[Hastings Law Journal](https://repository.uchastings.edu/hastings_law_journal)

[Volume 66](https://repository.uchastings.edu/hastings_law_journal/vol66) | [Issue 1](https://repository.uchastings.edu/hastings_law_journal/vol66/iss1) Article 7

12-2014

Price Fixing the Priceless? Discouraging Collusion in the Secondary Art Market

Nicole Dornbusch Horowitz

Price Fixing the Priceless? Discouraging Collusion in the Secondary Art Market

NICOLE DORNBUSCH HOROWITZ*

In the 1920s and 1930s, major oil companies took advantage of market conditions to raise gasoline prices. They sold a limited amount of gasoline on smaller submarkets and the remainder of their gasoline by other methods. Despite the fact that the submarkets only represented a small portion of the overall gasoline market, pricing in the greater market was based on them. Thus, through collusive agreements, major oil companies were able to raise prices in the overall market by inflating prices in the smaller markets. In United States v. Socony-Vacuum Oil Co.*, the U.S. Supreme Court held that these agreements constituted price-fixing and violated the Sherman Act.*

Today, conditions in the art market create opportunities and incentives for coordinated price manipulation similar to those present in Socony-Vacuum. *Art sold at auction represents a small portion of the art market, but prices paid for art at auction are used to determine prices in the larger market. Further, the art market's opacity and the fact that small, tight-knit groups buy and sell high-end artworks provide even greater opportunities for collusion than those present in* Socony-Vacuum. *This Note examines these comparable opportunities and incentives through a study of activity in the market for artworks by Andy Warhol.*

* J.D. Candidate, 2015, University of California Hastings College of the Law; Senior Managing Editor, *Hastings Law Journal*. Prior to attending law school, I worked as an arts administrator for Jose Mugrabi, one of the collectors discussed in this Note. Many thanks to friends who provided feedback on early drafts and to the *Hastings Law Journal* staff editors for their hard work in getting this Note to its publishable state. In particular, I am grateful to my friend Jeremy Rhodes, my husband Adam Horowitz, and Professors Christopher Ries and David Ward for their expertise and support, and for acting as excellent sounding boards throughout the development of this Note.

Table of Contents

Introduction

In *United States v. Socony-Vacuum Oil Co.*,[1] the U.S. Supreme Court held that major oil companies engaged in *per se* illegal price fixing in violation of the Sherman Act by agreeing to purchase and store gasoline sold on "spot markets." The oil companies made those agreements to restrict excess spot market supply and, as a result, increase gasoline prices in the market generally. Although spot markets occupied a small percentage of sales in the gasoline market, spot market supply and pricing were used to determine overall contract pricing. By restricting the spot market supply, the oil companies were able to create

1. 310 U.S. 150 (1940).

the appearance of greater demand or decreased supply, which increased prices for their own gasoline contracts.

Today, pricing for art functions in a similar manner to the pricing for oil that occurred in *Socony-Vacuum*. Art sold at auction represents a small portion of the art market, but prices paid for art at auction are used to determine prices in the larger market. Moreover, data shows that, like the oil companies in *Socony-Vacuum*, art dealers and invested collectors of certain artists' work frequently appear to be involved in the purchase and sale, and hence the price determination, of those artists' work at auction. For example, with regard to the market for Andy Warhol's artworks, an analysis of publicly available data shows that, since 2005, less than twenty parties have dominated bidding on Warhol works at auction. Many of these bidders are either secondary art market dealers[2] or collectors with large Warhol holdings who have an interest in ensuring that Warhol works retain their high value. Currently, these dealers and collectors have similar incentives and opportunities to collude and fix Warhol prices through these auction "spot markets," akin to the activity that occurred in *Socony-Vacuum*.

Part I of this Note discusses market factors that make pricing in the art market, and particularly in the secondary art market, subjectively opaque and easy to manipulate. Part II compares the conditions in the art market to the incentives and opportunities for collusion that led to *Socony-Vacuum*. It also explains the characteristics that make the Warhol market a good example of the broader secondary art market and assesses auction records to determine bidding patterns in the Warhol market. Part III proposes a solution that would discourage collusion and offer greater market transparency, while preserving buyers and sellers' much-desired privacy at auction.

I. The Art Market and Its Inflatable Investment Value

Many dealers, auction houses, collector-investors, and economists view art as more than a durable commodity; they also view it as an investment vehicle from which to derive gains.[3] This vision of art as an asset has led to immense growth in the art market, particularly with

---

2. "Secondary art market dealers" are those who deal in the secondary art market. The secondary art market is the resale market for art, as compared to the primary market, where "individual artists provide works to galleries, local art exhibitions, or directly to . . . consumers." Louis-André Gérard-Varet, *On Pricing the Priceless: Comments on the Economics of the Visual Art Market*, 39 Eur. Econ. Rev. 508, 511 (1995).

3. *See, e.g.*, Katya Kazakina, *Billionaires at Basel Bet Art Is Better Investment Than Cash*, Bloomberg (July 19, 2014, 9:00 PM), http://www.bloomberg.com/news/2014-06-20/billionaires-at-basel-bet-art-better-investment-than-cash.html.

respect to the most expensive artworks.[4] As renowned modern art collector Peggy Guggenheim reflected in her autobiography, "prices [for art] were still normal" when she began collecting art after World War I.[5] Then, in the 1950s "the whole picture world turned into an investment market."[6] The change in pricing occurred because of the number of speculators that entered the art market.

A number of factors related to the art market's opacity create opportunities and incentives for collusion between invested dealers and collectors. First, art prices are inherently subjective because they are not correlated with artworks' intrinsic value; instead, they are primarily based on buyers' and sellers' personal interests and trends in the market.[7] Second, the art market is relatively unregulated, especially compared to other markets where equivalent sums of money are exchanged, such as the securities market.[8] Third, the only sale prices made public are those from auction records, such as those from Sotheby's and Christie's, which only account for a high estimate of twenty percent of the total art market in a given year.[9] The remainder of sales occurs in private, with prices only revealed to the parties to the transactions. Fourth, many auction sales occur through "phone bids," which may allow dealers or collectors to manipulate prices without being identified. Finally, segments of the art market are small and tight-knit, often guarding prices from the greater public.

A. The Art Market's Inherently Subjective Nature

The price of artwork is inherently subjective, as its value is primarily based on market trends and buyers' and sellers' personal interests.[10] This characteristic makes art valuation different from that of other markets.[11] Economists studying markets other than the art market look to

---

4. *See* Alexander Forbes, *TEFAF Art Market Report Says 2013 Best Year on Record Since 2007, With Market Outlook Bullish*, ARTNET NEWS (Mar. 12, 2014), http://news.artnet.com/market/tefaf-art-market-report-says-2013-best-year-on-record-since-2007-with-market-outlook-bullish-5358.

5. PEGGY GUGGENHEIM, OUT OF THIS CENTURY: CONFESSIONS OF AN ART ADDICT 108 (1979).

6. *Id.*

7. *Researching Your Art: How Much Is Your Object Worth?*, SMITHSONIAN INST., http://americanart.si.edu/research/tools/art/worth (last visited Dec. 14, 2014).

8. Robin Pogrebin & Kevin Flynn, *As Art Values Rise, So Do Concerns About Market's Oversight*, N.Y. TIMES, Jan. 27, 2013, at A1.

9. Rachel Corbett, *How Big is the Global Art Market?*, ARTNET, http://www.artnet.com/magazineus/news/artnetnews/china-the-worlds-top-art-and-antique-market.asp (last visited Dec. 14, 2014). This figure may actually be generous. *See infra* Part I.C.

10. *Researching Your Art: How Much Is Your Object Worth?*, *supra* note 7.

11. William J. Baumol, *Unnatural Value: Or Art Investment as Floating Crap Game*, 76 AM. ECON. REV. 10, 10 (1986).

commodities' "normal," "natural," or "average" values.[12] Those values are the equilibrium prices towards which economic forces drive market prices.[13] On the other hand, art's valuation is rarely correlated with its natural value.[14] Art prices are "strictly *un*natural in the classical sense" and have no equilibrium level driven by economic forces.[15] They "float more or less aimlessly," and are directly determined by what buyers are willing to pay.[16]

Given the absence of natural or intrinsic value in the art market, prices must be set in a different way—based instead on market trends and the personal interests of those buying and selling art.[17] For example, the highest known price paid for an artwork to date is $259 million, for Paul Cézanne's "The Card Players."[18] "The Card Players" is a painting; its intrinsic value is the cost of canvas and oil paint.[19] Forbes hypothesized that the buyer, the country of Qatar, valued the painting at such an exorbitant amount based on: Cezanne's fame as an artist; the fact that the artwork was rarely seen, remaining in private hands prior to the sale; rumors that the work's seller "turned down nine-figure offers to buy" the work; and the fact that Qatar wanted a "treasure" to establish itself as a "world-class intellectual mecca."[20] Accordingly, Qatar based its purchase decision on factors other than the artwork's natural or intrinsic value.

As personal interests are subjective, buyers and sellers do not have to explain why they are willing to buy or sell at higher prices. On a larger scale, an investor that buys enough of a certain artist's work can set prices in that artist's market to what she thinks they should be, without explaining why those prices are appropriate.[21] In this way, a heavily invested dealer determines for how much she is willing to buy or sell a work, and through enough of these decisions, sets market trends. Thus, the current market structure creates the opportunity to affect both of the bases for price determination—personal tastes and market trends—without explanation.

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Researching Your Art: How Much Is Your Object Worth?*, *supra* note 7.
18. Alexandra Peers, *Qatar Purchases Cézanne's* The Card Players *for More Than $250 Million, Highest Price Ever for a Work of Art*, VANITY FAIR (Feb. 2, 2012), http://www.vanityfair.com/culture/2012/02/qatar-buys-cezanne-card-players-201202.
19. Jane Lee, *Cézanne's Card Players Shatters Record for Highest Price Ever for a Work of Art*, FORBES (Feb. 6, 2012, 1:52 AM), http://www.forbes.com/sites/janelee/2012/02/06/cezannes-card-players-shatters-record-for-highest-price-ever-for-a-work-of-art.
20. *Id.*
21. Baumol, *supra* note 11, at 10.

B. Lack of Regulation in the Art Market

In addition to the fact that art has no natural value, lack of regulation in the art market creates further opportunities for price manipulation.[22] By 1991, Alice Goldfarb Marquis compared the art auction market to the stock market, stating that given the "large sums of money . . . at stake" in both markets, "creative minds scheme to manipulate the system."[23] However, she identified a difference between the markets, stating, "there is no Securities and Exchange Commission to formulate and enforce rules."[24]

For example, in many cases, the seller is the buyer's advisor.[25] Thus, the buyer's main sources for determining the value of the piece of art are the public auction market and the seller-advisor.[26] *The Economist* referenced this lack of regulation in an article about "Carte Blanche," a sale at auction house Phillips, curated by art dealer and consultant Philippe Ségalot.[27] According to the article, Ségalot both "persuaded sellers to consign" and "advised buyers" in that sale.[28] According to *The Economist*, Ségalot was seen bidding against his assistant Ali Rosenbaum and his business partner Franck Giraud, each representing different collectors.[29] When asked whether acting on behalf of buyers and sellers constituted a conflict of interest, Ségalot "insisted it was not a problem."[30]

Despite Ségalot's dismissal of the possibility of a conflict of interest, this structure appears to lead to an inherent one. Undoubtedly, a seller or a dealer representing a seller has an interest in selling the work at its highest price.[31] An advisor, on the other hand, should help a buyer purchase a work at a fair price.[32] Since the buyer is depending on the

---

22. Pogrebin & Flynn, *supra* note 8.

23. Alice G. Marquis, The Art Biz: The Covert World of Collectors, Dealers, Auction Houses, Museums, and Critics 255 (1991).

24. *Id.*

25. *Artelligence Panel: Inside the Modern Market*, Art Mkt. Monitor (Sept. 21, 2011), http://www.artmarketmonitor.com/ 2012/08/22/artelligence-recap-inside-the-modern-market.

26. Georgina Adam, *Inside the World of the Art Adviser*, Art Newspaper (June 12, 2009), http://www.theartnewspaper.com/articles/Inside-the-world-of-the-art-adviser/17486.

27. Sarah Thornton, *A Passion that Knows No Bounds*, Economist (Nov. 19, 2010, 5:39 PM), http://www.economist.com/node/17551930.

28. *Id.*

29. *Id.*

30. *Id.*

31. Katya Kazakina, *Perelman's 'Popeye' Spurs Accusations of Secret Deals at Gallery*, Bloomberg (Sept. 16, 2012, 9:00 PM), http://www.bloomberg.com/news/2012-09-17/perelman-s-popeye-spurs-accusations-of-secret-deals-at-gallery.html (detailing the potential conflict of interest leading to several lawsuits between dealer Larry Gagosian and billionaire buyer Ron Perelman).

32. Eric Bryant, *10 Things to Know About Choosing an Art Adviser*, Blouin Artinfo (July 10, 2013, 7:00 AM), http://www.blouinartinfo.com/news/story/967954/10-things-to-know-about-choosing-an-art-adviser.

seller-advisor to recommend the work's appropriate price, the seller has an immense opportunity to adjust those prices to her advantage.

This conflict was highlighted in 1989, when Sylvester Stallone sued his art consultant, Barbara Guggenheim.[33] Stallone claimed that, after he bought an artwork on Guggenheim's advice, he discovered the seller was a private dealer and friend of hers.[34] While Stallone purchased the work for $1.7 million in accordance with Guggenheim's alleged advice, he also learned that a work by that artist had never sold for more than $1 million.[35] In the suit, Stallone questioned Guggenheim's ability to represent his interests as an advisee as well of those of her friend and colleague, the work's seller.

C. The Importance of Auctions To Art Market Valuation

Further opportunities for price manipulation exist because sales at only a few auction houses—particularly Sotheby's and Christie's—provide the primary reference for the value of other artworks.[36] Art valuation indices, such as the Mei Moses index, base their studies only on works sold at auction.[37] Similarly, auction houses and dealers rely on past auction catalogues and websites that post auction records, such as Artnet, when determining prices for comparable works to be sold.[38] Even "museums rely on [auction records] for insurance valuations and dealers adjust their prices to conform with the latest sales figures."[39]

News sources make auction records appear even more important, as they regularly report on "evening sales" for Impressionist/Modern Art and Contemporary Art during the major auctions in New York and London.[40] Sotheby's and Christie's sell their most notable, and generally most expensive, artworks in these two genres at these separate one-night sales four times per year—twice in London, in October and June, and twice in New York, in November and May.[41] The general public learns

---

33. *Stallone Files $5-Million Suit Against N.Y. Art Consultant*, L.A. Times, Dec. 27, 1989, at 8.

34. *Id.*

35. *Id.*

36. *See* Orley Ashenfelter & Kathryn Graddy, *Art Auctions: A Survey of Empirical Studies* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 8997, 2002), *available at* http://www.nber.org/papers/w8997. For more information on the logistics of art auctions, *see id.* at 5–7.

37. *See, e.g.*, Jianping Mei & Michael Moses, *Computation and Data Collection of the Mei Moses Family of Art Indexes*, http://www.artasanasset.com/main/computation.php (last visited Dec. 14, 2014) ("To insure transparency for our art indexes we only collect data based on public auction results.").

38. Eric J. Russ, Is Andy Warhol Dangerous?: Why the Pop Art Superstar May Be a Risky Investment at Present Market Valuation 20 (Feb. 2011) (unpublished M.A. thesis, Sotheby's Institute of Art) (on file with author).

39. Marquis, *supra* note 23, at 255.

40. *See, e.g.*, *Christie's News*, N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/organizations/c/christies/index.html (last visited Dec. 14, 2014); Marquis, *supra* note 23, at 250.

41. *See, e.g.*, *Impressionist & Modern Art*, Christies, http://www.christies.com/departments/

about art prices through these sources, given the relative opacity of the rest of the market. For the general public, these works represent the greater art market.

The focus on auctions leads to opportunities for collusion. An inevitable selection bias for market prices exists when prices are drawn only from auction records.[42] Only a small percentage of total sales occur at auction. Though no consensus exists as to the percentage of the total market that sales at Sotheby's and Christie's auctions occupy, a high estimate in 2012 was twenty percent.[43] Generally, works throughout the art market that decrease in value or are not in demand do not go to auction.[44] Instead, owners sell the work privately or hold on to it until the market for that artwork recovers.[45] Additionally, sales of art at auction occur infrequently, with the average turnover for an individual artwork at around thirty years.[46] This infrequency makes it even harder to determine the average change in prices for the artwork.

As indices and sellers rely on past auction sales to determine future prices, they disregard a majority of the market. In fact, the *Financial Times* has quoted Kevin Radell, Artnet's market research specialist, referring to art market indices as "alchemy," because of the inherent misconceptions they fuel.[47] The fact that this portion of the market is so important to price determination provides greater opportunities for price manipulation; a collector can affect an entire artist's market by driving up auction prices for artworks by that artist. Despite their shortcomings, these auction records are vital to determining market conditions because they are the only part of the market that is public and transparent.[48]

---

impressionist-and-modern-art-29-1.aspx (last visited Dec. 14, 2014); *Contemporary Art*, CHRISTIES, http://www.christies.com/departments/post-war-and-contemporary-art-74-1.aspx (last visited Dec. 14, 2014).

42. Ashenfelter & Graddy, *supra* note 36, at 14.

43. *See* CLARE MCANDREW, EUROPEAN FINE ART FOUND., THE INTERNATIONAL ART MARKET IN 2011: OBSERVATIONS ON THE ART TRADE OVER 25 YEARS 30 (2012) [hereinafter TEFAF REPORT]. Many dealers decline to participate in studies of the art market's size. Corbett, *supra* note 9. Thus, it is impossible to truly know how much art is traded privately, and the percentage of art sold at auction is likely to be even smaller. *Id.*

44. Ashenfelter & Graddy, *supra* note 36, at 14.

45. Tom Johansmeyer, *The Global Art Market Finds Its Floor*, DAILYFINANCE (Oct. 26, 2009, 12:30 PM), http://www.dailyfinance.com/2009/10/26/the-global-art-market-finds-its-floor.

46. TEFAF REPORT, *supra* note 43, at 94.

47. Deborah Brewster, *Buying Paintings by Numbers*, FINANCIAL TIMES (Aug. 11, 2006, 4:19 PM), http://www.ft.com/cms/s/2/3c6d52fe-2882-11db-a2c1-0000779e2340.html (quoting Kevin Radell of Artnet.com) ("To pretend average price indices are the same as price/performance indices is alchemy. They are measuring different paintings, so they are meaningless from a financial point of view.").

48. *See* Felix Salmon, *Are Warhol Auctions Being Gamed?*, REUTERS, May 24, 2011, *available at* http://blogs.reuters.com/felix-salmon/2011/05/24/are-warhol-auctions-being-gamed (stating that auction prices' main value is their very public indication of how much someone is willing to pay for a certain artwork); *see also* Mei & Moses, *supra* note 37.

D. Phone Bidders at Auction

Phone bidding adds another level of secrecy to the auction process. Auction statistics show that many buyers at auction cannot be identified because they bid by phone through an auction house employee.[49] Phone bidding became popular by the 1980s, at which time up to ten auction "staff members [might be] lined up at the front of the main gallery taking bids by telephone" for an artwork.[50] Today, at a single evening auction, there may be as many as seventy staff members on telephones in a sales room, reporting artworks' current statuses to clients.[51] Typically the employee calls the client before bidding on the artwork begins.[52] She then reports the artwork's status and bids on behalf of the client when instructed to do so.[53] Accordingly, the client can bid as though she is in the room without being identified by other buyers, the press, or the public.[54]

While some phone bidders may be as far away from the auction as another country, others are may be in the actual auction room, using the process to guard their identities.[55] In fact, *Town and Country* magazine quotes Brett Gorvy, Christie's Chairman and International Head of Postwar and Contemporary Art, explaining that sometimes he and other employees are simply pretending to be on the phone, and instead "looking out into the room to someone who [is] giving [them] a pre-agreed symbol."[56] This anonymity allows bidders to affect auction prices, and potentially manipulate the art market, without being identified.

Despite the secrecy of phone bids and the opportunities that they create for manipulation, these sales can be an important measure of art's value. Record-breaking sales often occur by phone.[57] *Town and Country* also quotes Gorvy as stating, "It all happens on the phone . . . if you look at the [most expensive works], eight of 10 times they go to phone bids."[58] Thus, phone bidding is an essential part of the auction market.

---

49. *See infra* Figure 1.

50. Rita Reif, *Auctions: Phone Bids Add to Drama*, N.Y. Times, Mar. 30, 1984, at C27.

51. *See, e.g.*, Daniel Grant, *The Pleasures and Perils of Auction-House Phone Bids*, ARTnews (Oct. 16, 2013), http://www.artnews.com/2013/10/16/pleasures-and-perils-of-phone-bids-at-auctions.

52. *See, e.g.*, Sotheby's, Absentee/Telephone Bidding Form: Jony and Marc's (Red) Auction (Nov. 23, 2013), *available at* http://www.sothebys.com/content/dam/sothebys/PDFs/cob/N09014-AbsenteeBid.pdf (stating, in its standard guide for telephone bids, that someone "will call [the bidder] from the saleroom shortly before [the] lot is offered").

53. *Id.*

54. *Id.*

55. Rachel Wolff, *The Essential Guide to Auctions*, Town & Country, Aug. 2011, at 64, 69.

56. *Id.*

57. Sarah Thornton, *The Wizards of the Warhol Market*, Economist (May 17, 2011, 4:02 PM), http://www.economist.com/blogs/prospero/2011/05/contemporary_art_sales.

58. Wolff, *supra* note 55, at 69.

E. The Secondary Art Market

Opportunities for collusion and price manipulation are particularly present on the secondary art market. The secondary art market is the resale market for art, as compared to the primary market, where "individual artists provide works to galleries, local art exhibitions, or directly to . . . consumers."[59] Known as a "dealer market," the secondary market is composed of a range of resale market segments for works by notable artists.[60] Each segment hosts a small network of top dealers and auction houses that are crucial to that segment's success.[61] These networks are especially important at the most expensive end of the secondary market, occupied by a small group of international auction houses and dealers mostly trading blue-chip art in New York and London.[62] These groups are often privy to "informational asymmetries" because they are the only ones who know the value of artworks traded privately.[63]

Information asymmetries are especially prominent because only certain wealthy parties can afford to be involved in these sales. As Sarah Thornton explains in her book on the art market, "the thing that most distinguishes [secondary-market dealers] from primary dealers is their need to be 'cashed up'" to be effective.[64] Thornton clarifies that these parties, "the strongest players" in the secondary market, "have the capital to buy with no financial pressure to sell."[65] Of course, only a limited number of people are in that position.[66] As those people are particularly aware of the conditions present in an artist's market, while others are not, the secondary market is even more opaque for most art buyers than the primary market. This additional layer of opacity leads to further opportunities for market manipulation.

---

59. Gérard-Varet, *supra* note 2, at 511.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* (explaining that economists call these practices "informational asymmetries" because one party to a trade can profit by using information to which others do not have access).
64. Sarah Thornton, Seven Days in the Art World 30 (2008).
65. *Id.*
66. Mike Boehm, *Report: Super-Rich, Favoring Just a Few Artists, Drive Art Market*, L.A. Times (Mar. 18, 2014, 7:34 AM), http://www.latimes.com/entertainment/arts/culture/la-et-cm-art-market-prices-auctions-billionalires-20140316-story.html ("When we're talking about the people who really, really matter in the art market, the [2014 TEFAF Art Market Report] informs us, we're talking not about those 600,000 mere millionaires and their tastes, but about just under 200,000 'ultra-high net worth individuals' (UHNWIs) who sit atop piles of $30 million or more").

II. Opportunities and Incentives for Collusion: Comparing *Socony-Vacuum* to the Current Art Market

The art market conditions just described are similar to those that created the opportunities and incentives for the formation of a gasoline cartel in the early twentieth century, culminating in the U.S. Supreme Court case *United States v. Socony-Vacuum*.[67] Accordingly, the current art market structure creates the same incentives and opportunities for a similar "spot market" price fixing plan.[68] In fact, the subjective value, lack of regulation, and opaque nature of the market, in combination, create even greater opportunities for collusive price fixing than those that led to *Socony-Vacuum*.

A. Market Conditions Leading to *Socony-Vacuum*

In the 1920s and 1930s, crude oil refiners sold gasoline either on spot markets or by long-term contracts.[69] On spot markets, shipments were "made in the immediate future—usually within ten to fifteen days."[70] No central exchange existed for spot market transactions; instead, sales resulted from "individual bargaining between" refiners and middlemen or wholesalers, with their prices published daily in trade journals.[71] For long-term contracts, the buyer agreed to take delivery and the seller agreed to provide a fixed amount of gasoline up to a year in advance.[72] Long-term contracts during the period "contained price formulae that were directly dependent on" spot market prices.[73] Thus, contract pricing was tied to spot pricing.[74]

At that time, a number of factors—including the fact that oil wells in the Midwest and Texas began overproducing crude oil—deflated oil and gasoline prices.[75] Closing the over-producing wells was difficult and costly.[76] Smaller producers and refiners had little storage capacity, forcing them to sell their crude oil and gasoline quickly on spot

67. 310 U.S. 150 (1940).

68. For an explanation of "spot market," see *Spot Price Definition*, Nasdaq, http://www.nasdaq.com/ investing/glossary/s/spot-price (last visited Dec. 14, 2014) (defining spot markets as those "in which goods are sold for cash and delivered immediately"); *see also Definitions, Sources, and Explanatory Notes*, U.S. Energy Info. Admin., http://www.eia.gov/dnav/pet/tbldefs/pet_pri_spt_tbldef2.asp (last visited Dec. 14, 2014) (defining spot price as "[t]he price for a one-time open market transaction for immediate delivery of a specific quantity of product at a specific location where the commodity is purchased 'on the spot' at current market rates").

69. *Socony-Vacuum*, 310 U.S. at 193.

70. *Id.*

71. *Id.* at 193–94.

72. *Id.* at 192.

73. *Id.* at 198.

74. *Id.*

75. *Id.* at 170.

76. *Id.*

markets.[77] These hurried sales drove down both the spot market and, because of their public nature and direct effect on the market, the longer-term contract prices that made up the majority of the market.[78] Affected states and the federal government instituted laws to regulate pricing but they were largely ineffective.[79]

Meanwhile, major oil companies were heavily invested in the gasoline market.[80] They engaged in "every branch of the business—owning and operating oil wells, pipe-lines, refineries, bulk storage plants, and service stations."[81] Given their investment, they had an incentive to keep prices for gasoline high. When the U.S. Secretary of the Interior established a Petroleum Administrative Board to determine ways to improve the market, many of these major oil companies became involved.[82] In 1934, the Petroleum Administrative Board formed a General Stabilization Committee, a voluntary, cooperative movement to correct the market.[83] In 1935, the General Stabilization Committee met and established a Tank Car Committee ("Committee").[84] The major oil companies, parties to that Committee, subsequently created a conspiracy plan to fix prices.[85]

Beyond the fact that their heavy investment created an incentive to manipulate the market, the market structure, through which spot prices influenced contract prices, created opportunities for collusive price manipulation. Despite spot sales' importance to price determination, they only accounted for about five percent of total gasoline marketed in a corresponding area,[86] with more common long-term oil-purchase contracts constituting the rest of the market.[87] Since prices in the overall market were determined based on spot market prices, oil companies could raise spot market prices to create the illusion of decreased supply or heightened demand, and raise contract prices in the overall market. Major Midwestern and Texan oil companies seized the opportunity to manipulate prices through these spot markets in the late 1920s, thereby securing their investments.[88]

---

77. *Id.* at 171; *see* C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 909 (2008).
78. *Socony-Vacuum*, 310 U.S. at 171; *see also* Rogers, *supra* note 77, at 909.
79. *Socony-Vacuum*, 310 U.S. at 170–71.
80. *Id.* at 164, 173, 179, 184 (calling those involved the "major companies").
81. *Id.* at 166 n.4.
82. *Id.* at 171–72.
83. *Id.* at 175–77.
84. *Id.* at 178.
85. *Id.*
86. *Id.* at 170.
87. *Id.* at 192–93.
88. *Id.* at 169.

These companies, having sufficient space to store the gasoline that smaller independent refiners overproduced, were assigned respective independent refiners or "dancing partners" from whom they would buy surplus gasoline.[89] Thus, the independent refiners no longer needed to immediately sell their overproduced gasoline at exceedingly low prices and instead, could sell to their assigned major oil companies.[90] The major oil companies could hold onto the excess gasoline until market conditions stabilized and then sell limited quantities of it to meet demand. The conspiracy succeeded; as oil companies acted according to the plan, the spot market prices for gasoline rose. Since overall gasoline prices were based on spot market prices, these buying plans "at least contributed to the price rise and the stability . . . of gasoline" during the period.[91]

B. The Sherman Act and the U.S. Supreme Court's Evaluation of *Socony-Vacuum*

In *Socony-Vacuum*, the Supreme Court held that the major oil companies' conspiracy plan violated 15 U.S.C. § 1, commonly known as the Sherman Act (the "Act"). Congress passed the Act as "the basic statute of the anti-trust laws" in 1890.[92] Among other antitrust activity, the Act prevents price fixing. Section 1 of the Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[93]

Since the Act's inception, the Supreme Court has "consistently and without deviation" read § 1 to mean that price fixing agreements are *per se* unlawful.[94] Accordingly, § 1 does not require a competitive abuse showing;[95] as the Court explained in *United States v. McKesson & Robbins, Inc.*:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.[96]

89. *Id.* at 179.
90. *Id.*
91. *Id.* at 219.
92. 15 U.S.C. § 1 (2014); Austin T. Stickells, Federal Control of Business: Antitrust Laws § 28 (1972).
93. 15 U.S.C. § 1.
94. *Socony-Vacuum*, 310 U.S. at 218.
95. *Id.*
96. 351 U.S. 305, 310 (1956).

All that must be proved in a § 1 price fixing prosecution is the existence of an agreement to fix prices.[97] Further, a price fixing agreement need not come in the form of one single "moment of [the conspiracy's] crystallization," as long as the existence of a concerted effort is established.[98]

Based on those principles, the *Socony-Vaccum* Court held that the agreement to manipulate gasoline prices on "spot markets" was a *per se* § 1 violation.[99] The Court called other factors leading to the rise and stability of the market "immaterial" to the Court's determination.[100] It explained that the "reasonableness" of the prices or "good intentions" of the participants were irrelevant, as the Act's main goal is to promote a free-market system, and,

> [i]f the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition.[101]

Moreover, the Court stated that the agreement violated the Act despite the fact that prices were not rigid. Price fixing is not just the establishment of uniform prices, it is any "interference with the setting of prices by free market forces."[102]

Socony-Vacuum was also significant because no single formal contract existed between the oil companies to substantiate the conspiracy.[103] Instead, the Department of Justice ("DOJ") built its case against the oil companies around proof of meetings at which the conspiracy's details were decided.[104] In essence, the agreement that denoted the § 1 violation came in the form of an informal "gentlemen's agreement" or "understanding whereby each [defendant] undertook to perform" its role in the conspiracy.[105] In fact, within one year of the first meeting, the plan worked well enough that in-person meetings were no longer necessary, any relevant discussions were held by phone.[106]

97. *Socony-Vacuum*, 310 U.S. at 218.

98. *Id.* at 188; *see also* Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) ("Traditional 'hard-core' price fixing remains *per se* unlawful under the seminal case *United States v. Socony-Vacuum* . . . .").

99. *Socony-Vacuum*, 310 U.S. at 218.

100. *Id.* at 219.

101. *Id.* at 221.

102. 54 Am. Jur. 2d *Monopolies and Restraints of Trade* § 69 (2013).

103. *Socony-Vacuum*, 310 U.S. at 188 ("It is impossible to find from the record the exact point of crystallization of a buying program.").

104. *Id.* at 178.

105. *Id.* at 179.

106. *Id.* at 185.

C. Conditions in the Current Art Market and *Socony-Vacuum*: Similar Incentives and Opportunities for Collusion

Parallels exist between the conditions in the gasoline market in *Socony-Vacuum* and those in the current secondary art market. A small group of major oil companies were involved in the formation of the *Socony-Vacuum* conspiracy. Likewise, a small group of art dealers and collectors can dominate a certain artist's market. These parties' significant investments in their respective markets create incentives for collusive price fixing to sustain or raise the value of their portfolios.

Both markets reflect certain characteristics that lead to opportunities for price fixing. First, in *Socony-Vacuum*, published spot sales occupied a small portion of the market, but set overall prices. In the secondary art market, while auction sales constitute a small portion of the market, they too influence overall prices. Second, in both markets, spot sales and auction sales are public, while other sales are not. The remainders of the corresponding markets are more opaque than the spot and auction portions of the markets. These two factors, in combination, create opportunities to manipulate spot and auction markets, while affecting prices in the larger markets. Third, the limited number of parties involved in the art market creates incentives to collude, as cartels are more streamlined, stable, and efficient when they have fewer members.[107]

Further, even more opportunities for price fixing are present in the art market than were present in the conspiracy leading to *Socony-Vacuum*. Three other aspects of the art market not present in *Socony-Vacuum* make the art market more opaque and ripe for collusive price fixing: the subjective value of art; the conflicts of interest present when dealer/sellers double as advisors; and phone bidding, which allows parties to bid while remaining anonymous. As discussed earlier in this Note, these factors create opportunities for interested parties to manipulate the market while remaining unidentified.[108]

A study of the current market for Andy Warhol's artwork demonstrates the likelihood that these opportunities and incentives exist and serves as an example for the rest of the secondary market. This Note will assess statistics in the Warhol market only since this area of the market provides an example for similar opportunities and incentives that may exist in other segments of the secondary market.

---

107. *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 564 (2004).
108. *See supra* Part I.

1. Warhol: The "One-Man Dow Jones"

The Warhol market is often considered a determinant of the greater secondary art market. In fact, *The Economist* has referred to the Warhol market as the art market's bellwether or "one-man Dow Jones."[109] The Warhol auction market has continued to grow in the last few years.[110] In 2010, 148 works at auction alone sold for a total of $277 million and accounted for seventeen percent of all post-war and contemporary auction sales.[111] During the 2011 auctions, Warhol works sold for a total of $300 million.[112] In fact, at each of the three major auction houses' spring evening sales that year, the most expensive lot was created by Warhol.[113]

Another factor that makes Warhol a good measure of the overall art market is, as *The Economist* explains, the group that collects Warhol's art "often find[s] [itself] coming together around other artists;" the same group of collectors that buy Warhol's works invest in works by other artists.[114] For instance, Jose Mugrabi, Peter Brant, Steve Cohen, and Larry Gagosian, four avid Warhol collectors, all have some connection to artist Urs Fischer, whose artwork Christie's offered for sale in 2011.[115]

2. Incentives and Opportunities for Collusion Created by Tight-Knit Market

Given the importance of Warhol works to the remainder of the art market, I use a study of available Warhol auction records to show the incentives and opportunities for collusion that the current art market fosters. Dealers and collectors with the largest and most valuable Warhol holdings have an incentive to keep Warhol auction prices high. Having a substantial market share correlates to the risk of a significant decline in a

---

109. *See* Bryan Appleyard, *A One-Man Market*, INTELLIGENT LIFE (Nov./Dec. 2011), *AVAILABLE AT* http://moreintelligentlife.com/content/arts/a-one-man-market; Russ, *supra* note 38, at 6; Sarah Thornton, *The Pop Master's Highs and Lows*, ECONOMIST, Nov. 28, 2009, at 9, 9.

110. ARTTACTIC, ANDY WARHOL MARKET: SEPTEMBER 2012 2 (2012). "During the 1980s art market boom, Warhol's total auction sales were only $2.3 million (1980–1987). However, his market showed signs of improvement beginning in 1986 and expanded rapidly after Warhol's death in 1987 reaching $31.3 million in 1989." *Id.* His market yo-yoed with the stock and commodities market between 1987 and 1998. *Id.* As of 1998, "the market entered a new growth phase." *Id.* In 1999, the Warhol market was valued at $22.5 million, and by 2007 it was valued at $382.4 million. *Id.*

111. *Id.*

112. *Id.*

113. Thornton, *supra* note 57. Those works were: "Self-Portrait," 1963–64 (Christie's, $38.4 million); "Liz #5 (Early Colored Liz)," 1963 (Phillips, $24 million); and "Sixteen Jackies," 1964 (Sotheby's, $20 million). *Id.*

114. *Id.*

115. *Id.* Christie's offered "Untitled (Lamp/Bear)" by Urs Fischer for sale in 2011. *Id.* Brant and Cohen both collect works by the artist, and the work is "soon to be shown at Gagosian's Beverly Hills gallery." *Id.* "Consigned by the Mugrabis, the work sold for $6.8m, an astounding price for art by a 38-year-old, especially for a 17-tonne sculpture in need of electrification." *Id.*

collection's value, or worse, the collector's portfolio, if comparable artworks' values lessen. While not all artworks are alike, many blue-chip artworks are comparable to those sold at auction. For example, the Warhol market provides extraordinary opportunities for collusion because Warhol created works in series. A series is a group of artworks that are similar, but exhibit slight differences. One such series by Warhol is titled "Flowers."[116] In its online sold lot archive, Sotheby's indicates that it has sold a total of 126 Warhol lots from that series since 2004.[117] Given the number of similar artworks, those determining prices have numerous reference points against which to compare a painting in the series.[118]

In a 2011 panel on the art market, Hillel "Helly" Nahmad, son of billionaire art dealer David Nahmad, explained the incentive to influence prices through the auction market, stating that, if he owns "ten examples of an artist['s work valued at $1 million each], and an eleventh example comes up for auction . . . and [he] allow[s that work to trade for] $700,000, then theoretically . . . [his] ten other comparable paintings are all worth $700,000."[119]

In other words, the value of Nahmad's comparable investments is affected by that public sale. Certain art dealers and collectors are significantly invested in particular artists' markets. For example, Jose Mugrabi owns an estimated 800 Warhols.[120] *Business Insider*

116. *Floral Fantasy*, SOTHEBY'S http://www.sothebys.com/en/news-video/videos/2013/10/Floral-Fantasy.html (last visited Dec. 14, 2014).

117. *Search Results for Sold Lot Archive*, SOTHEBY'S http://www.sothebys.com/en/search.html?ex_creator=warhol&ex_title=flowers&ex_currency=USD&startDate=01%2F01%2F2004&endDate=21%2F07%2F2014&ex_soldPR=soldPR#keywords= (last visited Dec. 14, 2014). This number may include works that have been sold more than once. *Id.*

118. *Id.*

119. *Artelligence Panel*, *supra* note 25; *see also* Patricia Hurtado & Katya Kazakina, *Art Dealer Nahmad Gets 1-Year Term in Gambling Case*, BLOOMBERG (May 1, 2014, 3:36 PM), http://www.bloomberg.com/news/2014-04-30/art-dealer-nahmad-gets-1-year-term-in-gambling-case.html. Nahmad and his family primarily deal in work by Pablo Picasso, Mark Rothko, and Francis Bacon. Wolff, *supra* note 55, at 64. They also deal in Warhol. HELLY NAHMAD GALLERY, http://www.hellynahmadgallery.com/artists (last visited Dec. 14, 2014); *see also* WILLIAM D. GRAMPP, PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS 142 (1989) ("[Uncertain in the art market] is whether an actual sale at an actual price was made in order to inflate the value of a work. A owns one or more paintings by Z and at an auction bids for another that has been put up for sale by another owner or by A himself. A increases his bid as much as the rules of the auction permit. If his is the winning bid it establishes a new and higher value for the works of Z including those which A owns. If his is not the winning bid, the value of his collection rises even more . . . . Consistent with the account is the fact that auction houses frequently do not reveal the names of buyers and sellers . . . [or that] certain conditions [would also] be present[, such as] the spurious bidder has confederates who bid.").

120. Kelly Crow, *The Man with the 800 Warhols*, WALL ST. J. (Jan. 4, 2008, 12:01 AM), http://online.wsj.com/news/articles/SB119940749725466431. Fellow dealer Francis Naumann, speaking with the *New York Times Magazine*, called Mugrabi and his sons "so invested [in the Warhol market], they're like the casino, not the gambler." Eric Konigsberg, *Is Anybody Buying Art these Days?*, N.Y. TIMES MAG., Mar. 1, 2009, at 22, 24.

approximates that those Warhols account for an estimated $770 million of his $795 million in assets.[121] Thus, as an investor heavily invested in a market, he may have an incentive to protect his Warhol investment by affecting the market through auctions. The *Socony-Vacuum* defendants had similarly large investments in the gasoline market, and thus, had a similar incentive to fix prices.

Nahmad's statements during that 2011 panel also demonstrate the opportunities to influence prices through the auction market.[122] With regard to his practices, Nahmad explained that if he owns ten artworks, previously valued at $1 million, and a similar work comes up for auction at a price that he finds "to be very low," such as $700,000, he is "forced to bid on" the work and either acquire it "at a good value . . . or stop bidding at one million dollars," letting someone else buy it for the price of the work he already owns.[123] In the case of heated bidding, if a comparable sells for "$1.1 million or $1.2 million[,] [his] other ten works [would be] worth $1.1 million or $1.2 million."[124] In contrast, if he does not bid, he allows the value of the piece he already owns to be marked at the new, and lower, market value established at that auction. Thus, these auctions create opportunities to maintain and raise the values of the artworks he already owns. Here, as in *Socony-Vacuum*, a market player has the opportunity to protect the value of his overall investment by publicly buying a substantially similar asset to those he owns in his portfolio at constant or elevated rates.

In addition, as in the conspiracy that led to *Socony-Vacuum*, the small, tight-knit nature of the Warhol market creates further opportunities for collusion. Not all Warhol buyers and underbidders are identified at auction, but a study of those who are may indicate the probability that auctions give dealers and collectors the opportunity to collude.

The following collection of data focuses on evening auctions at Christie's, Sotheby's, and Phillips. I have chosen this subset of auction records because these three auction houses are the most publicized. To compile this information, I evaluated *Baer Faxt* newsletters from 2005 to 2013. Art market critic Josh Baer publishes these newsletters, including his personal notes on buyers and underbidders at auction.[125] I then checked that data against various news sources, when possible, such as *The New York Times*, *Blouin Artnet*, *Bloomberg News*, and *The Wall*

121. Julie Zeveloff, *Meet the World's Biggest Warhol Collector, Who Just Added a $37 Million Work to His Trove*, BUSINESS INSIDER (May 10, 2012, 5:24 PM), http://www.businessinsider.com/jost-mugrabi-warhol-collector-2012-5.

122. *Artelligence Panel*, *supra* note 25.

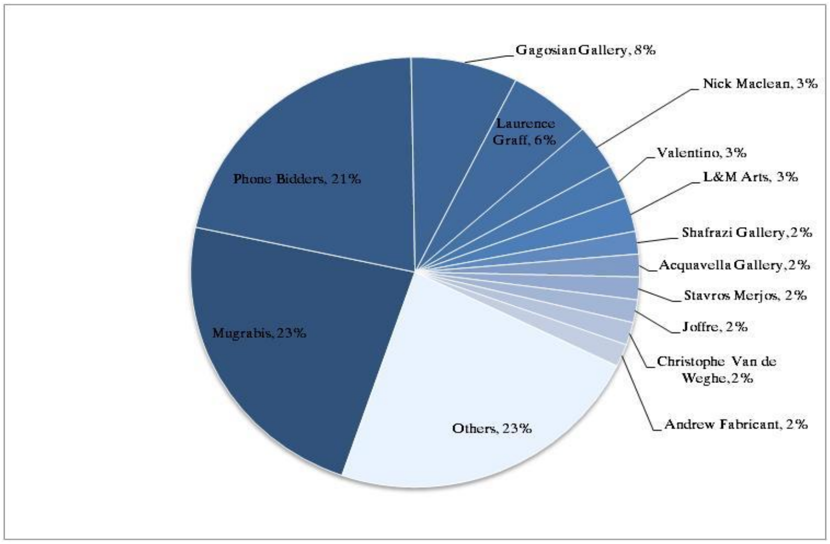
123. *Id.*

124. *Id.*

125. *About The Baer Faxt*, THE BAER FAXT, http://www.baerfaxt.com (last visited Dec. 14, 2014).

Street Journal, published around the time of each relevant sale. While this study does not include all sale records, it is based on the only public information on buyers and underbidders available. I created two figures using this data, one that displays percentages of works purchased by parties at auction ("Documented Warhol Buyers") (Figure 1), and another that displays percentages of works on which parties bid without making the final, winning bid, ("Documented Warhol Underbidders") in cases where the work was purchased within or above its estimated value range (Figure 2).

FIGURE 1: DOCUMENTED WARHOL BUYERS AT EVENING AUCTIONS, 2005–2013



A group of twelve collectors and dealers appear consistently on the list of Documented Warhol Buyers identified between 2005 and 2013, accounting for about half of known purchases. Eight of these twelve parties are professionals who either deal in Warhol works or own or represent galleries that sell them.[126] *Artinfo*, a publication on the art market, reports that Stavros Merjos, one of the four "non-professionals," is an avid art collector and is married to an art dealer who sells Warhol works at her gallery.[127] Another twenty percent of purchases occurred by phone, so it is difficult to know whether more of the same art dealers or other collectors made those purchases.[128]

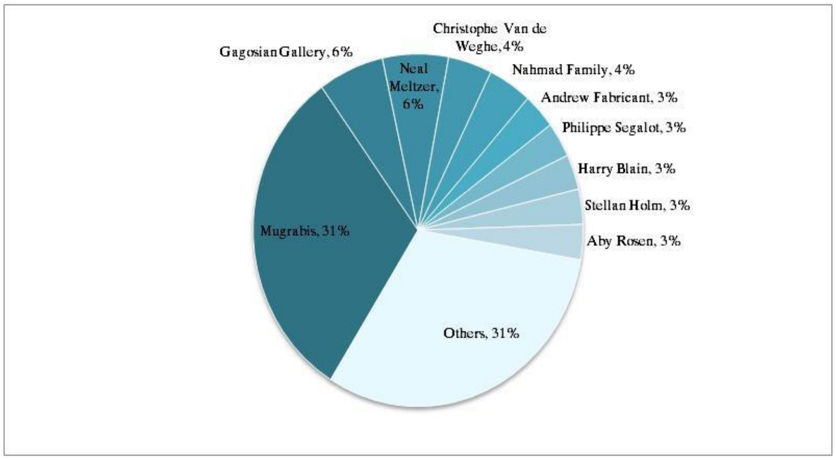
---

126. *See supra* Figure 1.

127. *The Love List: Power Couples of the Art World*, BLOUIN ARTINFO (Feb. 15, 2011, 8:19 AM), http://www.blouinartinfo.com/news/story/123097/the-love-list-power-couples-of-the-art-world (listing Merjos as married to art dealer Honor Fraser); *see also* HONOR FRASER, http://www.honorfraser. com (last visited Dec. 14, 2014) (listing current and past Warhol exhibitions at the gallery).

128. *See supra* Figure 1.

FIGURE 2: DOCUMENTED WARHOL UNDERBIDDERS AT EVENING AUCTIONS, 2005–2013



An even smaller group of collectors and dealers, only ten individuals, account for about seventy percent of Documented Warhol Underbidders on works sold above or within their estimated value during that period. Underbidding is particularly appealing for someone hoping to sustain an artist's market. As Nahmad has explained, one can push up or sustain the value of comparable artworks without spending any money.[129] The Nahmad family's activity in the Warhol market indicates that the family may use this method of affecting prices; the available data shows that Nahmad's family underbid four percent of the time, while it never, at least publicly, appeared as a buyer.

Nine out of the ten Documented Warhol Underbidders are art dealers. The tenth is collector Aby Rosen, who may soon be neighbors with art dealer Alberto Mugrabi, Jose Mugrabi's son and business partner. After Rosen showed Mugrabi the building where he had recently gone into contract to buy a condominium, Mugrabi decided to buy a condominium there as well.[130] Jose Mugrabi and his two sons Alberto and David rent their collection's primary office and gallery space from Rosen, and they have collaborated with him to present art exhibitions in the lobby of the office building.[131]

129. *Artelligence Panel*, *supra* note 25.

130. Alyssa Abkowitz, *Two Big Art Collectors Pick Up Condos*, WALL ST. J. (Sept. 21, 2013), http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-280902/?mod=wsj_streaming_latest-headlines; Mark Maurer, *Aby Rosen, Alberto Mugrabi Buy at Schumacher*, THE REAL DEAL (July 19, 2013, 11:30 AM), http://therealdeal.com/blog/2013/07/19/aby-rosen-alberto-mugrabi-buy-at-schumacher.

131. Marion Maneker, *Aby Rosen Gets Self & Mugrabi into New Digs*, ART MKT. MONITOR (July 19, 2013), http://www.artmarketmonitor.com/2013/07/19/aby-rosen-gets-self-mugrabi-into-new-

The Mugrabi family and Rosen do not represent an anomaly in this group of parties invested in the Warhol market; many of the recurring parties appear to know each other, collaborate in business, and socialize together.[132] In one example, the U.S. government sued collector Peter Brant and dealer Larry Gagosian for tax evasion for a previous joint venture.[133] Further, these parties do not keep their bidding practices secret from one another or from the public. Helly Nahmad and Alberto Mugrabi have essentially laid them out in the media.[134] The tight-knit nature of the group creates opportunities for "gentlemen's agreements" similar to the one in *Socony-Vacuum*.

In addition to the tight-knit nature of the parties, phone bidding provides another opportunity for a dealer to influence the value of an artist's works while remaining anonymous. Warhol auction statistics reflect this commonality. Over twenty-percent of Warhol works sold at evening auctions are purchased by phone.[135] According to Christie's Chairman and International Head of Postwar and Contemporary Art, Brett Gorvy, that statistic is low compared to that of the most expensive works. He explained that eight out of ten of the most expensive artworks "go to phone bids."[136]

According to the study underlying Figure 1, twelve dealers and collectors with another group of unidentified phone bidders purchase seventy-five percent of Warhol works. Given those figures, by collaborating to buy or underbid works, invested parties within this

---

digs; *Midtown Madness*, W MAG., Nov. 2007, at 98, *available at* http://www.wmagazine.com/culture/art-and-design/2007/11/uncensored_lever.

132. For example, according to *New York Magazine*, before opening his own gallery in 1999, Christophe Van de Weghe worked as Gagosian Gallery's top director. Josh Baer, *Art by Numbers: Printing Money*, N.Y. MAG. (Dec. 18, 2000), http://nymag.com/nymetro/arts/features/4201. An online digital media company's website lists dinner parties that Alberto Mugrabi and Peter Brant have hosted together and displays several pictures of them side-by-side. *See, e.g.*, *Aby Rosen, Peter Brant & Alberto Mugrabi Dinner at W South Beach*, PATRICKMCMULLAN.COM, http://www.patrickmcmullan.com/site/event_detail.aspx?eid=31615 (last visited Dec. 14, 2014). Brant also personally interviewed dealer and gallery owner Larry Gagosian for one of Brant's publications, *Interview Magazine*, in 2012. Peter Brant, *Larry Gagosian*, INTERVIEW MAG., Dec. 2012/Jan. 2013, at 140. While Peter Brant does not appear in the auction records analyzed to produce Figures 1 and 2, arts journalist Sarah Thornton calls Brant's "the best [Warhol] collection." THORNTON, *supra* note 64, at 29; *see also* Wolff, *supra* note 55, at 64.

133. Carol Vogel, *Art Dealer and 3 Others Sued Over $26.5 Million in Taxes*, N.Y. TIMES, Mar. 20, 2003, at C12.

134. *Artelligence Panel*, *supra* note 25; Marion Maneker, *Art Market Shifts with Players*, N.Y. SUN, Apr. 10, 2007, at 1 (stating that Alberto Mugrabi got into a bidding war with collector Peter Brant and quoting Alberto Mugrabi saying, "I'm only helping my collection . . . [i]f I don't get it, I'm keeping the market healthy. Everyone likes a healthy market.")

135. *See supra* Figure 1.

136. Wolff, *supra* note 55, at 64.

group could manipulate the Warhol market to maintain or increase the value of their holdings, while sometimes remaining unidentified.

3. Additional Opportunities for Collusion

The lack of clarity in the overall market creates further opportunities for collusion. Data available to sellers, buyers, and the public is limited, even at auction. Thus the market is hard to understand, even for those that deal within it. It is likely even more difficult for a regulatory body outside of the art industry to identify price-fixing practices. Further, unlike the gasoline in *Socony-Vacuum*, art has an inherently subjective value.[137] Even if parties in the art industry were to conspire, they could easily explain a sudden upsurge in pricing caused by a price fixing agreement by pointing to an upsurge in a work's aesthetic desirability. Finally, the art market is highly unregulated, again leading to the ability to manipulate prices while going unnoticed by those outside of the market. The combination of these factors makes the Warhol market ripe for price fixing.

Given the small group of market players with existing relationships and a strong common interest in keeping Warhol prices high, the possibility of collusion is hardly a surprise or secret. Adam Lindemann, an art collector and writer referred to these parties as a "crooked cartel" whose "scam" he is "in on."[138] He wrote the comment in response to an article by fellow writer Sarah Thornton, which referenced parties such as "[t]ightknit cabals of dealers and speculative collectors."[139]

III. Balancing Antitrust Goals with Privacy Concerns

The goal of the Sherman Act is to protect consumers. The art market's opacity creates opportunities for collusive price fixing, which inherently harms consumers with higher prices and barriers to entering the market. Thus, increasing transparency is essential to protecting consumers in this market. However, as many buyers and sellers at auction prefer to remain anonymous, any solution to this issue must balance antitrust goals with privacy concerns. This Part proposes one solution that takes into account both of these considerations.

A. Sherman Act Goals and Antitrust Concerns

The Sherman Act's goal is to "increase efficiency and productivity to the ultimate benefit of the consumer in the form of lower prices, better

137. *See supra* Part I.A.

138. *See, e.g.*, Adam Lindemann, *Writing About Not Writing About the Art Market*, AdamLindemann.com (Nov. 16, 2012), http://www.adamlindemann.com/writing-about-the-art-market.

139. Sarah Thornton, *Top 10 Reasons NOT to Write About the Art Market*, TAR Mag., Fall 2012, at 82, 82.

products, and increased value."[140] In *Socony-Vacuum*, market manipulation trickled down to the numerous consumers that purchased gasoline.[141] Given the importance of the gasoline market, the DOJ prosecuted the *Socony-Vacuum* case to protect those consumers.

Some are skeptical of the need to protect the "consumers" now involved in the art market, a supposedly small group of wealthy, sophisticated parties. For example, one popular argument for allowing market manipulation in the secondary art market is that only the richest, savviest buyers are harmed by its rising prices.[142] Given their level of sophistication and available capital, some argue that the affected parties can protect themselves. Writer and collector Adam Lindemann encapsulates this contention in stating that "innocent moms and pops don't buy art."[143]

However, potential harm to the greater population may arise if museums and other philanthropic organizations, where the general public has access to see and enjoy art, are cut out of the market by rising prices.[144] Peggy Guggenheim, the benefactor of several major eponymous art museums around the world, recounted that by the 1950s the most notable art was being traded by investors that could afford it.[145] To make matters worse, some dealers store a majority of their collections in guarded storage facilities.[146] Thus, "much of [the] collection is not in museums or on display," but instead completely outside of public view.[147]

Though this form of harm is difficult to quantify, it likely exists. Museum acquisition policies vary. Some museums have policies against purchasing works, and instead rely solely on gifts from collectors to build their permanent collections.[148] Museums that do purchase art have varying acquisitions budgets.[149] Despite these variations, the rising prices mean that even museums with large budgets that do want to purchase works, such as the Metropolitan Museum of Art in New York, do not have the capacity to compete with some of today's dealers and collectors.[150] This leads to a real possibility that more museums, as well

---

140. Deborah P. Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 GEO. MASON L. REV. 121, 122 (2002).

141. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 168–69 (1940).

142. *See, e.g.*, Lindemann, *supra* note 138.

143. *See id.*

144. Lee Rosenbaum, *So Long Masterpieces*, L.A. TIMES, Sept. 4, 2007, at A15.

145. *See* GUGGENHEIM, *supra* note 5, at 108.

146. *See, e.g.*, Zeveloff, *supra* note 121.

147. *Id.*

148. Judith H. Dobrzynski, *How an Acquisition Fund Burnishes Reputations*, N.Y. TIMES, Mar. 15, 2012, at F4.

149. *Id.*

150. For example, the Metropolitan Museum of Art's acquisition budget, for all departments, has ranged from $30 million to $100 million over the past six years. Though this budget is high as compared to those of other museums, when split between its numerous departments, it does not allow

as other collectors with less resources, might be able to access the secondary art market if prices were lower.

B. Privacy Concerns

Many buyers and sellers prefer to remain anonymous in buying or selling artwork through an auction house. Sotheby's Senior Vice President of Provenance and Restitution Lucian Simmons described Sotheby's policy with respect to client confidentiality, stating:

> Sotheby's will not disclose clients' identity without their consent as this is commercially sensitive proprietary data of Sotheby's and could constitute a breach of contract and/or a breach of data protection and privacy legislation—depending on the jurisdictions concerned. We are equally sensitive to the privacy concerns of the heirs to looted collections and do everything we can to help them maintain their anonymity in the event that they wish to sell restituted property through Sotheby's.[151]

As discussed above, many buyers use phone bidding to remain anonymous.[152] A review of the May 2014 Sotheby's *Contemporary Art Evening* auction catalog, as encapsulated in Figures 3 and 4 below, illustrates the fact that sellers also prefer to remain unidentified.[153] Figure 3 shows that, of seventy-nine works sold at that auction, the auction records for fifty-four, or 68% do not reference their sellers' names.[154] Forty-three, or 54% of the total works list no identifying information whatsoever, using terms such as "private collection" or "present owner."[155] The other eleven, or 14%of works without sellers' names listed show only geographic identifiers, such as "Europe," "East Coast," or "New York."[156] Only three sellers owning twenty-five, or 32% of all works chose to be listed: the Estate of Andrew Gordon; Jane and Marc Nathanson; and the Sender Collection.[157] The Sender Collection was featured, with nineteen works in the sale. If those works were removed, the percentage of works without a seller identified would jump 90%as shown in Figure 4. Thus, most sellers in that sale, as in many

for expansive purchasing. *See Annual Report*, Metro. Museum of Art, http://www.metmuseum.org/about-the-museum/annual-reports/reports (last visited Dec. 14, 2014).

151. Lucian Simmons, Provenance and Private Ownership: Just and Fair Solutions in the Commercial Art Market 6 (2009), *available at* http://www.commartrecovery.org/sites/default/files/docs/events/LucianSimmonsPaperforPrague.pdf.

152. *See supra* Parts I.D, II.C.2.

153. *See generally Ahead of the Curve: The Sender Collection*, Sotheby's, http://www.sothebys.com/en/auctions/ecatalogue/2014/contemporary-art-evening-sale-n09141/lot.2.html (last visited Dec. 14, 2014).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

others at Sotheby's, Christie's, and Phillips's evening sales, preferred to remain anonymous.

FIGURE 3: SOTHEBY'S MAY 13, 2014 CONTEMPORARY ART EVENING AUCTION

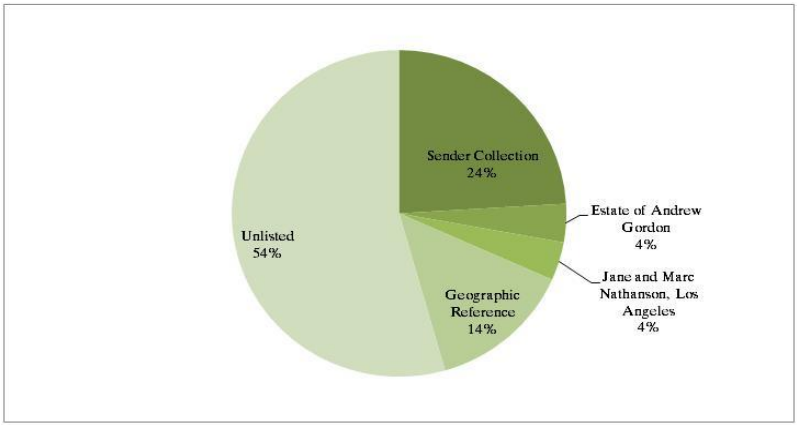
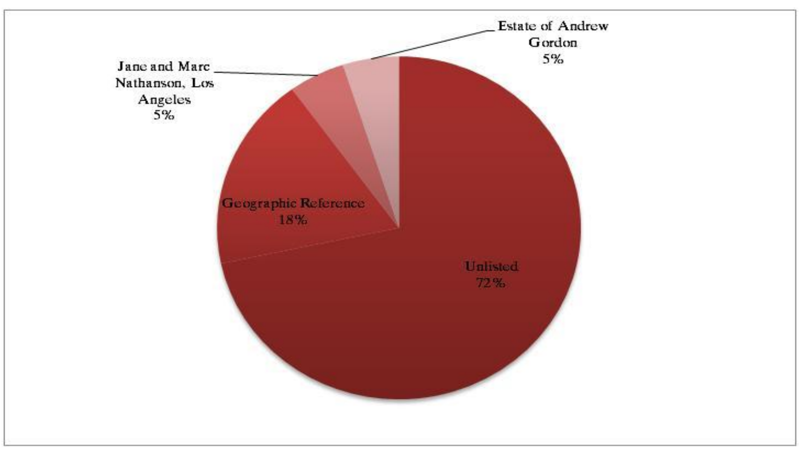


FIGURE 4: SOTHEBY'S MAY 13, 2014 CONTEMPORARY ART EVENING AUCTION WITHOUT SENDER COLLECTION



C. PROPOSING A SOLUTION TO BALANCE THESE CONCERNS AND DISCOURAGE COLLUSION

Implementing a mechanism to increase pricing transparency in the art market could minimize opportunities for collusion and enable purchasers on the secondary market to make more informed decisions when purchasing in the secondary market. As previously discussed, the disparity between the publicity of the auction market and the opacity of the remainder of the market creates opportunities for price fixing or other forms of anticompetitive collusive conduct.

One way to implement a mechanism would be through government action. The DOJ or the Federal Trade Commission ("FTC") could investigate the structure and function of the auction market to determine if participants in the market are in fact engaging in collusion. In such a case, the government could reach an "antitrust consent decree" with auction houses to curtail these opportunities. An antitrust consent decree is "an order of the court agreed upon by representatives of the Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General, in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes."[158] Parties to a consent decree:

> [W]aive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.[159]

Consent decrees may also be reached prospectively, outside of the litigation context. For example, the DOJ and FTC have propagated a preventative "fix it first" policy with respect to mergers, where they reach consent decrees when companies are in the process of merging, before possible antitrust violations occur.[160]

Another solution would be for auction houses to implement changes unilaterally, serving the interests of the art market as well as protecting consumers from collusion. For example, Sotheby's, Christie's, and Phillips could create a mechanism that increases consumer awareness of interested parties' bidding activities, without sacrificing privacy concerns. The system would work as follows. First, the auction house would require that all buyers wishing to participate at an evening auction ("Participants")[161] report to the auction house the percentage of works in the Participants' art collections created by each artist featured in that auction. Second, the auction houses could establish a formula, based on benchmarks they determine, to identify bidders who may have incentives

158. ANTITRUST SUBCOMM. OF THE H. COMM. ON THE JUDICIARY, 86TH CONG., REP. ON CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (Comm. Print 1959).

159. United States v. Armour & Co., 402 U.S. 673, 681 (1971).

160. 2 SPENCER WEBER WALLER & ANDRE FIEBIG, ANTITRUST AND AMERICAN BUSINESS ABROAD § 13:8 (3d ed. 2013); Panel, *60 Minutes with J. Paul McGrath, Assistant Attorney General, Antitrust Division*, 54 ANTITRUST L.J. 131, 143 (1985).

161. Auction houses could eventually include auctions other than evening sales. However, given the value and limited number of works sold at evening sales, they would be the most reasonable place to start.

and opportunities to collude.[162] If a Participant meets the threshold formula, the Participant would be deemed an "Interested Bidder." Third, during the auction, the auction house would track instances where an Interested Bidder placed a bid. The auction house could then convey, in its post-sale records, the bid prices submitted by all Interested Bidders without disclosing any personal information. For example, a record with two Interested Bidders and one non-Interested Bidder buying an artwork by Banksy titled "Dogs" would include the following text:

NB (non-Interested Bidder): $1 million

IB1 (Interested Bidder 1): $1.25 million

IB2 (Interested Bidder 2): $1.5 million

Through this structure, buyers would retain their privacy and the market would be more transparent. Consumers would be better equipped to know when prices in the primary market had been driven higher by actions of Interested Bidders and could use such information to aid in their negotiations for artworks outside of the auction market. For example, a seller negotiating the price of a work comparable to Banksy's "Dogs" referenced above might tell a buyer that the market value of the artwork was $1.5 million. The buyer could counter that the work might not actually be worth $1.5 million, given that Interested Bidders placed many of the final bids at auction. Of course, the seller would have the ability to refuse to sell the work at a lower price. But at least, with this added level of transparency, a prospective post-auction buyer would find herself on a more level playing ground with the seller.

Conclusion

The current art market's structure is similar to the environment leading to *Socony-Vacuum*, and is, in some ways, more conducive to collusive price fixing. In *Socony-Vacuum*, major oil companies took advantage of spot markets and formed price-fixing agreements to increase their own contract gasoline prices. They limited supply on spot markets, which were used to determine more common, but unpublished, contract pricing. Similarly, the current art market is generally opaque, but features its own smaller public auction market. Three other aspects of the art market not present in *Socony-Vacuum* make the art market further disposed to collusive price fixing: (1) the subjective value of art;

162. This formula could be similar to that currently used in the securities market. *See, e.g.*, *Form 13F—Reports Filed by Institutional Investment Managers*, U.S. Sec. & Exch. Comm., http://www.sec.gov/answers/form13f.htm (last visited Dec. 14, 2014). I merely offer a proposal and admit that any calculation of Interested Buyers would need to take into consideration issues with title, for example, in the case where a buyer transfers half of her collection to a trust or holding company, and neither she nor the holding company would qualify as an interested party (despite the fact that she controls a five percent market dominant position).

(2) the conflicts of interest present when dealer/sellers double as advisors; and (3) phone bidding, which allows parties to bid while remaining anonymous. Accordingly, the art market's structure creates greater opportunities and incentives for art dealers to manipulate the overall art market by buying and underbidding blue-chip works at auction. By implementing mechanisms to increase transparency in this market, regulatory bodies and major auction houses could curtail those opportunities and incentives to prevent collusion.