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UCLA Entertainment Law Review

Title

Let Them Authenticate: Deterring Art Fraud

Permalink

<https://escholarship.org/uc/item/41d817dg>

Journal

UCLA Entertainment Law Review, 24(1)

ISSN

1073-2896

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Publication Date

2017

DOI

10.5070/LR8241035524

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LET THEM AUTHENTICATE: DETERRING ART FRAUD

Justine Mitsuko Bonner*

ABSTRACT

Forged art is corrupting the art market, a market that has grown more brazenly dishonest as the value of artwork has skyrocketed. Fake art not only harms the financial interests of investors, but it also damages the integrity of the art market, ultimately undermining the historical-cultural record. Yet art fraud is flourishing because art experts are increasingly unwilling to express authentication opinions due to the specter of expensive litigation. This paper examines the historical background of art fraud and the legal protection needed for art experts if rampant art fraud is to be deterred.

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* Lewis & Clark Law School, J.D. (expected May 2018). The author wishes to thank Nick Craven for his patience and for being my foil, Kimiko and Robert Bonner for their encouragement and time, Adair Smith for bringing old connections back together, and Prof. Tomás Gómez-Arostegui for his enthusiasm for my topic and academic guidance.

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Yesterday this picture was worth millions of guilders, and experts and art lovers would come from all over the world and pay money to see it. Today, it is worth nothing, and nobody would cross the street to see it for free. But the picture has not changed. What has?

—Han van Meegeren, at his 1947 trial, speaking about a Vermeer painting he forged¹

INTRODUCTION

Forged art has been corrupting the Western art market ever since artist patronage extended beyond the royal classes and art became accessible to middle class connoisseurs. Over the past several decades, the market for the works of prominent artists has been increasingly infected with fake art, as the prices for certain works skyrocketed to headline-worthy proportions. Despite dips in the economy, prices for such works of art continue to increase, as evidenced in 2014 when Christie’s sold \$745 million worth of contemporary art at the single most expensive art auction in history.² Fake art obviously harms the financial interests of those who invest in the art market. More importantly, though, placing such art into the stream of commerce adversely affects the integrity of the art market and ultimately harms our overall historical and cultural record.³ As the late John Berger stated in *Ways of Seeing*: “No other kind

¹ ROBERT E. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS* 2 (1977).

² Dan Duray, *Christie’s \$745 Million Contemporary Art Sale Is Most Expensive Single Auction in History*, *OBSERVER* (May 13, 2014, 11:54 PM), <http://observer.com/2014/05/christies-745-million-contemporary-art-sale-is-most-expensive-single-auction-in-history>.

³ As explained by Professor Patty Gerstenblith, “only by examining and viewing authentic art works and cultural objects can we truly understand the perspective of the original creator of the work and the historical and cultural context in which the work was created.” Patty Gerstenblith, *Getting Real: Cultural, Aesthetic and Legal Perspective on the Meaning of Authenticity of Art Works*, 35 *COLUM. J.L. & ARTS* 322, 325 n.3 (2012). Prof. Gerstenblith

of relic or text from the past can offer such a direct testimony about the work which surrounded other people at other times. . . . [T]he more imaginative the work, the more profoundly it allows us to share the artist's experience of the visible."⁴ Maintaining the integrity of the art market and preventing the corruption of our cultural history should be the paramount goal of art law.⁵ Yet, as explained below, today's laws and legal system undermine the integrity of the art market by facilitating art fraud.

Twenty years ago, Thomas Hoving, referring to his tenure as Director of the Metropolitan Museum of Art in New York City, warned of the magnitude of the art fraud problem:

In the decade and a half that I was with the Metropolitan Museum of Art, I must have examined fifty thousand works in all fields. Fully 40 percent were either phonies or so hypocritically restored or so misattributed that they were just the same as forgeries. Since then I'm sure that percentage has risen. What few art professionals seem to want to admit is that the art world we are living in today is a new, highly active, unprincipled one of art fakery.⁶

If anything, today's art market is even more susceptible to rampant fraud because of a breakdown in the process of art authentication. Starting decades ago, fewer and fewer knowledgeable and impartial experts and academics are willing to express opinions on the genuineness of art because of the prospect of having to defend themselves in expensive litigation. This, coupled with the potential of a sizeable financial payoff for the successful forger, has made today's art market the "wild west" for fraud.⁷

One way to dramatically reduce art fraud is to assure that knowledgeable art authenticators are brought back into the process. Art attribution scholarship, of course, has value beyond the mere deterrence of art fraud; it is essential to the unfettered study of history through objects and the study of art. Yet without authentication, the art market is especially vulnerable to fraud.

There are at least three legal solutions that might effect change by providing some degree of legal protection for art experts and their authentication opinions. The first places barriers to punishing art authenticators, such as providing greater pleading specificity, a higher burden of proof, and/or requiring a losing plaintiff to pay the defendant art expert's attorney fees. The second cloaks art authenticators with immunity or privilege, thus barring them from liability in potential lawsuits. The third establishes a regime of licensing/accreditation for art authenticators who meet certain standards of education and professionalism, which would qualify them to authenticate works of art in a

is a professor of law at DePaul University and director of their Center for Art, Museum & Cultural Heritage Law. *Id.* at 322.

⁴ JOHN BERGER, *WAYS OF SEEING* 10 (1972).

⁵ *Id.* at 348.

⁶ THOMAS HOVING, *FALSE IMPRESSIONS: THE HUNT FOR BIG-TIME ART FAKES* 17 (1996).

⁷ *See infra* Part III at p. 17.

given field and give them additional legal protections. Each of these approaches will require legislation. This Article examines all three potential solutions.

This Article is organized into six parts. Part I defines art forgery generally and then describes its history and several well-known forgers. Part II outlines the different types of art forgery and an overview of the history of art fraud in the case law. The section begins with the earliest recorded artist-driven legal action against others copying and reproducing artwork during the late Renaissance, continues with early English common law cases, and concludes with American cases selected to frame the current predicament facing art authenticators. Part III describes the various methods used to determine the authenticity of a work of art and explains how one of those methods, stylistic analysis by art experts, is an essential aspect to the process that has been silenced by the threat of litigation. Part IV discusses four different ways the law can be used to protect the opinions of art authenticators. Part V weighs the pros and cons of the different possible legal protections and proposes the optimal legislation for protecting art experts who offer authentication opinions. Part VI explains the model legislation proposed in the appendix.

I. BACKGROUND: ART FORGERY AND FAKE ART

A. *Art Forgery Defined*

Art and law have disparate definitions of forgery No single definition of art forgery exists, and perhaps like the word art itself, a definition cannot be authoritatively made.

— Alexandra Darraby⁸

Merriam Webster's dictionary definition of forgery is "falsely making or copying a document in order to deceive people" or "something that is falsely made or copied in order to deceive people"⁹ An adaption of this colloquial definition to art forgery is copying and selling works of art in order to deceive people. Unlike copying money (i.e., counterfeiting) or forging the payer's name on a negotiable instrument (classic forgery), an art forgery is not necessarily the exact copy of an existing work. A forged work of art is more often done "in the style" of a certain artist and then passed off as an actual, previously uncirculated work of the artist because a copy of a known work is more likely to be discovered than an "undiscovered" work introduced to the public and the market for the first time.¹⁰

⁸ ALEXANDRA DARRABY, ART, ARTIFACT, ARCHITECTURE & MUSEUM LAW § 11:4 (Thompson Reuters 2010).

⁹ *Forgery*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/forgery>.

¹⁰ Denis Dutton, *Art Hoaxes*, in *ENCYCLOPEDIA OF HOAXES* 21 (Gordon Stein ed., 1993).

B. *Types of Art Forgery and Fraud*

Art forgery or art fraud can be divided into three categories. The first is exact copies of an artist's entire work, usually including the forgery of an artist's name or signature as well as authentication documents. The second is more common, encompassing works done "in the style" of a famous artist, represented and sold as her work. The third includes works altered via extra restoration, completion, or other embellishment to increase the value.¹¹ This Article concerns itself with the first two categories.

C. *A Brief Chronology*

In the canon of the history of Western art, it is well-known that the Romans copied Greek statuary. From the Fourth Century B.C.E. onward, the Romans began a period of expansion that included high demand among wealthy Romans for Greek art. In fact, almost no Greek sculpture survives, so nearly all of what is known about Greek art has been discovered from Roman marble and bronze copies of Greek statues taken from molds of the originals.¹² From the Middle Ages until the demise of traditional representative art spearheaded by the Impressionists in the latter half of the 19th century, copying art was standard practice. The majority of artists trained under a master, copied his work and the work of others, and even contributed to works the master signed as his own.¹³

Copying with the intent to deceive first appears in historical records during the Renaissance. Early in his career, Michelangelo copied a Roman sculpture called *Sleeping Eros* and sold it to the cardinal as an original antique. Serendipitously for the cardinal, after Michelangelo became the most famous artist of his time, the piece became more valuable than it would have been as a Roman original.¹⁴

While Michelangelo's cardinal is one of few patrons to benefit economically from being duped by a forgery, the cultural shift during the Renaissance that elevated artists such as Michelangelo set the stage for art forgery. The emergence of the merchant class, their purchasing power, and general philosophical thrust towards beauty and human understanding, gave rise to the growth of art connoisseurship which led, in turn, to the commodification of art.

¹¹ Leonard DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 974 (1973).

¹² *Roman Copies of Greek Statues*, METROPOLITAN MUSEUM ART, https://www.metmuseum.org/toah/hd/rogr/hd_rogr.htm.

¹³ For an overview of forgery in art history, see Leonard B. Meyer, *Forgery and the Anthropology of Art*, in *THE FORGER'S ART 77* (Denis Dutton ed., 1983).

¹⁴ *Could the Masterpiece Be a Fake? Profit, Revenge and 'The Art Of Forgery,'* NAT'L PUB. RADIO (June 23, 2015, 1:45 PM), <http://www.npr.org/2015/06/23/412244490/could-the-masterpiece-be-a-fake-profit-revenge-and-the-art-of-forgery>.

By the 17th century, artists such as Rembrandt and Rubens lived in luxury and dictated taste.¹⁵

More recently, art has become an investment. The growth of democracy and the concurrently expanding economy led to a price explosion in the art market. During the economic boom of the 1980s, certain works of art sold for such incredible prices that these sales made newspaper headlines, leading Robert Hughes, *Time* magazine's respected art critic at the time, to quip: "Art is no longer priceless, it is priceful."¹⁶ Vincent Van Gogh's *Portrait of Adeline Ravoux* exemplifies the dramatic appreciation of a single painting, having sold for \$441,000 in 1966 and then reselling in 1988 for a whopping \$13.75 million, an increase of more than 3000 percent over the original sale price.¹⁷ Extraordinary sale prices continue, and 2015 recorded the two highest prices ever paid at auction: (1) Picasso's *Les Femmes d'Alger* (Women of Algiers) sold for \$179 million in May, and (2) Modigliani's *Nu Couché* (Reclining Nude) sold for \$170 million a few months later.¹⁸

Given that the exorbitant price commanded by an undetected forgery is exactly the same as the original, genuine work, the result is more art fraud. Experts believe that, depending on the period and the painter, between 10 percent and 40 percent of pictures by 'significant' artists are bogus.¹⁹ Art philosopher Denis Dutton, explains why the art market is particularly ripe for fraud:

As much as many other human enterprise, the art world today is fuelled [sic.] by pride, greed, and ambition. Artists and art dealers hope for recognition and wealth, while art collectors often acquire works less for their intrinsic aesthetic merit than for their investment potential. In such a climate of values and desires, it is not surprising that poseurs and frauds will flourish.²⁰

The study of art forgers in the 20th century yields numerous tales of colorful characters. Consider this sampling of their stories:

- (1) Han van Meergeren (1930s and 1940s) is considered one of the best forgers in history. An embittered failed artist, he turned to forgery as way of getting back at the art world. He intentionally culminated his work as a forger when

¹⁵ Raúl Jáuregui, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947, 1954 (1997).

¹⁶ LANEY SALISBURY & ALY SUJO, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* 21 (2009).

¹⁷ *Id.*

¹⁸ Chris Michaud, *Modigliani Nude Sells for \$170 Million, Second-Highest Price Ever Paid at Art Auction*, REUTERS (Nov. 10, 2015, 11:22 PM), <http://www.reuters.com/article/us-art-auction-idUSKCN0SZ0B420151110>.

¹⁹ THOMAS HOVING, *supra* note 6, at 17; Peter Landesman, *As Police and Art Experts Soon Discovered, Forging Masterpieces, as a 20th-Century Master Scam*, N.Y. TIMES (July 18, 1999), <http://www.nytimes.com/1999/07/18/magazine/a-20th-century-master-scam.html?pagewanted=all>.

²⁰ Denis Dutton, *supra* note 10, at 21.

he painted *Christ with the Woman Taken in Adultery* in the style of Vermeer and then released it in a “complicated swindle involving two different layers of lies in order to prevent any suspicion that the sudden appearance of the work from nowhere would have raised.”²¹ Ironically, the painting went on to be hailed as one of Vermeer’s most important works, only to be revealed as a forgery by Van Meergeren himself when he was forced to detail his forgery methods in order to prove that he did not sell valuable Dutch paintings to the Nazis because he had painted the works himself.²²

- (2) Eric Hebborn (1950s) was a skilled artist and forger of old master drawings who wrote a book called the *Art Forger’s Handbook*, a detailed how-to guide on the production of forgeries which has been subsequently used by and found in the homes of many forgers.²³
- (3) Elmyr de Hory (1960s and 1970s) sold over a thousand forgeries to reputable art galleries all over the world. A suave and charismatic Hungarian of unknown origins, he finally received the fame he desperately sought when the press broke the story of his art fraud.²⁴ After learning about de Hory and his story, Orson Welles pursued and formed a relationship with de Hory, introduced him to his circles, and based his final film, *F is for Fake*, on him.
- (4) David Stein (née Henri Haddad) (1960s) was an American forger and art dealer who inspired the drive for more laws preventing art forgery in New York in the late 1960s. He produced 41 paintings in the style of Picasso, Chagall, Matisse, Miro, Braque, Klee, and others. After his arrest in 1967, he pleaded guilty to and served prison time for six counts of art forgery and grand larceny.²⁵ He became so famous as a forger that he continued to paint in jail to prepare for his successful exhibit called “Forgeries by Stein.” The New York state Attorney General sought to enjoin the exhibition and sale on the grounds of public nuisance, but the court rejected the argument, holding that the paintings could not constitute a public nuisance on the mere possibility of the future commission of a crime.²⁶
- (5) John Drewe (1980s) was a debonair conman whose strategy was to deliver low-profile paintings in high volume. Drewe regularly commissioned John Myatt to paint paintings in the style of artists such as Matisse, Klee, and Braque. Drewe then created provenances for Myatt’s paintings by employing methods such as using his friends as pretend “owners” of the paintings,

²¹ THIERRY LENAIN, ART FORGERY: THE HISTORY OF A MODERN OBSESSION 284 (2011).

²² *Id.* at 282.

²³ ERIC HEBBORN, THE ART FORGER’S HANDBOOK (1997).

²⁴ *Elmyr*, NAT’L PUB. RADIO (August 1, 2014), <http://www.npr.org/2014/08/01/337096108/elmyr>.

²⁵ *State v. Wright Hepburn Webster Gallery, Ltd.*, 314 N.Y.S.2d 661 (1970); see also Dutton, *supra* note 10.

²⁶ *Wright Hepburn Webster Gallery, Ltd.*, 314 N.Y.S.2d at 661. The Attorney General was Louis Lefkowitz, who also drafted the 1966 New York Bill designed to protect authenticators. See *infra* Part IV.B.

forging art catalogs, and forging letters between fake owners. Sotheby's sold 14 of Myatt's forged paintings through Drewe.²⁷

- (6) Wolfgang Beltracchi (2010s) was another slick European. He painted and his wife sold the forged work. *Vanity Fair* followed the Beltracchi story closely, reporting that:

One phony Max Ernst had hung for months in a retrospective at the Metropolitan Museum of Art in New York City. Comedian Steve Martin purchased a fake Heinrich Campendonk through the Paris gallery Cazeau-Béraudière for \$860,000 in 2004, and French magazine-publishing mogul Daniel Filipacchi paid \$7 million for a phony Max Ernst, entitled *The Forest*, in 2006.²⁸

The Beltracchis are currently under house arrest in Germany.

- (7) Glafira Rosales (2000s and 2010s) sold the works of Pei Shen Qian, a Chinese national living in Queens, via art dealer Ann Friedman at the Knoedler Gallery in New York City. Rosales fabricated a story about the "David Herbert Collection" and produced approximately 40 works purportedly by Pollock, Rothko, Motherwell, and other prominent 20th-century artists for the gallery to sell.²⁹ Opening in 1852 as an art supply store, the Knoedler Gallery was the oldest and one of the most esteemed galleries in New York City until its closure in 2011 in the wake of this forgery scandal. After serving three months in jail, Rosales' sentencing hearing resulted in three years of supervised release and restitution.³⁰

II. ART FORGERY AND THE LAW

A. *Chronology of Case Law Relating to Art Forgery*

The start of legal actions in connection with forgeries began long ago, soon after artist attribution became important and mass production of works of art became easier. One of the very earliest reports of threatened legal action against forgers was reported by Giorgio Vasari in his seminal 1550 collection of artist biographies entitled *The Lives of the Most Excellent Painters, Sculptors, and Architects*, known colloquially today as *The Lives of the Artists*.³¹ Vasari

²⁷ SALISBURY & SUJO, *supra* note 16.

²⁸ Joshua Hammer, *The Greatest Fake-Art Scam in History?*, VANITY FAIR (Oct. 10, 2012), <http://www.vanityfair.com/culture/2012/10/wolfgang-beltracchi-helene-art-scam>.

²⁹ Michael Schnayerson, *A Question of Provenance*, VANITY FAIR (Apr. 30, 2012), <http://www.vanityfair.com/culture/2012/05/knoedler-gallery-forgery-scandal-investigation>.

³⁰ Colin Moynihan, *Dealer in Art Fraud Scheme Avoids Prison*, N.Y. TIMES, (Jan. 31, 2017), <https://nyti.ms/2jTNP2>. As of Feb. 5, 2017, a couple of Knoedler-related cases are still pending. See also *Ann Friedman Settles Eighth Lawsuit Filed Against Knoedler Galleries over Forgeries*, ARTFORUM (Oct. 20, 2016), <https://www.artforum.com/news/id=64137>; Schnayerson, *supra* note 29.

³¹ See GIORGIO VASARI, *THE LIVES OF THE ARTISTS* (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1991) (1550); see also Guilia Bartum, *The Cult of the Artist, in FAKE? THE ART OF DECEPTION* 12022 (Mark Jones ed., 1990).

reported that Albrecht Dürer made a trip to Venice in 1506 to carry out a lawsuit against Italian engraver Marcantonio Raimoni for producing engraved copies of Dürer's woodcut series *Life of the Virgin*. Copyright protection did not exist at the time, so Dürer only achieved a partial victory: an agreement that Raimoni would not reproduce Dürer's name or monogram on the works he copied.³² In 1511, Dürer added this threatening note in Latin to the tailpieces of his *Life of the Virgin* and *Small Passion* series: "Beware all thieves and imitators of other peoples' labour and talents, of laying your audacious hands upon our work!"³³

1. English Case Law

After the end of the 18th century, art forgery occasionally appears in the records of English cases. The common issue: was the seller's representation of the "original" work of a certain artist the mere expression of the seller's opinion or should the seller be held liable for breach of an express warranty? In one of the earliest cases, *Jendwine v. Slade*, two paintings purchased from Slade were allegedly "copies" and not artist originals as claimed.³⁴ The case involved a battle calling several experts to offer their opinions about the authorship of the paintings, but authenticity was not established one way or the other.³⁵ Foreshadowing the difficulties surrounding authentication, Lord Kenyon stated that:

[I]t was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore or not.³⁶

In *Lomi v. Tucker*, a seller named Lomi sought to recover the agreed sales price of £95³⁷ in a case that revolved around a couple of paintings sold by Lomi to Tucker as original Poussins which, as it turns out, were "not originals, but very excellent copies."³⁸ Tucker refused to pay, claiming that Lomi misrepresented that the paintings were done by Poussin. Lomi countered that, given the low price for the two works, Tucker could not have believed that the paintings were authentic and, therefore, did not rely on Lomi's representations. The jury upheld the verdict for the defendant and relieved Tucker of paying the contract price.³⁹

³² *Id.* at 120.

³³ *Id.*

³⁴ 170 Eng. Rep. 459 (K.B. 1797).

³⁵ *Id.*

³⁶ *Id.* at 460.

³⁷ In 2014, £95 was equivalent to approximately \$11,700.00. *Five Ways to Compute the Relative Value of a UK Pound Amount, 1270 to Present*, MEASURING WORTH, <https://www.measuringworth.com/ukcompare>.

³⁸ 172 Eng. Rep. 587 (K.B. 1829).

³⁹ *Id.* ("[I]t was contended, on the part of the plaintiff, that the price would shew that they

De Sewhanberg v. Buchanan posed a question as to whether there was an express warranty for a painting that was sold as a genuine Rembrandt.⁴⁰ Several witnesses testified for plaintiff De Sewhanberg that the painting was not a Rembrandt and “of no use to a connoisseur in pictures.”⁴¹ The jury determined that there was a breach of a warranty and found for De Sewhanberg for the full amount of the sale price.⁴² De Sewhanberg believed that the painting was an original when he purchased it and relied upon the seller’s representation that it was a “true picture of Rembrandt’s.”⁴³

In *Power v. Barnham*, defendant sold plaintiff four paintings described in the bill of sale as: “Four pictures, Views in Venice, Canaletto, [£]1601” which turned out to be fakes.⁴⁴ The court upheld the jury’s decision that the bill of sale constituted a warranty, specifically distinguishing this case from *Jendwine* on the basis that “Canaletto was a comparatively modern painter and the authority of his works was ascertainable.”⁴⁵

2. American Case Law

Art fraud in American case law includes stories that are as interesting and amusing as the forgers themselves. One of the first reported cases of a suit for damages against an art expert and one of a small number that involve art expert testimony was *Hahn v. Duveen*.⁴⁶ This action for slander of title centered around Sir Joseph Duveen’s declaration that Mrs. Hahn’s inherited *La Belle Fennonière*, purportedly by Da Vinci, was a fake.⁴⁷ Sir Duveen had not seen the painting at the time but was reputed to be “the most spectacular art dealer of all time.”⁴⁸ The case settled when the jury was unable to reach a verdict at the end of a four week trial and a fierce battle of the experts. The trial itself was a spectacle, a “highbrow and lowbrow circus, the smartest show in town.”⁴⁹

Like the English cases, many of the American cases sought damages against a defendant seller or art dealer based on breaches of contract, such as breach of express or implied warranty, and for fraud. Often these cases involved issues relating to whether the relevant statutes of limitations were

were never intended to be sold as originals, which would be of much higher value, and that they were only sold as very good copies.”).

⁴⁰ 172 Eng. Rep 1004 (K.B. 1832).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1004–05. In 2014, £200 was equivalent to approximately \$26,000.00. *Five Ways to Compute the Relative Value of a UK Pound Amount*, *supra* note 37.

⁴⁴ 111 Eng. Rep. 865 (K.B. 1836).

⁴⁵ *Id.*; see also DUFFY, *supra* note 1, at 22.

⁴⁶ 234 N.Y.S. 185 (Sup. Ct. 1929); Jáuregui *supra* note 15, at 1991.

⁴⁷ DAVID L. GOODRICH, ART FAKES IN AMERICA 144 (1973).

⁴⁸ *Id.*

⁴⁹ *Id.*

toll. *Balog v. Center Art Gallery-Hawaii, Inc.*, is an example of this type.⁵⁰ After visiting an art gallery while on vacation, the Balogs purchased a number of paintings allegedly by Salvador Dalí from Center Art Gallery.⁵¹ Years later, when they discovered that the works were fake, the Balogs brought an action for breach of express warranty against the gallery. In the only decision recognizing such a claim beyond the four-year statute of limitations, the court held “in the case of artwork which is certified authentic by an expert in the field or a merchant dealing in goods of that type, such a certification of authenticity constitutes an explicit warranty of future performance sufficient to toll the U.C.C.’s statute of limitations.”⁵²

Recently and widely reported were cases brought as a result of the art fraud perpetrated at the Knoedler Gallery, including *De Sole v. Knoedler Gallery*.⁵³ The De Soles purchased a painting at the New York’s historic and prestigious Knoedler Gallery supposedly by abstract expressionist artist Mark Rothko for \$8.3 million in 2004 which turned out to be a forgery.⁵⁴ The De Soles’ suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), fraud, in addition to a variety of state law contract-related claims.⁵⁵ The court held that the statute of limitations for fraud did not begin to run at the time of purchase but instead when “discovered,” i.e., after the De Soles were put on notice of a possible fraud after reading about the Knoedler’s closing in the *New York Times* in 2011.⁵⁶ The court adopted discovery to toll the statute of limitations because, according to the court, Ms. Friedman, the director of the gallery at the time, went out of her way to make sure that the De Soles would not suspect the authenticity of the Rothko. Ms. Friedman falsely

represented that the anonymous seller was Knoedler’s client, that he and his father were known personally to Knoedler, and that the father had obtained the work directly from Rothko Moreover, Friedman told the De Soles that Mark Rothko’s son, Christopher Rothko, and other Rothko experts, including the individual responsible for the Rothko catalogue raisonné, had

⁵⁰ 745 F. Supp. 1556 (D. Haw. 1990).

⁵¹ *Id.* at 1558–59. The Gallery represented the works “to be of equal or greater value than their purchase price” and gave the Balogs a “Confidential Appraisal—Certificate of Authenticity” for each piece purchased. *Id.*

⁵² *Id.* at 1570. Most jurisdictions do not apply the statute of limitations discovery rule on such claims. See, e.g., *Rosen v. Spanierman*, 894 F.2d 28 (2d Cir. 1990); *Wilson v Hammer Holdings, Inc.*, 850 F.2d 3 (1st Cir. 1988); *Firestone & Parson, Inc. v. Union League of Phila.*, 672 F. Supp 819 (E.D. Pa. 1987).

⁵³ 974 F. Supp. 2d 274 (S.D.N.Y. 2013).

⁵⁴ *Id.* For background on the Knoedler gallery and another participant in this scheme, Glafira Rosales, see *supra* Part I.C.(6).

⁵⁵ *Id.* at 294. RICO’s purpose is to combat organized crime. “It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal” 18 U.S.C.A. § 1962 (2017).

⁵⁶ *De Sole*, 974 F. Supp. 2d at 298.

examined the work and had attested to its authenticity. Freedman also told the De Soles that the purported work would be included in a forthcoming supplement to the Rothko catalogue raisonné, then being prepared by the National Gallery of Art.⁵⁷

Freedman went on to provide additional oral and written assurances including the praise of a former Rothko conservator and a curator.⁵⁸ The De Soles sought \$25 million in damages.⁵⁹ The case settled in February 2016 after 12 days of trial for an undisclosed amount.⁶⁰

III. A CRITICAL COMPONENT OF ART FRAUD TODAY: THE LACK OF ART AUTHENTICATION

The nature of property involved in an art transaction readily distinguishes itself from most commercial transactions. In an art transaction, often the property or chattel involved is unique and irreplaceable. Yet the worth of its elements, canvas and paint in the case of a painting, is usually quite small. Its market value depends to a great extent on the popularity (“importance”) of the artist at the particular time of the sale.

—Robert E. Duffy⁶¹

Authenticity, as it pertains to art, means that the alleged authorship of a work has been confirmed. Whether art is fraudulent turns in part on an evaluation as to whether or not a particular work of art is authentic. The methods used to authenticate art include: stylistic (expert) opinion, provenance, scientific analysis, and catalogues raisonnés. No method is dispositive, and more than one method is typically used to establish authenticity.

Stylistic analysis/expert opinion: An expert who has specialized knowledge in a particular area of art through study and experience may offer her opinion of a work’s authenticity through stylistic analysis. Before the chilling effect of lawsuits, experts publicly rendered opinions on a work of art’s authenticity based on their “knowledge, experience and intuition.”⁶² Although this is a subjective authentication method, stylistic experts are essential because, standing alone, the other methods discussed below are seldom adequate.

Provenance: Provenance traces the documented history of an object, primarily through the history of its ownership. Determining provenance is akin to a title search but without the same level of formality, which can be problematic because, for example, methods of recording ownership are inconsistent and

⁵⁷ *Id.* at 298–99.

⁵⁸ *Id.* at 299.

⁵⁹ Colin Moynihan, *Knoedler Gallery Director Settles Lawsuit over Fake Rothko*, N.Y. TIMES (Feb. 7, 2016), <http://nyti.ms/23RVgNH>.

⁶⁰ *Id.*

⁶¹ DUFFY *supra* note 1, at 2.

⁶² RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 262 (3d ed. 2005).

documents are often, not kept, or forged.⁶³ If provenance cannot trace a work's unbroken ownership history from the original artist to the current owner, it is helpful but does not provide conclusive evidence of authenticity because gaps in the chain of ownership raise questions about the authenticity of a piece.⁶⁴

Scientific analysis: Scientific testing represents the most objective evidence and is extremely useful for identifying fakes. Available methods of scientifically analyzing paintings include radiocarbon dating, thermo-luminescent analysis, x-ray photography, chemical analysis, infrared imaging, and comparative analysis.⁶⁵ For example, any painting under consideration for purchase by or donation to San Francisco's De Young Museum is sent to the Museum's conservation department for basic noninvasive procedures such as infrared reflectography and examination under ultraviolet light. These procedures detect features of a work such as varnish, extent of restoration, and underdrawings.⁶⁶ If further questions as to a work's authenticity exist, the Museum might have the painting x-rayed under fluorescent light to find any inorganic components used in the paint in order to date the piece. Titanium, for example, was not used in paints before the 20th century, so titanium on a canvas purported to be more antique indicates either a fake or restoration.⁶⁷ Although scientific technology in this field is improving constantly, it can determine the physical properties of the art, so is best used as one component to make a conclusive attribution.⁶⁸ Moreover, most purchasers of art lack the resources of a museum such as the De Young.

⁶³ See *Provenance Guide*, INT'L FOUND. FOR ART RESEARCH, https://www.ifar.org/provenance_guide.php.

⁶⁴ Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, 22 INT'L J. CULTURAL PROP. 419, 424–25 (2015). "To build a provenance, art historians and investigators examine a totality of museum records, catalogues raisonnés, and any other historical resources that can trace the work's ownership and location history. Some of the work in developing a provenance report is serendipitous, as in cases where an object was captured in an old family photograph or a newspaper clipping." *Id.* at 425. The problem with relying on provenance is that provenance documentation itself can be faked, as was done as part of the Myatt and Beltracchi forgeries. See Gerstenblith, *supra* note 3, at 339.

⁶⁵ LERNER & BRESLER, *supra* note 62, at 262–63.

⁶⁶ Telephone Interview with Elise Effmann Clifford, Head of Paintings Conservation, de Young Museum, S.F., Cal. (Mar. 16, 2016).

⁶⁷ *Id.*

⁶⁸ A specific recent example of technical analysis working together with scholarly research that brought about a reattribution occurred at San Francisco's de Young Museum. Experts had cast doubt over the authenticity of a small work attributed to but not in catalogues raisonnés of Van Gogh. The painting's authenticity was confirmed based on an extensive technical analysis undertaken at the Van Gogh Museum. Among other discoveries, the analysis found that the canvas came from the same bolt of cloth used by the artist for others of his contemporaneous works. *Id.*

Catalogues Raisonnés: A catalogue raisonné is a “comprehensive, and authoritative, cataloguing of every artwork made by an artist,” usually undertaken after an artist’s death by a museum or artist’s foundation.⁶⁹

Traditionally, they include an image and description of each catalogued work. The description, often referred to as primary information, includes the title, date of creation, materials used, dimensions, inscriptions and signatures, and ownership history (provenance) for each artwork. Primary information is often accompanied by secondary information, describing the history of the object and includes literature and exhibition histories. Primary and secondary information is an essential part of any catalogue raisonné.⁷⁰

Locating a work in a reputable catalogue raisonné is considered a strong indicator of authenticity. Because compiling catalogue raisonnés is laborious, most works of art, particularly those by contemporary, lesser-known, or extremely prolific artists, are not catalogued.⁷¹

Experts historically offered their authentication opinions freely within the informal customs of the art market. For instance, Kirk Varnedoe, chief curator at New York’s Museum of Modern Art from 1988–2001, reportedly “would think nothing of offering his view of a drawing attributed to Rodin, his specialty. ‘He was qualified to do it and felt he had a moral obligation to do it.’”⁷² Similarly, art scholars regularly offered opinions for a fee.⁷³

However, this is no longer the case, largely because art authenticators have been sued for disparagement, libel, fraud, breach of contract, and antitrust violations.⁷⁴ As a result, museum curators and conservators as well as art history professors and experts at artist foundations now assiduously avoid giving authentication opinions that could affect the value of a work of art to anyone

⁶⁹ Caroline Gabrielli, *Preparing the Catalogue Raisonné: A Guideline for Publishing Online*, METRO. N.Y. LIBRARY COUNCIL (2014), <http://metro.org/media/files/files/0df1431c/Gabrielli.pdf>.

⁷⁰ *Id.*

⁷¹ See *id.*; *Catalogue Raisonné, Critical Catalogue*, WILDENSTEIN INST., <http://www.wildenstein-institute.fr/spip.php?page=wildenstein-catalogue-raisonne-catalogue-critique&lang=en>.

⁷² Patricia Cohen, *In Art, Freedom of Expression Doesn’t Extend to ‘Is It Real?’*, N.Y. TIMES (June 19, 2012), <http://nyti.ms/1917X16>.

⁷³ Email from Elise Effmann Clifford, Head of Paintings Conservation, de Young Museum, to author (Apr. 14, 2016) (on file with author).

⁷⁴ See, e.g., *Bilinski v. Keith Haring Found., Inc.*, 96 F. Supp. 3d 35, 39–40 (S.D.N.Y. 2015) (antitrust, defamation, conspiracy to defame, tortious interference with prospective business relations, trade libel, intentional infliction of economic harm, unjust enrichment); *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423 (LTS) 2009 WL 145177, at *1 (S.D.N.Y. May 26, 2009) (antitrust, unjust enrichment, false advertising, fraud); *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S. 2d 16, 25–32 (App. Div. 2009) (breach of contract, tortious interference with prospective business advantage, product disparagement, breach of fiduciary duty, civil conspiracy). For the stories behind these authentication cases, see *infra* the next paragraph of this section.

outside of the institution they represent.⁷⁵ According to Dawn Odell, art history professor and chair of the art department at Lewis and Clark College, she and her classmates in graduate school were pointedly counseled against giving unsolicited authentication opinions precisely because lawsuits by disgruntled owners might ensue.⁷⁶ The conservation department at the De Young Museum in San Francisco may occasionally use their ultraviolet light, among other nondestructive analytical techniques, as a service to members of the public who seek to know more about a work they own. However, when looking at and talking to an owner about a painting, Head Conservator Elise Effman Clifford uses carefully chosen words, limiting herself to objective descriptions of the examination and steering clear from offering her attribution or authentication opinions.⁷⁷

Until recently, foundations set up by prominent artists under their wills authenticated deceased artists' works and maintained catalogue raisonnés. Fear of costly litigation has since eliminated this last bastion of authentication. *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.* exemplifies the potential costs of authenticating works.⁷⁸ After the Andy Warhol Foundation twice deauthenticated an alleged Warhol self-portrait owned by Joe Simon, Simon sued the Foundation, alleging an antitrust cause of action based upon the Foundation's purported conspiracy to monopolize and control the market for Andy Warhol art.⁷⁹ Although the suit was eventually dropped, the Foundation spent over \$6 million fighting the suit and stopped authenticating Warhols in 2011.⁸⁰

Thome v. Alexander & Louisa Calder Found followed several months later,⁸¹ after an art collector sought an injunction against the Calder Foundation to compel both the inclusion of several pieces allegedly by Calder in the artist's catalogue raisonné and a judgment of the works' authenticity.⁸² The court held

⁷⁵ “[W]hen the owner of a painting attributed to Henri Matisse recently asked John Elderfield (the former chief curator of painting and sculpture at the Museum of Modern Art) for his opinion, he demurred. He was worried he could be sued if he said the painting was not a real Matisse.” Cohen, *supra* note 72. “Sometimes the fear goes beyond suit to personal safety. Marc Restillini ceased work on a Modigliani catalogue raisonné because he received death threats after offering the opinion that some Modigliani drawings were fakes.” Meryle Secret, *Succès Fou*, N.Y. TIMES, (Oct. 3, 2012) http://tmagazine.blogs.nytimes.com/2012/10/03/succes-fou/?_php=true&_type=blogs&_r=0.

⁷⁶ Interview with Dawn Odell, Professor of Art History & Chair of the Art Dep't at Lewis & Clark Coll. (Apr. 5, 2016).

⁷⁷ Telephone Interview with Elise Effman Clifford, *supra* note 66.

⁷⁸ No. 07 Civ. 6423 (LTS), 2009 WL 145177, at *1 (S.D.N.Y. May 26, 2009).

⁷⁹ *Id.* at *2.

⁸⁰ Jennifer Maloney, *The Deep Freeze in Art Authentication: Costly Litigation Has Forced Foundations from Warhol to Haring to Fold Their Authentication Boards*, WALL ST. J. (Apr. 24, 2014), <http://www.wsj.com/articles/SB10001424052702304279904579518093886991908>.

⁸¹ 890 N.Y.S. 2d 16 (App. Div. 2009).

⁸² *Id.* at 20.

that the Foundation did not owe a duty to Thome, the art collector, when it did not respond to his submission of his alleged Calder pieces. The court reasoned that both causes of action were “based upon [Thome’s] contention that he is absolutely entitled” to authentication and inclusion in the catalogue raisonné,” holding that he had neither established the right to inclusion in the catalogue raisonné nor authentication.⁸³ Nonetheless, the Calder Foundation has since stopped authenticating Calder’s works.⁸⁴

Most recently, in *Bilinski v. Keith Haring Found., Inc.*, nine collectors brought antitrust, false advertising, and other claims against the Haring Foundation after it deauthenticated 111 of their alleged Harings.⁸⁵ The court granted the Foundation’s motion to dismiss for failure to state a claim.⁸⁶ Nevertheless, the case prompted the Foundation to cease authenticating Harings.⁸⁷ As a result of the threat of the similar litigation, nearly all comparable foundations stopped authenticating, including those representing Pablo Picasso, Jackson Pollock, Roy Lichtenstein, Jean-Michel Basquiat, and Isamu Noguchi.⁸⁸

IV. USING THE LAW TO PROTECT AUTHENTICATORS, DETER ART FRAUD, AND RESTORE THE INTEGRITY OF THE ART MARKET

[M]any commentators assert that there are exceptional circumstances relevant to art—notably the expertise required to judge authenticity—that single out art cases for special treatment.

—Swift Edgar⁸⁹

Present laws facilitate art fraud because they have had the effect of removing a critical deterrent: assessment of authenticity by disinterested authenticators. As a result, the art market has become even more unstable—lacking integrity and rife with fraud—particularly now that art is often viewed as an investment. If the status quo persists, the problem will worsen and ultimately imperil a once fluid, trusted market for works of art. This, in turn, will cause irreparable damage to the cultural and historical record. The lack of willing authentication experts is the direct consequence of the substantial cost of litigation incurred by and threatened against authenticators and their

⁸³ *Id.* at 22.

⁸⁴ Cohen, *supra* note 72.

⁸⁵ *Bilinski v. Keith Haring Found., Inc.*, 96 F. Supp. 3d 35, 39–41 (S.D.N.Y. 2015).

⁸⁶ *Id.* at 52.

⁸⁷ Maloney, *supra* note 80.

⁸⁸ Eileen Kinsella, *A Matter of Opinion: Concerns About Liability Have Led Several Artist’s Foundations to Stop Authenticating Their Work*, ARTNEWS (Feb. 28, 2012), <http://www.artnews.com/2012/02/28/a-matter-of-opinion>; Michael H. Miller, *Basquiat’s Authentication Committee to Disband in September 2012*, OBSERVER (Jan. 17, 2012), <http://observer.com/2012/01/basquiats-authentication-committee-to-disband-in-september-2012>.

⁸⁹ Swift Edgar, Note, *Standing by Your Man Ray: Troubles with Antitrust Standing in Art Authentication Cases*, 37 COLUM. J.L. & ARTS 247, 264 (2014).

authentication and attribution opinions. As Joel Wachs, President of the Andy Warhol Foundation for the Visual Arts, expressed: “[F]rivolous lawsuits have had a broad, chilling effect on art historians.”⁹⁰

Mr. Wachs suggested this fear has steered professors and other scholars away from initiating any scholarship that might question the origin of a work of art.⁹¹ Art experts point to authenticators’ fear of litigation as a major reason why the Knoedler Gallery fraud ring went on for so long.⁹² Others say that “keeping quiet is standard practice.”⁹³ Journalist and art collector Daphne Merkin, reported the following in an article about the Knoedler Gallery:

I can get sued,” one dealer told me, “for expressing an adverse opinion—which is why so many people saw those works and didn’t say, ‘I’m not sure; you should check.’” An art consultant concurred, “To say anything, you risked being sued for loss of value. You have to go to court and it costs huge amounts of money; that kept people quiet. The collectors finally went after her That’s why it took so long, and even once it was in motion, there were a number of collectors who settled.”⁹⁴

The sham within the art market will continue unless and until legal protections are given to art authenticators. Proposals to restore authentication and deter art fraud include: (1) implementing procedural barriers to initiating suits against authenticators, (2) granting authenticators immunity from suit and/or privileging their opinions and assessments, and (3) establishing a method of professionalization through a licensing or accreditation regime to distinguish qualified art authenticators. Each of these proposals is discussed below.

A. *Creating Procedural Barriers: The 2014 and 2015 New York Bills*

In the wake of the Knoedler Gallery scandal, New York State Senate Bill S6794, entitled “An act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship of works of fine art” was introduced into the New York legislature.⁹⁵ Sponsored by

⁹⁰ Tracy Zwick, *Good News for People Who Bear Bad News: Legislators Seek to Shield Art Authenticators*, ART IN AM. (June 5, 2014), <http://www.artinamericamagazine.com/news-features/news/good-news-for-people-who-bear-bad-news-new-york-legislators-seek-to-shield-art-authenticators-from-frivolous-lawsuits>.

⁹¹ Telephone Interview with Joel Wachs, President, Andy Warhol Foundation for the Visual Arts (Mar. 29, 2016) (on file with author).

⁹² Patricia Cohen, *Selling a Fake Painting Takes More Than a Good Artist*, N.Y. TIMES (May 2, 2014), <http://nyti.ms/1hluBhI> (“Jack Flam, an art historian who was one of the first to challenge the authenticity of the Rosales paintings, said: ‘If you asked me what the biggest factors were behind this thing succeeding so long, first is that everybody was afraid to be sued. People give credibility to works unwittingly by keeping quiet.’”).

⁹³ *Id.*

⁹⁴ Daphne Merkin, *What’s Love Got to Do with It?*, DEPARTURES, May/June 2016, at 183.

⁹⁵ An Act to Amend the Arts and Cultural Affairs Law, in Relation to Opinions Concerning Authenticity, Attribution and Authorship of Works of Fine Art, S. 6794 (N.Y. 2014) [hereinafter 2014 Bill]; see also email from Sandra S. Sloane, Legislative Director, Office of

Senator Betty Little, who worked closely with the Art Law Committee of the New York Bar, the Bill, provided a definition of “authenticator,” emphasizing that an authentication is an opinion,⁹⁶ and sought to limit the number of suits brought as a result of such opinions by instituting procedural barriers. First, the Bill increased the pleading requirements from a “short and plain statement of the claim showing that the pleader is entitled to relief”⁹⁷ to “specify with particularity in the complaint facts sufficient to support each element of the claim or claims asserted” against an authenticator, mimicking the fraud pleading requirements.⁹⁸ Second, the Bill imposed a higher burden of proof on plaintiffs—“clear and convincing” rather than “preponderance of the” evidence.⁹⁹ Third, the Bill provided that an authenticator defendant can “recover his, her or its reasonable attorney’s fees, costs and expenses if and to the extent that the authenticator prevails in such action.”¹⁰⁰ This is contrary to the “American Rule” regarding attorney’s fees, which provides that a party to a lawsuit bears the cost of her attorney’s fees irrespective of outcome. This Bill was not enacted because the New York State Trial Lawyers Association opposed it.¹⁰¹

After the 2014 Bill failed to pass, Senator Little sponsored another version of the Bill in 2015.¹⁰² The 2015 version retains the same definition of “authenticator” as one who gives an authentication opinion,¹⁰³ but eliminates the higher burden of proof and changes the attorney’s fees language from the mandatory “*shall* be entitled to attorney’s fees, costs and expenses” resulting from “any action” if the authenticator prevails to the permissive “the court *may* allow the prevailing authenticator the costs of the action.”¹⁰⁴

Sen. Betty Little, to author (Apr. 5, 2016, 8:14 PST) (on file with author).

⁹⁶ 2014 Bill § 1 (citing proposed § 13.04 ¶ 3 of the arts and cultural affairs law).

⁹⁷ FED. R. CIV. P. 8(a)(2).

⁹⁸ 2014 Bill § 1 (citing proposed § 13.04 ¶ 1(A) of the arts and cultural affairs law); see FED. R. CIV. P. 9(b) (“Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

⁹⁹ 2014 Bill § 1 (citing proposed § 13.04 ¶ 1(B) of the arts and cultural affairs law).

¹⁰⁰ 2014 Bill § 1 (citing proposed § 13.04 ¶ 2 of the arts and cultural affairs law).

¹⁰¹ Laura Gilbert, *Five Legal Cases Changing the Art Market as We Know It*, ARTSY (Dec. 23, 2015), <https://www.artsy.net/article/artsy-editorial-five-legal-cases-changing-the-art-market-as-we-know-it> (“They were concerned about any obstacles to filing lawsuits,” said Dean Nicyper, the attorney leading the bar association’s effort.”).

¹⁰² An Act to Amend the Arts and Cultural Affairs Law, in Relation to Opinions Concerning Authenticity, Attribution and Authorship of Works of Fine Art, S. 1229A (N.Y. 2015) [hereinafter 2015 Bill].

¹⁰³ *Id.* at § 1 (citing proposed subdivision 23 of § 11.01 of the arts and cultural affairs law).

¹⁰⁴ 2014 Bill § 1 (citing proposed § 13.04 ¶ 2 of the arts and cultural affairs law) (emphasis added); S. 1229 § 4 (citing proposed subdivision 4(B) of § 15.15 of the arts and cultural affairs law) (emphasis added).

Because of these changes, the current bill has been criticized as “watered down.”¹⁰⁵ In June 2015, the Bill passed the New York State Senate but has yet to be approved by the State Assembly.¹⁰⁶ Dean Nicyper, Chair of the Art Law Committee of the New York Bar, says that the Bill will be reintroduced in 2017, reporting that “[w]e have already been in contact with legislators, and we will be undertaking a major effort at passage in the spring.”¹⁰⁷

B. *Immunity and Privilege: The 1966 New York Bill*

Unless the artist is alive, authenticating with objective certainty is impossible. Factors such as age, gaps in knowledge about an artist’s work or chain of title, and collaborative or unorthodox artistic methods add to the subjectivity. Therefore, a knowledgeable art expert’s assessment of who created a given work of art is necessarily a matter of subjective opinion.

Beyond making the initiation of law suits more difficult, one way to protect such expert opinions is to grant authenticators absolute immunity or privilege from civil suit based on their opinions. A less-sweeping alternative is providing qualified immunity or a qualified privilege as to their authentication opinions.

The concepts of immunity and privilege as protections against lawsuits are well established in American jurisprudence. These protections ensure that individuals have the freedom to act independently and without fear of being sued. Judges, prosecutors, and legislators have absolute immunity from lawsuits arising from actions taken as part of their official duties.¹⁰⁸ Qualified immunity similarly shields government officials acting in an official capacity and with a good faith belief that her actions are lawful from liability.¹⁰⁹ This

¹⁰⁵ See Kevin P. Ray, *New York Senate Passes Bill to Protect Art Authenticators*, NAT’L L. REV. (June 29, 2015), <http://www.natlawreview.com/article/new-york-senate-passes-bill-to-protect-art-authenticators>; Telephone interview with Joel Wachs, *supra* note 90.

¹⁰⁶ Press Release, N.Y. St. Senate, Senate Passes Bill to Protect Art Authenticators (June 15, 2015), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-bill-protect-art-authenticators>.

¹⁰⁷ Email from Dean Nicyper, Chair of the Art Law Comm. of the N.Y. Bar, to author (Dec. 20, 2016, 7:19 PST) (on file with author).

¹⁰⁸ Judges are absolutely immune from civil suits based upon their judicial acts. *Bradley v. Fisher*, 80 U.S. 335, 336 (1872); *Randall v. Bringham*, 74 U.S. 523, 531 (1868). Well established in the common law, absolute immunity for judges dates back centuries. See, e.g., *Floyd v. Barker*, 77 Eng. Rep. 1305 (K.B. 1608). Prosecutors also enjoy absolute immunity from civil suit for their prosecutorial actions. *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). With few exceptions, absolute immunity applies only to cases with claims for money damages and does not protect against criminal prosecution. See, e.g., Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473 (2008); Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *TOURO L. REV.* 1643, 1649 (1998); Steven F. Huefner, *Congressional Searches and Seizures: The Place of Legislative Privilege*, 21 *J.L. & POL.* 271, 272 (2008).

¹⁰⁹ *Harlow v. Fitzgerald* revised the subjective “good faith” test for qualified immunity when it held that a state official receives qualified immunity when acting in an official role unless her conduct violates “clearly established statutory or constitutional rights of which a

lower level of protection is traditionally granted to law enforcement officials. Courts have extended immunity to others, particularly those acting in a “quasi-judicial” capacity.¹¹⁰

The distinction between absolute and qualified immunity is important. A defendant with absolute immunity can get a lawsuit against her dismissed at the pleading stage because her actions are absolutely protected. A defendant with qualified immunity has a better chance of being dismissed early on, but dismissal is not assured because of the additional “good faith” requirement. She may have to undergo the expense of some discovery before resolution. Indeed, factual issues may prevent summary judgment.¹¹¹ Nonetheless, qualified immunity poses a large barrier to plaintiff success and will facilitate earlier termination of litigation against authenticators in many cases.

Privilege is conceptually different from immunity in that it protects the speaker’s statement, but its result is the same: potential dismissal at the pleading or other early stage. Privilege also serves a similar purpose: to allow a person to speak openly and honestly about a subject matter of public importance. Absolute privilege grants an individual an absolute right to make a statement at a particular time. Legislators enjoy absolute privilege against “compelled questioning” of their legislative work.¹¹² Witness testimony in court, however defamatory, is absolutely privileged and cannot be used as a basis for a civil suit.¹¹³ Some privileges are qualified, meaning that the person making the statement has some right to do so. In the classic case *New York Times Co. v. Sullivan*, the Supreme Court held that a newspaper has a qualified privilege to make libelous statements against a public figure if made

reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

¹¹⁰ See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 365 (2009) (qualified immunity for school official searching a student); *Ernst v. Child & Youth Servs. of Chester Cty.*, 108 F.3d 486, 488 (3d Cir. 1997) (absolute immunity for social workers in relation to their work on dependency proceedings); *O’Neal v. Miss. Bd. of Nursing*, 113 F.3d 62 (5th Cir. 1997) (qualified immunity for nursing board when revoking nursing licenses); *Watts v. Burkhart*, 978 F.2d 269, 278 (6th Cir. 1992) (absolute immunity for medical professional boards). For a comprehensive guide to the range of immunities given by one state, see Kristin Hogue, *General Immunities of Public Entities and Employees*, in CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (Robert Waxman ed., 2016).

¹¹¹ Whether a law enforcement officer acted in bad faith in violation of another’s constitutional rights can present factual issues. EDWARD J. BRUNET, JOHN T. PARRY & MARTIN REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE, § 9:11 (2016).

¹¹² Huefner, *supra* note 107, at 283. Freedom of speech for the legislature is written into the Constitution: “[a]ny Speech or Debate in either House, (the Senators and Representatives) shall not be questioned in any other Place.” U.S. CONST. art. I, § 6. This freedom has been interpreted and upheld as legislative immunity for legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (local legislative acts); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislative acts). Like the idea of absolute immunity for judges, absolute privilege for legislators comes from English common law, where it is called Parliamentary privilege. Privilege of Parliament Act 1512, 4 Hen. 8 c. 8 (Eng.).

¹¹³ Restatement (Second) of Torts § 588 (Am. Law Inst. 1977).

without malice.¹¹⁴ The Court reasoned that protecting journalists and limiting the First Amendment's freedom of the press was necessary to remove the "chilling effect" that the threat of libel suits had upon investigative reporting.¹¹⁵ Absolute privilege, like absolute immunity, poses an insurmountable barrier to civil suits. But even qualified privilege and immunity constitute significant deterrents to suits.

One bill attempted to use these legal concepts to protect the opinions of art authenticators. In the mid-1960s, in reaction to a "rash" of art forgeries that included the arrest and prosecution of forger David Stein and an atmosphere of fear of litigation among authenticators, the then New York State Attorney General, Louis Lefkowitz, conducted an extensive study on ways to combat art fraud in the state,¹¹⁶ arguably the art market's world capital. As result of his findings, Lefkowitz proposed legislation aimed at protecting art authenticators.¹¹⁷

Lefkowitz recognized that art fraud is a long-term problem affecting the stability and integrity of the art market, and that the integrity of the art market is unquestionably important to the New York economy. Significantly, Lefkowitz' study found that the art fraud problem is directly traceable to an unwillingness of art experts to authenticate art work because of the threat of costly litigation. Lefkowitz' Bill, introduced in 1966, included provisions that granted absolute immunity to "[a] recognized museum, college or university" for any damages alleged to have been sustained as a result of "any opinion respecting the authenticity of a work of fine art communicated by such."¹¹⁸

The Lefkowitz Bill also provided a qualified privilege for opinions of "accredited" art experts, not associated with academic institutions, who evaluate and opine on the authenticity of works of art.¹¹⁹ It provided that "no action

¹¹⁴ 376 U.S. 254, 278 (1964).

¹¹⁵ *Id.* at 300.

¹¹⁶ Richard Shepard, *Law Is Proposed for Art Experts: Lefkowitz Urges Immunity on Negative Judgments*, N.Y. TIMES, Mar. 17, 1966, at 32, <http://timesmachine.nytimes.com/timesmachine/1966/03/17/79975496.html?pageNumber=32>; see Leslie Kaufman Akst, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939 (1978).

¹¹⁷ The Lefkowitz study resulted in the proposal and enactment of a number of other bills aimed at regulating the art market around the same time. See Akst, *supra* note 115, at 939–40. This Article will discuss exclusively the Lefkowitz bill aimed at protecting art authenticators. An Act to Amend General Business Law, Print 7131, Intro. 6062 (N.Y. 1966) (on file with author) [hereinafter Lefkowitz Bill]. The full name of the Bill is "An Act to amend general business law, in relation to providing for the accrediting of fine arts experts, and conferring immunity upon experts, museums, colleges and universities for opinions relating to authenticity of works of fine art, and making an appropriation therefor."

¹¹⁸ Lefkowitz Bill, *supra* note 116, at § 227.

¹¹⁹ *Id.* § 226. See generally Symposium, *Art Forgery*, METROPOLITAN MUSEUM ART BULL. (1968). The Metropolitan Museum of Art convened a series of seminars about art forgery around the same time for the same reason. For a separate discussion of licensing/

for damages” can be sustained for such an [authentication] opinion unless it was given in “bad faith or out of actual malice.”¹²⁰ The Bill reinforced this qualified privilege by establishing a presumption of good faith when “communicating a negative opinion with respect to the genuineness or authenticity of a work of fine art in answer to the request of the owner or prospective purchaser thereof.”¹²¹ Appropriately, because they have an interest in selling works of art, art dealers were specifically precluded from qualifying as an accredited art authenticator entitled to qualified privilege.¹²²

The Lefkowitz Bill was “expected to cause controversy,” and it did. Most art dealers and gallery owners opposed the bill because dealers were specifically excluded from those who could be accredited as art experts. Artists tended to favor the bill and some testified to support it.¹²³ The Bill failed, at least in part because art dealers opposed the Bill.¹²⁴

C. *Licensing/Accreditation of Art Experts*

Legislating the licensing or accreditation of art experts can protect the public from unqualified providers and is another potential means of deterring forgery because it restricts who can authenticate. State licensing of professions and service providers is not uncommon: states routinely license liquor distributors, hair dressers, doctors, and lawyers, among others.¹²⁵

Of the several models for licensing and professionalization of art experts, one model is contained within Lefkowitz’ 1966 bill discussed in the prior section. The Bill defined an “accredited fine arts expert” as:

[A] person certified by the board of regents of the university of the state of New York or by a corporation formed or chartered by such board for such purpose . . . as possessing the necessary training, skill and qualifications to form a sound judgment as to the genuineness or authenticity of works of fine art within the scope of his specialty or specialties as defined or limited and certified by any of the aforesaid accrediting agencies, or a natural person certified by any other accrediting agency of this or any other country which has been certified by the board of regents or by a corporation formed or chartered by such board for such purpose as aforementioned, as substantially

accreditation, *see infra* Part IV.C.

¹²⁰ Lefkowitz Bill, *supra* note 116, at § 226.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Judith Wallace, *Art Law on Protecting Expert Opinion*, ARTNET NEWS (Feb. 14, 2016), <https://news.artnet.com/market/art-law-on-protecting-experts-opinion-419132>). Jaques Lipchitz is one artist who testified in support of the Bill. *Id.*

¹²⁴ *See id.* (“Ironically, the Art Dealers Association of America opposed that proposal because it excluded dealers from the proposed accreditation and immunity.”).

¹²⁵ *See 10 Jobs You Didn’t Know Need Licenses*, BUSINESS NEWS DAILY (May 9, 2012), <http://www.businessnewsdaily.com/2492-occupations-requiring-licenses.html#sthash.IBBP-4mKH.dpuf>.

meeting the standards established by the rules and regulations promulgated by the board of regents for accrediting fine arts experts in this state.¹²⁶

Lefkowitz cleverly left open the parameters of who was authorized to provide accreditation beyond the regents of the university of New York, while avoiding setting up a state licensing agency. His proposal did not exclude other states, or even nations, from setting up a similar accreditation entity whose accredited authenticators would be recognized in New York and entitled to the law's protections.¹²⁷

Debra Homer, law professor at Northwestern University, proposed licensing art appraisers via a model "Fine Art Appraiser Act" within her article *Fine Art Appraisers: The Art, the Craft and the Legal Design*.¹²⁸ Professor Homer recommends that art appraisers should be academically and experientially trained, objective, and undergo formal licensing procedures. The appraisal itself should be written and follow a set of predetermined steps.¹²⁹ As she writes, "such licensing should be achieved legislatively, through a Licensing Board constituted of qualified members of the appraisal profession."¹³⁰ The resulting legislation will help the profession attain stature and induce professional pride.¹³¹

France provides a comprehensive and elaborate model for the professionalization of art experts and appraisers.¹³² While the American auction system revolves around big art auction houses like Christie's or Sotheby's, the French system functions through auctioneers and buyers who "rely on independent professional experts to value and appraise a piece."¹³³ The art appraiser is a licensed expert who receives a percentage of the final sale from the purchaser.¹³⁴ French law requires art experts to join a professional organization, which have stringent requirements.¹³⁵ Admission to the *Chambre Nationale des Experts Spécialisés*, for example, entails written and oral examinations, followed by two years of professional training, and a final round of oral and written exams.¹³⁶ For the final oral exam, "the candidate faces twenty objects, consisting of five fakes, five exceptional pieces, and ten common pieces. The

¹²⁶ Lefkowitz Bill, *supra* note 116, at § 225.

¹²⁷ *Id.*

¹²⁸ Debra B. Homer, *Fine Art Appraisers: The Art, the Craft, and the Legal Design: Proposed Model Fine Art Appraiser Act*, 8 COLUM. J. ART & L. 457 (1984). Appraisers give a monetary value to a work, while authenticators discern a work's origin.

¹²⁹ *Id.* at 479.

¹³⁰ *Id.*

¹³¹ Homer, *supra* note 127, at 480.

¹³² Jáuregui, *supra* note 15, at 1966–70.

¹³³ *Id.* at 1966.

¹³⁴ *Id.* at 1967.

¹³⁵ *Id.* at 1968.

¹³⁶ *Id.*

candidate must successfully attribute these works for full membership.¹³⁷ The French expert need only provide her name and the name of her licensing body as a guarantee of “expert competence.”¹³⁸ Other advantages of state-licensing include the weeding out of incompetent or “fake” experts and facilitating group rates for malpractice insurance.¹³⁹

V. EFFECTIVE LEGISLATION REQUIRES STRONG LEGAL PROTECTION

Several ideas described above have been offered to protect art authenticators from liability, thereby encouraging their participation in the market, but none have become law. Meanwhile, as the former director of the Metropolitan Museum of Art, Thomas Hoving, predicted, the number of fakes on the market continues to rise because “[t]oday there are hardly any fakebusters at work.”¹⁴⁰ To stem the tide of forgeries, it is more important than ever that the opinions of art experts are brought into the discourse regarding the origins of works of art.

Kevin P. Ray formulated the key test to measure successful legislation in his *National Law Review* article: “The ultimate test will be whether authenticators view the Bill as having sufficiently improved their lot that they are willing to return to the field.”¹⁴¹ For legislation to meet Ray’s test of bringing experts back, it must define art authenticators and, at a minimum, grant them a qualified privilege for their opinions.

A. *The Limitations of Licensing and Accreditation Regimes*

Given Ray’s standard elucidated above, the proposal of licensing and accreditation regimes falls short. In the first instance, a licensing regime, standing alone, would do little to protect art authenticators from civil suits and is too bureaucratically cumbersome. Furthermore, the French and Homer’s licensing approaches are needlessly overbroad in that they encompass appraisal (a distinctly market-driven analysis for an otherwise genuine work) as well as attribution.

State governments have jurisdiction to issue professional licenses. Government-imposed standards may provide consistency, but they also create an additional layer of bureaucracy. Further, little evidence demonstrates that licensing equates to a higher professional standard. For example, studies have shown that “more-difficult requirements to earn a dental license (in the form of the pass rate of the required exam) do not actually lead to improved dental outcomes of patients,” and, “[s]imilarly, more-stringent licensing of mortgage

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ HOVING, *supra* note 6, at 17.

¹⁴¹ Ray, *supra* note 104. While Ray’s quote applies to any legislation intended to protect art authenticators, his article specifically discusses the 2015 New York Bill. *See infra* Part V.B.

brokers has no influence on the number of foreclosures.”¹⁴² Furthermore, licensing would create the problem of figuring out who is qualified to administer the licenses.¹⁴³

At first glance, accrediting authenticators seems like a simple fix to these problems, bestowing automatic credibility on the expert by establishing a set of guidelines to define and setting a high bar for what “authenticating expert” means through a private nonprofit organization. As a result, the public gains a weeding out of unqualified and incompetent authenticators without use of government resources.

However, private accreditation is not the easy fix it appears to be. Establishing an accreditation regime may beget many of the same shortcomings as government licensing. Because a nongovernment accrediting association would be required, the same key questions arise: who would do the accrediting and against what standards of background, education and experience? While the American Bar Association has long had a prominent role in accrediting law schools, the private association that would or could undertake the role of accrediting art authenticators is unclear.¹⁴⁴

B. *Recent Legislation for the Protection of Authenticators Proposed in New York State Falls Short*

Senator Little’s 2014 Bill creates several hurdles to the pursuit of legal recourse against authenticators: a more stringent pleading requirement when suing an art authenticator, a heightened burden of proof, and an award of attorney’s fees when the authenticator prevails. Although helpful, these measures do not assure authenticators’ return.

More stringent pleading requirements for claims against authenticators (“specify with particularity”) should help deter some litigation, because if a plaintiff (usually an aggrieved art owner) fails to plead all the elements of a

¹⁴² See Morris M. Kleiner, Discussion Paper, *Reforming Occupational Licensing Policies*, THE HAMILTON PROJECT 6 (2015), http://www.brookings.edu/~media/research/files/papers/2015/03/11-hamilton-project-expanding-jobs/thp_kleinerdiscpaper_final.pdf. “In the early 1950s, less than five percent of U.S. workers were required to have a license from a state government in order to perform their jobs legally. By 2008, the share of workers requiring a license to work was estimated to be almost twenty-nine percent.” *Id.* at 5.

¹⁴³ *Id.*

¹⁴⁴ Attorney General Lefkowitz suggested giving the accreditation function to the New York State Board of Regents and granted the Board a budget for this task. Lefkowitz also recognized that other institutions could conceivably qualify as accrediting institutions. See *supra* Part V.C. While this is perhaps the most sensible method for accreditation, standing alone, it will not thwart those seeking to litigate against authenticators. For example, the A.B.A. accredits lawyers, but people still bring malpractice suits against lawyers. See Daniel E. Pinnington, *The Biggest Malpractice Risks*, LAW PRACTICE, July/Aug. 2010, at 29, http://www.americanbar.org/publications/gp_solo/2011/march/the_biggest_malpractice_claim_risks.html; see also *Suing Your Lawyer for Malpractice*, NOLO, <http://www.nolo.com/legal-encyclopedia/suing-lawyer-malpractice-30192.html>.

claim for relief in the complaint, then the authenticator can seek dismissal.¹⁴⁵ Indeed, the purpose of existing heightened pleading requirements for fraud claims (Fed. R. Civ. P. 9(b)) is to “protect defendants from ‘spurious charges of immoral and fraudulent behavior.’”¹⁴⁶ A specific pleading requirement’s efficacy, however, depends on the type of claim. Despite providing the model and inclusion in the Federal Rules of Civil Procedure, the special pleading burden of Rule 9(b) has actually “not posed a significant barrier” to common-law fraud claims,¹⁴⁷ suggesting that the requirement will not be terribly effective in deterring suits against authenticators.

The higher standard of proof requirement (“clear and convincing”) is similarly unlikely to deter suits. The intended result of a more difficult burden of proof standard (beyond the ordinary “preponderance”) is that fewer plaintiffs bring suit because it is harder for them to win. The clear and convincing standard is often applied to civil suits when there is thought to be a danger of deception: fraud, wills/inheritances, and family decisions such as whether or not to terminate life support.¹⁴⁸ Even though clear and convincing is considered a “daunting standard,” it will not likely shield art authenticators from suits.¹⁴⁹ Currently, plaintiffs rarely prevail in suits against art authenticators, so increasing plaintiff concerns about losing due to a heightened burden of proof is not the critical issue.

The provision regarding the recovery of attorney’s fees in the event that an authenticator prevails is a modest protection, but is not enough of a protection here because it is one that is not available until after litigation. Fee-shifting provisions, such as those in the 2014 Bill, are meant to increase the litigation-related risks to plaintiffs who will have to pay the defendant’s legal costs if they lose, thus improving the position of a relatively weaker party.¹⁵⁰

¹⁴⁵ FED. R. CIV. P. 12(b)(6). Although the plaintiff may have the opportunity to amend the complaint to add the needed allegations, it may be impossible to do so.

¹⁴⁶ U.S. *ex rel.* Marlar v. BWXT Y-12, L.L.C., 525 F.3d 439 (6th Cir. 2008); *see also* 61A Am. Jur. 2d Pleading § 201 (2017). The heightened pleading standard proposed for claims against authenticators is comparable to that of fraud claims as codified in FED. R. CIV. P. 9(b) (“Fraud or Mistake; Conditions of Mind”). In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. However, malice, intent, knowledge, and other relevant conditions of a person’s mind needed to establish liability may be alleged generally. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1297 (3d ed. 2004).

¹⁴⁷ Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 552, 567 (2002).

¹⁴⁸ *See, e.g.*, Griffith v. Latiolais, 48 So. 3d 1058 (La. 2010); *In re* Quinlan, A.2d 647 (N.J. 1976).

¹⁴⁹ Nicholas O’Donnell, *Proposed Amendment to New York Arts and Cultural Affairs Law Would Protect Authenticators*, SULLIVAN & WORCESTER: ART L. REP. (Apr. 30, 2014), <http://blog.sandw.com/artlawreport/2014/04/30/proposed-amendment-to-new-york-arts-and-cultural-affairs-law-would-protect-authenticators>.

¹⁵⁰ Recovery of attorney’s fees applies to frivolous lawsuits. *Attorney Fees: Does the Losing Side Have to Pay?*, Nolo, <http://www.nolo.com/legal-encyclopedia/attorney-fees-does-losing-side-30337>.

The cost of defending is beyond the means of most art historians and experts. Furthermore, recovery after defending is not always possible. As Kevin Ray commented: “While fee shifting provisions may cause a plaintiff with a weak case to reconsider filing suit, prevailing after years of costly litigation and being given an award of legal costs does the authenticator little good if the award proves uncollectable.”¹⁵¹ However, leaving aside the exorbitant costs of legal fees, because the vast majority of art experts do not want to spend their time defending suits challenging their opinions and expertise, they will continue to shy away from granting opinions even if they are relatively confident that they will win and eventually be reimbursed for their attorney’s fees.

Clearly, even if all three provisions of the 2014 Bill were to be enacted, the Bill would not solve the problem, nor would its 2015 counterpart, which weakened the Bill to the detriment of art authenticators. Legislation must go beyond making it more procedurally difficult for art owners to win suits against authenticators and should instead stop the suits in the first instance, or, at the very least, permit resolution early by dispositive motion, before substantial expense is incurred.

C. *Absolute or Qualified Immunity/Privilege?*

As noted above, either providing art authenticators with absolute immunity or making their opinions regarding authenticity and attribution subject to an absolute privilege could function to eliminate the fear of costly litigation. However, because these mechanisms completely cut off any legal redress for wrongs, absolute immunity and unqualified privilege should be limited to certain purposes for which they are essential to democracy and justice such as absolute immunity for members of Congress acting as legislators or unqualified privilege to protect freedom of speech in court proceedings.

A more appropriate solution for the predicament of art authenticators may lie in a qualified statutory privilege, which is narrower standard. This is because the issue in the case of art authentication is fear of civil actions based upon a specific communication (a good faith statement or opinion regarding authenticity). A qualified makes privilege sense because not all statements by authenticators should be protected, only the ones made in honestly and sincerely, i.e., in good faith.

D. *Presumption of Good Faith Bolsters Qualified Privilege/Immunity*

In addition to a qualified privilege based on good faith authentications, there should be a presumption of good faith for those who meet the definition

html. For an overview of this concept, see generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982). At the federal level, Congress has provided that the party who prevails in a civil antitrust action and civil rights plaintiffs are entitled to attorney’s fees.

¹⁵¹ Ray, *supra* note 104.

of an authenticator. Adding a presumption of good faith assures that a plaintiff suing an authenticator has the burden of proving bad faith or malice by the authenticator, in addition to the ordinary burden of proving elements of his claim, e.g., defamation, slander on title, interference with prospective economic advantage, professional negligence, etc.

Without the presumption, there would be some uncertainty regarding who bears the burden of proof as to qualification of the privilege. The presumption of good faith removes any issue in this regard, as the burden of proving bad faith (a knowing and malicious false attribution) by the authenticator falls on the plaintiff. This creates a “very difficult and demanding hurdle” that few potential plaintiffs can overcome because then the plaintiff not only has to prove that the essential allegations of her claim against the authenticator are true, but also that the authenticator’s authentication opinion, even if false, was made in bad faith or with malice.¹⁵²

VI. THE PROPOSED MODEL LEGISLATION

The model legislation proposed in the Appendix of this Article provides a framework for a statute with clear parameters that will have immediate effects: art experts will feel free to render opinions about a work’s authenticity without fear of consequently being dragged into legal proceedings. As a result, fraud in the art market will subside.

While the 2014 New York Bill may help around the margins by increasing the likelihood that authenticators will prevail, a qualified privilege is more certain to be effective. The proposed New York legislation inserts mere procedural barriers which apply only after a suit is filed and thus do not assure deterrence of litigation. A protective statute affording authenticators qualified privilege (possibly strengthened with qualified immunity) is better because it specifically legislates who is protected (art authenticators), what is protected (their good faith authenticating opinions), and how the protection works (precludes suit based on those opinions).

A. “Authenticator” and “Authentication”

As discussed above, no objective standards (such as licensing or accreditation) exist to determine exactly who should be a protected expert art authenticator, and such a standard is neither needed nor justified.¹⁵³ The legislation itself should define who is an art “authenticator,” and that definition should, at a minimum, mimic the requirements to testify as an expert in court,

¹⁵² *Grzelak v. Calumet Publ’g Co.*, 543 F.2d 579, 582 (7th Cir. 1975); *see also McCoy v. Hearst Corp.* 727 P.2d 711, 727 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987) (The “protections present a . . . formidable barrier”). “Actual malice,” as defined in *New York Times Co. v. Sullivan*, means “with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. at 280.

¹⁵³ *See supra* Part V.A.

i.e., require the background, education, and experience that would qualify a person to testify as an expert witness and render an opinion in court regarding the authenticity of art of that genre and period. The definition should additionally reflect the nature of the relatively small world of disinterested art historians, art experts, and academics who meet those qualifications and include foundations and museums which, as part of their functions, render opinions regarding attribution and authorship of works of art.

Additionally, the definition should require that a privileged authentication opinion be made in good faith, use some examples of authenticators, and require objectivity. The definition in the model legislation accomplishes the foregoing.¹⁵⁴

B. *Qualified Privilege*

Qualified privilege is essential. It should be viewed as the protection that functions as the “floor” of the legislation, on top of which other protections can be added.¹⁵⁵ As noted, in *New York Times Co. v. Sullivan*, the U.S. Supreme Court created an “actual malice” standard for journalists and news organizations sued for libel,¹⁵⁶ establishing the equivalent of a qualified privilege for journalists writing about public officials. Although the standard was created judicially rather than legislatively, *New York Times* provides a useful analogy. In *New York Times*, the threat of libel was particularly felt by civil rights reporters and their news organizations, and the Court’s decision was aimed at removing “the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.”¹⁵⁷ The immediate result was that civil rights journalists returned to the field and freedom of press was fostered in “innumerable ways.”¹⁵⁸ Beyond civil rights reporting, the news media have been far more free to report information about public figures, because the threat of libel suits by these officials has been dramatically reduced.¹⁵⁹ This has been true even though privilege with respect to such statements is a qualified one, and can be overcome by proof of

¹⁵⁴ See *infra* Appendix § 1(A).

¹⁵⁵ See *infra* Appendix § 2(A).

¹⁵⁶ See *New York Times*, 376 U.S. at 279–80 (discussed *supra* in Part V.B.).

¹⁵⁷ *Id.* at 300–01. In *New York Times*, five lawsuits were filed in the state courts of Alabama claiming \$3 million in damages (more than \$23 million in 2013) against the *New York Times* after it published an advertisement entitled “Heed Their Rising Voices” asking for contributions to the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.” This was just one example of a defamation action in retaliation against pro-civil rights journalism at the time. LEE LEVINE & STEPHEN WERMEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* 4–6 (2014). See generally KERMIT L. HALL & MELVIN UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW AND THE FREE PRESS* (2011)

¹⁵⁸ Roy Gutterman, *The Landmark Libel Case, Times v. Sullivan, Still Resonates 50 Years Later*, FORBES (Mar. 5, 2014), <http://www.forbes.com/sites/realspin/2014/03/05/the-landmark-libel-case-times-v-sullivan-still-resonates-50-years-later/#30470f007eb7>.

¹⁵⁹ Gutterman, *supra* note 157.

“actual malice,” that is, by evidence that the news organization knew that the statement was false but nonetheless published it.

There are parallels between journalists and art authenticators. Both can be sued for defamation. Indeed, defamation is the essence of libel suits and suits against authenticators (that the authenticator’s statements and opinions about the authenticity of an art work are defamatory and false and that the owner has suffered damages as a result). There is every reason to believe that legislation creating a qualified privilege would have an effect similar to *New York Times* upon art authenticators by allowing them to safely express their honest expert opinions.

C. *Qualified Immunity*

Qualified immunity would create an even more formidable obstacle for plaintiffs.¹⁶⁰ Qualified immunity is broader because it attaches to status and therefore subsumes qualified privilege. Given the negative impact of fraudulent and forged art on the integrity of the art market, the fear of costly litigation by art authenticators and the critical need for expert authentication to ameliorate this issue of fraud, legislative policy makers would be wise to consider legislation that provides for both.

D. *Procedural Protections*

Qualified privilege and immunity can be melded with the pleading requirements of the 2014 New York Bill to provide even greater protection to expert opinions of authenticators.¹⁶¹ As noted, legislation should include the presumption of good faith that was proposed in the Lefkowitz’ 1966 Bill.

CONCLUSION

Throwing up procedural barriers for art buyers bringing claims against authenticators is unlikely to deter filing a civil complaint. The goal of effective legislation should be to prevent litigation in the first instance.

The model legislation proffered in this article is an objective policy proposal designed to squarely address a very real problem in today’s art market. Unless other forces intervene to stabilize the art market and restore integrity, the art market will continue to be infected with a sizeable amount of fraudulent and fake art and recurrent scandals, such as recently befell the Knoedler Gallery. At a minimum, legislation must grant qualified privilege to art authenticators in order to produce four desirable effects:

- (1) Remove authenticators’ fear of costly and protracted litigation,
- (2) Allow art experts to play an important part of the art market,
- (3) Dramatically reduce the overall level of art fraud, and
- (4) Restore the integrity of the art market.

¹⁶⁰ See *infra* Appendix § 2(B). For the distinction between immunity and privilege, see *supra* Part IV.B.

¹⁶¹ See *infra* Appendix § 2(C)–(F).

APPENDIX: MODEL LEGISLATION

This Model legislation combines elements from the 1966 and 2014 New York Bills.¹⁶² As discussed in the text, the goal of the legislation (preventing litigation against art experts for their authentication opinions) can be accomplished by adopting the definition of “authenticator” § 1(C)(1) and protecting authentication opinions by establishing a qualified privilege, § 2(A). The other provisions provide extra protections for authenticators, and, while helpful, are less essential to the goal of restoring authentication into the art market.

Model Art Authenticator Protection Act

AN ACT: To deter fraud in the art market and restore integrity to that market by providing for qualified immunity and a qualified privilege to expert art authenticators and their opinions regarding authenticity of works of fine art and further providing for a presumption of good faith respecting such opinions, specificity pleading in suits against authenticators and the award of attorney’s fees to authenticators who prevail in civil suits.

The People of the State of _____, represented in the Senate and the Assembly, do enact the following:

Section 1. *Definitions.*

- (A) “Fine art” means paintings, sculpture, drawings and the graphic arts.
- (B) “Authentication” means an opinion regarding the stated or reputed origin, provenance, or creator of a work of fine art.
- (C) “Authenticator” means a person or entity recognized in the visual arts community as having expertise regarding the artist or work of fine art who renders an opinion in good faith as to the authenticity of a work of fine art, or a person or entity recognized as having expertise in uncovering facts that serves as a direct basis, in whole or in part, for an opinion as to the authenticity of a work of fine art. An “Authenticator” is a person who would qualify as an expert by virtue of her knowledge, skill, experience, training or education and includes, without limitation, museum curators, professors of art history, authors of catalogues raisonnés or other scholarly texts in which an opinion as to the authenticity, attribution or authorship of a work of art is expressed or implied.
 - (1) Even if otherwise qualifying as an “authenticator” under § 1(C), above, a person shall not be entitled to the protections of § 2 if such person or entity has a current, prospective or contingent financial interest in the work of fine art for which such opinion is rendered or in any transaction

¹⁶² See Lefkowitz Bill, *supra* note 116 (discussed in Part IV.B.); see also 2014 Bill, *supra* note 94 (discussed in Part IV.A.).

concerning such work of fine art, including but not limited to an owner, dealer, broker, consignee or prospective purchaser of such work,

(2) An otherwise qualifying authenticator receiving only fixed, nonconditional, noncontingent compensation or fee for services relating to providing an opinion as to the authenticity, attribution or authorship of a work of fine art or to provide information on which such an opinion is based in whole or in part, shall be eligible for the protections set forth in § 2, below.

Section 2. *Protecting Art Authenticators*

- (A) In any civil suit brought against an authenticator for damages or injury alleged to have been sustained as a result of her opinion of a work of fine art's authenticity, she is entitled to the following protections:
- (B) *qualified privilege*. Statements, communications and opinions of an authenticator regarding authenticity shall be privileged, unless such statements, communications or opinions are made in bad faith or with malice, notwithstanding the falsity thereof.
- (C) *qualified immunity*. No action for damages against an authenticator shall be maintained based upon her actions relating to the authenticity of a work of fine art, unless she acted in bad faith or with malice, notwithstanding the falsity thereof.
- (D) *presumption of good faith*. Regarding § 2 (A) and (B), above, an authenticator shall be presumed to have acted in good faith and without malice in her opinion with respect to the genuineness or authenticity of a work of fine art.
- (E) *pleading particularity*. A claimant shall specify with particularity in a complaint facts sufficient to support each element of the claim or claims asserted.
- (F) *clear and convincing evidence*. A claimant shall have the burden of proving the elements of such claim or claims by clear and convincing evidence.
- (G) *attorney's fees*. The authenticator shall be entitled to recover his, hers, or its reasonable attorneys' fees, costs and expenses if and to the extent that the authenticator prevails in such action.

Section 3. *Effective Date*

This Act shall take effect _____, 20__ and shall apply to all opinions as to the authenticity of a work of fine art provided to someone other than the authenticator after such effective date.