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Art Forgery: The Art Market and Legal Considerations

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Abstract

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KEYWORDS: art, market, forgery

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Introduction

“The Fortune Teller” is a painting attributed to the French seventeenth century artist Georges de La Tour and is believed to have been painted between 1632 and 1635. It hangs in the Metropolitan Museum of Art and is in the center of a controversy that has spanned two continents and still has not been definitively settled. The painting was purchased by the museum for \$675,000 in 1968 and several distinguished critics have branded it a fake. They claim it is a forgery.¹ One might

1. Hochfield, *Can the Fortune Teller be Trusted?*, ART NEWS, Summer 1982, at 73.

wonder how a museum of the caliber of the Metropolitan Museum of Art could have been so incompetent as to have bought such a lemon. Others might wonder why the issue—whether it is or is not a fake—is still not settled to everybody's satisfaction. The issue that should grab center stage, however, is: Why does this painting, bought by the museum as a great work of art and enjoyed as such for an extended period of time, lessen in value when its authorship becomes doubtful? Does it really make any difference by whom or when it was painted? Is the test of greatness the aesthetic appeal, the ability of the work to be universally enjoyed, or is it defined in more concrete mundane terms? These questions are significant ones to be answered in the context of forgery and the art market and in consideration of the legal ramifications of a situation such as the one exemplified by "The Fortune Teller."

There have been many hoaxes and forgeries throughout history; Van Meegeren's faked Vermeers are among the most notable.² In many of these situations, as with Van Meegeren's forgeries, the works of art were enjoyed and mistaken for the originals. They provided aesthetic pleasure for the average person, and even the experts could not tell the difference. Why then do we brand such works as forgeries or fakes and provide legal penalties and remedies? In what context are these remedies and penalties established, and how adequate are they? Why do we have such difficulty in accepting a work of art once we have discovered it is a forgery? The "fake" painting or other work of art has the aesthetic qualities of composition, color, harmony, power, and whatever else one wants to attribute to aestheticism. Logically, there is no reason not to accept the work and value it.

Other cultures like the ancient Egyptians and Chinese made no distinction between copies and originals. There was no stigma attached to acquiring or making a copy. The Romans and Greeks commissioned and collected copies. During the Renaissance an acknowledged imitation could bring as much as half the price of the original. In the seventeenth century Emperor Rudolf II sent court painters to copy the best of Venice and Rome. Experts today still have trouble distinguishing these paintings from the originals.³ In Germany, if a work in one of their museums was determined to be a fake the word "nach" ("in the

2. L. ADAMS, *ART ON TRIAL* 115 (1976).

3. Banfield, *Art Versus Collectibles*, *HARPERS*, Aug. 1982, at 28, 31.

manner of") was put before the artist's name. The work could then be celebrated for its own merits and appeal.⁴ The art historian Walter Pach wrote that until modern times "copies, imitations, and even forgeries were made by men of such talent that the works possess qualities connoisseurs value in themselves."⁵ Today, however, our experience and view of art have shifted along with changes in culture, economics, and aesthetic values. To understand a problem such as forgery, it is pertinent for one to analyze it in relation to these changes—to look at it philosophically, historically, and legally. Art related problems such as forgery have arisen in the context of our culture and the art market, and our response and law reflect these factors.

I. Art Forgery—A Philosophical Enigma

In 1962 the Fogg Museum of Harvard University held an exhibition intentionally displaying copies along with original works. The guests were art connoisseurs who were to decide which was which. Among the items exhibited were an original portrait by Annibale Carracci, an important painter of the Italian baroque, and a copy of that work. An original Picasso and two forgeries of the same were also displayed. Many of the experts incorrectly picked the forgeries instead of the originals.⁶ Therefore, the disturbing question arises whether these forgeries or copies then became less beautiful or less valuable because painted by somebody else. "The fact that even professional experts are unable to point out the difference in artistic merit between the true and the false Picasso, Carracci, or Vermeer is conclusive proof that no such difference can be registered by the laymen's eyes."⁷ If we do not see any difference is there really an artistic difference? Are we so myopic that a signature or the postmark of a period is more important than the intrinsic beauty of the object itself?

The answer lies in contemplation of the total art experience. Art does not live in a vacuum of aesthetic beauty but reflects the values, psyche, and structure of the people and society in which it was created.

4. G. APOLLINAIRE, *APPOLLINAIRE ON ART: ESSAYS AND REVIEWS 1902-1918*, at 10 (1972).

5. Banfield, *supra* note 3, at 31.

6. Koestler, *The Aesthetics of Snobbery*, *HORIZON*, Winter 1965, at 50, 51.

7. *Id.*

Our attitude towards art—how we value it aesthetically—is tied to other factors as well. If one was to return home and say he met someone who looked like Elizabeth Taylor, that would not have the same value as one who could claim he met the actual Mrs. Taylor.⁸ So it is with art. As people, we are imbued with a system of value and criteria of excellence and worth. We have a sense of history from which art as well as other life experiences cannot be isolated. There is a “magical pull” inside of us that enhances the experience when we know it is real or historic. The shirt with a spot of blood becomes more alluring when it belongs to Rommel. Napoleon’s inkpot or a galley proof corrected by Tolstoy himself possesses a magic that we cannot escape.⁹ Perhaps this stems from a belief by “[o]ur forbears . . . that an object that had been in the possession of a person became imbued with his emanations, and in turn emanated something of his substance.”¹⁰

The art experience is a subjective one; all that has really changed when we discover a forgery is our own subjective experience. Only then does the work become less valued. We attribute to the original or authenticated version inordinate importance rooted in an almost unconscious feeling state of awe and magic.

The second process that interferes with our acceptance of forgeries or copies is “period consciousness.” We look at art in the context of its history and its place in that history as well as in the context of isolated present experience. There is a relativism of aesthetic judgment that makes allowances and perverts our scale of values. Much of art is only appreciated in the context of its place in the development of styles of art and if taken out of that context would be considered junk.¹¹

Thirdly, our aesthetic interest as a matter of psychology is tied to pecuniary interest and the realities of an art market. Many people find things beautiful in direct relation to their cost. Costliness is associated with power, fame, respect, and awe. Cost stirs the emotions which are then transferred to the work of art and contributes to aesthetic attitudes.¹² It would probably be safe to say that some people who stood in line to look at “Aristotle Contemplating the Bust of Homer,” after the

8. Banfield, *supra* note 3, at 34.

9. Koestler, *supra* note 6, at 53.

10. *Id.* at 52.

11. *Id.* at 53.

12. Banfield, *supra* note 3, at 34.

Metropolitan Museum of Art paid six million dollars to get it, would have just as soon stood in the same line to see six million dollars in cash.¹³ It is therefore apparent, although perhaps illogical, that to “the extent that these nonaesthetic feelings are linked with aesthetic ones, the public will not accept a perfect copy as a perfect substitute for the original.”¹⁴

Lastly, a person who buys a forged work of art or the artist whose work is forged or misrepresented is injured in his possession or in his interest. There is an interference with the individual freedom of the victim. There is an infringement on the personal expression of the artist that is offensive to many people. There is frustration of purpose for the artist in his desire to express his individuality and a frustration of the collector’s quest for truth in beauty or aesthetics.¹⁵ The fraud is perceived as a degradation. It is out of step with the social tenets of modern society and is an imposition upon one’s desire for truth. “It threatens and abuses the possessions, values and interests of the individual and society.”¹⁶ It is an aggressive act.¹⁷

II. Art Forgery—A Reflection of the History and Development of the Art Market

A. Early History

“Art history is traditionally taught in visual terms and rarely examines either the society influencing the artist or the market that absorbs the work.”¹⁸ To understand the current highly competitive structure of the art market and its impact on society including the present legal ramifications, it is instructive to understand how this market developed.

Historically, art forgery and art fraud did not become an offense

13. *Id.*

14. *Id.*

15. Wurtenberger, *Criminal Damage to Art—A Criminological Study*, 14 DE PAUL L. REV. 83, 88 (1964).

16. *Id.* at 85.

17. *Id.* at 83.

18. P. FRISCHER & J. ADAMS, *THE ARTIST IN THE MARKET PLACE* 21 (1980) [hereinafter cited as P. FRISCHER].

under English law until 1562. There were a variety of punishments. They included having both ears cut off, standing in the pillory, slitting and searing the nostrils, forfeiting land, or even imposing perpetual imprisonment. In the seventeenth century capital punishment was included. Since that time there have been a hoard of statutes, but the penalties have lightened. Han van Meegeren made over half a million pounds from his forgeries and received only a one year sentence.¹⁹

Today this type of crime is considered more or less "white collar." Generally, the federal and state criminal statutes have been ineffective in reducing the amount of forged and faked works in circulation. Most of the applicable statutes are general antifraud statutes imposing relatively minor penalties. Only a few states have statutes that specifically deal with art fraud.²⁰ Therefore, in pursuing a remedy one, for the most part, must rely on civil remedies applying contract and tort law principles. These are not always satisfactory to the victim of the fraud who, while participating in the art market, has invested a great deal of time, money, and emotion.²¹

Originally there was no free market in art as we know it today; therefore, art forgery was not a profitable viable alternative. The concept of the creative artist as distinct from the artisan is relatively new. The status of the artist until the fourteenth century was that of a workman.²² Almost all painters also worked as decorators. They might be called upon to paint walls or to decorate furniture panels.²³ The artist in Greek or Roman times was treated as a carpenter or mason. He usually did not create a work unless it was ordered in advance because the risk of not selling it was great.²⁴

The role of the artist became more important with the growth of the power of the Church. However, the Church controlled the artist's creativity. It dictated what was acceptable and had a pervasive influence on the composition and execution of works of art. The clergy were

19. J. MILLS & J. MANSFIELD, *THE GENUINE ARTICLE* 12 (1979) [hereinafter cited as J. MILLS].

20. R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS* 12 (1977).

21. *Id.* at 13.

22. P. FRISCHER, *supra* note 18, at 22.

23. G. SAVAGE, *FORGERIES, FAKES & REPRODUCTIONS* 2 (1964).

24. P. FRISCHER, *supra* note 18, at 22.

the organizational go-betweens in art dealings so they had to be obeyed.²⁵

At the time of the Renaissance the painters of pictures were regarded as the social equivalents of craftsmen. These painters were usually skilled in several related crafts and were commissioned by patrons who exercised some control over the work. During this period, it was known for an artist of note to make a replica of the work of another to fulfill a patron's order. (Of course, there were no copyright acts.) These duplicate works would not be regarded as forgeries today; but, there are implications in terms of possible misrepresentations which might arise when, along with the effect of time on the work, a copyist competently imitates the style, materials, and methods of a master. The problem becomes one of attribution.²⁶

Most artists were members of guilds. These guilds were trade unions and often controlled the materials used and the terms of sale. They examined the quality of the work produced condemning that which was inferior. Much of the artist's work was done with the aid of apprentices and employees. However, the influence of the master would predominate in the style of the work. For example, the face in a portrait might be painted by the master but the background filled in by another. Replicas of paintings would be ordered from the artist and carried out by a workman under his supervision. The buyers of the time were well aware of the nature of their purchase and made no demand that the master should execute every aspect of the creative process from priming the canvas to the finishing touches and signature.²⁷ "The signature was not the hallmark of genius, it was the trade-mark of the studio."²⁸ Today the fashion is for the personality cult. Collectors demand the unaided work of the artist. As a result, such work has more value than composites or replicas done by others, thus paving the way for art fraud, false attribution, and forgery.

Toward the end of the sixteenth century creativity was elevated to a new position of recognition. There began a transformation of the artist from artisan to creative human being. The idea espoused was that

25. *Id.*

26. G. SAVAGE, *supra* note 23, at 2.

27. *Id.*

28. *Id.*

since artists could translate God's creations into recognizable form, they must be closer to God than other people. Now the artist was in demand rather than the subject. Therefore, a work of art for the first time became subject to the laws of supply and demand. The notion of art for profit and investment was created, and some painters such as Raphael were in much demand and profited enormously, although most still lived in poverty.²⁹

This market in art gave the artist and his work a new status and created an elitism in art. The high cost of procuring an artist's services due to these laws of supply and demand made art less available to the ordinary person and produced a wide division between art and the lower classes. The emerging role of the artist at the height of the Renaissance, especially in Italy, was no longer compatible with the Mechanical Arts and the guilds. The artist became the companion and friend of princes. He was sought after and fought over by rival patrons seeking the fruits of his genius. This was in marked contrast with his role in the Middle Ages of the humble artist-decorator.³⁰ However, the Church still retained a great deal of control. For many artists it was their main sponsor and sole means of support.

As the struggle against the reformation developed, the Church tightened its control decreeing what should be painted, and many of the gains toward artistic individuality were stifled. The artist was once again an extension of the Church with little room to freely express or create. Art was brought back to the people reducing it from the elite status of the Renaissance.³¹

It was not until Louis XIV of France that artists were again elevated to a high status. Louis used art to enhance the splendor of his court. He exercised control by making the artists civil servants who had to satisfy the king to be paid. However, Louis' extravagances began to bankrupt the state and the position of the artist was again threatened. The artist now had to turn to the open market for a living. He had to struggle to survive without the support of the king as did all members of the lower class.³²

29. P. FRISCHER, *supra* note 18, at 24.

30. G. KEEN, *THE SALE OF WORKS OF ART* 21 (1971).

31. P. FRISCHER, *supra* note 18, at 24-25.

32. *Id.* at 26.

During this time Dutch painters, foreshadowing the twentieth century artists, had been fighting for survival in the open market. They were basically free of the religious and political restrictions that bound artists elsewhere in Europe. They produced paintings at will relying on their sales to make a living. This period saw the rise of the middle class collector in northern Europe while the fervor of the Italian Renaissance in art was essentially limited to the rich and noble and the Church.³³

The Dutch were aware of art as an investment and pushed collecting to extremes, creating a glut on the market which resulted in low prices. Artists had to turn to other employment. Some such as Vermeer and Rembrandt became dealers.³⁴ Speculation on the fame of artists was a natural outgrowth as it caught the imagination of almost all who could afford it.³⁵ There emerged a group of professional art dealers who saw opportunity in an oversupplied and under-promoted market. Dealers associated with particular artists making them sign contracts whereby the artist agreed to hand over to the dealer everything he created. However, the market was still in its early stages. These dealers did not have sufficient control of it and as a result the artists not under a contractual obligation continued to saturate the market with work. Prices fell even further and dealers turned to handling the works of the old masters. These were in short supply and had a greater potential for profit.³⁶

Thus, the foundation of the modern art market was laid and with it the law as applied to this market and to art in general developed. Economic circumstances in France and Holland necessitated artists find alternative means to sell their product. Salons were established with public exhibitions to introduce art to buyers. The idea of prints to distribute before sales, as publicity, was developed. Along with this came the idea of catalogues and printed criticism which were refined sales techniques but which paved the way for more indepth analysis of what actually constitutes art. Intellectualism pertaining to art was born as men discussed theories of art, and the resultant ideas influenced the creativity of artists eager for recognition.³⁷

33. G. KEEN, *supra* note 30, at 22.

34. P. FRISCHER, *supra* note 18, at 27.

35. G. KEEN, *supra* note 30, at 22.

36. P. FRISCHER, *supra* note 18, at 28.

37. *Id.* at 29.

This new spirit of individualism with an accompanying change of values further enhanced the status of the individual. As society more and more recognized the artist's genius, the higher was his rise in social life and the more advanced his economic gain. He was respected for his achievements and talents. The value of art was tied to the social recognition of its creator. It was considered a part of the artist and conceptualized as an "original" in the sense the public knows it today. It was important in the development of art forgery and art fraud that this value was associated with the artist through development of a capitalistic market. In today's modern market originals draw higher prices and are more valued as trade commodities. As a result, wherever art is disposed, traded, or collected there is the temptation for dishonest people to enrich themselves by forgery or fraud.³⁸

In Europe during the late eighteenth and early nineteenth centuries there was profound political change. The old elitist system was fighting for survival and the artist was again redefining his role in the marketplace. There developed "the idea of the artist as isolated and oppressed yet somehow above the real world. . . ."³⁹ This idea was perpetuated by the artists themselves as they took refuge from the harsh realities of life in a world of romantic unreality. The idea of art for art's sake and the refusal of the artist to accept many of the regimens of society scandalized the bourgeoisie. In the years before and after the French revolution, art became a weapon of propaganda for the people as the artist further realized his identity and began to see himself more and more as a producer of a commodity.⁴⁰

B. The Modern Market

The role of Great Britain in the late eighteenth and nineteenth centuries paralleled that of America in the late nineteenth and twentieth centuries in relation to the art market. The industrial revolution and expansion of its trading empire gave Britain power and prosperity. Travelers and traders returned to Britain from the Continent laden with art.⁴¹

38. Wurtenberger, *supra* note 15, at 84.

39. P. FRISCHER, *supra* note 18, at 29.

40. *Id.* at 29-30.

41. G. KEEN, *supra* note 30, at 23.

American collecting began its tremendous impact in the late nineteenth century. As America became the richest country in the world in the twentieth century, it achieved a dominant position in the art market. In this century art treasures from Europe have continuously flowed westward to the United States and the fashion for collecting has been firmly established.⁴² Art prices have multiplied phenomenally since the early 1950's,⁴³ and public interest in the sale of art has continued to bring exceptional prices. Everyone wants to get into the act, creating a ripe environment for fraud and forgery.⁴⁴

The art market, although dominated presently by the United States, is an international market with London as a center of operations. There are many important European collectors, and Japan is exerting a powerful influence.⁴⁵ Besides the growth of huge auction houses such as Sotheby's and Marlborough Fine Art, the post war period has been marked with a vast increase in the number of small scale dealers and collectors.⁴⁶ Due to a reverential attitude toward art, the educated middle classes have taken up collecting on an impressive scale. The availability of education to so many has created an environment which fosters respect for artistic genius and achievement, an appreciation of art history, and a clientele to purchase the more minor prizes of the art market.⁴⁷

Thus, today the art market is prosperous and conducive to fraud and forgery. Many people buy as much for an investment as for pleasure or aesthetic taste. As a result, the issue concerning the value of the "original" versus its aesthetic duplicate arises. There are important forces at work to prevent the separation of artistic and pecuniary value. The individuals who own originals have an important financial and emotional stake. If reproductions lose their stigma and become legitimate alternatives to original works, these originals would lose their value. Museums directly and indirectly (by virtue of tax exemptions for wealthy donors) are among the mainstays of pecuniary value. If "they were to substitute reproductions for originals the multibillion dollar art

42. *Id.* at 24.

43. *Id.*

44. *Id.* at 25.

45. *Id.*

46. *Id.* at 30.

47. *Id.* at 31-32.

business would fall into an acute and permanent recession."⁴⁸

Also, many of the experts relied upon to authenticate works of art are art historians. Due to their training, these experts are usually more sensitive to historical than to artistic values. In their view the authenticity of the work is of supreme importance. Most of the educated public who purchase art have learned from books and courses by these art historians; therefore, they also see art as part of this history or culture rather than as a solely aesthetic experience. The professional's respect for the authentic and his contempt for the inauthentic have been transferred to the public at large and the art market.⁴⁹

Therefore, many factors go into determining the value of a work of art and help to create a climate ripe for forgery and fraud. The nature of the art market has created a valuable pecuniary commodity. Associated with this pecuniary value are cultural ideals of beauty and aesthetics, artistic merit, the reputation of the artist, and also psychological factors such as prestige, and a sense of historical appreciation or magic. The work's provenance, i.e. whether it was once part of a great collection or not, enhances its value.⁵⁰ The condition of a painting is important as is its rarity or lack of it. Price is also dependent on who is selling and who is buying. A work will be worth more if sold by a dealer of worldwide fame rather than by an unknown dealer.⁵¹

Importantly, since the market is an international one, it is affected by the legal, fiscal, and commercial policies of the countries in which it operates. These policies can have a major influence on values. For example, Italy has more restrictions on export than England or the United States; therefore, the same painting would bring less in Italy.⁵² Auction prices in Paris are usually ten percent lower than prices in London because in France there is a sales tax. In the United States favorable tax considerations for donations to museums have encouraged speculation and lavish spending. In some cases, a collector who buys a painting that significantly increases in value can receive a charitable deduction for income tax purposes in excess of the amount he originally

48. Banfield, *supra* note 3, at 33.

49. *Id.* at 34.

50. G. KEEN, *supra* note 30, at 41.

51. *Id.* at 42.

52. *Id.*

paid for it.⁵³

III. Art Forgery—Legal Considerations

A. Factors Perpetuating Art Forgery

In recent years the exigencies of the art market and its development into a free trading international market have given ingenious forgers and ordinary confidence men plenty of opportunity for swindling the art buying public. There has been an increase of public awareness of art and an increase in the number of people who can afford to buy these works. They have proven to be in many cases a more attractive investment than the stock market. In these inflationary times when people tend to turn to collectibles to preserve the value of their money, art works have been a favorable investment. They have reacted to the market forces of supply and demand, increasing tremendously in value as the supply of authentic works remains relatively constant while consumer demand rises.

The market forces and structure of the art market have set the stage. The art forger steals the scene by taking advantage of the situation. Although since the advent of art forgery as a recognizable offense authorities and victims have sought to eradicate it, the risk of conviction for a sale of an art forgery is relatively small. There are several reasons for this. On one side stands the scientist with his technical equipment for detection of fraud. However, he must rely upon the art experts. It is the historian's or connoisseur's trained eye that first detects the possibility of the forgery, thus alerting the technicians. These experts are not available to everybody desiring to buy art and there are no licensing agencies, ethical committees, or competency exams to control the quality and validity of these authentications. The situation is ripe for negligent or incompetent advice. On the other side stands the forger who has all the modern technical and artistic resources available to aid in his attempt to stay one step ahead of the authenticators. In the middle are the galleries, the collectors, and the directors of museums. These participants many times unwittingly aid the forger. They often are hesitant in the face of costly advice, huge publicity, and a

53. *Id.* at 43. See I.R.C. § 170 (1983).

desire not to besmirch the good name of the art market or their own good names to admit publicly they have bought a forgery and thus fail to cooperate in criminal prosecution. If a fraud is reported the victim dealers are afraid they will lose customers, and the victim collectors are afraid they will lose the value of their bargain if the fraud becomes known. So they both remain silent—one to preserve his supposed integrity and one to preserve the supposed “authenticity” of his purchase.

The sympathies of the general public often tend to side with the forger. We see something glamorous in somebody with the skill and cunning to produce a work the apparent equal of a great master.⁵⁴ We somehow do not see this crime as being as aggressive or as debilitating as others. “[T]he crime of the forger is not violent, it is just cunning.”⁵⁵

Taking all the foregoing factors into account and considering: (1) there are jurisdictional problems due to the international nature of the art market,⁵⁶ and (2) that presently both federal and state laws are inadequate in specifically dealing with this problem, the risk of conviction for the sale of forged art remains relatively small.⁵⁷ Although all states have penal statutes that prohibit forgery, these statutes do not deal specifically with the marketing of fake paintings or art forgery as a distinct statutory crime.⁵⁸ Prosecutions generally fall under laws dealing with conspiracy, larceny, and fraud which are not conducive to effective art forgery deterrence.⁵⁹

“A work of art has been defined as an aesthetic expression that is a product of a particular time, place, and person. A fake pretends to this but is not.”⁶⁰ If a person wants to buy a fake and pays a proper price there is no legal problem. “The essential feature of art forgery is not imitation, which may have many other motives, but the intention to deceive either the general public or an individual dupe or—as a

54. J. MILLS, *supra* note 19, at 21.

55. *Id.*

56. Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 508 (1982).

57. *Id.* at 507.

58. Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930, 940 (1972).

59. Comment, *supra* note 56, at 507-08.

60. Committee Report, *Legal Problems of Art Authentication*, 21 THE RECORD 96 (1966).

rule—prospective buyers.”⁶¹ Therefore, to obtain a conviction the essential element is fraudulent intent. To obtain the necessary proof of intent in a criminal prosecution for art forgery under these statutes and to carry the burden of proof beyond a reasonable doubt is difficult.⁶² It is easy for the faker to claim he had no knowledge the fakes would be sold as originals. It is easy for the dealer to claim he thought the works were authentic.

It is also sometimes difficult for the prosecution to prove beyond a reasonable doubt the painting is indeed a fake. Scientific analysis is not foolproof and the appraisals of experts are just expressions of opinions which juries and judges may not find convincing. The prosecution must prove a connection between the fake and the faker which is costly and many times difficult because the chain of title or origins of the work often can be difficult to trace. This is further complicated by the international nature of the art market.⁶³

B. Other Problems to be Considered

The case of the *State of New York v. Wright Hepburn Webster Gallery, Ltd.*⁶⁴ is instructive as to some of the problems associated with the prevention of art forgery. Defendant David Stein was a former art dealer who had been convicted of forgery. After serving a jail sentence he was deported to France where he was again convicted for selling art forgeries in that country. While in jail he was permitted to produce fakes provided he signed his own name. After a successful London sale these paintings were exhibited in New York accompanied by the sign “Forgeries by Stein.”⁶⁵ The New York Attorney General attempted to enjoin the sale or transfer of these paintings on a theory of public nuisance.⁶⁶ Stein’s name could easily be removed and replaced with the name of the imitated master. Thus, the contention that a threat of

61. 2 J. MERRYMAN & A. ELSEN, LAW AND THE VISUAL ARTS 6-87 (1979) [hereinafter cited as J. MERRYMAN].

62. Comment, *supra* note 56, at 508.

63. Note, *supra* note 58, at 941.

64. 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), *aff’d*, 37 A.D.2d 698, 323 N.Y.S.2d 389 (App. Div. 1971).

65. *Id.* at 424, 314 N.Y.S.2d at 663.

66. *Id.*

fraud was posed to the cultural welfare of that segment of the population which is involved in the sale and collection of works of art was valid in a pragmatic sense. However, legalistically the court refused to grant the relief asked for saying that no crime had been committed. Both sides conceded that no forgery was involved.⁶⁷ Stein has the right to sell under his own name even if there is the possibility of a future criminal act. The court cannot enjoin a potential crime. As regards forgery, the case does not fall within any sections of the Penal Law which requires a showing of intent to defraud. Also paintings such as the ones displayed are not included among the items declared by the statute to be a nuisance subject to abatement.⁶⁸

Another problem is represented by the case of *Weisz v. Parke-Bernet Galleries, Inc.*⁶⁹ where forged paintings were bought at auction pursuant to a catalogue that listed each artist and described each painting stating that each purchaser would be given a signed certificate. This was followed by a "disclaimer of warranty as to genuineness, authorship and the like."⁷⁰ The issues here were: (1) whether the plaintiffs knew of the disclaimer and, if they did, to what extent were they legally chargeable with such knowledge; and (2) if the answer to the first question is yes, to what extent was the auction house responsible, given this disclaimer, where a sale resulted from a representation of genuineness that later proved to be inaccurate.⁷¹ The court concluded on the trial level that even if plaintiffs had knowledge of the disclaimer other factors were relevant. The auction house had superior knowledge and experience. It demonstrated an intention that the buyers rely on the catalogue for their descriptions. This, accompanied by such factors as the wording and arrangement of the catalogue, the technical language, and the subtle presentation of the disclaimer, made it ineffective.⁷² Thus, the court relied on "requirements of fair dealing where there is a relationship between parties in which there is a basic unequal-

67. *Id.* at 428, 314 N.Y.S.2d at 668.

68. *Id.* at 427, 314 N.Y.S.2d at 667.

69. 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (Civ. Ct. 1971), *rev'd*, 77 Misc. 80, 351 N.Y.S.2d 911 (App. Div. 1974).

70. *Id.* at 1078, 325 N.Y.S.2d at 578.

71. *Id.* at 1079, 325 N.Y.S.2d at 579.

72. *Id.* at 1082, 325 N.Y.S.2d at 581.

ity of knowledge, expertness or economic power."⁷³

The judgment, however, was reversed on appeal.⁷⁴ The court maintained that there was no implied warranty of authenticity of authorship as a result of the expressed opinion or judgment of the seller. There was a clear disclaimer of warranty of authenticity in the catalogue and no willful intent to deceive was demonstrated.⁷⁵ The court relied upon common law precode principles which date back to the cases of *Jendwine against Slade*⁷⁶ and *Hyslop v. Shirlaw*.⁷⁷ If a seller represents what he believes, he is guilty of no fraud.⁷⁸

C. The Uniform Commercial Code—The Problem Continues

Now New York, where Weisz was tried, and a majority of the states have adopted the Uniform Commercial Code which could be relied upon under sections 2-313, 2-314, 2-315, and 2-316, dealing with warranties.⁷⁹

U.C.C. § 2-313

Generally under the Uniform Commercial Code "an express warranty can be created by an 'affirmation of fact or promise made by the seller,' a 'description of the goods,' or by a 'sample or model,' so long as the affirmation, description, or sample is part of the 'basis of the bargain.'"⁸⁰ The seller does not have to specifically make the warranty

73. *Id.* at 1082, 325 N.Y.S.2d at 582.

74. *Weisz v. Parke-Bernet Galleries, Inc.*, 77 Misc. 80, 81, 351 N.Y.S.2d 911, 912 (App. Div. 1974).

75. *Id.* at 80, 351 N.Y.S.2d at 912.

76. 2 Esp. 572, 170 Eng. Rep. 459 (1797). See J. MERRYMAN, *supra* note 61, at 6-106.

77. 42 Scottish Law Repr. 668 (Sheriff Court, Lanarkshire 1905). See J. MERRYMAN, *supra* note 61, at 6-106.

78. J. MERRYMAN, *supra* note 61, at 6-107.

79. Comment, *supra* note 56, at 523. This Note will not consider the warranty of title provided by section 2-312.

80. Comment, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 954 (1978). See U.C.C. § 2-313 (1979) which states:

Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows: (a) Any affir-

through actual words of warranty or guarantee. Likewise, the seller need not intend a warranty for such to exist.⁸¹ A critical issue to be determined is whether an affirmation of fact was made by the seller or whether he was just stating an opinion or puffing his product.⁸² This problem arises continuously in the sale of art works when dealers attribute value or authorship to a painting or other work of art. This was an issue in the *Weisz* case. Did the cataloguing of the paintings along with the names of the artists create an express or implied warranty despite the disclaimer? Generally a statement of opinion or of value by the seller is considered mere puffing and does not create a warranty.⁸³ However, express warranties have been found where the seller's expression tends to assert facts that are in some way measurable.⁸⁴

The seller's contention in regard to the application of the Code to the sale of works of art is that any statement as to value or authorship can be construed as merely opinion, identification, and description as opposed to a warranty. However, such a contention is not necessarily valid when considering the nature of the art market. To maintain that a dealer's description, attribution, or affirmation of authorship or value does not go to the basis of the bargain is to deny the realities of that market. One who purchases works of art, especially expensive pieces or those for investment, is paying for more than the materials and labor. The intrinsic value of the work is derived from its history, the reputa-

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

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

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

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

81. U.C.C. § 2-313(2) (1979).

82. Comment, *supra* note 80, at 954.

83. *Id.*

84. *Id.* at 955.

tion of the artist, its previous sales price, and even who the previous buyer or present seller is. It takes into account the judgments of critics, major dealers, and collectors. Its intrinsic value is even affected by how often it has been offered for sale within a given period of time. Therefore, a statement of authorship or even value refers to a specific attribute of the work and can reasonably be attributed to the basis of the bargain.⁸⁵

It also could be maintained that the most precise way to determine authorship is through acknowledgement by the artist himself. Once the artist dies, authentication is less precise, especially given the prevalence of forgeries and the expertise in their execution. Most people, therefore, buy works of art relying on the word of authenticators such as experts, dealers, and the like and must accept the reality of the uncertainty as to origin. Given this knowledge that a dealer's statement of authenticity is just his opinion, it could be maintained that it is incumbent upon the buyer not to rely on the word of the dealer as an express warranty. However, this would be impractical. It is the expert or dealer who actually sets the value through his affirmations; therefore, it would be only equitable that he should bear the burden of the truth of these representations. Thus, if the seller receives a high price for a painting as a result of an expert's opinion that it is genuine and receives the benefit of that bargain, he should bear the burden if that opinion later turns out to be incorrect.⁸⁶

U.C.C. § 2-316

If it is determined that the seller's description or affirmation is part of the basis of the bargain, the seller is considered to have made an express warranty.⁸⁷ Nevertheless, the seller may attempt to disclaim the warranty. Prior to the Uniform Commercial Code the seller could disclaim warranties virtually at will; caveat emptor was the order of the day.⁸⁸

Under section 2-316(1) of the Uniform Commercial Code general

85. *Id.* at 956.

86. *Id.*

87. U.C.C. § 2-313 (1979).

88. Comment, *supra* note 80, at 957.

disclaimers of express warranty are likely to be found inoperative.⁸⁹ Where these disclaimers conflict with specific express warranties, the Code “gives effect to the express warranty.”⁹⁰ To avoid liability the seller must prove that no express warranty existed initially. This may prove difficult because there are a variety of representations that give rise to express warranties.⁹¹ For example, is a listing with a name of the artist in a catalogue a representation that gives rise to an express warranty? (The *Weisz* case could fall directly under section 2-316.) This further demonstrates the sensitivity of the law to the art market. The courts dislike general language of disclaimer. If they refuse to give effect to such disclaimers, they can protect the art market from disreputable dealers who attempt to hide their fakes and poor quality works of art by using these disclaimers in their contracts.⁹² But it is still a question of fact whether the seller’s prior statement of authorship, value, etc. is consistent with a later statement that no warranties were made. So, although the Uniform Commercial Code provisions concerning express warranty and disclaimer can provide adequate protection for works of art, the buyer must prove the creation of the express warranty as to authorship and the inconsistency of the disclaimer with that express warranty.⁹³

89. U.C.C. § 2-316(1) (1979). This section provides:

Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-316, Comment 1 states: “This section . . . seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty. . . .”

90. Comment, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409, 420 (1972). See also U.C.C. § 2-316, Comment 1.

91. Comment, *supra* note 90, at 420.

92. *Id.*

93. *Id.*

U.C.C. § 2-315

In the context of art forgery, section 2-315 of the Uniform Commercial Code presents an alternative to the art buyer by establishing an implied warranty of fitness for a particular purpose. The warranty would arise under this section if "the seller at the time of contracting has reason to know any particular purpose for which the goods are required *and* that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. . . ."⁹⁴ In order for liability to occur three elements must be present: (1) the seller must know or should know what the buyer's particular purpose is; (2) there should be on the part of the seller actual or constructive knowledge that the buyer is relying on his skill; and (3) there must be actual reliance on the seller by the buyer.⁹⁵

A distinction should be made here between particular purpose, as contemplated by a warranty of merchantability related to a special use particular to the nature of one's business, and ordinary purpose, meaning the customary use made of the goods.⁹⁶ Thus, if one purchases a painting for his own pleasure or a museum buys it for exhibition, the section could not be invoked since the art is being used for its ordinary purpose. They are the customary uses or not peculiar to the buyer's business. It might be difficult to envision a use for a work of art that is not "ordinary" and would fall under the "particular use" requirement.⁹⁷ However, it is possible to make a case in the context of forgery

94. U.C.C. § 2-315 (1979) (emphasis added). This section provides:

Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

95. U.C.C. § 2-315. *See also* U.C.C. § 2-315, Comment 1; Comment, *supra* note 90, at 428.

96. U.C.C. § 2-315, Comment 2 states:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

97. Comment, *The Uniform Commercial Code Warranty Provisions and the*

if one was to buy for the purpose of completing a collection, or if the purchase is for a certain gift or investment based upon public demand for a particular artist or period. If the three aforementioned requirements are met, the sale of a forgery or that which was not bargained for could constitute breach of warranty for a particular purpose.⁹⁸

U.C.C. § 2-314

Lastly, with regard to section 2-314 of the Uniform Commercial Code dealing with the implied warranty of merchantability for the sale of goods, the issue in relation to art revolves around merchantability. The provision "limits liability to a 'merchant with respect to goods of that kind.'"⁹⁹ It would not apply to a private sale. Therefore, there could arise the issue of whether the seller-dealer is a merchant under the Code. Assuming he is a merchant, the buyer must establish the

Theory of Strict Liability in Tort as Solutions to Art Counterfeiting in Painting: A Critical Analysis, 20 St. Louis U.L.J. 531, 549 (1976).

98. Comment, *supra* note 90, at 428.

99. Comment, *supra* note 97, at 546. See U.C.C. § 2-314 (1979) which states:

Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-314, Comment 3 (1979) states: "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."

work was not merchantable because it was a forgery.¹⁰⁰ To be merchantable the goods must be fit for their "ordinary purpose" and must be "honestly resalable in the normal course of business because they are what they purport to be."¹⁰¹

Taking this into account, an argument could be made two ways. One could maintain that a forgery would defeat the purpose of buying an original and would certainly not be "honestly resalable" as an original. However, on the other side, a viable contention is that the ordinary purpose of a work of art is aesthetic pleasure. Thus, if one cannot tell the difference between a forgery and the original with one's naked eye, fitness for ordinary purpose can be accomplished with a forgery, which returns to the philosophical issue raised in part one of this article. Also, to be proven conclusively not to be "honestly resalable" is difficult. Only the artist himself knows for sure if the work is his. If he is dead and there is disagreement among the experts as to attribution or originality, such proof could be difficult. Just because several critics label a painting a forgery, this does not mean there are not others who will certify it as an original, thus fulfilling the "honestly resalable" requirement and creating a problem of certainty.¹⁰² The possible application of this section is also pertinent in that it does not require the showing of intent. The seller's knowledge of the defect is not essential. This would provide some redress to the victims of forgeries. It is a form of strict liability that could be applied even in situations where the seller is unable to discover the defect in the work of art.¹⁰³

D. New York Legislation Leads the Way

New York has led the way in terms of art related legislation. This seems to be a logical outgrowth of New York's status as a leading art market and the continuing problems of preventing art forgery and providing sufficient remedies. Illinois and California have attempted to follow New York's lead.¹⁰⁴ Such legislation can significantly affect the art market by setting standards of behavior or customs of the trade. In

100. Comment, *supra* note 97, at 546.

101. Comment, *supra* note 90, at 425. See U.C.C. § 2-314, Comment 8 (1979).

102. Comment, *supra* note 97, at 547.

103. Comment, *supra* note 90, at 423-24.

104. Hodes, *Wanted: Art Legislation for Illinois*, 57 ILL. B.J. 218, 219 (1968).

regard to forgeries, sales of works of art not warranted under New York law will not be readily accepted in other markets. Disclosures relied upon by buyers under New York law will most likely not be ignored in other markets not subject to the same requirements.

New York Penal Law § 170.45

Under section 170.45 of the Penal Law, New York has made art forgery a separate punishable offense. It makes "fraudulent misrepresentation and simulation of antiques, objects d'art, rare books and comparable matter"¹⁰⁵ a misdemeanor. However, proof of criminal intent is still necessary and it is questionable whether a penalty of up to a year in jail is sufficient deterrence given the huge profits to be made through forgeries.

New York General Business Law Articles 12-C to 12-H

Articles 12-C through 12-H of the New York General Business Law have helped alleviate the problem through additional regulation, although there is some duplication of and inconsistency with pre-existing law.¹⁰⁶

Article 12-C of the New York General Business Law attempts to protect the artist by imposing a trust obligation on the dealer.¹⁰⁷ Arti-

105. N.Y. PENAL LAW § 170.45 (Consol. 1977). This section provides:

Criminal simulation

A person is guilty of criminal simulation when:

1. With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess; or
2. With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

Criminal simulation is a class A misdemeanor.

106. Comment, *supra* note 80, at 961. See N.Y. GEN. BUS. LAW arts. 12-C to 12-G (Consol. 1980); 12-H (Consol. Supp. 1982).

107. N.Y. GEN. BUS. LAW § 219-a (Consol. 1980). This section provides:

Artist-art dealer relationships

1. Any custom, practice or usage of the trade to the contrary notwithstanding, (a) whenever an artist delivers or causes to be delivered a work of fine art of his own creation to an art dealer for the purpose of exhibition and/or sale on a commission, fee or other basis or compensation, the delivery to and acceptance thereof by the art dealer is deemed to be "on con-

cle 12-D relates to the protection of the art consumer. Some maintain

signment", and

(i) such art dealer shall thereafter, with respect to the said work of fine art be deemed to be the agent of such artist, and

(ii) such work of fine art is trust property in the hands of the consignee for the benefit of the consignor, and

(iii) any proceeds from the sale of such work of fine art are trust funds in the hands of the consignee for the benefit of the consignor,

(b) a work of fine art initially received "on consignment" shall be deemed to remain trust property notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for his own account until the price is paid in full to the consignor. If such work is thereafter resold to a bona fide third party before the consignor has been paid in full, the proceeds of the resale are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full.

(c) no such trust property or trust funds shall be or become subject or subordinate to any claims, liens or security interests of any kind or nature whatsoever, of the consignee's creditors, anything in uniform commercial code section 2-326 or any other provision of the uniform commercial code to the contrary notwithstanding.

2. Any provision of a contract or agreement whereby the consignor waives any provision of this article is absolutely void except as hereinafter provided. A consignor may lawfully waive that part of subdivision one of section two hundred nineteen-a of this article which provides that "any proceeds from the sale of such work of fine art are trust funds in the hands of the consignee for the benefit of the consignor", provided: (a) that such waiver is clear, conspicuous, in writing and subscribed by the consignor and (b) that no waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve-month period commencing with the date of the execution of such waiver and (c) that no waiver shall be valid with respect to the proceeds of a work of fine art initially received "on consignment" but subsequently purchased by the consignee directly or indirectly for his own account.

(d) that no waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under subdivision one of this section.

3. Nothing in this amendment shall be construed to have any effect upon any written or oral contract or arrangement in existence prior to the effective date hereof nor to any extensions or renewals thereof except by the mutual written consent of the parties thereto.

4. All of the provisions of this article are applicable notwithstanding the

this article is an unnecessary duplication of the Uniform Commercial Code. However, it is a type of express warranty legislation which creates a presumption that the authorship of a work of art is part of the basis of the bargain.¹⁰⁸ Thus the burden of proving authenticity is shifted from the buyer to the seller. This overcomes the difficulty of proof in an action for breach of warranty under the Code discussed previously. There is no longer uncertainty as to “whether the written description set forth in a bill of sale is sufficient to constitute a war-

absence of, or their conflict with, any written agreement, receipt, note or memorandum between the consignor and the consignee concerning any matter covered by such provisions and notwithstanding any conflict between such provisions and the uniform commercial code or any other statute, requirement, rule or provision of law.

108. *Id.* § 219-c. This section provides:

Express warranties

Any provision in any other law to the contrary notwithstanding: 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange. Such warranty shall not be negated or limited because the seller in the written instrument did not use formal words such as “warrant” or “guarantee” or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the seller’s opinion.

2. In construing the degree of authenticity of authorship warranted as aforesaid, due regard shall be given to the terminology used in describing such authorship and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place. A written instrument delivered pursuant to a sale which took place in the state of New York which, in describing the work, states, for example,

(i) that the work is by a named author or has a named authorship, without any other limiting words, means, unequivocally, that the work is by such named author or has such named authorship;

(ii) that the work is “attributed to a named author” means a work of the period of the author, attributed to him, but not with certainty by him;

(iii) that the work is of the “school of a named author” means a work of the period of the author, by a pupil or close follower of the author, but not by the author.

ranty of genuineness.”¹⁰⁹ When the seller gives the buyer a written instrument where authorship is stated, an express warranty of authorship is created.¹¹⁰ It also requires any disclaimers to be clear and conspicuous, making it more difficult for the seller to disclaim.¹¹¹

Article 12-E protects the artist’s reproduction rights. Although it has been preempted by the new federal copyright law, it has recognized that advances in the techniques and technology of reproduction have created a new dimension in the field of fine art. Article 12-E establishes the creation of new property rights with substantial monetary value based on the ability to reproduce formerly unique one-of-a-kind creations. The establishment of these property rights has created confusion and controversy as to who has title to and as to who may realize the proceeds from the reproduction of the sale of fine works of art. Here the legislature attempted to set guidelines in regard to the right of re-

109. Hodes, *Fake Art and the Law*, 27 FED. B.J. 73, 77 (1979).

110. N.Y. GEN. BUS. LAW § 219-c (Consol. 1980).

111. *Id.* § 219-d(1). N.Y. GEN. BUS. LAW § 219-d provides:

Disclaimers

Words relevant to the creation of an express warranty of authenticity of authorship of a work of fine art and words tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of section 2-202 of the uniform commercial code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable. Subject to the limitations hereinafter set forth, such construction shall be deemed unreasonable if:

1. The language tending to negate or limit such warranty is not conspicuous, written and contained in a provision, separate and apart from any language relevant to the creation of the warranty, in words which would clearly and specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of the authorship of such work of fine art. Words of general disclaimer like “all warranties, express or implied, are excluded” are not sufficient to negate or limit an express warranty of authenticity of the authorship of a work of fine art, created under section two hundred twenty-two of this article, or otherwise; or
2. The work of fine art is proved to be a “counterfeit”, as that term is defined in this article, and this was not clearly indicated in the description of the work; or
3. The work of fine art is unqualifiedly stated to be the work of a named author or authorship and it is proved that, as of the date of sale or exchange, such statement was false, mistaken or erroneous.

production.¹¹² The courts had previously protected these interests, known in Europe as *droit moral*, by using tort or contract law with less than satisfactory results or consistency.¹¹³

Under article 12-F of the New York General Business Law, the consumer is given further protection by the implementation of a criminal penalty for the creation and circulation of false certificates of authentication.¹¹⁴ This misdemeanor applies to a situation not covered by forgery provisions of the Penal Law.¹¹⁵

The New Article 12-H: New York's Visual Multiples Disclosure Bill

Article 12-H of the New York General Business Law, better known as New York's visual multiples disclosure bill, is a relatively new section regarding works of art.¹¹⁶ It became effective in September 1981 with penalties to be imposed as of March 1, 1982; thus, it gave people some time to comply.¹¹⁷ This new bill was passed as a result of New York's dominant position as a center in the art market and its continuing effort to legislate in the art field to prevent art fraud, the corrupting of this market, and disillusionment on the part of the collec-

112. N.Y. GEN. BUS. LAW art. 12-E (Consol. 1980). See History. Art. 12-E, § 219-g provides:

Right to reproduce works of fine art

Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it, or his heirs or personal representatives, the right of reproduction thereof is reserved to the grantor until it passes into the public domain by act or operation of law unless such right is sooner expressly transferred by an instrument, note or memorandum in writing signed by the owner of the rights conveyed or his duly authorized agent. Nothing herein contained, however, shall be construed to prohibit the fair use of such work of art.

113. Comment, *supra* note 80, at 962.

114. N.Y. GEN. BUS. LAW § 219-i (Consol. 1980). This section provides:

Falsifying certificates of authenticity of works of fine art

A person who, with intent to defraud, deceive or injure another, makes, utters or issues a false certificate of authenticity of a work of fine art is guilty of a class A misdemeanor.

115. Comment, *supra* note 80, at 962.

116. Nils, *Legal Protection for Print Collectors*, ART NEWS, Oct. 1982, at 8. See N.Y. GEN. BUS. LAW art. 12-H (Consol. Supp. 1982).

117. Chamberlain, *Fraudulence Curtailed*, AMERICAN ARTIST, Mar. 1982, at 10 [hereinafter cited as Chamberlain, *Fraudulence*].

tor which could cause the bottom to fall out of the market.

The worst offenses with regard to art forgery arise in the field of prints. Lithographs are especially vulnerable as today's technology makes it easy to fool the public into thinking photomechanical lithographic reproductions are real lithographs.¹¹⁸ In the past twenty years abuses have increased tremendously as the market has grown. Previously, prints did not bring enough money to make forging them worthwhile. However, this small market has grown to do an estimated business of \$125 million to \$150 million a year for modern prints alone.¹¹⁹ An increase in demand has caused prices to increase tremendously. People can now own original works by well-known artists by purchasing limited edition fine prints at a fraction of the cost of a drawing or painting by the same artist.¹²⁰ Due to the multiplicity of the print, a collector can ascertain its value at a particular time through auction results or prices asked by other dealers for the same print. This certainty creates a greater feeling of security for the buyer and enhances the desirability of prints as an investment.¹²¹

The basic problem with a print occurs when trying to distinguish between an "original" print and a reproduction.¹²² The aesthetic value is controlled by the degree of active participation of the artist and is diluted to the extent that the work is done by others. There is a difference in the artistry involved between an "original" print and a reproduction; thus, there exists a disparity in value.¹²³ It has been suggested that a modern print be classified as an original if it meets three criteria:

- (a) the artist has created the master image in or upon the plate, stone, wood block or other material for the purpose of creating the print; (b) the print is made from this material by the artist or pursuant to his directions; and (c) the finished print is approved by the artist.¹²⁴

118. Chamberlain, *Gold Brick Control*, AMERICAN ARTIST, Mar. 1981, at 10 [hereinafter cited as Chamberlain, *Gold*].

119. Wallach, *The Trouble with Prints*, ART NEWS, May 1981, at 60, 62.

120. R. DUFFY, *supra* note 20, at 59.

121. *Id.* at 60.

122. Committee Report, *supra* note 60, at 98.

123. Hodes, *supra* note 109, at 75.

124. Committee Report, *supra* note 60, at 98.

If a product is made by photomechanical and other processes, usually in large quantities independent of the artist's supervision and without his final approval, it is a reproduction. The sale of reproductions as "originals" or under misleading names such as heliographs results in much fraud. Other factors that must also be distinguished to qualify a print as a more valuable original include: the size of the edition, the quality and condition of the print, the date of the artist's signature and impression, or whether future editions will be printed.¹²⁵

This new law which covers prints and photographs sold for \$100 and up is "an attempt to design a law that would deter deceptive print practices, thwart misleading advertising and provide purchasers with 'the information for making an intelligent choice,' by legally requiring the disclosure of certain facts that—as the law points out—most reputable dealers already furnish voluntarily."¹²⁶ It protects the buyer's

125. *Id.* at 98-99.

126. Nils, *supra* note 116, at 8. See N.Y. GEN. BUS. LAW § 220-b (Consol. Supp. 1982) which states:

Full disclosure in the sale of certain visual art objects produced in multiples

1. An art merchant shall not sell or consign a multiple in, into or from this state unless a written instrument is furnished to the purchaser or consignee, *at his request, or in any event* prior to a sale or consignment, which sets forth as to each multiple the descriptive information required by section two hundred twenty-c of this article for any period. *If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such an art multiple, this information shall be supplied at the time of or prior to delivery.* With respect to auctions, this information may be furnished in catalogues or other written materials which are made readily available for consultation and purchase prior to sale, provided that a bill of sale, receipt or invoice describing the transaction is then provided which makes reference to the catalogue and lot number in which such information is supplied. Information supplied pursuant to this subdivision shall be clearly, specifically and distinctly addressed to each of the items listed in section two hundred twenty-c of this article unless the required data is not applicable. This section is applicable to transactions *by and between* merchants, non-merchants, and *others considered art merchants for the purposes of this article.*

2. An art merchant shall not cause a catalogue, prospectus, flyer or other written material or advertisement to be distributed in, into or from this state which solicits a direct sale, by inviting transmittal of payment for a specific multiple, unless it clearly sets forth, in close physical proximity to

right to full disclosure. It is an attempt by the legislature to stifle such practices as the “use of editions ‘stretched’ by an undisclosed and unusually large number of artist’s proofs, undeclared closely related editions, misrepresented reproductions and claims that a work is ‘signed’ ”¹²⁷ by the artist when the signature is that of another. Interestingly, the law never uses the terms “original” or “fine print.” The criterion is whether it is the artist’s print approved by the artist after completion.

the place in such material where the multiple is described, the descriptive information required by section two hundred twenty-c of this article for any time period. In lieu of this required information, such written material or advertising may set forth the material contained in the following quoted passage, or the passage itself, containing terms the nonobservance of which shall constitute a violation of this article, if the art merchant then supplies the required information prior to or with delivery of the multiple:

“Article twelve-H of the New York general business law provides for disclosure in writing of certain information concerning multiples of prints and photographs when sold for more than one hundred dollars (\$100) each, exclusive of any frame, prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist’s signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the master which produced the multiple, and the number of multiples in a ‘limited edition’. If a prospective purchaser so requests, the information shall be transmitted to him prior to payment or the placing of an order for a multiple. If payment is made by a purchaser prior to *delivery* of such an art multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he returns the multiple substantially in the condition in which received, within thirty days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies.”

This requirement is not applicable to general written material or advertising which does not constitute an offer to effect a specific sale.

3. In each place of business in the state where an art merchant is regularly engaged in sales of multiples, the art merchant shall post in a conspicuous place, a sign which, in a legible format, contains the information included in the following passage:

“Article twelve-H of the New York general business law provides for the disclosure in writing of certain information concerning prints and photographs. This information is available to you in accordance with that law.”

127. Nils, *supra* note 116, at 8.

To accomplish its purpose article 12-H is divided into sections according to the availability of information. Prints dated from 1950 to 1981, 1900 to 1950, and prior to 1900 require progressively less requirements of disclosure as the availability of information diminishes due to the age of the print.¹²⁸ Only that information which is reasona-

128. Chamberlain, *Fraudulence*, *supra* note 117, at 10. See N.Y. GEN. BUS. LAW §§ 220-c to 220-f (Consol. Supp. 1982) which states:

§ 220-c. Information required

The following information shall be supplied, as indicated, as to each multiple produced *on or after* the effective date of this article:

1. Artist. State the name of the artist.
2. Signature. If the artist's name appears on the multiple, state whether the multiple was signed by the artist. If not signed by the artist then state the source of the artist's name on the multiple, such as whether the artist placed his signature on the master, whether his name was stamped or estate stamped on the multiple, or was from some other source or in some other manner placed on the multiple.
3. Medium or process. (a) Describe the medium or process, and where pertinent to photographic processes the material, used in producing the multiple, such as whether the multiple was produced through the etching, engraving, lithographic, serigraphic or a particular method and/or material used in photographic developing processes. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made. (b) If the *purported* artist was deceased at the time the master was made which produced the multiple, this shall be stated. (c) If the multiple or the image on or in the master constitutes a photomechanical or photographic *type of* reproduction of an image produced in a *different* medium, for a purpose other than the creation of the multiple being described, this information and the respective mediums shall be stated. (d) If paragraph (c) of this subdivision is applicable, and the multiple is not signed, state whether the artist authorized or approved in writing the multiple or the edition of which the multiple being described is one.
4. Use of master. (a) If the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, this shall be stated. (b) If the multiple was made from a master which produced a prior limited edition, or from a master which constitutes or was made from a reproduction of a prior multiple or *of a* master which produced prior *multiples*, this shall be stated.
5. Time produced. As to multiples produced after nineteen hundred forty-nine, state the year or approximate year the multiple was produced. As to

bly obtainable is required. The dealer must provide certain basic infor-

multiples produced prior to nineteen hundred fifty, state the year, approximate year or period when the master was made which produced the multiple and/or when the particular multiple being described was produced. The requirements of this subdivision shall be satisfied when the year stated is approximately accurate.

6. Size of the edition. (a) *If the multiple being described is offered as one of a limited edition, this shall be so stated, as well as the number of multiples in the edition, and whether and how the multiple is numbered.*

(b) *Unless otherwise disclosed, the number of multiples stated pursuant to paragraph (a) of this subdivision shall constitute an express warranty, as defined in section two hundred twenty-g of this article, that no additional numbered multiples of the same image, exclusive of proofs, have been produced.*

(c) *The number of multiples stated pursuant to paragraph (a) of this subdivision shall also constitute an express warranty, as defined in section two hundred twenty-g of this article, that no additional multiples of the same image, whether designated "proofs" other than trial proofs, numbered or otherwise, have been produced in an amount which exceeds the number in the limited edition by twenty or twenty percent, whichever is greater.*

(d) *If the number of multiples exceeds the number in the stated limited edition as provided in paragraph (c) of this subdivision, then state the number of proofs other than trial proofs, or other numbered or unnumbered multiples, in the same or other prior editions, produced from the same master, or from another master as described in paragraph (b) of subdivision four of section two hundred twenty-c of this article, and whether and how they are signed and numbered.*

§ 220-d. Information required; nineteen hundred fifty to effective date

The information which shall be supplied as to each multiple produced during the period from nineteen hundred fifty to the effective date of this article, shall consist of the information required by section two hundred twenty-c of this article except for paragraph (d) of subdivision three, paragraph (b) of subdivision four and paragraphs (c) and (d) of subdivision six of section two hundred twenty-c of this article.

§ 220-e. Information required; nineteen hundred to nineteen hundred forty-nine

The information which shall be supplied as to each multiple produced during the period from nineteen hundred through nineteen hundred forty-nine shall consist of the information required by section two hundred twenty-c of this article except for paragraphs (b), (c) and (d) of subdivision three and subdivisions four and six of section two hundred twenty-c of this article.

§ 220-f. Information required; pre-nineteen hundred

mation in writing which is considered part of the basis of the bargain creating an express warranty. This warranty cannot be negated by the merchant for the lack of the use of formal words of warranty, or for the lack of intention or authorization to make a warranty, or because the statement could be interpreted as the seller's opinion.¹²⁹ If the informa-

The information which shall be supplied as to each multiple produced prior to nineteen hundred shall consist of the information required by section two hundred twenty-c of this article except for *subdivision two*, paragraphs (b), (c) and (d) of subdivision three and subdivisions four and six of section two hundred twenty-c of this article.

129. N.Y. GEN. BUS. LAW § 220-g(2) (Consol. Supp. 1982). N.Y. GEN. BUS. LAW § 220-g provides:

Express warranties

1. Whenever an art merchant furnishes the name of the artist pursuant to subdivision one of section two hundred twenty-c of this article as to multiples created prior to nineteen hundred fifty, *the warranties created* by the provisions of section two hundred nineteen-c of article twelve-D of this chapter *shall apply*, except that said section shall be deemed to include sales to art merchants. *However, with respect to photographs produced prior to nineteen hundred fifty, and other multiples produced prior to nineteen hundred, as to information required by subdivision three of section two hundred twenty-c of this article, the merchant shall be deemed to have satisfied this section if a reasonable basis in fact existed for the information required.*

2. Whenever an art merchant furnishes the name of the artist pursuant to subdivision one of section two hundred twenty-c of this article for any time period after nineteen hundred forty-nine, and otherwise furnishes information required by any of the subdivisions of section two hundred twenty-c of this article for any time period, as to transactions including offers, sales, or consignments made to non-merchants and to another art merchant, such information shall be a part of the basis of the bargain and shall create express warranties as to the information provided. Such warranties shall not be negated or limited because the merchant in the written instrument did not use formal words such as "warrant" or "guarantee" or because the merchant did not have a specific intention or authorization to make a warranty or because any required statement is or purports to be, or is capable of being merely the seller's opinion. The existence of a basis in fact for information warranted by virtue of this subdivision shall not be a defense in an action to enforce such warranty. *However, with respect to photographs produced prior to nineteen hundred fifty, and other multiples produced prior to nineteen hundred, as to information required by subdivision three of section two hundred twenty-c of this article, the merchant shall be deemed to have satisfied this section if a reasonable basis in fact existed*

tion provided is erroneous, the buyer is entitled to a full refund. If the buyer can prove that the seller willfully failed to provide the required information or knowingly provided false information, the buyer may be able to collect treble damages and attorney's fees from the seller.¹³⁰

for the information provided. When information is not supplied as to any subdivision of section two hundred twenty-c of this article because not applicable, this shall constitute the express warranty that the subdivision is not applicable.

3. Whenever an art merchant disclaims knowledge as to a particular item about which information is required, such disclaimer shall be ineffective unless clearly, specifically and categorically stated as to such particular item and contained in the physical context of other language setting forth the required information as to a specific multiple.

130. *Id.* § 220-i. This section provides:

Remedies and enforcement

1. An art merchant, including a merchant consignee, who offers or sells a multiple in, into or from this state without providing the information required in sections two hundred twenty-b and two hundred twenty-c of this article for any time period, or who provides information which is mistaken, erroneous or untrue, except for harmless errors such as typographical errors, shall be liable to the purchaser to whom the multiple was sold. The merchant's liability shall consist of the consideration paid by the purchaser with interest from the time of payment at the rate prescribed by section five thousand four of the civil practice law and rules or any successor provision thereto, upon the return of the multiple in substantially the same condition in which received by the purchaser. This remedy shall not bar or be deemed inconsistent with a claim for damages or with the exercise of additional remedies otherwise available to the purchaser.

2. In any proceeding in which an art merchant relies upon a disclaimer of knowledge as to any relevant information set forth in section two hundred twenty-c of this article for any time period, such disclaimer shall be effective unless the claimant is able to establish that the merchant failed to make reasonable inquiries, according to the custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries.

3. If an art merchant offers, *consigns* or sells a multiple and:

- (a) Willfully fails to provide the information set forth in sections two hundred twenty-b and two hundred twenty-c of this article for any time period; or
- (b) Knowingly provides false information; or
- (c) The purchaser can establish that the merchant willfully and falsely disclaimed knowledge as to any *required* information, the purchaser of such a multiple may recover from the art merchant an amount equal to

Such information as the actual total number in the edition including the artist's proofs must be revealed if the print is represented as being from a limited edition. Also, a statement as to the authenticity of the artist's signature, the year executed, the medium used, and whether the work was authorized by the artist if there is no signature must be provided.¹³¹

The potential impact of this law is significant in that it provides an enforcement mechanism through its penalties previously lacking in similar versions adopted in California (1971), Illinois (1972), Maryland (1975), and Hawaii (1978).¹³² Interest in the new law has been expressed by such states as North Carolina, Michigan, and California where they do not have the enforcement procedures expressed in the New York law.¹³³

Some objections to the law have been raised by dealers who claim that the information necessary to complete a transaction provides undue paper work and expense, complicating the process. Some artists have complained that requiring disclosure of the total number in a limited numbered edition is too restrictive as they cannot wait and see how an edition will be received and sells. If an artist miscalculates and issues too many, the value inherent in scarcity is lost.¹³⁴ However, these

three times the amount recoverable under subdivision one of this section. As to this paragraph and paragraph (a) of this subdivision, a merchant may introduce evidence of the relevant usage and custom of the trade in any proceeding in which such treble damages are sought. This subdivision shall not be deemed to negate the applicability of article twelve-f of this chapter as to authenticity and article twelve-f is applicable, as to authenticity, to the multiples covered by the provisions of this article.

4. In any action to enforce any provision of this article, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the art merchant as it deems appropriate.

5. An action to enforce any liability under this article [article] shall be brought within the period prescribed for such actions by article two of the uniform commercial code.

131. Chamberlain, *Fraudulence*, *supra* note 117, at 10. See N.Y. GEN. BUS. LAW §§ 220-b to 220-e (Consol. Supp. 1982) for disclosure requirements.

132. Wallach, *supra* note 119, at 69.

133. Nils, *supra* note 116, at 8.

134. Chamberlain, *Gold*, *supra* note 118, at 11.

objections have been overcome when weighed against the potential contribution of this article to the stability and integrity of the market, and its important benefits provided to the collector who would otherwise have little recourse. Article 12-H helps establish a basis for values.¹³⁵ The fair market value of these prints is based partly on scarcity. It is pertinent for the collector in determining estate taxes; it is necessary for the seller who warrants his product and must make refunds or absorb additional penalties if labeling is inaccurate.¹³⁶

Earlier proposals of this law had included sculpture which is a runner-up to prints in the fraud market. However, it was not included due to an intention of giving it separate consideration in another law that deals specifically with sculpture.¹³⁷ The problems with regard to sculpture are similar to those of prints. Significant is the number of casts which have been made. Multiplicity of casts creates the potential for forgery, unauthorized editions, excess production, and inferior reproduction which might be dealt with through specific legislation within the next couple of years.¹³⁸

Conclusion

In today's world, aesthetic pleasure is not the sole test of the value of a work of art. Art is not created in a vacuum isolated from external influences both creative and economic. The experience of uncovering an art forgery that at one time was admired as a great work of art is inseparable from our ideas of art as a reflection of history—the truth about its creation and antiquity, the impact of a particular artist, and the functioning of an international art market.

Art forgery, as a crime of major proportion, is connected to market forces which, accompanied by generally inadequate legal protections, make it possible to amass huge profits. There is an alliance between society as a whole and art's economic status so that works of art have acquired tremendous investment value. The result is a currently thriving art market in which the artist has become the source of the economic interest of others and himself. The idea of the isolated es-

135. *Id.*

136. Chamberlain, *Fraudulence*, *supra* note 117, at 10.

137. *Id.*

138. Committee Report, *supra* note 60, at 99-100.

tranged artist now seems irrelevant in the context of the corporate age where this international art market contemplates huge investment and profit.¹³⁹

There are no simple solutions to the problem of art forgery. It is a function of man's creativity—creativity to produce and creativity to find ways to profit illegally. As of yet there has not been much specific legislation to deal with the problem. At the national level some sort of strict uniform legislation seems advisable; however, this has not occurred. Only a few states have adopted legislation specifically geared towards art forgery and art fraud. New York in its position as a center for the art market leads the way with the strictest most effective legislation. The new article 12-H of the New York General Business Law and a possible statute dealing specifically with sculpture are examples of New York's continuing innovative effort in this field. The Uniform Commercial Code can also be an effective remedy. The warranty provisions (sections 2-313, 2-314, 2-315, 2-316) if used effectively and creatively can provide relief to the unwary or duped victims of art forgery. Nevertheless, it should be recognized both legally and commercially that there is a necessity for an effective realistic approach to the problem of art forgery in view of the modern art market.

Peter Barry Skolnik

139. Gablik, *Art Under the Dollar Sign*, ART IN AMERICA, Dec. 1981, at 13.