for erroneous authentication opinions in the past. To authenticate one 1848 George Inness painting, for example, "Sotheby's sent a black and white photograph of the artwork to an expert, who wrote 'yes' on the back of the photograph and sent it back to Sotheby's."³³⁵ The painting was sold as an original work, but was later determined to be a forgery.³³⁶ Today, such a result would likely open up Sotheby's to litigation, on a theory that the auction house owed the buyer more care in rendering its authentication decision.

Despite the risks that auction houses face in authenticating a work, many large auction houses guarantee authorship or authentication to some extent. "In 1973, Sotheby's announced that it would guarantee the authorship of all post-1870 works and the authenticity of pre-1870 works."³³⁷ To cap its liability exposure, Sotheby's imposed some limits on its commitment, namely that its guarantee: (1) "extends only to the heading in bold type listed in the catalog according to the technical terminology system of attribution established by the auction house[.]" and (2) "is valid for only five years from the date of sale, regardless of when the discovery of lack of authenticity is made."³³⁸ Within this framework, Sotheby's appears to have presumed that it is exposed to an acceptable level of risk.³³⁹ Similarly, Christie's warrants the authenticity of works it sells for a period of five years from the date of sale, provided that: (1) this warranty extends only to aspects of the description of the work published in all caps in the auction catalogue, (2) the warranty does not extend to works whose authenticity could only be brought into question by scientific means

³³¹ *Id.*

³³² *Id.* Sellers sometimes pay commissions but not always; their commission may be waived by the auction house to induce them to sell goods through that intermediary. *Id.*

³³³ *Id.*

³³⁴ For a further discussion of these sorts of conflicts of interest as they affect various art market participants, see *supra* Part III(A)(1).

³³⁵ Medelyan, *supra* note 228, at 10.

³³⁶ *Id.*

³³⁷ Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 531 (1988).

³³⁸ *Id.*

³³⁹ *See id.*

not yet available at the time of the sale, and (3) the buyer provides the written opinion of two independent experts that the lot is not authentic, among other requirements.³⁴⁰

The risks faced by independent authenticators and auction houses vary to some degree in a situation where an authentication has gone awry. Auction houses render more authentication decisions than any single authenticator, and thus aggregate a greater amount of total risk exposure.³⁴¹ At the same time, these institutions are deeper-pocketed entities than individual experts. Moreover, auction houses make more than a single representation to a client: they can face liability for negligently warranting the authenticity of a work merely by describing it in a certain way in their catalogues.³⁴² By contrast, the very specific opinion that an independent authenticator provides may be less likely to result in liability. “An art expert is not necessarily negligent because he arrives at a conclusion that later is challenged by other experts or ultimately proves to be wrong[;]” rather, “[h]e is negligent only if the error is due to a failure to use the care and skill ordinarily used by other experts in similar circumstances.”³⁴³ Furthermore, authenticators face a lower level of risk than auction houses merely by virtue of the fact that “[s]cientific tests can never prove that a work is genuine, only (sometimes) that it is not genuine.”³⁴⁴ Nevertheless, there have been several notable cases in which an independent authenticator has faced allegations of fraud or negligence stemming from a faulty authentication.³⁴⁵

³⁴⁰ *New York Conditions of Sale Buying at Christie’s*, CHRISTIES, § E(2)(a), <https://www.christies.com/buying-services/buying-guide/conditions-of-sale> (last visited Feb. 15, 2021).

³⁴¹ In 2018, for example, Christie’s sold \$7 billion worth of art and objets d’art, up 6% from the previous year, with 67 paintings sold at prices over £10 million. *Christie’s Continues to Lead the Global Art Market*, CHRISTIE’S (Feb. 7, 2019), <https://www.christies.com/features/Christies-continues-to-lead-the-global-art-market-9681-1.aspx>. This is compared to “Professor Frederick Hartt, a world-renowned specialist on Michelangelo, [who] testified in 1989 that in his entire career, which spanned decades, he had only been asked to make attributions on about twenty occasions.” Levy, *supra* note 294, at 602 (citing *Hartt v. Newspaper Publ’g P.L.C.* [1989] (unreported) (Eng. & Wales)).

³⁴² See, e.g., text accompanying notes 270–79.

³⁴³ Levy, *supra* note 294, at 605.

³⁴⁴ *Id.* at 612.

³⁴⁵ RAGAI, *supra* note 3, at 71–76. One stark example of the risks that authenticators face is the recent criminal case brought against art authentication expert Elena Basner for forgery. *Id.* Basner’s 2014 arrest was branded “an insult to ‘the whole Russian intellegensia[.]’” by Hermitage Museum Director Mikhail Piotrovsky. *Id.* at 71. The allegations against Basner—of which she was quickly acquitted in May 2016—had their roots in Basner’s 2009 authentication of a gouache painting as attributed to Boris Grigoriev, entitled *In A Restaurant*. *Id.* at 72. Basner and her colleague, Yulia Solonovich, agreed after inspection that the work appeared genuine; unbeknownst

C. Remedies for Bona Fide Purchasers

“[T]he art market is one of the largest (if not *the* largest) unregulated markets.”³⁴⁶ Surprisingly, despite the sky-high prices of artworks, some art purchasers have little to no knowledge of best practices when it comes to buying art.³⁴⁷ “The vast majority of purchases of artworks are impulsive, with buyers shockingly uninformed about the nature of the object to be purchased, its provenance, or its physical condition.”³⁴⁸ The lack of informed buyers, coupled with the dwindling number of experts willing to authenticate art, “has made today’s art market the ‘[W]ild [W]est’ for fraud.”³⁴⁹ The statistics of fraud in the art world are staggering. For example, it has been presumed that about 60% of art on the market today has insufficient, unverifiable, or otherwise suspect provenance.³⁵⁰ It is only logical then that individuals, museums, and galleries across the country own fraudulent pieces and must arm themselves with legal remedies in case of faulty authentication. Furthermore, due to the high risk of purchasing a fraudulent piece, buyers interested in investing in expensive art should make hiring their own independent authenticity expert a priority.

There are a number of legal protections and remedies available in the United States to the good faith purchaser who falls victim to a forgery by mistake or misrepresentation.³⁵¹ Common law contract rules provide some protection for consumers who are taken advantage of by more sophisticated sellers.³⁵² Institutional buyers like museums and galleries may also be victims of fraudulent schemes and can seek out similar protections.³⁵³ In addition to common law contract protections, buyers—sophisticated or not—“unfairly injured in an art sales transaction may find useful legal recourse in tort law, Federal and State Penal statutes[,]” and in

to the two authenticators, “a few months earlier, the Grabar Restoration Center . . . had ruled it as a fake through the scientific detection of anachronistic phthalocyanine pigments[.]” *Id.*

³⁴⁶ Aminatedoleh, *supra* note 50, at 424.

³⁴⁷ See, e.g., Clark, *supra* note 23, at 20–21.

³⁴⁸ *Id.* at 20.

³⁴⁹ Bonner, *supra* note 20, at 21. While it may be surprising to many that individuals are willing to purchase a multimillion-dollar work of art on impulse, the context of these sales—generally, in a well-respected gallery or through a dealer of known reputation, and with the implicit and explicit assurances of the gallery owner or dealer of the work’s authenticity—to some degree explain the ease with which some individuals make these sorts of purchases. *See id.*

³⁵⁰ See Harry Hillman-Chartrand, *Investment Protection: Reducing Financial Loss from Fraudulent Art*, 14 J. CULTURAL ECON. 83, 89 (1990).

³⁵¹ Aminatedoleh, *supra* note 50, at 427–30.

³⁵² *Id.* at 429.

³⁵³ RAGAI, *supra* note 3, at 87–93.

legislation enacted in a few jurisdictions prominent in today's art market.³⁵⁴ New York and California stand out as states with additional legal protections for art buyers.³⁵⁵

However, in most circumstances, the currently available legal remedies do not adequately protect the interests of good faith purchasers of fine art. Additional statutory protections, like those adopted in New York and California, would help protect bona fide buyers from the risk of loss associated with fraudulent or negligent authentication. Additional legal protections of this nature would encourage independent authenticators and auctions houses to take more care in rendering their opinions about the authenticity of a work, as well as help deter criminal actors from undertaking fraudulent schemes. Thus, a proliferation of state-level legislation like that enacted in New York state, discussed *infra*, would be a net positive for all parties involved in the art market. At present, the Uniform Commercial Code comes the closest to providing a national and uniform means of protection for purchasers of fine art and other chattel, but it is inadequate to provide full protection in the ever-shifting world of art authentication. As laid out *infra*, none of the current protections available to good faith purchasers are on their own sufficient, though the New York state legislation provides a case study on some potential improvements.

1. *Uniform Commercial Code*

The Uniform Commercial Code ("U.C.C.") "is the most important legal instrument for ensuring the propriety of transactions involving artworks[,] as it "offers powerful mechanisms to discourage misrepresentation in the case of paintings."³⁵⁶ In general, the U.C.C. aims "at protecting the sanctity and fairness of business dealings[,] specific to transactions for chattel, such as paintings, sculptures, and other tangible works of art."³⁵⁷ The U.C.C. is particularly useful in the commercial art market, which is filled with many sophisticated sellers and highly inexperienced buyers, as courts have interpreted it to afford special protections for nonprofessional buyers.³⁵⁸ A nonprofessional buyer is characterized in *Balog v.*

³⁵⁴ Clark, *supra* note 23, at 25–26.

³⁵⁵ *Id.* at 26.

³⁵⁶ *Id.* at 26–27.

³⁵⁷ *Id.*

³⁵⁸ *See id.* at 20.

*Center Art Gallery-Hawaii*³⁵⁹ as someone who buys art that is not “so valuable as to warrant buyer-financed authentication[.]”³⁶⁰

The U.C.C. provides several legal remedies for good faith buyers of fraudulent art. U.C.C. § 2-313 protects buyers against a seller’s express warranties, defined as “any promise or affirmation of fact made by the seller, or any description, . . . if it forms part of the basis of the bargain.”³⁶¹ Therefore, if a dealer makes a statement of fact as to a work’s authenticity that constitutes a warranty and the buyer relies on this representation to purchase a work of art, the buyer can seek the protections of U.C.C. § 2-313 when the seller’s statement later turns out to be false.³⁶² A prima facie case for breach of express warranty requires for a plaintiff to prove five elements: “a statement of facts by the seller; the buyer’s reliance upon this statement; the seller’s making [of] this statement when the bargain was struck; proximate cause; and injury suffered as a result of the buyer’s reliance on the seller’s statement.”³⁶³ Because “an express warranty may be created regardless of the seller’s intention to make such a warranty[.]” what a dealer may think is “mere opinion” can nonetheless be treated as an express warranty.³⁶⁴ Moreover, the seller’s “good faith is no defense to a false assertion.”³⁶⁵ Breach of express warranty occurs when the delivery of the chattel is made, unless the warranty “explicitly extends to future performance of the goods and the discovery of the breach must await the time of such performance.”³⁶⁶ The court in *Balog* reasoned that artwork does not perform in the traditional sense of goods covered by the U.C.C., and since any test for authenticity is often deferred until a future sale, “the initial buyer must rely on representations by the seller concerning the certification of the artwork.”³⁶⁷ Such representations “create an explicit ‘warranty of future performance,’ sufficient to toll the applicable statute of limitations.”³⁶⁸

³⁵⁹ *Balog v. Ctr. Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1558–59 (D. Haw. 1990).

³⁶⁰ Clark, *supra* note 23, at 21–23. The buyers in *Balog*, a couple on vacation in Hawaii, purchased what they believed were original works by Salvador Dalí. *Id.* The couple relied on representations by the art gallery including notices entitled “Confidential Appraisal - Certificates of Authenticity[.]” but the works turned out to be fakes and resulted in a net financial loss of \$36,200. *Id.*

³⁶¹ Jáuregui, *supra* note 255, at 1979.

³⁶² *Id.*

³⁶³ Drew N. Lanier, *Protecting Art Purchasers: Analysis and Application of Warranties of Quality*, 12 CARDOZO ARTS & ENT. L.J. 191, 192 (1994).

³⁶⁴ Clark, *supra* note 23, at 27–28.

³⁶⁵ *Id.* at 28.

³⁶⁶ *Id.* at 21 n.55 (citing U.C.C. § 2-314).

³⁶⁷ *Id.* at 22–23.

³⁶⁸ *Id.* at 23 (citing *Balog v. Ctr. Art Gallery-Hawaii*, 745 F. Supp. 1556, 1573 (D. Haw. 1990)).

However, the default protections available to buyers within U.C.C. § 2-313 may be modified by contract. Many dealers include disclaimers in all correspondence and contracts with buyers. While permissible, U.C.C. § 2-316 views such disclaimers as a “repugnant” practice and affords them no effect unless “they are clearly and prominently displayed, *and* the dealer has made no assertion of authenticity.”³⁶⁹ However, buyers may be unaware of these requirements for disclaimers and avoid litigation based on the mistaken belief that they have disclaimed their rights to any warranty claim.

Further, U.C.C. § 2-314 establishes an implied warranty of merchantability.³⁷⁰ “[A]n implied warranty of merchantability springs into existence when goods in question are purchased from a seller who is a ‘merchant with respect to goods of that kind.’”³⁷¹ This warranty is particularly useful when buyers are dealing with prominent dealers or galleries who are clearly merchants dealing in “goods of that kind.”³⁷² It likely does not apply to sales by private individuals.³⁷³ Moreover, to make use of these protections, the buyer must prove that the forged piece she received is not “fit for its ordinary purpose,” which could be difficult for an art collector to prove as the “ordinary purpose” of any art is hard to identify concretely and a piece could still fulfill the “ordinary purpose” of aesthetic pleasure despite being fraudulent.³⁷⁴

In sum, the U.C.C. protections for good faith buyers, while promising, remain incomplete. Under U.C.C. § 2-313, sellers can modify express warranties through contract, and plaintiffs struggle to prove a prima facie case for an implied warranty of merchantability under U.C.C. § 2-314. The inadequacy of U.C.C. remedies is especially stark where buyers lack adequate knowledge about their rights and are likely to rely on a seller’s representations of such. Thus, rather than protecting unsophisticated good faith purchasers, the U.C.C. merely enforces the already-extant information disparity in such relationships, often to the detriment of individual purchasers.

2. *Tort Claims*

If the U.C.C. does not provide sufficient protection, another avenue for a duped good faith purchaser is to sue for fraud. To prove fraud, a plaintiff needs to show “reliance on the defendant’s misrepresentations, and that this reliance caused

³⁶⁹ Clark, *supra* note 23, at 28.

³⁷⁰ *Id.* at 29. *See also* U.C.C. § 2-314 (amended 2003).

³⁷¹ Clark, *supra* note 23, at 29 (citing U.C.C. § 2-314(1)).

³⁷² Skolnik, *supra* note 21, at 336 (quoting U.C.C. § 2-314(1) (1979)).

³⁷³ *Id.*

³⁷⁴ *Id.* at 336–37 (quoting U.C.C. § 2-314(1)(c) (1979)).

injury.”³⁷⁵ Yet, “courts have held that a dealer cannot be guilty of fraud for representing information that he himself *reasonably* believes.”³⁷⁶ Accordingly, the buyer has the burden of proving that the dealer had actual knowledge that the artwork was not authentic.³⁷⁷ Most of the time, the dealer is able to “convincingly assert that he, too, was deceived.”³⁷⁸ Similarly, a dealer may avoid liability by showing that he lacked actual knowledge sufficient for a finding of fraud.³⁷⁹ Thus, the knowledge requirement for a fraud claim can be a sticking point for a bona fide buyer seeking to redress a loss from authentication.

Owners may also sue for “disparagement,” also known as “injurious falsehood,” if the defendant makes a derogatory statement about a painting to a third party that causes pecuniary damage.³⁸⁰ To assert a prima facie case, the plaintiff must show: “1. [t]he plaintiff’s interest in the object in question[,] 2. [t]he nature of the derogatory statements made[,] 3. [t]he falsity of the derogatory statements[,] 4. [t]he publication of these statements to a third party (or parties) without the plaintiff’s consent[, and] 5. [a]s a result of the publication, the incurrence of a definite pecuniary loss.”³⁸¹ The plaintiff’s burden to prove disparagement, especially showing the falsity of the defendant’s statement, is not an easy hurdle. In *Hahn v. Duveen*, for example, Judge Black explained that “in order for a plaintiff to recover, she must prove that her property is what she claims it to be, because until she establishes the genuineness of her own property[,] she cannot prove that defendant’s statement regarding its spuriousness was false.”³⁸² In such circumstances, the only route to victory is the plaintiff affirmatively proving that the work that they own is genuine—a tall order, given the limited methods by which a work’s authenticity can be definitively determined.³⁸³

³⁷⁵ Jáuregui, *supra* note 255, at 1977.

³⁷⁶ Amineddoleh, *supra* note 50, at 428.

³⁷⁷ *Id.*

³⁷⁸ *Id.* For one example of such an instance of “willful blindness,” see *supra* text accompanying notes 310–20.

³⁷⁹ *Id.* In the tort context, the term “fraud” should be read not to refer to forgery itself, but rather to the intent-based act of purposefully deceiving another for financial gain. *Cf.* Skolnik, *supra* note 21, at 330–31.

³⁸⁰ MARIE C. MALARO & ILDIKO POGÁNY DEANGELIS, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 434–35 (3d ed. 2012).

³⁸¹ *Id.* at 435.

³⁸² *Id.*; *Hahn v. Duveen*, 234 N.Y.S. 185, 187 (Sup. Ct. 1929).

³⁸³ See *supra* text accompanying note 115.

3. *Contract Law*

Contract law may provide another layer of protection for the good faith purchaser. One potentially applicable principle of contract law is the doctrine of mutual mistake—that is, in some circumstances, a contract cannot be enforced if it is based on both parties’ mistaken belief regarding a material aspect of the bargained for exchange.³⁸⁴ “In contract law, a *material term* is a contract provision that concerns significant issues, such as subject matter, price, quantity, or payment.”³⁸⁵ Specific to transactions in the art market, “a reasonable person would believe that authorship is an important provision of a contract for an artwork.”³⁸⁶ Thus, “[w]here a dealer and a buyer are both mistaken about the attribution, one may be able to successfully assert mutual mistake and void the contract.”³⁸⁷ However, there are several exceptions to the rule of mutual mistake that make this form of redress incomplete. For example, if a contract includes a provision allocating risk to the buyer, or when the buyer is aware of his own limited knowledge but relies on its sufficiency, he cannot seek rescission of the contract for mutual mistake.³⁸⁸ Thus, whether this form of protection applies will depend on the specific provisions of the contract between the parties and the factual context surrounding the sale itself.

4. *Specialized Protections under State Law: New York as a Case Study*

In recent years, several states have enacted specific statutory protections for good faith purchasers of fine art. New York state lawmakers stand out as leading the nation in codifying law to protect the art market and its key players.³⁸⁹ For example, Section 170.45 of New York’s Penal Law has made art forgery, fraudulent misrepresentation, and simulation of antiques all separate criminally punishable offenses.³⁹⁰ In the civil context, Section 13.01 of New York’s Arts and Cultural

³⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 152 (AM. LAW. INST. 1981). More specifically,

[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Id. at § 152(1); *see also id.* at § 154.

³⁸⁵ Amineddoleh, *supra* note 50, at 429.

³⁸⁶ *Id.*

³⁸⁷ *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 152 (AM. LAW. INST. 1981).

³⁸⁸ Amineddoleh, *supra* note 50, at 429–30. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 154 (AM. LAW. INST. 1981).

³⁸⁹ Amineddoleh, *supra* note 50, at 428.

³⁹⁰ Skolnik, *supra* note 21, at 338 (citing N.Y. Penal Law § 170.45 (McKinney)).

Affairs Law “established that when an art merchant, in writing, attributes an artwork to a particular author, it is presumed to be part of the basis of the sale and is deemed to be an express warranty of authenticity,” but this warranty only applies “when a written statement is made by an art merchant and provided to a non-art merchant.”³⁹¹ To determine breach of warranty, Section 13.01 has been interpreted to require the buyer to prove, via preponderance of the evidence, that the merchant’s assertions made at the time of the representation did not have a reasonable basis in fact.³⁹² Likewise, the buyer’s claim regarding reasonable basis in fact should be supported by expert testimony from art professionals.³⁹³

On the whole, New York state’s approach is a move in the right direction. Greater criminal penalties for art market crimes, including art forgery and fraudulent misrepresentation, can have an important deterrent effect by encouraging authenticators to take more care in rendering opinions and by deterring criminal syndicates from entering the art market. Furthermore, stronger default protections for bona fide buyers may make it easier to bring a civil case against authenticators and auction houses that have made erroneous representations as to the authenticity or attribution of a work. Laws like New York’s suggest that authenticators and auction houses will take more care in future authentications or representations to buyers, and similarly suggest that buyers will have viable means to seek redress when authentication goes awry. Several other states including California and Illinois have attempted to follow in New York’s footsteps, passing their own laws to protect the art market.³⁹⁴ Nevertheless, the United States as a whole is still a long way from remedying the murky waters of the art market, even if action by some states demonstrates a trend in a positive direction.

IV

PUBLIC HARMS FROM ART FRAUD

Art fraud is, in many ways, the epitome of white-collar crime, as it involves billions of dollars in discrete transactions over what some have dismissed as an elitist status symbol. However, when art fraud occurs, the harm created affects more than just elite art collectors and private museums. Beyond loss to individual collectors and institutions, “the federal government also loses money as a result of art

³⁹¹ Ameddoleh, *supra* note 50, at 428; *see* N.Y. Arts & Cult. Aff. Law § 13.01 (McKinney).

³⁹² Ameddoleh, *supra* note 50, at 428.

³⁹³ *Id.*

³⁹⁴ Skolnik, *supra* note 21, at 337.

forgery[,]”³⁹⁵ and the public writ large may be less likely to see important works exhibited.

Public harm from art fraud and mistaken authentication can occur in a variety of ways, such as a decline in federal tax revenue. Such a decline results because, at present, there are several tax benefits that apply in the fine arts market. First, “[u]nder [S]ection 170(a) of the Internal Revenue Code, I.R.C. § 170 (1954), individuals who make charitable contributions of art are allowed to deduct the amount of the contribution from their taxable income.”³⁹⁶ Thus, a forged or misattributed work, donated by a high net-worth individual, would allow that individual to claim an oversized or otherwise unmerited tax deduction. Second, “[t]he Internal Revenue Code enables taxpayers to deduct losses suffered due to the destruction or loss of original artwork not covered by insurance.”³⁹⁷ However, in order to obtain this tax deduction, “taxpayers must provide the Internal Revenue Service (“IRS”) with evidence of the amount lost, i.e., the value of the artwork.”³⁹⁸ Therefore, “[i]f the work claimed as the basis of such a deduction is actually a forgery, then the government is granting a deduction for something which is not an original artwork and is losing the value of the tax it would have received on the unoriginal work.”³⁹⁹ Accordingly, the government and the art market should both value originality, because both stand to suffer significant losses due to art forgery.

Beyond the harms to public tax revenue that art fraud can pose, the fear of mistaken authentication may make some parties hesitant about exhibiting their art, lest someone else through research and study determine that it is not authentic. As a baseline matter, only a small fraction of the works in museum collections are on display at any given time: “[t]he Metropolitan Museum of Art in New York, for example, owns two million objects and displays only tens of thousands at a time[,]” while “[a]t the Museum of Fine Arts in Boston, 18,000 objects are on display at any one time, of 450,000 in inventory.”⁴⁰⁰ Similarly, “[t]he Louvre shows 8%, the Guggenheim a lowly 3% and the Berlinische Galerie . . . [displays] 2% of its holdings.”⁴⁰¹ While much of this low exhibition rate is due to limited gallery space,

³⁹⁵ Judith Nelson, *Art Forgery & Copyright Law: Modifying the Originality Requirement to Prevent the Forging of Artworks*, 8 CARDOZO ARTS & ENT. L.J. 683, 698 (1990).

³⁹⁶ Homer, *supra* note 237, at 457 n.1.

³⁹⁷ Nelson, *supra* note 395.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ Geraldine Fabrikan, *The Good Stuff in the Back Room*, N.Y. TIMES (Mar. 12, 2009), <https://www.nytimes.com/2009/03/19/arts/artsspecial/19TROVE.html>.

⁴⁰¹ Kimberly Bradley, *Why Museums Hide Masterpieces Away*, BBC (Jan. 23, 2015), <http://www.bbc.com/culture/story/20150123-7-masterpieces-you-cant-see>.

fear of a mistaken authentication being unmasked may worsen the problem. Indeed, the fear that a work could even be destroyed—as the forgery laws of some jurisdictions require upon discovery and confirmation of a forgery⁴⁰²—proves to be a strong disincentive to loaning out works. Such a reduced exhibition of museum-held art causes the public to suffer, as society is deprived of exposure to art, resulting in a cultural loss.

Ultimately, expanding criminal penalties to address art fraud and improving the ability for private parties to bring civil suits for faulty authentication would do double duty to improve outcomes for both private parties and the public. The increased ease of seeking a civil remedy will incentivize auction houses to improve the rigor of their authentication services. Increased criminal penalties for forgery will put criminal syndicates on notice that they could face significant liability for fraud and misrepresentation in the art market. Combined with stronger statutory protections for bona fide buyers of fine art, such a renewed statutory scheme could finally throw light onto the dark recesses of the art market, increasing buyer confidence and seller accountability.

CONCLUSION

Authentication is a double-edged sword. While authentication drives up the value of paintings, creates publicity that benefits owners, and adds prestige to institutions whose art has been authenticated, it carries inherent risks. Authentication can destroy the value of an artwork as easily as it can bolster it. Examples of this risk range from where the mere question of a work's authenticity made it impossible to sell to where authentication led to a legal duty to destroy the work in question upon proof it was a forgery.

Ultimately, technology can streamline, reinforce, and guarantee the authenticity of a work, but technology can also create the opportunity for nefarious actors to perpetrate fraud on a massive scale. At present, however, legal protections have not yet adapted to ensure adequate protections for authenticators, auction houses, and bona fide buyers to fairly and predictably allocate risk. Until these concerns can be addressed, and the art market adapts ways to address them, the old adage of *caveat emptor*—buyer beware—will continue to be the hallmark of art authentication.

⁴⁰² Cf. *supra* text accompanying notes 305–09 (regarding destroyed Cranach forgery).