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Says Who?: The Futility of Authenticating Art in the Courtroom

Valerie Medelyan

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Says Who?: The Futility of Authenticating Art in the Courtroom

by VALERIE MEDELYAN*

I.	Introduction	1
II.	Background.....	3
	A. Art is Now Better Than Cash: The Current Role of Art Within the Economy	3
	B. The Current Art Buyer	4
	C. Auction House Practices.....	5
	D. Available Authentication Methods.....	9
III.	Analysis.....	13
	A. Treatment of Art Merchants and Private Buyers.....	13
	B. Courts' Treatment of Art Authenticity Disputes	17
IV.	Proposal.....	21
	A. Attribution of Artwork is an "Inexact Science"	21
	B. Buyers' Reasonable Reliance on Art Merchants' Assertions	23
	C. Proposed Process for Court Proceedings.....	23
	D. Likely Effects of the Proposed Process	25
V.	Conclusion.....	26

I. Introduction

In a 1993 case involving the authenticity of a mobile by sculptor Alexander Calder,¹ Judge Louis F. Oberdorfer bitterly conceded that if a prominent art expert testified that a work was a forgery, it would become so in the eyes of the market and its value would be destroyed.² However, the judge went on to say, "this is not the

* Corporate Documents Specialist at the Chicago Stock Exchange. The Author dedicates this article to Igor and Alla Medelyan, for their constant support of my pursuits in both art, and law, and to Dominic Johnson, for his insight, random knowledge, and great editing skills.

1. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167, 174 (D.D.C. 1993).

2. *Id.* Even the defendants' experts stated in their depositions that the plaintiff's expert is one of only two true experts on Calder's work, and if the plaintiff's expert says that the work is a forgery (as he did in this case), "[t]he work is then ipso facto unsalable and should not be touched by any honorable person." *Id.* In layman's terms, this means that the owner of the mobile will not be able to sell this work through any reputable gallery or auction house. See generally *Greenberg Gallery*, 817 F. Supp. 167 (discussing

market, but a court of law, in which the trier of fact must make a decision based upon a preponderance of the evidence.”³ While acknowledging that the opinion of the more respected expert (that the Calder mobile was a fake) would govern in the art world, Judge Oberdorfer ruled that the mobile was “more likely than not” the original Rio Nero by Alexander Calder.⁴ Twenty years later, this piece remains unsold, even after its current owner has obtained a judgment of a United States District Court declaring its authenticity.⁵

Receiving such a judgment might not have been a concern for a buyer who had purchased the artwork for aesthetic reasons. After all, would it matter whether Alexander Calder or someone else authored the work if the buyer bought the piece solely because he liked it for aesthetic reasons? However, the art market has become a “financial instrument,” where buyers are not only art lovers, but also investors,⁶ and the law must now reflect this change.

Part II of this article provides a background of the current role art plays within the U.S. and world economy, identifies the typical art buyers, explains the auction house industry, and describes methods that are available to authenticate works of art. Part III addresses and

the importance of the plaintiff’s expert’s (Klaus Perls) opinion in the art market). This is because the opinion of Mr. Perls is equivalent to the opinion of the Supreme Court within the art market regarding Alexander Calder artwork. *Id.*

3. *Id.* at 174. The court chose to balance the testimonies of the plaintiff’s expert and the defendants’ principal expert. *Id.* It found that the defendant’s expert “based her determination that the piece was an authentic Calder upon a detailed and extensive examination of the piece, with emphasis on the [artist’s] signature,” whereas the plaintiff’s expert “conspicuously did not address the signature” and only spent a maximum of ten minutes examining the mobile before concluding that it was a forgery. *Id.* at 170, 174. Therefore, the court concluded that the plaintiff’s expert testimony did not “carry plaintiff’s burden.” *Greenberg Gallery*, 817 F. Supp. at 174–75. This was a bench trial, without a jury, where the court acted as fact finder. *Id.* at 167.

4. *Id.* at 175. Originally, the mobile was exhibited as an untitled Calder. *Id.* at 168. Perls Galleries, after verifying the mobile’s provenance, produced an invoice which identified the sculpture as a “black sheet metal and steel wire hanging mobile, 31” by 65,” entitled ‘Rio Nero,’ and signed ‘AC.’” *Id.*

5. *Id.* at 175. The court entered a judgment for defendants on all counts. *Id.* The Calder mobile was mentioned in a recent article published by *The New York Times*, where it was stated that the mobile has not been sold since the 1993 decision. Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. TIMES, Aug. 5, 2012, at C5.

6. Charlotte Burns & Riah Pryor, *New York’s Billion-dollar Art Week*, THE ART NEWSPAPER (May 3, 2012), <http://www.theartnewspaper.com/articles/New-Yorks-billion-dollar-art-week/26450>. “The artist, curator and critic Robert Storr says that the art market has been fuelled by ‘two separate things for a very long time’: die-hard art lovers and investment buyers.” *Id.* Marc Payot, a partner of the gallery Hauser & Wirth said “there is a clear split between investors buying blue-chip works at auctions and the people we tend to talk to in the gallery, who are either emerging critics, curators and writers or more established institutional buyers and traditional collectors.” *Id.*

analyzes how the courts have dealt with cases in which the authenticity of artwork was at issue. Part IV proposes that the courts should reexamine their approach to such cases, and refrain from making rulings that authenticate works of art. Finally, Part V will briefly conclude.

II. Background

A. Art is Now Better Than Cash: The Current Role of Art Within the Economy

Profligacy, volatility, and chaos within the traditional financial markets has motivated many twenty-first-century Americans to move away from the stock markets and invest in art instead.⁷ Economic turmoil or political conflicts affect the art market substantially less than other asset markets.⁸ For example, after the September 11 terrorist attacks, as well as during the war in Iraq, art prices barely dropped.⁹ According to the Artprice Global Index, the price of art dropped only 1.2% during the third quarter of 2001, and then rose 7% in the first six months of 2003.¹⁰

In 2011, art sales raised more revenue than in any previous year in history.¹¹ The prices of individual artworks are rising to dizzying

7. Thierry Ehrmann, *Art Market Trends 2011*, ARTPRICE 6, http://imgpublic.artprice.com/pdf/trends2011_en.pdf (last visited Sept. 29, 2012). The art market, historically, has often played the role of a “value haven,” with certain investors using the term “SWAG,” which stands for silver, wine, art, gold (the classes of more secure investments). *Id.*

8. *Art Market Trends 2004*, ARTPRICE 5, <http://press.artprice.com/pdf/trends2004.pdf> (last visited Sept. 29, 2012). For example, from January 1, 1997, to June 1, 2004, the average quarterly fluctuation in the Artprice Global Index was two to three times smaller than the same statistic for the Dow Jones Industrial Average and the Standard & Poor’s 500. *Id.* Additionally, “stock markets tend to [be affected] in the slightest concerns investors may have, there is no automatic correlated reaction on the art market.” *Id.* Instead of compromising on price, the individuals involved in selling and purchasing artworks become significantly more selective. *Id.* “At auctions, this translates into a higher bought-in rate: between 2000 and 2003 the bought-in rate rose by 9%. The quality of the work bought and sold guarantees the return on investment, while the lower sales volume fuels prices.” *Id.*

9. *Id.*

10. *Art Market Trends 2004*, *supra* note 8, at 5. In fact, during this period of time, “prices for works of art purchased for more than \$50,000 have risen 22.6% since January 2001.” *Id.* The Artprice Global Index “tracks international auction figures.” Andrew Russeth, *Global Art Prices Are Surging, Index Reveals*, THE NEW YORK OBSERVER (July 27, 2011, 6:05 PM), <http://observer.com/2011/07/global-art-prices-are-surging-index-reveals>.

11. *Art Market Trends 2011*, *supra* note 7, at 6. “So in spite of the sword of Damocles hanging over the West,” art brought in \$11.57 billion in total global annual revenue, which

amounts.¹² In 2011 alone, more than 1,675 artworks were sold for over \$1 million worldwide, and fifty-nine were sold for over \$10 million.¹³ The depreciation of the dollar has attracted many international art buyers to the United States' sales, where no fewer than twenty-nine of the fifty-nine artworks over the \$10 million threshold were sold.¹⁴

B. The Current Art Buyer

The growth in the population of art lovers alone does not explain the increased interest in the art market. Over the last two decades, the typical art buyer has changed.¹⁵ One of the co-owners of Sprüth Magers, a leading contemporary art gallery, recently said that very few people bought art for investment purposes twenty-five years ago, "but now they are around all the time."¹⁶ Due to the attractive investment benefits of purchasing art, the typical buyer has changed from an experienced dealer or a professional collector to an inexperienced individual looking to purchase items that will

is \$2 billion above the 2010 total global revenue, and 2010 "already produced the best performance of the decade." *Id.*

12. *Id.* Pablo Picasso's "La lecture" sold for over \$36.2 million at Sotheby's February 8, 2011, auction in London. *Id.* at 30. Egon Schiele's "Häuser m itbunter wäsche" sold for over \$35.6 million at Sotheby's June 22, 2011, auction in London. *Id.* Andy Warhol's "Self-Portrait" sold for \$34.2 million at Christie's May 11, 2011, auction in New York. *Id.*

13. *Art Market Trends 2011, supra* note 7, at 6. One hundred twenty-seven works by Francis Bacon were sold in 2011, with the highest price of \$32.9 million, whereas the highest price paid for a work by Bacon in 2010 was \$12.5 million. *Id.* at 32. Fifty-six works by Egon Schiele were sold in 2011, with the highest price of \$35.6 million, whereas the highest price paid for a work by Schiele in 2010 was \$6.8 million. *Id.* However, 1,624 works by Andy Warhol were sold in 2011, with the highest price of \$34.2 million, whereas the highest price paid for a work by Warhol in 2010 was \$56.5 million. *Id.*

14. *Id.* at 6. Some of the artworks sold in the United States include Gustav Klimt's "Litzberg Am Attersee" for \$36 million, Claude Monet's "Les Peupliers" for \$20 million, Gerhard Richter's "Abstraktes Bild" for \$18.5 million, Clyfford E. Still's "1949-A-No.1" for \$55 million, Mark Rothko's "White Cloud" for \$16.5 million, and Jeff Koons's "Pink Panther" for \$15 million. *Id.* at 30-31.

15. See generally ALICE GOLDFARB MARQUIS, *THE ART BIZ: THE COVERT WORLD OF COLLECTORS, DEALERS, AUCTION HOUSES, MUSEUMS, AND CRITICS* (1991) (stating that during the late 1980s, the percentage of sales at Sotheby's to private individuals went from 40%, up to 60%). "Historically, dealers comprised seventy or even eighty percent of auction house clients, but in recent years that percentage has dropped to around forty percent." *Id.*

16. Burns & Pryor, *supra* note 6. Robert Storr, an artist and curator stated that art "is big business, and it's international. There is a valuation system associated with the idea of masterpieces that is connected to art as an alternative investment." *Id.*

appreciate in value over time.¹⁷ Art dealer Christophe Van de Weghe stated that current art buyers are interested in “big names”—the work of artists whose names will still be valuable 100 years from now.¹⁸ Naturally, investment in the art market still carries risks.¹⁹ Such risks are particularly serious when the buyer lacks substantial knowledge about the artwork’s authenticity.²⁰

This lack of knowledge and experience in current art buyers is especially noticeable in the auction market.²¹ Individual bidders often lack awareness of the rules governing auction transactions and are unfamiliar with auction-house procedures.²²

C. Auction House Practices

Art buyers at auction frequently rely upon the knowledge and expert opinions of the auctioneers.²³ They freely purchase works of art, unaware of or unconcerned with whether the law establishes any legal duties between the buyer and auctioneer.²⁴ Such presumptions

17. See MARQUIS, *supra* note 15 (discussing the change in the art buyer over the years from one who is involved in the art world, to one who lacks knowledge regarding the field of art).

18. Burns & Pryor, *supra* note 6. Mr. Van de Weghe says that the price of entry into the auction market is high, but he believes that the buyer is getting “something solid.” *Id.* He equated buying art with owning an apartment on Fifth Avenue in New York City. *Id.*

19. *Art Market Trends 2004*, *supra* note 8, at 5.

20. *Weisz v. Parke-Bernet Galleries, Inc.*, 325 N.Y.S. 2d 576, 580 (N.Y. Civ. Ct. 1971) (finding that the buyer did not have actual knowledge of disclaimers of warranty because a reasonable person could not have thought that the seller would be able to disclaim information provided in the catalogue).

21. William W. Stuart, *Authenticity of Authorship and the Auction Market*, 54 ME. L. REV. 71, 72 (2002). Stuart comments on the fact that “[t]hese new entrants to the art and antique auction market bid against each other, as well as against the dominant long-term experienced participants, dealers and gallery owners.” *Id.*

22. See Stuart, *supra* note 21, at 72–73 (discussing how inexperienced auction bidders lack knowledge about the goods they are bidding on, and they are unaware of the “need and opportunity to obtain expert third party evaluations of the goods offered at auction[s]”).

23. *Infra* note 28.

24. See Kai B. Singer, “Sotheby’s Sold Me a Fake!” *Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art*, 23 COLUM.-VLA J.L. & ARTS 439, 450–51 (2000) (discussing the conflict of interest that may arise if an auction house had to represent both the seller and the buyer at once). However, Singer brings up an example “of a real estate broker who similarly finds himself advising both the buyer and seller simultaneously.” *Id.*; see also Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 557–58 (1988) (discussing further the potential conflict of interest relationship which may arise when an auction house acts as a dual agent, for both the seller and the buyer). Gerstenblith brings up other areas where such relationships have been accepted by the court, such as the real estate market. *Id.*

may be attributed to the fact that many auction houses provide “specialist advice” to prospective bidders, or may be because inexperienced bidders lack the requisite understanding of an auction house’s function.²⁵ Nevertheless, an auctioneer is considered the agent of the seller, and has a duty “to act in the utmost good faith and in the interest of” the seller, not the buyer.²⁶ One of the auctioneer’s most important duties is to acquire the highest possible price for his or her client, the seller.²⁷

Traditionally, the principle of *caveat emptor*, or “buyer beware,” was applied in auction transactions.²⁸ In contrast, the courts have altered their views regarding the buyer-auctioneer relationship in limited circumstances, partly because of the aforementioned changes in the art market and also because auction houses are no longer wholesale suppliers for art dealers, but are providers of art to the general public.²⁹ The change in the courts’ views may also be due to the fact that successful bidders currently pay auction houses a buyer’s premium of around twenty-five percent of the hammer price on each

25. *Conditions of Sale*, SOTHEBY’S, available at <http://www.sothebys.com/content/dam/sothebys/PDFs/cob/N08887-COS.pdf> (last visited Feb. 12, 2013) (stating that if prospective bidders are interested in specific information which is not included in the catalogue, they may talk to a specialist in charge of the sale, or contact the Client Services Department); *Conditions of Sale*, CHRISTIE’S, available at <https://www.christies.com/LotfinderSecure/LotFinderDocuments/CKS/7567/ConditionsOfBusiness.htm> (last visited Oct. 4, 2012) (stating that during pre-auction viewing Christie’s specialists are available to give advice, or a prospective bidder may make an appointment with a Christie’s specialist for advice); *Infra* note 28 (“[A]uction houses invite buyers to rely on their expertise by offering services to both buyers and sellers.”). In an English case, the court discussed the warranties a buyer may reasonably rely on when bidding on a work of art. *Avrora Fine Arts Inv. Ltd. v. Christie, Manson & Woods, Ltd.*, [2012] EWHC 2198 (Ch) (Eng.). There, the court gave an example, stating:

[T]o tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability.

Id.

26. *Cristallina S.A. v. Christie, Manson & Woods Int’l, Inc.*, 502 N.Y.S.2d 165, 171 (N.Y. App. Div. 1986); Brenna Adler, Comment, *The International Art Auction Industry: Has Competition Tarnished its Finish?*, 23 NW. J. INT’L L. & BUS. 433, 435 (2003).

27. Adler, *supra* note 26, at 435–36.

28. Ildiko P. DeAngelis, *Nuts and Bolts of Buying and Selling Collection Objects at Public Auction*, ALI-ABA COURSE OF STUDY MATERIALS, COURSE NUMBER SB53 (1997), available at LexisAdvance.

29. Adler, *supra* note 26, at 433.

item they purchase.³⁰ In some instances, the seller's premium is substantially reduced or even waived entirely, and the buyer, instead of the seller, pays the auction house the full amount of the commission from the sale..³¹

Another caveat of which the average buyer may not be fully aware is the disclaimer of warranty or representation that an auction house may assert.³² In states where laws allow such disclaimers,

30. See Carol Vogel, *Postwar and Contemporary Artworks Draw Record Prices at Christie's*, N.Y. TIMES, Nov. 9, 2011, at A29 (stating that “[f]inal prices include the buyer’s commission to Christie’s: twenty-five percent of the first \$50,000; twenty percent of the next \$50,000 to \$1 million; and twelve percent of the rest.”). See also Carol Vogel, *Sotheby’s Contemporary Sale Makes \$108 Million*, N.Y. TIMES (June 26, 2012, 6:00 PM), <http://artsbeat.blogs.nytimes.com/2012/06/26/sothebys-contemporary-sale-makes-108-million> (stating the percentage a buyer pays the auction house as a buyer’s commission). Leslie Hindman Auctioneers states in its catalogue that the buyer’s premium is twenty-two percent for the first \$200,000, 20% for the next \$200,000 to \$500,000, and 12% for the next \$500,000 and above. Leslie Hindman Auctioneers, *infra* note 32.

31. DeAngelis, *supra* note 28; see also Pierre Valentin, *Selling at Auction: A Negotiable Process*, MARTINDALE (May 2, 2012), http://www.martindale.com/entertainment-sports/article_Withers-Bergman-LLPWithers-LLP_1505718.htm (last visited Oct. 5, 2012) (discussing the typical way an auctioneer is paid today). Assuming you are consigning artwork of some value, it is worth prevailing upon the auction house to assume as many of the other expenses as possible incurred in the consignment, all costs of any tests or procedures the auction house may require to verify the authenticity, attribution or quality of your property. In the event you are consigning property of considerable value, the auction house should pay all of the above expenses—and should charge you a greatly reduced seller’s commission. For big-ticket items and/or property the auction house is extremely eager to acquire from you on consignment, you might in rare instances be offered more than 100% of the sales proceeds—meaning that the auction house will pay you the full hammer price plus a small percentage above the hammer price so you receive, say, 102% of the hammer price. *Id.*

32. See SOTHEBY’S, *supra* note 25 (stating that “Sotheby’s makes no warranties whatsoever, whether express or implied, with respect to any material in the catalogue other than that appearing in the Bold or Capitalized heading and subject to [other] exclusions.”). See *Conditions of Sale*, SLOTIN FOLK ART, <http://www.slotinfolkart.com/auctions/buyers.html> (last visited Oct. 4, 2012) (stating that “Slotin, for itself and as agent for the seller, makes no warranties or representations of any kind with respect to any Lot.”). Additionally, the “[b]uyer agrees that in no event shall Slotin be responsible for the correctness, description, genuineness, authorship, attribution, provenance, period, culture, source, origin, value or condition of any Lot.” *Id.* Slotin’s Condition of Sale continues by stating, “[n]othing being said or done by Slotin shall be deemed a warranty of representation or an assumption of liability by Slotin.” *Id.*; see, e.g., *Catalogue No. 179*, LESLIE HINDMAN AUCTIONEERS (Dec. 11, 2011), at 142, available at http://www.lesliehindman.com/files/Conditions_of_Sale.pdf (stating that “[a]ll lots are sold “AS IS” and without recourse and neither Leslie Hindman Auctioneers, Inc. nor its consignor(s) makes any warranties or representations, express or implied with respect to such lots.”). Specifically:

[N]either Leslie Hindman Auctioneers, Inc. nor its consignor(s) makes any express or implied warranty or representation of any kind or nature with respect to merchantability, fitness for purpose, correctness of the

auction houses may disclaim any liability in regards to title, merchantability, fitness, or condition of the artwork.³³ The “express warranty” provision of the Uniform Commercial Code (“U.C.C.”) allows auction houses to assert that the descriptions they provide for the artwork are opinions rather than facts, on which the buyer should not rely.³⁴ Even in states, such as New York, that have established more stringent regulations for auction houses than most other states, disclaimers of representations relating to the correctness of descriptions made for artwork declared to be sold “as is” may still be upheld.³⁵ Also, even in states where auction houses are required to disclose certain information to the buyers, such disclosure requirements are limited, leaving prospective bidders in the dark regarding a considerable amount of information about the artwork.³⁶

catalogue or other description of the physical condition, size, quality, rarity, importance, medium, material, genuineness, attribution, provenance, period, culture, source, origin, exhibitions, literature or historical significance of any lot sold. The absence of any reference to the condition of a lot does not imply that the lot is in perfect condition or completely free from wear and tear, imperfections or the effects of aging. No statement, whether written or oral, and whether made in the catalogue, or in supplements to the catalogue, an advertisement, a bill of sale, a salesroom posting or announcement, the remarks of an auctioneer, or otherwise, shall be deemed to create any warranty, representation or assumption of liability.

Id.

33. DeAngelis, *supra* note 28.

34. *Id.* “Although disclaimers of warranties of title are not favored by the courts (and indeed in New York City, auction houses are prohibited from disclaiming warranties of title), some auction houses in other localities will require the buyer to rely only on the warranties of title of the consignor/seller.” *Id.*

35. *Id.* The New York statute states: “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 certificate of authenticity or any similar written instrument it: (a) Shall be presumed to be part of the basis of the bargain.” Express Warranties, N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 2012). The statute continues on to state that such a certificate of authenticity “[s]hall create an express warranty for the material facts stated as of the date of such sale or exchange.” *Id.*

36. DeAngelis, *supra* note 28. Auction regulations of New York City state that the subsequent information must be disclosed to purchasers:

If an auctioneer or public salesroom has any interest, direct or indirect, in an article, including a guaranteed minimum, other than the selling commission, the fact such interest exists must be disclosed in connection with any description of the article or articles in the catalogue or any other printed material published or distributed in relation to the sale. Such notice may be denoted by a symbol or letter which will refer the reader to an explanation of the nature of the interest the symbol or letter denotes. For the purpose of this subdivision (d), advertisements in

D. Available Authentication Methods

Auction houses declare that they are “not in the business of authenticating works of art.”³⁷ Yet, authentication fuels the auction art market because it prevents forgeries and misrepresented work from being sold.³⁸ Authentication provides an element of certainty for prospective buyers.³⁹ Therefore, it is in the best interest of the

newspapers or other periodicals shall not constitute printed material. Where no printed material is provided in connection with an auction, the auctioneer shall have available during any advertised inspection period, information as to whether such an interest exists with relation to a particular item and shall announce before he or she commences the auction that such information is available upon request.

RULES OF THE CITY OF NEW YORK, NEW YORK, N.Y., R.C.N.Y. tit. 6, ch. 2, § 2-122(d) (2009), available at http://www.nyc.gov/html/dca/downloads/pdf/auctioneer_law_rules.pdf.

Where a consignor is to receive a rebate commission in whole or in part, or where he or she will be permitted to bid upon and to buy back his or her own article at the sale, disclosure of such a condition must be made in connection with any description of the item or items so affected in the catalogue or any other printed material published or distributed in relation to the sale. The existence of such a condition may be denoted by a symbol or letter which will refer the reader to an explanation of the nature of the interest the symbol or letter denotes. For the purpose of this subdivision (e), advertisements in newspapers or other periodicals shall not constitute printed material. Where no printed material is provided in connection with the auction, the auctioneer shall have available during any advertised inspection period information of whether such a condition exists with relation to a particular item and shall announce before he or she commences the auction that such information is available upon request.

RULES OF THE CITY OF NEW YORK, NEW YORK, N.Y., R.C.N.Y. tit. 6, ch. 2, § 2-122(e) (2009), available at http://www.nyc.gov/html/dca/downloads/pdf/auctioneer_law_rules.pdf.

37. Tony Shafrazi Gallery Inc. v. Christie’s Inc., 2011 N.Y. Misc. LEXIS 5578 (N.Y. Sup. Ct. Nov. 22, 2011). The opinion discusses the practices of authenticating works of art that Christie’s utilizes, which begins with the auction house obtaining any useful information that is available from the consignor, and then attempting to verify such information by using outside sources, such as books which have been written on the artist. *Id.*

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

39. *Id.* Lacy writes:

Contemporary art is bought and sold on two basic markets: the primary market for newly-created work of living artists; and the secondary market for work that has already been sold on the primary market. Secondary art market sales generally occur through auctions and private-dealer sales where prices are often much higher than in primary markets. The primary market involves curated gallery exhibitions of work obtained directly from artists’ studios. The supply side of both markets

auction houses to exhaust the research and authentication processes prior to a sale.

Stylistic authentication is the method which art experts and auction houses use most in order to attribute an artwork to a specific artist.⁴⁰ Such methods include connoisseurship, reviewing the *catalogue raisonné*, and establishing the artwork's provenance.⁴¹

Connoisseurship consists of an art expert viewing the artwork and verbally expressing his or her opinions and observations.⁴² While connoisseurship is primarily based on the inherently subjective opinions of "experts," a knowledgeable and respected expert's opinions will be considered valid.⁴³ Nevertheless, in some cases, auction houses have obtained expert opinions regarding works of art in somewhat questionable ways.⁴⁴ For example, to authenticate an 1848 painting by George Inness, Sotheby's sent a black and white photograph of the artwork to an expert, who wrote "yes" on the back of the photograph and sent it back to Sotheby's.⁴⁵ Based on that information alone, Sotheby's auctioned off the painting as an original George Inness.⁴⁶ Subsequently, the painting was found to be a forgery.⁴⁷

includes individual collectors, private owners, museums, foundations, and dealers holding inventories, while the demand side includes collectors, museums, and dealers seeking inventory. Intermediary dealers, galleries, and auction houses bring these buyers and sellers together on the primary and secondary art markets. Authentication supports the secondary art market.

Id.

40. *Id.* "Another approach is scientific authentication in which the expert conducts objective investigation based on tests including radiocarbon dating, chemical analysis, or x-ray diffraction." *Id.*

41. *Id.* at 189-90.

42. *Id.* at 189. However, opinions regarding the authenticity of any work of art can change over time due to new information being discovered, and it is not unheard of for different experts to have competing opinions about the attribution and authenticity of an artwork. *Id.*

43. Lacy, *supra* note 38, at 190. Some art experts rely on their feelings and emotions about a certain work of art, and determine its authenticity, or lack thereof, based on whether or not they believe the feel of the artwork fits into the real artist's style. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167, 170 (D.D.C. 1993). In certain instances, some of the best art experts may need no more than 10 minutes with the work in order to determine whether or not it is an original work of art, or a forgery. *Id.*

44. Singer, *supra* note 24, at 439.

45. *Id.* Many "prominent auction houses" often authenticate valuable works of art by using nothing more than a photograph; in fact, it is considered "standard practice" in the auction house business. *Id.* at 449.

46. *Id.* at 439. "In another case, *Aryeh v. Christie International* involving the authenticity of a Fabergé egg, which was also settled out of court, Christie's allegedly, had

Authenticity may also be established by reviewing the *catalogue raisonné* for a particular artist.⁴⁸ A *catalogue raisonné* is an annotated book documenting all of the artist's work currently known.⁴⁹ Many catalogues raisonnés are established by artists' foundations that are considered to be "the art market's rating agencies . . . providing triple-A stamps of approval."⁵⁰ A determination of authenticity made by an artist's foundation and expressed through its *catalogue raisonné* can significantly affect the financial value of an artwork.⁵¹ However, the same foundations procure financial gains from selling the work they own by the same artist, which may lead to a conflict of interest between the foundation and the parties requesting the foundation's approval of authenticity.⁵²

the egg authenticated by an outside expert who never even saw it." Singer, *supra* note 24, at 449.

47. Singer, *supra* note 24, at 439. Douglas Esposit, an antique dealer bought that George Inness forgery, and upon discovering its lack of authenticity picketed outside of Sotheby's for several weeks. *Id.* Esposit learned of the painting's misattribution by inviting the same art expert who wrote "yes" on the back of the photograph sent to him by Sotheby's. *Id.* When the art expert saw the actual painting, he knew right away that he had made an error in attributing the painting to George Inness. Singer, *supra* note 24, at 439. When Esposit asked for a refund from Sotheby's, they refused stating that their warranties do not cover paintings dated before 1870. *Id.*

48. See Lacy, *supra* note 38, at 189 (stating that auction houses "will often refuse to sell work excluded from an artist's catalogue raisonné. In other words, authentication is as much a product of market consensus as expert or scholarly inquiry.").

49. *Id.*

50. James Panero, *Behind the Veil: Questions About Art Authentication*, WALL ST. J., Mar. 23, 2011, available at <http://online.wsj.com/article/SB10001424052748704608504576208622894968298.html>.

51. *Id.* Additionally, artists' foundations often create authentication boards that are comprised of individuals who have scholarly interest in an artist's work, or actual firsthand knowledge or experience working with the particular artist. Lacy, *supra* note 38, at 190. Authentication boards only review artwork as it is submitted by owners, and oftentimes it takes them a very long time to respond with an answer. *Id.* In fact, in some more recent instances, the authentication boards refused to give an answer at all, simply saying that they refuse to comment on the work. Lacy, *supra* note 38. However, there are some "impartial organizations" that may authenticate works of art, such as the International Foundation for Art Research. Samuel Butt, Article, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 COLUM. J.L. & ARTS 71, 84 (2004). However, such organizations require the owner of the work to waive his rights to sue the organization based on the authentication determinations. *Id.* Additionally, these organizations may publish their findings, which make them a less than ideal choice for some individuals who may want to keep such information private. *Id.*

52. Lacy, *supra* note 38 at 189. The American Alliance of Museums ("AAM," formerly the American Association of Museums) and the Association of Art Museum Directors ("AAMD") both have best-practice guidelines and enforceable standards of conduct for museums, but not for artist foundations. Despite their considerable influence, artist foundations follow no industry standards, are allowed to operate in complete secrecy, and are accountable to no outside individual or entity beyond the attorney

The most common method of authenticating artwork employed by auction houses is the documenting of provenance.⁵³ Provenance refers to the history of ownership of a specific artwork.⁵⁴ In an ideal situation, the provenance of an artwork can be traced all the way back to the artist, albeit rarely possible for older paintings.⁵⁵ Many experts consider provenance to be the best proof of a work's authenticity.⁵⁶

Auction houses may also conduct library research, research of the labels present on the back of the painting, and review previous exhibition catalogues.⁵⁷ While such authentication methods may leave much to be desired in regards to certainty, if utilized properly, they often lead to a reasonable attribution of an artwork. However, auction houses do not have any legal obligations to implement such methods.⁵⁸ In fact, the majority of auction house industry practices involving authenticity are voluntarily conducted.⁵⁹ This leaves the buyer with limited legal options once he realizes that he was sold a very expensive and worthless fake painting at an auction.

Part III of this article will illustrate, through several case examples, the courts' current approach to art-authenticity disputes. Part III.A. will discuss the lack of accountability currently placed on art merchants by the courts, and the unwillingness to distinguish art merchants from private buyers. Part III.B. will provide examples of how the courts have dealt with cases involving the authenticity of art, and will highlight some problems with the courts' current method of resolving such cases.

general and the Internal Revenue Service, with only the courts offering glimpses of their operations. *Id.*

53. Izabella Redzisz, Case Summary, *United States v. Davis*: 648 F.3d 84 (2d Cir. 2011), 22 DEPAUL-LCA J. ART & ENT. L. & POL'Y 297, 315 n.124 (2011).

54. *Id.*

55. *Id.*

56. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167, 173 (D.D.C. 1993).

57. *Tony Shafrazi Gallery Inc. v. Christie's Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *10 (N.Y. Sup. Ct. Nov. 22, 2011).

58. Gerstenblith, *supra* note 24, at 532. However, some states are attempting to hold art merchants liable for their representations. *Levin v. Dalva Bros.*, 459 F.3d 68, 77 (1st Cir. 2006). For example, the New York fine art statute does not distinguish between opinion and fact when provided by an art merchant to a non-art merchant. *Id.*

59. Gerstenblith, *supra* note 24, at 532.

III. Analysis

A. Treatment of Art Merchants and Private Buyers

In 2011, Guido Orsi, the buyer of an untitled Jean Michel Basquiat painting, sued Christie's, the auction house, for fraud.⁶⁰ Mr. Orsi alleged that the auction house knew that the painting was not an authentic Basquiat, and that it acted recklessly in misrepresenting the painting's authenticity.⁶¹

The dispute arose out of an auction that Christie's held in 1990.⁶² Christie's acquired the painting from a consignee, Carlos Diaz, and stated in its catalog that the work was acquired directly from the artist.⁶³ In 2006, Mr. Orsi discovered that the painting was a forgery.⁶⁴

60. *Tony Shafrazi Gallery*, 2011 N.Y. Misc. LEXIS 5578, at *1.

61. *Id.* at *2. Mr. Orsi originally sued for fraud, fraudulent inducement, negligent misrepresentation, deceptive business practices, breach of contract, and breach of express or implied warranty. *Id.* Originally, Mr. Orsi and Mr. Shafrazi filed suit together against Christie's. *Id.* The court dismissed Mr. Shafrazi's claims against Christie's because the court found that since he was able to resell the painting to Mr. Orsi, he did not suffer any actionable damages. *Tony Shafrazi Gallery Inc. v. Christie's*, 2009 N.Y. Misc. LEXIS 5714, at *3 (N.Y. Sup. Ct. Apr. 19, 2009). Unfortunately for Mr. Orsi, the majority of his claims were dismissed for being time barred. *Tony Shafrazi Gallery Inc. v. Christie's Inc.*, 2008 N.Y. Misc. LEXIS 8217, at *8-9 (N.Y. Sup. Ct. Nov. 7, 2008). But the case was allowed to go forward on Mr. Orsi's two remaining fraud claims. *Id.* Mr. Orsi sought damages in excess of \$2 million, the painting's current value, and over \$5 million in punitive damages. *Id.* Although Mr. Orsi did not purchase the painting from Christie's directly, the court stated, in a previous proceeding, that "lack of privity is not a viable defense to a fraud claim." *Tony Shafrazi Gallery Inc.*, 2009 N.Y. Misc. LEXIS 5714, at *3. The provenance of the painting included the sale to Mr. Shafrazi by Christie's, along with Christie's reputation within the art market made it likely that Mr. Orsi relied on Christie's misrepresentations when he purchased the work from Mr. Shafrazi. *Id.* at *7. Additionally, the court found that while Christie's may not have been aware of Mr. Orsi specifically as a potential buyer, they should have known that Mr. Shafrazi would resell the painting at some point. *Id.* Therefore, the court found that Mr. Orsi had standing to continue his lawsuit against Christie's. *Id.* at *11.

62. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *2. In 1990, an art buyer, Tony Shafrazi purchased a painting from a Christie's auction. *Tony Shafrazi Gallery Inc.*, 2008 N.Y. Misc. LEXIS 8217, at *3. The painting was described in the Christie's catalog as an original Jean-Michel Basquiat, and under its provenance stated that it was "acquired directly from the artist." *Id.* at *3. Mr. Shafrazi was the successful bidder and purchased the untitled work for \$242,000. *Id.* at *1. Subsequently, Mr. Shafrazi sold the painting to Mr. Orsi in 1991. *Id.*

63. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *4.

64. *Id.* at *2. In 2006, Mr. Orsi decided to submit his Basquiat painting for display in an exhibition in Italy. *Id.* The painting was rejected. *Id.* at *1. This rejection led Mr. Orsi to submit the painting to the Basquiat Committee for authentication, which informed him that the painting was a forgery. *Id.* Additionally, Mr. Orsi learned that two members of the Basquiat Committee had seen this painting before, when they were invited by Christie's to view and authenticate this work a few days prior to the auction in 1990. *Id.* at 3.

On Christie's motion for summary judgment, Mr. Orsi presented evidence that Christie's invited Gerard Basquiat, the artist's father, and John Cheim, the director of the gallery representing Basquiat, to view and authenticate the painting prior to the 1990 auction.⁶⁵ Gerard Basquiat testified that he told an unidentified Christie's employee that the painting was "not right" and that Mr. Cheim agreed with that opinion.⁶⁶

Christie's presented evidence that during Gerard Basquiat's visit, he never told anyone other than the unidentified person that he questioned the painting's authenticity.⁶⁷ In fact, Christie's argued, Gerard Basquiat never actually said that the painting was fake, just that he thought it was "not right."⁶⁸ Moreover, Christie's insisted that Gerard Basquiat could not identify the person to whom he talked, or whether or not that person worked for Christie's.⁶⁹ The auction house relied heavily on the fact that Gerard Basquiat never took any further action regarding the painting, but simply viewed the painting and left.⁷⁰

As to the provenance of the painting, which stated that the work was acquired directly from the artist, Christie's presented the testimony of two of its employees.⁷¹ The employees testified that, although they did not remember the specific transaction for the Basquiat painting, "Christie's practice at that time was to obtain the

65. *Id.* at *3.

66. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *3.

67. *Id.* at *10–11.

68. *Id.* at *11. Such statements as "not right" or "no good" are understood within the art community to mean that precisely the authenticity of the artwork is being questioned. *Boule v. Leonard Hutton Galleries, Inc.*, 70 F. Supp. 2d 378, 381 (S.D.N.Y. 1999). In *Boule*, a retired art gallery manager who was still curating shows around the country, showed her catalogue of an exhibition in which some Lazar Khidekel paintings were displayed to a gallery owner. *Id.* at 380. The gallery owner flipped through the catalogue, and after stopping at a particular painting by Khidekel, said, "that is no good." *Id.* at 381. The retired gallery manager understood exactly what that meant. *Id.* She knew that the gallery owner was "referring to the authenticity of the work." *Id.* Therefore, while Christie's attempted to argue that it would not have known what Gerard Basquiat meant by saying that the painting was "not right," this in fact is a common term used in the art world to refer to a possibly questionable authenticity of a work of art. *Tony Shafrazi Gallery, Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *11.

69. *Id.* at *12.

70. *Id.* at *11.

71. *Id.* at *9–10. The two employees who testified were Alison Gerstell, a former Christie's employee who signed the consignment agreement for the Basquiat painting on Christie's behalf. *Id.* The second employee was Susan Dunne, who worked in the Contemporary Art Department of Christie's during 1989, when the consignment was made. *Id.*

relevant information about the artwork from the consignor and then verify that information through [many] outside sources.”⁷² Both employees testified that Christie’s would “exhaust the research process prior to a sale.”⁷³

Based on the parties’ evidence, the court granted Christie’s motion for summary judgment, finding that Mr. Orsi’s evidence was “insufficient to raise a genuine issue as to Christie’s intent to defraud and to its knowledge.”⁷⁴ The court concluded that no evidence showed that Christie’s strayed from its customary authentication procedures.⁷⁵ Additionally, the court rejected Mr. Orsi’s argument that because Christie’s asked Gerard Basquiat to view the painting, it should have followed up and called him to ask what he thought about the artwork.⁷⁶

In this case, the court did not give any weight to Christie’s extensive prior experience dealing with Basquiat’s work, as well as Gerard Basquiat himself.⁷⁷ When discussing Gerard Basquiat’s testimony, the court focused on the fact that Gerard Basquiat knew and dealt with many of Christie’s employees in the past, yet chose not to express his opinion regarding the painting to any of these known parties.⁷⁸ The court, however, did not make any inquiry into how Gerard Basquiat communicated with Christie’s in the past, and whether or not it was customary for him to remain silent when viewing an authentic Basquiat painting. If, for example, Gerard Basquiat was usually very talkative when viewing his son’s real work, Christie’s knowledge that something was wrong with this painting could have been inferred.

More importantly, Christie’s did not provide any evidence as to how it established the provenance of this particular painting.⁷⁹ It certainly did not receive that information from Gerard Basquiat.⁸⁰ The painting was dated 1982, and Christie’s entered the consignment

72. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *9–10.

73. *Id.* at *10. Christie’s would “verify that information through outside sources, such as library research, review catalogues raisonné, review books written on the artist, and seek out the authorities on the artist.” *Id.*

74. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *14.

75. *Id.* at *10.

76. *Id.* at *15.

77. *Id.* at *11–12.

78. *Id.* at *10.

79. *Id.* at *9–10.

80. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *9–10.

agreement for this artwork in 1989.⁸¹ While artwork from previous centuries requires extensive research, Christie's needed to verify only seven years of provenance.⁸² Yet, it provided no evidence showing how it reached a conclusion that the consignor's misrepresentation was valid.⁸³ The easiest way would have been to ask Gerard Basquiat if he had any recollection regarding such a transaction between his son and the consignor. Furthermore, the court did not comment on Christie's status as an art merchant, or any duty to verify the authenticity of the painting that may have arisen from such a status. In fact, the court did not make any distinction between Christie's, the art merchant, and Mr. Orsi, who is a private buyer.

This case illustrates the lack of accountability and requirements for art merchants to verify the work they sell, which the courts allow.⁸⁴

81. *Id.* at *4-5.

82. *Id.*

83. *Id.* at *7.

84. *Id.* at *11. Similar rulings have been made as recently as July 2012. *Arthur Props., S.A. v. ABA Gallery, Inc.*, 2012 U.S. Dist. LEXIS 98631 (S.D.N.Y. July 16, 2012). In *Arthur Properties*, a trial preceding the July 2012 decision for the same parties, the buyer bought 18 paintings for a total of \$9.5 million. *Arthur Props., S.A. v. ABA Gallery, Inc.*, 2011 U.S. Dist. LEXIS 136389 at *1 (S.D.N.Y. Nov. 28, 2011). The buyer then filed a lawsuit for fraud, claiming that four of the paintings sold by the seller were forgeries. *Id.* The buyer presented evidence that the seller was an expert in Russian art, and should have easily been able to determine that the paintings were not authentic. *Arthur Props.*, 2012 U.S. Dist. LEXIS 98631 at *5. The buyer provided evidence that when he did finally consult an expert regarding the authenticity of the paintings, the expert was able to determine that the paintings were not authentic very quickly, and with ease. *Id.* Additionally, the buyer stated that the seller persuaded the buyer to not conduct any of his own expert research. *Id.* The court concluded that just because another expert was easily able to distinguish these paintings as forgeries, was not the kind of evidence that could establish "conscious fraudulent behavior or recklessness." *Id.* Therefore, the court granted the seller's motion to dismiss the buyer's fraud claims. *Id.* at *10; *but see*, *Rogath v. Siebenmann*, 941 F. Supp. 416 (S.D.N.Y. 1996). The court was able to find for the buyer because of documented evidence showing that the seller knew of challenges to the authenticity of a Francis Bacon painting. *Rogath*, 941 F. Supp. at 416. The authenticity of the painting was questioned by the Marlborough Gallery, who aborted its sale. *Id.* at 418. The Marlborough representatives questioned the use of glossy black paint in the work because Francis Bacon only used matte black paint in his other works. *Id.* at 418-19. Additionally, the buyer presented evidence that the seller was told that Marlborough Gallery's objection to authenticity was very serious because the gallery was Francis Bacon's agent. *Id.* at 418. Subsequently, the seller attempted to sell the painting at Sotheby's, which also rejected the artwork. *Id.* at 419. The Sotheby's representative told the seller that if Marlborough Gallery was objecting to the work, they were not comfortable putting it up for auction at their auction house. *Id.* When the seller finally sold the painting to the plaintiff, the seller made certain warranties to induce the plaintiff to buy the artwork. *Rogath*, 941 F. Supp. at 420. One of the warranties stated that "the Seller has no knowledge of any challenge to Seller's title and authenticity of the Painting." *Id.* at 420. Based on that, the court concluded that the seller breached the warranty, and was therefore, required to return \$950,000.00 to the buyer, which was the current value of

The inauthenticity of the Basquiat painting was not at issue in this case.⁸⁵ Yet, the court made no inquiry into what Christie's had specifically done to decide that this was a real Basquiat.⁸⁶ The court seemed satisfied with only evidence of Christie's general authenticity practices.⁸⁷ In this case, such general practices led to a sale of a forgery.

B. Courts' Treatment of Art Authenticity Disputes

In *Greenberg Gallery v. Bauman*, the authenticity of an Alexander Calder mobile was in dispute.⁸⁸ The defendants provided sufficient evidence through various records, showing that they had gone through all of the necessary steps to authenticate the Calder mobile.⁸⁹ However, the court went further and heard all of the experts' testimonies, and ruled on the actual authenticity of the mobile.⁹⁰

Fifteen years prior to the *Greenberg Gallery* decision, a federal court in New York dealt with a similar legal question.⁹¹ In *Dawson v. G. Malina, Inc.*, Dawson, the buyer of eleven Chinese art objects, sued Malina, the seller, for breach of warranty and rescission.⁹² Shortly after purchasing the objects from Malina, Dawson showed some of the objects to several experts in London.⁹³ The experts expressed doubts about the authenticity of the objects and ultimately concluded that, contrary to what Malina had stated, they were not from the Sung Dynasty.⁹⁴

the Francis Bacon painting had it been authentic. *Id.* Since the buyer was able to recover the entire amount that he was due, the court dismissed the fraud claims the buyer had against the seller. *Id.* at 425. The decision was later vacated, and remanded to the district court. *Rogath v. Siebenmann*, 129 F.3d 261, 267 (2d Cir. 1997).

85. *Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578, at *14–15.

86. *Id.* at *9–10.

87. *Id.* at *10.

88. *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993).

89. *Id.* at 168.

90. *Id.* at 175.

91. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461, 463 (S.D.N.Y. 1978).

92. *Id.* Dawson paid a total of \$105,400.00 for the objects in 1974. *Id.* Ultimately, the case was about only five out of the eleven Chinese objects Dawson originally bought because Malina agreed to the return of four ceramic objects, and refunded Dawson the price he paid for them. *Id.* at 464.

93. *Id.* Initially, Dawson showed a photograph of one of the objects to Mr. Bandini, who was an English art dealer working at Eskenazi Ltd. *Id.* at 463.

94. *Id.*

94. *Id.*

Initially, the court, without a jury, attempted to rule on the authenticity of the objects with the help of expert testimony.⁹⁵ After a five-day bench trial, the court concluded that due to “the differences of opinion amongst the experts,” it would not be able to make a definitive ruling.⁹⁶ The court observed that no reported cases existed at the time that would provide any guidance on how the court should resolve the authenticity issue.⁹⁷ After stating that “the process of attributing any of the works of art involved here to a particular period of Chinese antiquity is by its very nature an inexact science,”⁹⁸ the court chose to use a standard of “a reasonable basis in fact, at the time that these representations were made.”⁹⁹

Using the expert testimony provided at trial,¹⁰⁰ the court analyzed whether Malina had a reasonable basis in fact to tell Dawson that he could attribute each individual object Dawson was buying to a particular dynasty.¹⁰¹ Ultimately, the court concluded that some of

95. *Dawson*, 463 F. Supp. at 463. Dawson presented as his main expert, James Lally, who represented Sotheby Parke Bernet Inc. in New York. *Id.* at 464. He also presented testimonies of a curator for the Percival David Foundation at the University of London and the associate curator of the Far Eastern Art Department at the New York Metropolitan Museum of Art. *Id.* Malina called the director of Christie, Manson & Woods, who was also the head of Christie’s Decorative Arts Department. *Id.* at 464–65. Malina also provided testimonies from a Chinese artwork dealer, a private collector of jade, and two appraisers of decorative arts and antiques. *Id.* at 465.

96. *Dawson*, 463 F. Supp. at 463.

97. *Id.* at 467. The court stated that “[n]either side has cited nor has the Court discovered any reported cases involving the precise legal question presented here.” *Id.* The court also observed, “nor do there appear to be any cases based either on the Uniform Commercial Code or common law fraud or misrepresentation which would provide the Court with guidance on this issue.” *Id.*

98. *Id.* The court stated:

As the testimony of all the experts makes clear, a determination as to the proper attribution of any of these pieces is to a substantial extent a subjective judgment based upon whether an expert finds a given piece to be aesthetically consistent with other works of the period on the basis of such elusive characteristics as the quality, character, form or “feel” of the piece. For these reasons, it is obvious that any attempt to ascribe any of the works of art involved here to a specific period of Chinese history must be imprecise.

99. *Dawson*, 463 F. Supp. at 467.

100. *Id.*

101. *Id.* at 468–71. Discussing one of the vases, the court stated that Malina’s representation that the vase was once exhibited by the Metropolitan Museum of Art had no reasonable basis in fact. *Id.* at 468. Malina testified that he based that statement on seeing a similar vase in a catalogue published for the Museum’s exhibition. *Id.* Malina did not attempt to check with the museum if that vase was still in the possession of the museum. *Id.* It turned out that the particular vase that was exhibited in the museum was

the objects Malina sold had a reasonable basis in fact to be attributed to the specific period, while others did not.¹⁰²

Unlike the court in *Greenberg Gallery*, the *Dawson* court was more sensitive to the effect its ruling would have in the real world.¹⁰³ The *Dawson* court was careful not to make any definitive rulings regarding the authenticity of the objects, but to only rule on the fairness of the specific transaction between the two parties to the lawsuit.¹⁰⁴ It observed that the question of attribution was not a legal one, and that even the experts in the field of Chinese antiquities were unable to agree.¹⁰⁵ The court seemed to recognize that it was unnecessary for it to intervene and decide on what might be a timeless dispute.

The *Dawson* court, however, did not require Malina to prove that he himself had acquired the necessary information to state that the objects were authentic.¹⁰⁶ Instead, the court relied on the experts that the parties hired after the transaction occurred.¹⁰⁷ Hence, the court made no inquiry into Malina's pre-sale actions.

A more recent English case illustrates the drastic difference that a court's ruling makes when the court rules on the actual authenticity of an artwork, rather than on the parties' transaction.¹⁰⁸ In *Avrora Fine Arts Investment, Ltd. v. Christie, Manson & Woods, Ltd.*, *Avrora*, the buyer of a painting attributed to Boris Kustodiev, sued Christie's, seeking to rescind the purchase when *Avrora* came to believe that the painting was not an authentic Kustodiev.¹⁰⁹

still in the possession of the museum, making Malina's representations completely unfounded, regarding that particular item. *Dawson*, 463 F. Supp. at 468.

102. *Id.* *Dawson* was able to receive a refund of \$59,400.00 of the \$105,400.00 that he paid, with interest that ran from the time of purchase. *Id.* at 471. The court found three of the five of the Chinese objects to have had no reasonable basis in fact to be attributed to the period that Malina said they were from. *Id.* Those objects included an Imperial vase of the Chien Lung period, a jade peach tree carving, and a jade pilgrim vase. *Id.*

103. *Id.* at 467.

104. *Dawson*, 463 F. Supp. at 467.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Avrora Fine Arts Inv. Ltd. v. Christie, Manson & Woods, Ltd.*, [2012] EWHC 2198 (Ch) (Eng.).

109. *Id.* at [1]. *Avrora* paid £1.5 million (equivalent to \$1.9 million) for the painting, as well as a buyer's premium of £220,900.00 (equivalent to \$285,778.33). *Id.* at [4]. The painting at issue in this case was titled "Odalisque" which depicted a nude woman on a bed sleeping. *Id.* at [1]. A small inscription was present at the left-hand corner of the painting, which read "B. Kustodiev – 1919." *Id.* Boris Kustodiev was born in 1878; he entered the St. Petersburg Academy of the Arts and lived in that city for the rest of his life. *Id.* Kustodiev died when he was forty nine years old, in 1927. *Id.* One of the experts

The court conducted a thorough analysis of the painting's historical documentation and its technical elements.¹¹⁰ It concluded that the painting's provenance was flawless.¹¹¹ The painting had had only one owner from the time of its first exhibition in 1932.¹¹² Through historical newspaper articles and journals, Christie's verified that the painting's consignor purchased the piece from the 1932 Riga exhibition,¹¹³ and was its sole owner until Christie's became aware of the artwork in 1989.¹¹⁴

In addition, although Avrora's expert denied the painting's authenticity, he could not describe any other historical research that Christie's failed to perform that would have led the auction house to question the work's authorship.¹¹⁵ No other technical tests, or outside expert opinions, were reasonably necessary.¹¹⁶ Christie's could not have been expected to do anything more before concluding, with sufficient confidence, that the painting was an original Boris Kustodiev.¹¹⁷

Nevertheless, after stating that certainty of its authenticity was impossible,¹¹⁸ the court ruled that the painting was a forgery, and that Avrora was entitled to get its money back.¹¹⁹ Subsequently, Christie's stated that it would continue to stand by its attribution of the painting, and was "considering its options" as to how it should proceed further regarding the painting's authenticity.¹²⁰

who testified on Avrora's behalf said that Kustodiev is considered to have been "at his most creative in the period 1915–1921. *Id.* Kustodiev, unlike many other artists who gain fame after their death, was considered an important artist during his lifetime. *Id.* An expert for Christie's compared Boris Kustodiev to L.S. Lowry, saying that Kustodiev's importance to the Russians is equivalent to Lawrence Stephen Lowry's importance to the English. *Id.*

110. *Id.* at [9]–[18]. The court analyzed connoisseurship, historical issues, access to other works by Kustodiev, archive references, the 1920 solo exhibition of Kustodiev's work, the Riga group exhibition, the consignor's ownership of "Odalisque," the inherent likelihood of a forgery being made, who the possible forgers may have been, the Voinov/Notgaft materials, technical matters, the date of the inscription, and comparative technical analysis of Kustodiev's known work to the painting in question. *Id.*

111. *Avrora Fine Arts Inv. Ltd.*, [2012] EWHC (Ch) [9]–[18] (Eng.).

112. *Id.* at [2]–[3].

113. *Id.* at [2].

114. *Id.* at [3].

115. *Id.* at [27].

116. *Id.*

117. *Avrora Fine Arts Inv. Ltd.*, [2012] EWHC (Ch) [27] (Eng.).

118. *Id.* at [19].

119. *Id.*

120. Riah Pryor, *Christie's "Considering its Options" After Russian Painting Setback*, THE ART NEWSPAPER, Aug. 1, 2012, <http://www.theartnewspaper.com/articles/>

In *Avrora*, while stating that certitude of authorship is often impossible in the fine arts, the court failed to give equal weight to the inherent risk a buyer undertakes in order to invest in art. The court did not give any consideration to the fairness of the parties' transaction, or to whether each party adequately performed their respective duties. In addition, the court failed to assess the issue from the perspective of the time that the transaction was made; instead, it relied on experts who only viewed the work after the transaction.¹²¹ Even if the court was set on finding that the buyer should have been allowed to rescind the sale, it could have ruled that the evidence provided a reasonable basis in fact to question the authenticity of the painting, and left it to the art market to decide who really created the work.

Part IV of this article will offer a proposal to alter the courts' current approach when handling cases involving art authenticity disputes. The proposal's intention is to keep the courts away from making unnecessary rulings that serve to authenticate works of art. Finally, Part V will briefly conclude in summation of this article.

IV. Proposal

A. Attribution of Artwork is an "Inexact Science"

The first step courts must take when deciding cases where the authenticity of artwork is at issue is to acknowledge that certainty of authenticity is often impossible.¹²² Many art experts freely admit that attributing a work of art to a specific artist, or time period, is an "inexact science."¹²³ Therefore, when a buyer purchases a work of art not simply because he finds it beautiful, or because it matches his couch, but rather because of its investment value, the risk that its financial worth may one day vanish due to authenticity disputes is intrinsic in such a purchase.¹²⁴

Christie's%20%9Cconsidering+its+options%20%9D+after+Russian+painting+setback/26987.

121. *Avrora Fine Arts Investment, Ltd.*, [2012] EWHC (Ch) [19] (Eng.).

122. *Id.*

123. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 167, 467.

124. *Art Market Trends 2004*, *supra* note 8, at 5. It has been noted that about 10% of the annual sales of works of art is comprised of forgeries. *Balog v. Center Art Gallery – Hawaii, Inc.*, 745 F. Supp. 1556, 1560 (D. Haw. 1990). See generally Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973 (1976) (discussing the amount of art sales made annually that may be forgeries).

Due to the fact that an art merchant's attribution of an artwork to a specific artist can rarely be more than an opinion, the express warranty provisions of the U.C.C. are often of little help to the purchaser.¹²⁵ The courts must become more aware of the unique nature of art¹²⁶ and what precisely the parties to such a transaction are expecting. The courts need to be more sensitive to the art market's inability to authenticate art with certainty.

An easy contrast can be found in *Bill Spreen Toyota, Inc. v. Jenquin*.¹²⁷ The buyer purchased a car that she believed to be a Toyota.¹²⁸ Subsequently, the buyer learned that the car was actually half of a Toyota, welded to half of an unidentified vehicle.¹²⁹ In such a case, the court had no difficulty finding that the buyer did not receive what she expected.¹³⁰

Such a definitive finding is often not possible in transactions involving works of art.¹³¹ Art authenticity is often just an opinion.¹³² Whether it is the opinion of a highly respected expert, or that of an unknown dealer,¹³³ it is an opinion nonetheless. Therefore, the courts need to adjust their process to accommodate the inherently subjective nature of art.

125. *Balog*, 745 F. Supp. at 1564. The court discussed the fact that the U.C.C. states that "any 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." *Id.* However, the New York fine arts statute states:

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 certificate of authenticity or any similar written instrument it: (a) Shall be presumed to be part of the basis of the bargain; and (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.

Express Warranties, N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 2012).

126. Singer, *supra* note 24, at 441. "The sale of artwork presents a unique area for the application of" the Uniform Commercial Code's express warranty provisions. *Id.*

127. 163 Ga. App. 855, 855-56 (Ga. Ct. App. 1982).

128. *Id.*

129. *Id.* at 856.

130. *Id.* at 857.

131. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461, 465 (S.D.N.Y. 1978); *Avrora Fine Arts Investment, Ltd. v. Christie, Manson & Woods, Ltd.*, [2012] EWHC 2198 (Ch) [6] (Eng.); *Balog v. Center Art Gallery -Hawaii, Inc.*, 745 F. Supp. 1556, 1571 (D. Haw 1990).

132. *Avrora Fine Arts Investment, Ltd.*, [2012] EWHC (Ch) [27] (Eng.).

133. *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. at 172 (D.D.C. 1993). The court acknowledged the superior qualifications and respect of the art world that Klaus Perls possessed, however, the court also stated in its opinion that the testimony of Linda Silverman was far more credible and reliable. *Id.* at 174-75.

B. Buyers' Reasonable Reliance on Art Merchants' Assertions

However, the courts also need to acknowledge the unavoidable reliance buyers place on art merchants' assertions.¹³⁴ Such reliance is not unreasonable¹³⁵ and should carry more weight than, for example, a buyer who purchases an artwork from a stranger and relies upon the stranger's assertions.¹³⁶ The distinction between art merchants and laypeople should be made.¹³⁷ And in cases where certainty is impossible, the courts need to require that art merchants at least make a reasonable effort to verify the assertions they make to buyers. Therefore, when a buyer turns to a professional, such as an auction house, or a gallery for his investment purchases, the courts should provide a recovery for that buyer when the art merchant fails to exercise its due diligence prior to the sale of the artwork.¹³⁸

C. Proposed Process for Court Proceedings

Instead of allowing the parties to bring in numerous experts (most of who are retained by the parties long after the initial transaction occurred)¹³⁹ to testify about their opinions regarding the artwork's

134. Singer, *supra* note 24, at 450.

135. See DeAngelis, *supra* note 28 (discussing that auction houses provide services to both, buyers and consignors). See generally note 25 (illustrating the different services certain auction houses provide specifically for the buyer).

136. Waller v. Scheer, 175 Ga. App. 1, 1-3 (Ga. Ct. App. 1985). After seeing a newspaper advertisement for sale of antiques from China, Sheer went to Waller's home, and proceeded to enter into a purchase agreement, without doing any research on his own. *Id.*

137. Gerstenblith, *supra* note 24, at 559 (discussing that art merchants are in a better position to research the work due to their superior knowledge and resources). "Under current law, the buyer bears most of the loss, but the merchant is in the best position to reduce the likelihood that inauthentic works will gain acceptance, and to spread the loss when this occurs." Patty Gerstenblith, Keynote 1, *Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 349 (2012).

138. Balog v. Center Art Gallery – Hawaii, Inc., 745 F. Supp. 1556, 1571 (D. Haw 1990). The Balog case involved the sale of seven lithographs attributed to Salvatore Dali that turned out to be forgeries. *Id.* at 1558, 1561. The court stated that "[o]ne thing that a purchaser pays for when he buys artwork from a dealer such as Center Art is the expertise of the dealer and the dealer's promise of authenticity." *Id.* at 1571.

139. See generally Dawson v. G. Malina, Inc., 463 F. Supp. 461 (S.D.N.Y. 1978) (describing the qualifications of experts, and their relationship to the parties, many of the experts had no knowledge of the artifacts until they were retained by the parties for trial); Avroa Fine Arts Investment, Ltd. v. Christie, Manson & Woods, [2012] EWHC 2198 (Ch) (Eng.) (describing the qualifications of the experts, many of whom only saw the painting after being retained by the parties to testify at trial).

current authenticity,¹⁴⁰ the courts should do the following: require the parties to provide evidence to show what was done prior to, and at the time of, the transaction.¹⁴¹ For example, if a buyer suspects that an auction house sold him a forgery,¹⁴² the court should initially look at what the auction house asserted to the buyer to induce the sale.

If, as in *Tony Shafrazi Gallery Inc.*, a reputable auction house provided the seller with a description of provenance stating that the painting was acquired directly from the artist, the auction house should be required to show proof as to how it arrived at such a conclusion.¹⁴³ If the auction house is unable to provide any record or evidence of how, at the time of sale, it decided that the painting was authentic, the buyer should prevail. On the other hand, if the auction house made reasonable efforts to verify its statements prior to the sale, then, regardless of the artwork's currently alleged authenticity status, the auction house should prevail.

The standard for what would be considered "reasonable efforts" should be made based on the value of the individual artwork.¹⁴⁴ It would be unreasonable to expect an auction house or an art gallery to spend thousands of dollars in order to authenticate a painting with a

140. See generally *Dawson*, 463 F. Supp. 461 (discussing the court's use of expert testimony to reach a conclusion regarding the parties' transaction); *Aurora Fine Arts Investment, Ltd.*, [2012] EWHC (Ch) (Eng.) (discussing the court's reliance on expert testimony in deciding whether or not the painting in question was authentic).

141. *Contra Tony Shafrazi Gallery Inc. v. Christie's*, 2009 N.Y. Misc. LEXIS 5714, at *3 (N.Y. Sup. Ct. Apr. 19, 2009) (stating that no inquiry into the precise actions taken by the auction house to authenticate the work were necessary); *Dawson*, 463 F. Supp. at 464 (illustrating the court's disinterest in the actual authentication of the precise work in question).

142. *Dawson*, 463 F. Supp. at 463; *Balog*, 745 F. Supp. at 1560; *Arthur Props., S.A. v. ABA Gallery, Inc.*, 2011 U.S. Dist. LEXIS 136389 at *1 (S.D.N.Y. Nov. 28, 2011); *La Trace v. Webster*, 17 So. 3d 1210, 1213 (Ala. Civ. App. 2008); *Lawson v. London Arts Group*, 708 F.2d 226, 227 (6th Cir. 1983); *Krahmer v. Christie's, Inc.*, 911 A.2d 399, 401 (Del. Ch. 2006); *Yossi v. Shapiro*, 2010 Conn. Super. LEXIS 1678, at *5 (Conn. Super. Ct. July 1, 2010); *Kaiser v. Hennis*, 1986 Ohio App. Lexis 7093, 2 (Ohio Ct. App., Stark Cnty. May 27, 1986); *Kelly v. Brooks*, 1993 U.S. Dist. LEXIS 3385, at *3 (S.D.N.Y. Mar. 19, 1983).

143. *Contra Tony Shafrazi Gallery Inc.*, 2011 N.Y. Misc. LEXIS 5578 (stating that the court was satisfied with testimony describing general authenticity practices of the auction house, and no testimony or evidence was needed to show how this particular artwork was authenticated by the defendant).

144. See *Balog v. Center Art Gallery – Hawaii, Inc.*, 745 F. Supp. 1556, 1571 (D. Haw. 1990) (stating that "[t]he application of either method [of authentication] requires a substantial investment, and as a practical matter, the cost of authenticating a work of art may be prohibitive when the item is not one of considerable value"); *Gerstenblith*, *supra* note 24, at 558.

market value unlikely to exceed \$2,000 to \$3,000 dollars.¹⁴⁵ On the other hand, if an artwork is expected to sell for several million dollars, the art merchant should be required to employ more thorough authentication processes prior to placing the work for sale.

In addition, art merchants should be required to show documentation of who they retained to authenticate a given artwork, and evidence of what kind of research they conducted to come to their conclusion regarding the artwork's authenticity. In this digital age, with numerous options for preserving records, it is not overly burdensome to require art merchants to preserve their research and authentication records.

D. Likely Effects of the Proposed Process

Adopting such a rule for recovery in art authenticity disputes will lead to substantially shorter trials. Instead of wasting days listening to numerous experts retained for trial and having to decide which experts are more credible and reliable, the courts will simply examine the records that the art merchants preserved while authenticating the artwork prior to a sale.

The courts will then be able to rule much faster and easier on whether or not the art merchants conducted enough research to have a reasonable basis in fact for concluding the artwork's authenticity. This will also lead to better outcomes in cases where, as was seen in *Greenberg Gallery*, the courts decide that the testimony of an expert whose opinions carry little weight in the art world is more believable. In such cases, the courts' opinions have been entirely ignored outside of the narrow confines of the legal dispute.¹⁴⁶

Additionally, it has been noted that it is impossible to truly know how often such cases actually occur.¹⁴⁷ Many art buyers who were sold works of art which they later found out to be forgeries are unwilling to publicly disclose such occurrences.¹⁴⁸ Such buyers "often

145. *Boule v. Hutton*, 320 F. Supp. 2d 132, 137 (S.D.N.Y. 2004). This case involved a defamation claim regarding the authenticity of paintings by Lazar Khidekel, which, the court stated were of no substantial value because no consumers in the United States, or elsewhere, were interested in buying Khidekel work, most of which rarely sold for more than \$10,000. *Id.*

146. Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. TIMES, Aug. 5, 2012, at C5 (discussing the fact that even though the court ruled that the mobile was authentic, no one had purchased it since the judgment of the case, mainly due to the fact that the opinion of the plaintiff's witness carries significantly more weight than the courts).

147. Singer, *supra* note 24, at 440.

148. *Id.*

fear public embarrassment at having been made a dupe,”¹⁴⁹ or they may be incentivized “to preserve the value of the counterfeit item for resale or tax purposes.”¹⁵⁰

Therefore, if buyers of artwork subsequently found to be inauthentic knew that they had reasonable avenues for recovering their damages, they would be more willing to come forward and file lawsuits against inadequate or malevolent art merchants. This would lead to better and fairer art business practices, as well as a better and clearer awareness for the art world, and historians, as to which works of art are actually authentic, and which may not be.

V. Conclusion

The skyrocketing monetary value of art, and the resulting interest in using art as a tool for investment, has led to a dramatic increase in counterfeit artwork being sold. While the courts must continue to be an avenue to which buyers and sellers can turn to for redress of their damages, the courts should avoid playing the role of art authenticators. Rather, the courts should instead analyze the specific transactions between the parties, and rule on whether or not such transactions were fairly conducted by all parties involved. The courts will then better effect their duty to protect the citizens, and the art market. The art world will in turn resume its rightful place as sole arbiter of its subjective truth.

149. *Balog v. Center Art Gallery – Hawaii, Inc.*, 745 F. Supp. 1556, 1560 (D. Haw. 1990). This court also comments on the fact that skyrocketing prices in the art world offered to “both forgers and unscrupulous dealers with unprecedented opportunities for swindling the art-buying public. It has been estimated that transactions involving forgeries may comprise up to ten percent of the total art sales made annually.” *Id.*

150. *Id.* The court, while discussing the incentive for buyers to not disclose issues of authenticity regarding the work they own, stated that “[i]n instances such as this, not only is the purchaser defrauded, but the Treasury becomes a victim as well through the loss of revenue in the form of deductions for charitable gifts of inauthentic artwork or the duty-free importation of supposedly original artwork.” *Id.*