Controlling the Artful Con: Authentication and Regulation

Leonard D. DuBoff
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By Leonard D. Du Boff*

Introduction

In appraising art, the signature affixed,1 the period of creation, and the expert's determination of authenticity are inextricably interwoven with the aesthetic appeal. Perception of the artistic merits of a piece is also affected by these factors. Consequently, the discovery and disclosure that a once-accepted original is actually a copy or forgery creates confusion; the market value plummets and critics pan once lauded works.3

An estimated 1 to 10 percent5 of all art transactions involve forgeries or fakes. While the percentage may seem small, the amount of money involved is impressive.6 It has been suggested that every new art collection contains at least one fake; some collections contain little else.7

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1. There is a tale that Pablo Picasso signed a napkin and gave it to a poor friend, admonishing him not to sell it too cheaply. S. Burnham, The Art Crowd 87 (1973).
3. An example is the Etruscan Horse incident discussed in notes 27-28 infra.
6. See Note, Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery, 14 Wm. & Mary L. Rev. 409 (1972). Total sales in the art market annually reach $300 to $400 million. Id. See also Hodes, "Fake" Art and the Law, 27 Fed. B.J. 73 (1967) [hereinafter cited as Fake Art]. It is impossible accurately to state an annual figure for art transactions, since the so-called art market is spread all over the world, and many sales go unreported.
While forgery has been practiced for centuries, today it has reached epidemic proportions. Perhaps the increase in art frauds can be traced to the emergence of art as an investment vehicle. Art is viewed by some as a financial panacea, a viable alternative to the traditional forms of investment.

This article will explore some of the problems presented by forgeries, examine methods currently available for their detection, and analyze existing legislation. Several proposals will be presented which, if implemented, should result in greater protection for the art purchaser and a reduction in the quantity of forgeries currently masquerading as authentic works of art.

Defining the Problem

Before examining methods of authentication, it is worthwhile to consider what constitutes a forgery and who is responsible for it in each instance. To facilitate the discussion, forgeries will be divided into three general categories:

(1) Works deliberately created to be sold as the product of another artist. Activities involved include forgery of an artist’s name, falsification of documents of authentication and forgery of the entire work;

(2) Exact replicas or other innocently-created pieces which are sold as originals; this group encompasses pieces executed “in the style of” a famous artist which are later sold as the work of the master; and

(3) Works changed by the artist to enhance value or salabil-

ity. Such changes include embellishments, fragmentation of oversized piece completion of unfinished works, and excessive restoration.11

Some colorful examples of the first category, deliberate fabrications, may provide insight into the scope of the problem. One imitator used the pastiche method to forge a Holbein. The hands of one original Holbein were combined with the head and shoulders of another original to create the fake. The pastiche passed as an original until an art historian revealed the deception.12 A second example is the work of Van Megeeren, whose successful career as a forger of Vermeers was halted only when he himself disclosed the fraud to escape prosecution for aiding the enemy during World War II.13 The art world, shaken by the news, refused to accept the fact until Van Meegeren created another masterpiece in his jail cell.14

Not only do forgers copy past masters, but some have attempted to imitate famous contemporaries as well. Recently, David Stein adopted the styles of noted artists,15 forged their signatures to forty-one paintings and sold them for a total of $168,000.16 The reward for his skill was a two and a half to five year sentence in a French jail.17 While confined, Stein was permitted to continue painting in the style of Chagall, Miro, Matisse and Picasso provided the creations bore the signature “Stein, D.” rather than the simulated signatures of the renowned masters.18 In 1969, the London affiliate of the Wright Hepburn Webster Gallery of New York exhibited a collection of Stein forgeries.19 Half of these were sold on opening night.20 The following year, the Gallery in New York advertised the exhibition of sixty-eight Stein paintings by placing a notice in the window which read, “Forgeries by Stein.”21 The

11. Similar classifications are suggested in Fogg, supra note 8, and Fake Art, supra note 6.
12. VAN DANTZIG, TRUE OR FALSE 24 (1953) [hereinafter cited as VAN DANTZIG].
13. Id. at 25.
14. Id. See also Stross, Chemistry Digs the Past, 32 THE VORTEX 105.
15. Stein's skill is extraordinary. He can paint in the style of Picasso, Chagall, Miro and Matisse. See generally A. STEIN, THREE PICASSOS BEFORE BREAKFAST (1973) [hereinafter cited as STEIN].
17. Cf. N.Y. Times, Jan. 24, 1969, at 30, col. 5. -
20. Id.
21. 64 Misc. 2d at 424, 314 N.Y.S.2d at 663.
show drew tremendous crowds who paid high prices.\textsuperscript{22} The New York Attorney General sought an injunction to prevent this sale.\textsuperscript{23} It was alleged that the Stein paintings were so like the works of the masters whose styles he appropriated that an unscrupulous person could easily remove Stein's name, replace it with that of the artist whose style was imitated and flood the market with a new tide of forgeries.\textsuperscript{24} The court rejected this argument and held that the possibility of an intervening forger removing Stein's name and replacing it with a known master's was an insufficient basis for granting an injunction.\textsuperscript{25}

The New York court apparently ignored the fact that many forgeries are initially created as innocent copies. It is only after someone has doctored a work and passed it off as an original masterpiece that it becomes a forgery; it then fits within the second category of counterfeits. The possibility of such a development is not remote; yet the court apparently felt that it would be unjust to inhibit these legitimate sales merely because some unscrupulous person might be tempted to change a work's attribution.

Giovanni Bastianini, an eighteenth century artist, sculpted a bust inscribed with the name of a poet, Girolamo Benivieni, which soon was praised as an authentic Quattrocento work. Bastianini, innocent of the misrepresentation, received a mere 330 francs for the very work which the Louvre later paid 14,000 francs to acquire.\textsuperscript{26} The reluctance of the museum to believe Bastianini's claims of authorship and the later sale of the bust as an original raises some question about the importance traditionally attributed to authenticity.\textsuperscript{27}

\textsuperscript{22} Cf. id.
\textsuperscript{23} Id. at 423, 314 N.Y.S.2d at 662.
\textsuperscript{24} Id. at 424, 314 N.Y.S.2d at 663.
\textsuperscript{25} Id. at 429, 314 N.Y.S.2d at 668.
\textsuperscript{26} Fogg, supra note 8, at 12.
\textsuperscript{27} Perhaps the recent controversy over the New York Metropolitan Museum's Greek Horse best illustrates this point. In 1967, following a six-year probe, a museum director, J. V. Noble, alleged that the Greek statue thought to be 2,400 years old was of more recent origin. Esterow, Metropolitan Finds Its Greek Horse a Fake, N.Y. Times, Dec. 7, 1967, at 1, col. 2. See also Shepard, Tarnished Horse Shines at Museum, N.Y. Times, Dec. 8, 1967, at 58, col. 1, in which it is noted that the display of the allegedly fraudulent bronze took the spotlight away from the museum's authentic antiquities. Ironically, the popularity of the forgery created a brisk trade in reproductions of the horse for $75 a piece at Brentano's bookstore in New York. Id. Mr. Noble contended that the bronze was cast in sand, a method not developed until the fourteenth century. Shirey, Metropolitan Bronze Horse Proves to Be Ancient, N.Y. Times, Dec. 24, 1972, at 33, col. 1. The museum removed this once revered piece from its display and consigned it to storage. Curiously, this bronze, which had been previously cited as one of the finest examples of classic Greek craftsmanship, was suddenly criticized as
Creations of students working under the supervision of a recognized artist are also included in the second category. Some of these pieces have become confused with the works of the supervising master. For years, *Odalisque en Grisaille*, admired by many, was attributed to Ingres. In a recent reattribution proceeding at the Metropolitan Museum, the authorship of the work was placed in doubt. A museum expert attributed the work to Ingres's assistant, Armand Cambon, and sent the painting to the Wildenstein Gallery in Paris for further analysis.

The painting is back on display at the Metropolitan with the attribution changed to Cambon, although a few scholars still believe it to be Ingres's work. It is conjectured that the painting has depreciated from its previous worth of between $750,000 and $1,000,000 to a mere $100,000. Yet it is the same painting that has been critically appraised and technically described for years. The value of the art object, supposedly inherent, appears to have dwindled suddenly. The question necessarily arises whether the art object's value is innate or whether it is dependent on the identity of the artist.

It is impossible to determine the precise amount of work a student must perform under a recognized master before the creation becomes part of the master's "school." Consider, for example, the many apprentices of the Rembrandt School who worked not only under Rembrandt's direction but also with him on some creations. If it is disclosed that some of the paintings of Gerard Dou are incorrectly attributed to Rembrandt, these pieces might well be cast off as forgeries of the category two variety. These once-revered works could then be expected to fare poorly in a subsequent reappraisal.

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31. E. MICHEL, REMBRANDT 46 (2d ed. 1895).
32. Perhaps the term "forgery" is too harsh in some circumstances. If, for example, the misattribution resulted from an honest error, the piece should not be condemned as a forgery. If, on the other hand, the misattribution was intentional, a fraud has been perpetrated. The result in either situation is the same from the purchaser's point of view; namely, that he has paid for a Renoir and received a Dou. In the former instance, since there was no intent to defraud, the sole remedy should be rescission. See note 162 infra. In the latter, scienter was present, and the perpetrator of
The works of students may be mistaken for those of their student colleagues as well as for those of their masters. A particular local influence prompted two seventeenth century artists, Abraham Storck and Adam Silo, to depict the activity of ships. Both paintings were entitled *River Scene* and signed A.S., which led to inevitable confusion. It seems unjustified to regard one as an original and the other as a forgery when in fact they are independent but contemporaneous creations of similar subject matter. Yet if one of these artists became more famous than the other, it is likely that the lesser-known painter’s work would be misattributed to his better-known colleague.

Direct copies of known artists by contemporary or later artists may also fall within the second category. Innocent reproductions created as admitted copies are designated forgeries only if someone sells them as originals.

Collaborative efforts may also come within the scope of this category. Richard Guino, a sculptor, worked with Auguste Renoir to create several sculptures. After Renoir’s death, his heirs refused to pay Guino for his part in the production. A suit was commenced against Renoir’s heirs to establish Guino’s coauthorship. The defendants alleged that the works belonged undividedly to Renoir, the sole inspirer, the seeing guide, as Renoir can only be All Renoir, as Rubens is All Rubens. Only after comparing the works in question with the collaborative products of Renoir and other sculptors did the French court declare Guino to be a coauthor. Presumably, the sculptures had been held out to be the work of Renoir.

The third category consists of those works of art which have been subsequently altered by an individual other than the artist for the purpose of increasing their saleability. Many of these changes were

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33. VAN DANTZIG, supra note 12, at 24.
34. Id. at 42.
35. If created with the intent to deceive the public, the work slips into category one and deserves the forgery label.
38. Id.
made in the Renaissance and earlier periods when it was thought necessary for all art to reflect contemporary ideological philosophy or acceptable religious beliefs. This type of modification of the artist's original work is no longer a common practice. Nonetheless, an individual may alter a piece to suit some personal penchant. If a work is resold in an altered condition, it is likely to be mistaken for the artist's actual creation. In this instance, an authentic piece might inadvertently be converted into a forgery.

Another classic example of art which has been condemned as counterfeit or semi-counterfeit is an excessively overpainted or restored piece. If an art restorer merely repairs a work for conservation purposes, the activity is praised even though it is no longer solely the creation of the artist. The restorer may, however, go too far and add so much of his own work that it would be unrealistic to say the piece was still that of the original artist. This possibility exists even when the restorer makes every effort to preserve the integrity of the work.

Another form of forgery within category three is known as fragmentation. In this procedure, an individual subdivides a single work into smaller works. While the sections were actually created by the artist to whom they are attributed, they are merely part of the composition. The pieces do not truly represent the gestalt of the artist's creation.

Although it is necessary for purposes of imposing liability to determine what the author intended and at what point the misrepresentation occurred, the only matter of true concern to the viewing or purchasing public is whether the work purports to be something other

39. F. ARNAU, ART OF THE FAKE 18 (1961). An interesting example of the restorer “improving” upon the aesthetic balance of a picture occurred with the The Misses Payne, created by Sir Joshua Reynolds. When this 18th century painting was “restored,” one of the figures in the scene was deleted, since it “disturbed the smooth harmony of the work.” Id. (illustrations 33 & 34).

During the Ch'ing dynasty it was common for Chinese craftsmen to take fragments of older pieces and work them into a new composition. These items were frequently created in an earlier style. See 1 THE FREER GALLERY OF ART: CHINA 176 (1972) (description of 16th century incense burner which was altered during Ch'ing period).

40. See note 39 supra.

41. See Saving "The Night Watch", NEWSWEEK, Sept. 29, 1975, at 83. One article discusses the repair of Michelangelo's Pieta after it was defaced in Italy in 1972 and the restoration process which will be used to repair Rembrandt's Night Watch, slashed 13 times by a mentally unbalanced person in Holland. The restoration of Night Watch is intended to recreate the artist's original work rather than modify it. Authorities are so confident of achieving this result that the work is to be done behind a glass partition in full view of the public. Id.

42. See note 39 supra.
than what it actually is. The deception exists regardless of who is responsible for it.

The Art Experts and Methods of Establishing Authenticity

Self-help

The purchaser can take many precautions to reduce the likelihood of acquiring a counterfeit. Familiarity with the artist's style, period, and peculiarities is essential. Valuable knowledge can be gained by viewing disclosed forgeries or copies juxtaposed with the authenticated pieces which they attempt to duplicate.\textsuperscript{43} Careful questioning of the seller is another important precaution.\textsuperscript{44}

If the artist is living, the best means of establishing authenticity is to observe the work being created. This opportunity is, of course, exceedingly rare and of no use in a subsequent sale. To protect himself, the purchaser should require a certificate of authenticity\textsuperscript{45} and a bill of sale. These documents should accompany the creation when it is sold or transferred.\textsuperscript{46}

The Experts

When the artist is no longer living, the purchaser must resort to the scholarly expertise of the art historian for a determination of the work's authorship or to the advanced techniques of the scientist for verification of its age and material. The scientific methods are objective and the results can be reproduced by other scientists in order to test their accuracy. Stylistic authentication, on the other hand, is subjective. The

\textsuperscript{43} FoGo, \textit{supra} note 8, at 6.

\textsuperscript{44} A list of suggested questions has been formulated by the Art Committee of the Bar of the City of New York. \textit{See} Committee on Art, \textit{Legal Problems of Art Authentication}, 21 \textit{Rev. Ass'n B.N.Y.} 96 (1966).

\textsuperscript{45} The certificate of authenticity should include: the name of the artist, the title of the work, the date and place of completion, a description of the subject, the materials and media used, rights reserved by the artist, if any, and the artist's signature warranting the piece's genuineness. Artists are beginning to reserve moral and economic rights in the works they convey. In the United States these rights should be spelled out in the certificate. \textit{See} Schulder, \textit{Art Proceeds Act: A Study of the "Droit de Suite" and a Proposed Enactment for the United States}, 61 \textit{Nw. U.L. Rev.} 19 (1966); Treece, \textit{American Law Analogues of the Author's "Moral Right,"} 16 \textit{Am. J. Comp. L.} 487 (1968). \textit{See generally ART LAW: DOMESTIC AND INTERNATIONAL} (L. Du Boff ed. 1975) [hereinafter cited as \textit{ART LAW}]. If the work is purchased from a dealer and it is impossible to obtain the artist's signature, the seller may give the warranty.

\textsuperscript{46} Lane, \textit{Lawyer Finds Public Needs Protection}, 2 \textit{TRuL} 36 (1966).
expert views the piece in question and, based on his knowledge, intuition, and experience, makes a determination. The results of subjective authentication may vary from expert to expert.

The difference between these two methods of determining authenticity occasionally creates insoluble controversies. When the stylistic opinion rendered by an expert is in conflict with the scientific evidence, which should prevail? The resolution of this type of dilemma may be impossible, since forgers devote much of their skill to deceiving both types of experts.

The vast majority of tests are valuable in eliminating forgeries rather than precisely identifying a piece. Even scientific results are subject to some error, albeit de minimis. Inaccuracy varies with the material, age, region in which the piece was found, and numerous other factors. Accordingly, it is difficult, if not impossible, to have a newly discovered item conclusively identified and authenticated. It is more common for experts to say that based on the accumulated data, a work is most likely to have been created in a particular period by a particular artist.

Few art experts are available to the public, and some of those who are may not be entirely scrupulous. This fact may cause some art purchasers to forego the services of an art expert and, instead, rely on some lesser authority, their own superficial knowledge, or the seller's allegations.

A sanctuary for those who seek honest evaluation might appear to be the museum. Unfortunately, many curators are forbidden by their employers from giving opinions to outsiders. Museums wish to avoid becoming embroiled in costly and time-consuming controversies. They fear the prospect of having a questionable piece sell as authentic because

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"It should be unprofessional for a Museum Director . . .

"(B) to give, for a fee or on a retainer any certificate or statement as to the authenticity or authorship of a work of art, or any statement of the monetary value of a work of art, except where authorized by and in accordance with the lawful purposes of his own or other non-profit institutions concerned or government agencies."
it bears their endorsement. The possibility of conflict of interest is an additional problem. A museum employee might find himself in the untenable position of expert for both a dealer and his institution on an object the museum wishes to acquire.\textsuperscript{48}

Once an expert is located, he may be reluctant to render an opinion for fear of injuring his reputation if the pronouncement is later shown to be inaccurate. Many refuse to contradict incorrect reports of other experts even when the error is blatant. Their reticence may result from a fear of litigation or from a hope that others might similarly overlook their mistakes. It should be borne in mind that the credibility of a report is directly related to the reputation of its author; a young expert who challenges the establishment may find that he is henceforth an outcast.

Loss of credibility is a threat to which the art expert is particularly vulnerable. \textit{Porcella v. Time, Inc.}\textsuperscript{49} concerned this very issue. \textit{Time} magazine published an expose of the plaintiff art expert’s work. The article suggested that the plaintiff had been authenticating an astonishing number of masterpieces. It also hinted that there had been some collusion between the plaintiff and an auction gallery. The court stated that the article was a “satirical recital by an author who made no effort to conceal his belief that there were some authenticators of paintings less reliable than others.”\textsuperscript{50} It held that the recital was merely fair comment on an item of public interest and was therefore not actionable.

The expert who renders an unfavorable opinion may be subjecting himself to liability for slander of title. In \textit{Hahn v. Duveen},\textsuperscript{51} an art expert, Duveen, who was in the habit of making off-the-cuff remarks about the authenticity of paintings, generally discrediting them, stated that the plaintiff’s painting, \textit{La Belle Ferronière}, was not authentic. Duveen was convinced that the piece was a fake, notwithstanding the fact that he had never personally examined the picture itself. The owner, Hahn, was upset because Deveen’s statement to a \textit{New York World} reporter caused sales negotiations for the picture to be suspended.

\textsuperscript{48} This situation is particularly conducive to fraud and should be avoided. The museum community has recently become concerned about the role of trustees, directors, and other employees. The American Association of Museums and the American Law Institute of the American Bar Association jointly sponsor an annual program which analyzes the duties and liabilities of museum personnel as well as other legal problems encountered by museums. \textit{See ALI/ABA-AAM, Legal Problems of Museums} 1 (1973), 2 (1974), & 3 (1975).

\textsuperscript{49} 300 F.2d 162 (7th Cir. 1962).

\textsuperscript{50} \textit{Id}. at 166.

\textsuperscript{51} 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929).
Hahn felt that any future sale would be affected by the unfavorable comment.

After fourteen hours of deliberation without reaching a verdict, the jury was discharged and the case was restored to the general calendar. It was never retried; Duveen accepted a settlement of $60,000.52

In denying the defendant's motion to dismiss for failure to state a cause of action, the trial judge discussed the potential liability of an art expert. While the opinion in *Hahn* has been criticized for its extensive discussion of the facts upon which the expert's opinion was based, it rocked the art world and instilled fear in art experts over their potential liability. This reaction seems unjustified. Duveen was a stylistic expert who had never viewed the piece in question. Because his conduct was less than professional, there was little merit to his fair comment defense. Since *Hahn*, the fair comment defense has been broadened. Yet even today, it is submitted, an unprofessional damaging opinion should be actionable. Duveen also claimed that his statement was made without intent to disparage, as an innocent comment, and thus lacked the requisite scienter for slander of title.

53. See id. at 990.
55. Cf. *Walker v. D'Alesandro*, 212 Md. 163, 129 A.2d 148 (1957). In *Walker*, the court held that assuming a mayor had a conditional privilege to make allegedly disparaging statements by virtue of his office, this privilege was not absolute. Therefore, an artist had stated a cause of action against the mayor who had caused the work to be removed from a museum because it was allegedly obscene. *Id.*
56. The state of mind necessary to sustain disparagement charges is currently being debated. The Restatement embraces the idea that no actual malice is required. *Restatement of Torts* § 626 (1938). The late Dean Prosser, however, felt that negligence should be sufficient, when the negligence consists of a lack of reasonable grounds for the opinion expressed. See W. *Prosser, Law of Torts* § 128 (4th ed. 1971). Apparently Dean Prosser would have preferred a rule requiring more caution on the part of the expert. According to Professor Stebbins, however:

"In demanding proof of ill intent, Prosser follows the other economic torts too closely; intent is easier to prove where a line of overt conduct may be shown than in the typical disparagement case, where a single statement may be involved.

"At the other extreme, the First Restatement rule gives too much protection and puts all speakers at their peril. Acceptance of that rule by the courts could only curb all opinion-giving by experts. The compromise rule gives protection against irresponsible statements but allows freedom of speech for anyone with good reason to believe his statements." Stebbins, *Possible Tort Liability for Opinions Given by Art Experts* in *Feldman & Weil*, supra note 47, at 988.
One interesting question raised by Hahn is whether derogatory comments directed at the work of a living artist would be sufficient to allow recovery for defamation. In a case involving an article which criticized a painter,57 the court said:

[N]othing can be said to be libelous of a man in his profession except something which degrades or lowers him in his professional character generally, and it is not a libel of one in that regard to say that, in any particular work, he has fallen below the proper standard or has made a failure.58

In response to apparent pressure from art experts fearing litigation, New York State Attorney General Louis J. Lefkowitz caused a bill59 to be introduced into the state legislature which would have granted a "qualified privilege" or immunity from suits for accredited experts who evaluate art.60 The immunity would have protected an expert who declared a work to be a forgery if it subsequently appeared that he had been in error.61 In contrast, there would have been no presumption of good faith if the authenticator pronounced a work to be genuine and it was later disclosed that the determination had been wrong. Thus, liability might still have been imposed with respect to the latter category because of the possibility of collusion between the art dealer and the examiner.62 It was anticipated that this statute would encourage more experts to give opinions on the legitimacy of works of questionable

59. Print 5734, Intro. 4818, introduced May 11, 1966 by the Committee on Rules as a study bill entitled "An Act To Amend the General Business Law, in relation to providing for the accrediting of fine arts experts, museums, colleges and universities for opinions relating to authenticity of works of fine art, and making an appropriation therefore." The bill was drafted by Joseph Rothman, then Special Assistant Attorney General in charge of Art Fraud for the State of New York. Mr. Rothman is also credited with drafting all of the other New York art legislation discussed in this article.
60. In order to take advantage of this immunity, the expert would be required to obtain certification from the New York State University Board of Regents. The Art Dealers Association of America objected to the bill, possibly because of the limitation which would have excluded them from this qualified privilege. See Shepard, Lefkowitz Plans Art Fraud Bill, N.Y. Times, Jan. 3, 1968, at 45, col. 4. See also Fake Art, supra note 6.
61. The draftsman of the bill was apparently unaware of the grave potential for fraud in this situation. By discrediting an authentic piece, an expert could acquire it at a low price through a straw man. In addition, many valuable pieces which could add a great deal to the body of knowledge being developed about an ancient civilization might be carelessly discredited.
62. Cf. 90 CONG. REC. 3396 (1968). Bernard Berenson, an art expert, received 10% of the sales price from Joseph Duveen for those forgeries Berenson certified as genuine. Id.
authenticity. The bill failed, and it is submitted that the New York legislature acted wisely, since it is likely that the statute, if enacted, would have been declared unconstitutional. The state action of depriving a citizen of the right to redress an alleged wrong would probably be invalidated under the due process clause of the fourteenth amendment.

The licensing scheme, however, should be reconsidered since there is presently no manner in which the public can be assured that the expert is capable of making a valid evaluation; there are no standards or

63. Many alleged experts obtain a personal covenant against suit in the agreement between themselves and a client. See Feldman & Weil supra note 47, at 1011. This type of provision is not favored by the law. In some jurisdictions, such covenants have been declared void as against public policy. See Straight v. James Talcott, Inc., 329 F.2d 1 (10th Cir. 1964); Dearborn Motors Credit Corp. v. Neel, 184 Kan. 437, 337 P.2d 992 (1959); Fidelity & Cas. Co. v. Board of County Comm'rs, 342 P.2d 547 (Okla. 1959). In others, they are strictly construed against the writer and given limited effect. See Boll v. Sharp & Dohme, Inc., 281 App. Div. 568, 121 N.Y.S.2d 20 (1953), aff'd mem., 307 N.Y. 646, 120 N.E.2d 836 (1954); McCombs v. Texas & N.O.R.R., 178 S.W.2d 729, (Tex. Civ. App.) aff'd, 143 Tex. 257, 183 S.W.2d 716 (1944). The Restatement of Contracts provides:

“(1) A bargain for exemption from liability for the consequences of willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if

...“(b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.” Restatement of Contracts § 575 (1932).

Art authenticators are professionals and hold themselves out as having special expertise in their field. They should be considered as performing a public service and thus prohibited from extracting covenants against suit when performing their analyses. While article two of the Uniform Commercial Code would not apply to a contract for service (see Historic Shrines Foundations, Inc. v. Dali, 4 UCC Rep. Serv. 71 (1967)), it may nevertheless afford some guidance when a professional uses a form contract in his dealing with a nonprofessional who relies on the former's good faith. The Uniform Commercial Code provides: “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” Uniform Commercial Code § 2-302. Comment 1 to this section points out that it is designed to allow courts to rule on the unconscionability question directly, rather than manipulate the rules of contract law to reach a fair result. The basic test is whether, in light of all surrounding circumstances, the contract is so one-sided as to make its enforcement unconscionable. See id., illus. 1. When a court is faced with a situation in which a collector executes an art authenticator's form contract containing exculpatory clauses and covenants against suit for the expert's negligence, it should declare such provisions unenforceable. In addition, including such provisions raises substantial ethical questions for an attorney. See ABA Code of Professional Responsibility EC 7-5, D.R. 7-102(A)(1)-(2) (1969).
minimum qualifications for experts. Anyone can hold himself out as an art authenticator. Indeed, it is commonly believed that all members of a museum's professional staff are authorities in their fields; regrettably, this assumption is not always valid. Many of them do not possess degrees in art history, museology, science, or related fields. While formal education is not conclusive proof of expertise, without some other standard of measurement it is the best indicator available. Knowledge gained by experience is often more valuable than that which is obtained in the classroom. It should be a substitute for formal education and is necessary as a supplement to a degree. Yet, without some objective gauge by which to measure an individual's subjective knowledge, it may not be safe to rely on it. In general, the expert is one with special knowledge acquired by both study and experience. His area of expertise will be quite small, and, even here, the expert will not claim infallibility. One must realize that in obtaining an expert's evaluation, the statement is still an opinion. The New York bill would have required accreditation by the New York Board of Regents, and the body charged with administration of the act was to have formulated minimum standards for certification. Such a procedure is essential, for without

64. John H. Merryman, Sweitzer Professor of Law at Stanford Law School, recently pointed out some examples of unethical practices which have occurred in several museums. Merryman, Are Museum Trustees and the Law Out of Step?, 74 ART NEWS, Nov. 1975, at 24. At least one of these situations, referred to as "The Trustees and the Carpenter," involved individuals who lacked both moral integrity and technical expertise. In this case, an inexperienced carpenter was allowed to act as museum director for some time. When an inventory was taken several years ago in the museum in question and given to the trustees, the problem became evident. The incompetent director was replaced, and the museum is currently attempting to recover its lost articles. The trustees have also sought advice from experts on their proper role. Id.

65. Id. See generally AMERICAN ASSOCIATIONS OF MUSEUMS, OFFICIAL MUSEUM DIRECTORY (1975); WHO'S WHO IN AMERICAN ART (Jacques Cattell Press ed. 1973).

66. Long years of experience may mean nothing if there is no increase in meaningful knowledge. Similarly, the possession of a degree in a field without practice and continued education is not an indication of current expertise. This point has been recognized by several professions, which require either continued practice, periodic courses, or both. See, e.g., CALIF. BUS. & PROF. CODE § 5026 (West 1974) (accounting); ORE. REV. STKT. § 678.101 (1974) (nursing).


68. The bill defined an accredited fine arts expert as "a natural person certified by the board of regents of the university of the state of New York or by a corporation formed or chartered by such board for such purpose, pursuant to the provisions of section two hundred sixteen of the education law, as possessing the necessary training, skill and qualifications to form a sound judgment as to the genuineness or authenticity of works of fine art within the scope of his specialty or specialities as defined or limited and certified by any of the aforesaid accrediting agencies, or a natural person certified by any other accrediting agency of this or any other country which has been certified by the board of
establishing criteria for evaluating experts, the public cannot be adequately protected.

Yet the study bill went too far by immunizing the license holder from suit in several instances. Experts are professionals and should be held to the highest standard of performance. They should be required to document the reasons for their conclusions. Even stylistic experts can verbalize the facts upon which they base their findings. If they are granted greater flexibility with their decisions and immunity from suit, it is likely that their standards will decline. As a result, even more forgeries might flood the art market and valuable masterpieces be discredited.

Methods of Authentication

As a practical matter, the cost of authenticating a work of art may be prohibitive when the item in question is not worth a considerable amount. Therefore, less expensive frauds may go undetected. Yet it should be borne in mind that it takes a great deal of time and skill to create a good forgery. The likelihood that a counterfeiter will devote the necessary resources to minor pieces is small, since even he will expect a fair return for his work. In the underdeveloped nations, however, poor wages may provide the necessary incentive for inexpensive forgeries.

regents or by a corporation formed or chartered by such board for such purpose as aforementioned, as substantially meeting the standards established by the rules and regulations promulgated by the board of regents for accrediting fine arts experts in this state." Print 5734, Intro. 4818, introduced May 11, 1966.

69. A licensing scheme should not immunize a licensee from liability for his negligent or intentional acts. Rather, the holder should remain vulnerable to suit. Experts would be encouraged to exercise caution when making evaluations, since they might ultimately be forced to justify their actions in court. Potential liability might have the further advantage of improving the entire field of authentication, since experts who fear large tort judgments might either leave the profession, if they are incompetent, or devote more of their resources to education and research.

70. It is worth speculating on the possible fate of the Greek horse had it not been owned by a museum willing to reexamine Dr. Noble's pronouncements. See note 27 supra. Not many individuals possess sufficient capital and stamina to employ a panel of experts who will impartially examine a piece discredited by one of their number. Indeed, not many experts would be willing to risk a colleague's scorn by correcting him.

71. I am indebted to Dr. Fred Stross of the Archaeological Research Facility, University of California at Berkeley, for much of the scientific data which appears in this portion of the article. His study on scientific authentication is perhaps one of the best compilations of the scientific methods of authentication presently available; it will appear in the author's forthcoming book, Deskbook of Art Law, to be published in Spring, 1976, by Federal Publications, Inc.

Fakers have access to the same information about authentication as do the experts. If the rewards are sufficiently large, the forger can be expected to perfect methods of avoiding detection. The newly created antiquity, however, is not likely to withstand the test of time.\textsuperscript{73} A counterfeit contemporary work does not have this inherent flaw. Its detection is likely to come from stylists, although even they can be misled. One of the greatest artistic geniuses of this century, Pablo Picasso, frequently changed style to experiment with new media. Both he and Braque, for instance, developed the collage which, for the first time, incorporated papers, oilcloth and other materials into a single work.\textsuperscript{74}

The problem faced by the stylist is not confined to contemporary art. Enlightened artists were varying the styles of artistic representation as early as 1350 B.C.\textsuperscript{75} Akhnaton was famous for the renaissance in Egyptian art which occurred during his reign. His encouragement caused artists to develop a realistic rather than stylized mode. As a result, there are many Tel-El-Amarna pieces which are not in keeping with other works of that period.\textsuperscript{76} The stylist must therefore be cautious when declaring a work to be a forgery. His subjective evaluation should be checked and reinforced by scientific tests when possible. There is, however, no single scientific test that can be employed to evaluate all works of art. Each has a narrow scope of applicability.

\textit{Radiocarbon Age Determination}

One of the most well-known scientific methods used today is radiocarbon dating.\textsuperscript{77} This technique is used to test materials derived from once-living organisms; it provides estimates of the time elapsed since termination of the metabolic processes. Such materials

\textsuperscript{73} Aging is a chemical process and the copy may not resemble the original after time has passed. It is rumored that the forger de Hory would store his paintings for five years to observe them undergo this change before placing them on the market. This procedure could cause an expert to authenticate a piece and then later repudiate his earlier pronouncement. See S. Burnham, The Art Crowd 87 (1973). This phenomenon is a possible explanation for the extensive reattributions at the Metropolitan Museum in New York. See N.Y. Times, Jan. 19, 1973, at 1, col. 1.

\textsuperscript{74} G. Hamilton, 19th and 20th Century Art 212 (1970).

\textsuperscript{75} Fogg, supra note 8, at 8.

\textsuperscript{76} C. Desroches-Noblecourt, Tutankhamen 126 (1964).

\textsuperscript{77} See Broeckner & Kulp, The Radiocarbon Method of Age Determination, 22 Am. Antiquity 1 (1956). It is interesting to note that the actual cost for having a simple radiocarbon test performed is between $100 and $200. Commercial laboratories may charge more. Libby, Ruminations on Radiocarbon Dating, in Radiocarbon Variations and Absolute Chronology 639 (Olsson ed. 1970).
include charcoal, wood, paper, leather, parchment, hair, textiles, seeds, pollen, plants, flesh, dung, peat, organic muds and soils, bones (including teeth and ivory), and shells. The technique is based on counting residual radiocarbon activity and is absolute, which means that, in principle at least, the result is given directly in years elapsed since death. The scientist is not forced to judge the work in relation to other known pieces.

The dating range covered by this technique lies between a few hundred and 40,000 to 50,000 years. The upper limit can be extended by employing special precautions and procedures which complicate the method.

One of the earliest applications of the radiocarbon dating technique also provides a curious example of authentication, albeit unintentional. J.R. Arnold, who developed the test in close association with W.F. Libby, collected ancient Egyptian wood samples of supposedly known origin to test the method. Among the first three samples was a wood fragment from a solar boat of Snefru, a fourth dynasty pharaoh. The date determined was astonishingly close to that estimated by archaeological evidence, approximately 2,600 B.C. A fragment from the tomb of third dynasty King Zoser, who had live approximately seventy-five years earlier, also gave satisfactory results. The third sample, however, gave a count that looked as if the wood had been cut quite recently. The best technique had been employed in the experiment; consequently it was feared that there was something drastically wrong with the principles underlying the method. When Libby communicated the bad news to the museum authorities who had furnished the sample, they reexamined its pedigree. They soon found that it had come from a dealer in Cairo rather than from a well-controlled excavation, and further investigation showed that the sample was a modern forgery.

To avoid detection, today's forger would manufacture purported artifacts from ancient wood, which is easily acquired by members of the trade. If cost is no object, there are probably few physical tests which cannot be thwarted, once they are known to the forger. It is important to note, however, that the methods will be effective as applied to objects found and documented before a test is published. This circumstance must not be used as an argument against publication of technical 

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78. Libby, who developed the test, is an acknowledged expert in this area. See Libby, *Ruminations on Radiocarbon Dating*, in *Radiocarbon Variations and Absolute Chronology* 429 (Olsson ed. 1970).

79. Letter from James R. Arnold to Dr. Fred Stross, Nov. 2, 1973, on file with author.
progress in authentication, for without publication, research would wither.

**Thermoluminescent Analysis**

Another scientific test which has been devised is called thermoluminescent analysis (TL).\(^8\) When certain materials are heated, they emit a visible but faint light called thermoluminescence. This light precedes and occurs in addition to the ordinary heat glow produced by a sample. The material for which this technique is especially suited is ceramic ware or fired clay.\(^1\) Clay contains small amounts of radioactive impurities; therefore, when it is fired, it releases charge-carriers such as electrons. As the piece is exposed to radiation from numerous sources, including cosmic rays and the soil in which it may be buried, the charge-carriers liberated from this external radiation become trapped in the crystal lattices which form part of the mineral structure of the clay. The concentration of these particles builds up over time; therefore, when a sample is heated and the particles are freed, they emit a TL which, when measured, can give the time elapsed since the last firing\(^2\) of the clay. TL analysis is an absolute method, which can give results directly from measurable parameters. If, however, the nature of the sample is not favorable or the original context\(^3\) in which the piece was found has been destroyed, some of these parameters may be difficult to measure. The accuracy of the results will be correspondingly decreased.

TL analysis is applicable to age periods ranging from about three hundred years to that of the oldest pottery known. The error to be expected varies with the nature of the specimen. Recent test programs indicate that the difference between the average TL age and the accept-

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\(^1\) *Dating of Pottery*, supra note 80, at 129. Application to other materials of a related nature is being studied but is beyond the scope of this discussion.

\(^2\) The time period given usually reveals when the piece was first fired; however, if it was subsequently exposed to a temperature which exceeds 300\(^\circ\) C., the time period obtained will point to the later date, because the most recent heating will have dissipated the charge carriers trapped prior to this firing. See *Art Law*, supra note 45, at 503.

\(^3\) For example, the area where the piece was found might be so disturbed that it is impossible to obtain useful samples for analysis. In addition, illicitly imported pieces can rarely be traced to their exact points of origin. Perhaps this fact provides an argument in favor of international regulation of art. See generally *Art Law*, supra note 45.
ed chronological age is no more than 10 percent. In the best cases, the error may be even less, if the factors which contribute to the error are sufficiently identifiable to be compensated for.\textsuperscript{84}

Even though TL analysis has only recently been developed, and modifications of the technique are still being worked out at a relatively rapid rate, it has been applied to authentication problems in a number of cases with spectacular results. Activity in the northeastern Mediterranean region, from northern Greece to Mesopotamia, has played a significant part in revealing the remnants of what may be the most ancient urban civilization on earth. In Anatolia, the evidence of such civilization dating back to 7,000 B.C. has been particularly important. Pottery begins to appear in strata corresponding to the middle of the seventh millenium B.C. Toward the middle of the sixth millennium, the art of pottery had become advanced, and the ceramic ware, vessels, figurines and the like, had achieved a remarkable degree of sophistication and beauty. Professor J. Mellaart, discoverer of these Anatolian sites, found evidence of clandestine digging when his attention was first drawn to a site near Hacilar.\textsuperscript{85} It soon proved to be abundant in artifacts from the ancient cultures. It is not surprising that the price of the Hacilar finds on the antiquities market began to soar; individual pieces of Hacilar painted pottery have fetched as much as $75,000. With this incentive, not only the looters, but also the forgers, became active. By 1965 acquisitions by the Ashmolean Museum in Oxford, and by other public and private collections, came under scrutiny. In 1969, the technique of TL analysis had been developed by the Research Laboratory for Archaeology and the History of Art, Oxford University. In that year, a group of nearly seventy pieces of Anatolian pottery, brought together from museums, collections, and dealers, was submitted to the Oxford laboratory for analysis. Of the objects studied, only eighteen were found to be genuine.\textsuperscript{86}

At this time the TL test is probably one of the most difficult for a forger to circumvent.\textsuperscript{87} Leading experts suggest that even a skilled

\textsuperscript{84. Dating of Pottery, supra note 80, at 129.}
\textsuperscript{85. For more details on this interesting incident, see Pearson & Connor, The Strange Case of James Mellaart, 9 Horizon 12 (1967).}
\textsuperscript{86. Aitken, Moorey & Ucko, The Authenticity of Vessels and Figurines in the Hacilar Style, 13 Archaeometry 89 (1971).}
\textsuperscript{87. There are, however, some difficulties which have baffled the scientists. When Mexican clay figures which some believe to be fakes made within the last 100 years were subjected to TL analysis, they yielded dates of from 200 B.C. to 2,500 B.C. Since the samples had been fired in the testing process, the TL emission on a second test should have been zero. When retested sometime later, however, the samples had regained about
physicist might not be able to reproduce a believable signal, let alone one in accord with the time period he might be aiming at. If the reward is high enough, however, a combination of great scientific and artistic talent may, in time, develop a convincing forgery that might pass both stylistic study and TL analysis.

**Obsidian Hydration**

When an antiquity is created from obsidian (volcanic crystal), it can be subjected to the obsidian hydration test.\(^8\) This technique is valuable in estimating the period of time elapsed since the present surface of an obsidian artifact was exposed or shaped. Such artifacts include scrapers, knives, sickles, drills, fish hooks, ornamental carvings, weapon points, and any other obsidian object which in its making was worked so as to expose a fresh surface.

This method of dating is most valuable to the archaeologist, though collectors may also exploit it. The test has been successfully used to uncover numerous Mexican and Mayan forgeries.\(^8\)

**Fission Tracks**

Another scientific test for authentication makes use of fission tracks.\(^9\) This technique can be used on glassy or crystalline substances containing uranium. The uranium causes radiation damage, and it is this damage which, increasing with time, can be measured to provide an estimate of the time passed since the material was created.

The fission track technique is of particular value in dating substances from seventy thousand to about a million years old. The radiocarbon method does not work with pieces created during this period. In addition, with suitable materials and uranium concentration, the fission track method is capable of age-dating materials months to millions of years old.

10% of their earlier age indication. This result would mean that after approximately 50 years the piece would give a TL reading of about 2,500 B.C. There is speculation that this type of clay is particularly susceptible to ultraviolet rays and thus gives misleading readings on TL analysis. See Honan, *The Case of the Hot Pots*, N.Y. Times, June 18, 1975, § 6 (Magazine) at 14.


Substances which are susceptible to analysis by this method include, in decreasing order of uranium concentration, man-made glass, zircon, apatite, natural glass (obsidian) and hornblende. This technique determines the age of the formation or production of the material, not the time elapsed since it was shaped into an artifact. The two may coincide, as in the case of man-made glass. In the case of natural substances, however, the age determined is that of the formation of the rock, such as the time of the volcanic eruption that produced a given flow of obsidian, not when it was shaped into an artifact.

Thus, the test has limited applicability to artifacts which have been worked by man since it can only give the age of the material and not the date of the carving. When, however, the fission track technique has been applied to glass, glazes, minerals in pottery, and slags, the results have been in accord with the archaeologically estimated ages of the pieces.

Comparative Analysis

The principle of the comparative analysis technique of dating is to develop, by determination of elements or functional groups, characteristic composition patterns. These patterns can be compared with those of a known sample, from which the information sought can be deduced. This approach is very general.

Not infrequently, the composition of the paints, the ground, or other constituents of paintings are known, for the periods or artists to whom the paintings have been ascribed, either by prior analysis or from contemporary records. Alternatively, it may be known that certain components came into use at a certain time, and their presence in a work of art supposedly created earlier than this date would label it a forgery, or at least a restoration. Thus, the presence of a single element or compound may constitute strong evidence against authenticity. This approach may be referred to as a test by establishing anachronism.

This test is probably the most widely and successfully used. A famous example is the study of the Etruscan Terracotta Warriors of the Metropolitan Museum. The presence of significant amounts of manganese in the black glaze was evidence used in establishing the spurious nature of the objects.

91. Id.
93. See Treatise on Analytical Chemistry (Kolthoff & P. Elving eds. 1961).
The test determining provenance is most useful for the archaeologist. The best-known applications have occurred in the determination of the trace and minor components of obsidian, pottery, and quartzite artifacts, and the comparison of the composition patterns with the corresponding patterns of the sources from which the raw materials might have come.\(^9\) Trade routes and patterns of cultural interchange can be critically studied by using this technique.

This principle can also be used in the identification and authentication of works of art. It is known that the ratios of stable isotopes of some elements in certain materials vary, depending on their geological source. It has been shown that the lead in paintings produced prior to 1820 exhibits isotope ratios in a range typical of European ores, while more modern samples show a greater range of isotopes, typical of more modern sources of lead, which include deposits from the United States, Canada, and Australia.\(^9\) Thus, while much background work still remains to be done, one may expect to be able to distinguish paintings and other lead-containing artifacts of different cultural periods on the basis of their lead isotope ratios. In 1968, the Mellon Foundation announced that it was sponsoring a study to perfect a method of atomic pigment analysis for the works of old masters.\(^9\)

The test by comparative characterization, while general in nature, may nevertheless provide valuable information when other methods are not decisive. It may be used when more or less subtle changes take place on the surfaces of intrinsically homogeneous materials. These changes can be detected by comparison of the surface composition with that of the bulk substance.

An interesting use of this method was made in the authentication of some Egyptian limestone sculptures that had been buried in a sandy locale in Upper Egypt.\(^9\) It was found that several of the elements studied, particularly barium, copper, and manganese, showed significant enrichment on the surface. The process and chemistry of desert varnish formation were described some thirty-five years after the objects had been acquired by the collector and thus could not have been anticipated.


\(^9\) See TIME, Apr. 5, 1968, at 87.

\(^9\) ANAL. CHEM., Mar. 1960, at 17.
by a putative forger, even if it were possible to simulate the characteristic patina at the same time as the erosion evident on the surface.

**Analytical Reconstruction of Manufacturing Techniques**

The problem of recreating ancient, forgotten techniques has been handled in a variety of ways, generally involving analysis, deductions, and trial and error. Obviously, no general method can be provided, but examples do indicate what has been accomplished along these lines. An exemplary study by Schumann on the rediscovery of the technique of “terra sigillata and Greek red-black painting,” later elaborated by others, shed light on other ceramic techniques as well. Reports have been prepared describing illuminating studies of ancient glassmaking techniques as well as of metallurgical procedures in antiquity.

Schumann’s painstaking reconstruction of an ancient process was to provide the most telling evidence for the exposure of the Etruscan Warriors as forgeries. During World War I, the Metropolitan Museum acquired several alleged Etruscan terracotta statues, which were exhibited in a dramatic setting for nearly three decades. Doubts regarding their authenticity were expressed by Professor Pallottino of Rome as early as 1937. Finally, Schumann’s research made it possible to make a factual study of the situation. The terracottas, and especially the glazes, were found to contain much higher amounts of manganese than would be consistent with ancient manufacture. A series of test firings, and comparison with authentic red-and-black ware, confirmed the conclusion that the terracottas were recent forgeries. The case was closed when representatives of the Metropolitan succeeded in reaching a survivor of the team that had actually made the statues. He managed to supply the missing thumb of one of the warriors.

**Microscopic Techniques**

The optical microscope is such a generally useful device that one may begin the study of almost any object by looking at it through a low-power binocular microscope. Further examination at higher power

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101. See note 94 & accompanying text supra.
and under special conditions may follow. A competent microscopist develops an empirical background of images of the structures in which he has specialized. This knowledge often enables him to recognize similarities and differences in the pertinent structures of the respective materials.

_X-Ray and Related Methods_

X-radiographs provide remarkable insights into the structure of paintings in general.¹⁰⁵ They often reveal underlying brush strokes, and in some cases, even the fingerprints of the artist. Underlying painting, which sometimes is brought out quite clearly by radiographs, may provide evidence of forgery, of extensive restoration, of an artist's displeasure with his own work or a reluctance to waste a spoiled canvas that could still be used.

There are many examples of the use of X-radiography in the study of alterations of paintings. An instructive case is the overpainting by Titian of Bellini's _Feast of the Gods_.¹⁰⁶

The case of the Metropolitan Greek Horse¹⁰⁷ is of particular interest because the result of the X-radiography examination was misinterpreted, and as a consequence, an incorrect conclusion was reached initially. This error occurred because the person in charge of the study was inadequately informed, not because of a failure of the test itself. He believed that the presence of a terracotta core held in place by iron bands, as shown on shadowgraph, conclusively established the piece to be of recent origin. After further investigation, however, he learned that craftsmen in ancient Greece used this technique for creating bronzes.¹⁰⁸

_X-Ray Diffraction_

X-ray diffraction determines the degree and the character of internal structure of materials that are not amorphous or colloidal.¹⁰⁹ Thus, this method is applicable to a great variety of substances. It has been used on jewelry of all kinds, medieval niello, devitrification products of glass, pottery and glazes, pigments and jades. The sample must be in

¹⁰⁶. See J. Walker, _Bellini and Titian at Ferrara_ (1957). It is interesting to speculate concerning the reaction of art historians had the overpainter been an artist less established than Titian.
¹⁰⁷. See note 27 supra.
¹⁰⁸. _Id._
powdered form, but the amount needed is small, and the method is not destructive in itself; therefore it can be used for subsequent analysis. Diffraction analysis has also been used in the detection of faked patina on bronzes.110

Auto-radiography

Auto-radiography reveals structural details of paintings and their supports.111 Use of this technique is being developed in the study and conservation of other art objects—photographs, drawings, and old manuscripts. The technique differs from conventional X-radiography in that it produces a series of radiographs of a painting, each of which is quite different from the others, and all of which are different from X-radiographs. Analysis of such a series of auto-radiographs permits the identification of a number of the pigments used in a painting; it gives information on the manner in which they were originally put down by the artist, as well as their distribution throughout the body of the painting. In the words of the originators of the technique, “it is essentially a laboratory tool for the investigation of the architecture of paintings.”112

While these tests are feasible when a major work is involved, their effectiveness must be balanced against the costs involved in the utilization of experts and laboratories. An individual will rarely, as a practical matter, resort to them to analyze minor acquisitions. One may, however, perform a simple chemical test. Kits for novices have been prepared and should be used whenever the item in question is susceptible to such analysis.113

Some forgeries are practically undetectable. For example, it was discovered that six sculptures of bronze nudes allegedly created by Giacometti were actually unauthorized copies cast from an original bronze rather than from the artist's mold. This method of forgery is one of the most difficult to detect.114

Existing Legislation

The discussion thus far has focused on the categories into which art forgeries fall and the means currently available for identifying them.

110. See, e.g., Aitken, Physics and Archaeology, 1961 INTERSCIENCE 165.
112. Id.
113. See 88 SCIENCE NEWS LETTER 296 (1965). The instructions in these kits must be followed precisely, since carelessness can result in injury to the work and inaccurate results.
This section will be devoted to an analysis of existing legislation which is designed to inhibit forgers or to provide the defrauded purchaser with some relief. While some of this legislation is broad in scope, covering the entire spectrum of art, other statutes are limited to a specific category, such as fine prints, or to a class of craftsmen, such as Indians.

Penal Law

The federal and state general antifraud statutes may deter the forger. Yet the penalties for violating them are slight when compared to the potential profit which may be gained by creating and successfully disseminating fakes. In addition, they all require proof of a fraudulent or criminal intent. This element is easily established in the case of the forger but becomes less satisfactory when applied to an intermediate seller, who may merely suspect the spurious origin of the object. These statutes are totally worthless when the transferor is unaware of the deception and fails to have the piece authenticated. In fact, the provisions may encourage sellers to remain ignorant about the authenticity of the pieces they sell.

Even the federal statute designed to protect Indian artisans by imposing penalties on one who sells Indian crafts which are not accurately described requires the seller to have knowledge of the misattribution. While the Federal Trade Commission announced that it would strictly enforce the law, the market in counterfeit Indian jewelry and wares remains active. The situation has become so devastating that several states have enacted their own laws.

117. The federal law provides penalties of not more than $1,000 or imprisonment for not more than five years or both. 18 U.S.C. § 1341 (1970); cf. id. § 496 (customs documents) (fine up to $10,000).
119. See generally Württenberger, Criminological and Criminal-law Problems of the Forging of Paintings, in ASPECTS OF ART FORGERY 15 (1962). Thus, many of the individuals in categories two and three discussed in the text accompanying note 11 would escape prosecution.
122. See Lichtenstein, Fad for Indian Jewelry: Unethical Are Moving In On a Lucrative Market, N.Y. Times, July 11, 1975, at 9, col. 1. High prices have also resulted in an increase in theft. See United States v. Wilson, 523 F.2d 828 (8th Cir. 1975) (defendant convicted of interstate transportation of stolen Indian jewelry believed to be worth $40,000 to $50,000).
Alaska appears to have been the first to confront this dilemma. By the early 1960's the quantity of counterfeit native handcrafts had become staggering. In an apparent attempt to eliminate this problem, the legislature enacted statutes which allow for a seal to be placed on authentic items. The legislation defines native handicrafts as those pieces which are created by a resident having not less than one-quarter Eskimo, Aleut or Indian blood. Criminal penalties are imposed on any person who is guilty of intentionally misusing the seal or selling an object which falsely bears it. It was anticipated that this labeling would increase sales since consumers would be less wary of the objects they were purchasing.

In 1975, the Alaska legislature enacted a second series of statutes, which are similar in most respects to the laws protecting native handicrafts. The new laws are designed to protect items made in the state by resident Alaskans. It further provides the seal used shall have a “distinctive design that is entirely different from the native handicraft seal . . . .” There had been some opposition to this legislation, since it was felt that consumers would fail to understand the distinction between the two seals.

Both sets of Alaska statutes impose penal sanctions on persons who knowingly and willfully violate them. Arizona's law goes further than these statutes by omitting any requirement of knowledge on the part of the seller or trader when disseminating counterfeit Indian crafts. This omission may be interpreted as imposing a duty of inquiry on the dealer. It would have been more desirable, however, to include this duty in the legislation itself.

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123. Included as counterfeits are items made outside of the state and those manufactured out of simulated material, as well as pieces created by individuals other than natives. For several vivid examples of the problem see Consumer Protection Section, Office of the Attorney General, State of Alaska, Suggestions and Guidelines, Aug. 28, 1974.
124. ALASKA STAT. §§ 45.65.010-.070 (1962).
125. Id. § 45.65.070.
126. Id. § 45.65.060.
127. See note 123 supra.
128. ALASKA STAT. §§ 45.66.010-.080 (1975).
129. “[R]esident means a person whose domicile is the State of Alaska.” Id. § 45.66.080(3).
130. Id. § 45.66.030.
132. ALASKA STAT. §§ 45.65.060, 45.66.060 (1975).
133. ARIZ. REV. STAT. ANN. §§ 44-1231 to 1233 (Supp. 1975).
New Mexico has actually gone this far by providing that

[i]t is hereby made the duty of every person selling or offering for sale authentic or imitation Indian arts and crafts, or both, to make due inquiry of their suppliers of such arts and crafts concerning the methods used in producing such arts and crafts and to determine whether such arts and crafts are in fact authentic Indian arts and crafts or imitation Indian arts and crafts . . . .

The statute also provides that it is unlawful for any person to sell or offer for sale any Indian arts and crafts as authentic unless they are in fact authentic. While this innovative law should make prosecution of forgers and dealers less difficult, it still may not entirely eliminate the problem. The penalty imposed for its violation is slight when compared to the prices charged for authentic Indian crafts. This consideration appears to have influenced the draftsmen of the Colorado statute. That law not only imposes a duty of inquiry on sellers but provides realistic penalties for its violation.

The Colorado law is the most comprehensive and precise piece of legislation thus far enacted to police the Indian art market. Unfortu-
nately, it is limited in territorial application and the market for Indian wares is nationwide. The only way to decrease substantially the quantity of fake Indian crafts is to pass a federal law which imposes on sellers a duty to inquire about the authenticity of objects they sell and which provides penalties for its violation concomitant with the potential economic gain. Even if such a statute were enacted, it would merely affect a small portion of the market; other forms of art forgery would continue to plague purchasers.

New York appears to be one of the few states that actually recognizes the breadth of the art market. Its law describes as a class A misdemeanor a person who, with the intent to defraud, "makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess" or a person who, with knowledge of the object's true character and with the intent to defraud, "utters or possesses an object so simulated." In 1969, the New York legislature also enacted a bill which imposes criminal penalties on "[a] person who, with intent to defraud, deceive or injure another, makes, utters or issues a false certificate of authenticity of a work of fine art." Unfortunately, these statutes suffer from some of the same infirmities as the federal and Alaskan laws protecting Indian crafts, as they require fraudulent intent and impose insignificant penalties for their violation. Moreover, as with all state laws, their application is territorially limited.

These statutes attack the problem by penalizing the forger or fraudulent seller. They are designed to decrease the number of counterfeit works of art being sold by inhibiting the perpetrators of the fraud. Aside from the Colorado statute, they do not provide any relief for

141. The Colorado legislature should nevertheless be commended for its valiant effort. At least in that state, purchasers of Indian crafts can feel relatively safe when acquiring these objects. The territorial limitation is, of course, a product of our political structure, and state legislatures are limited in the effect they can have on a nationwide market. Colorado's law may make it the leading center for Indian crafts. Perhaps the other states which have a large Indian craft industry will follow Colorado's lead if their sales dwindle and Colorado's increase.

142. N.Y. PENAL LAW § 170.45 (McKinney 1975).

143. Id.


145. A class A misdemeanor carries a penalty of imprisonment for up to one year and/or a fine of up to $1,000. N.Y. PENAL LAW §§ 70.15, 80.05 (McKinney 1967).

146. See note 141 supra. While this legislation is not ideal, it places New York in the forefront regarding art protective legislation and may mark that state as the safest within which to purchase a work of art.

147. See note 139 supra.
the deceived buyer.\textsuperscript{148}

Buyer’s Remedies

As previously indicated, many purchasers do not take advantage of the increasing body of knowledge concerning authentication of art works.\textsuperscript{149} As a result, vast quantities of forgeries flood the art market each year. Furthermore, neither scientific tests nor stylistic analysis can eliminate all forgeries; some fakes may go undetected until a new method for uncovering them has been devised. The defrauded purchaser in this situation will not find solace in the fact that he has acquired a well-executed counterfeit; rather, he will want to recover for his loss.

The Uniform Commercial Code (UCC) is thought by some to afford a measure of relief.\textsuperscript{150} Section 2-313\textsuperscript{151} governs express warranties in the sale of goods. In applying this section, the courts have

\textsuperscript{148} This impediment is common to all penal laws; in most instances, the enforcement of laws such as the ones described is designed not to reimburse the defrauded purchaser, but rather to inhibit the forger’s future attempts at promoting fraudulent sales. This rationale raises questions about the entire penal system and whether the existence of a penalty really acts as a deterrent.

\textsuperscript{149} For an interesting commentary on this situation, see Lane, \textit{The Case of the Careless Collector}, \textit{Art in America}, vol. 53, Oct. 1965, at 90.

\textsuperscript{150} See \textit{Note, Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery}, 14 \textit{Wm. & Mary L. Rev.} 409 (1972). \textit{Contra, Art Legislation}, supra note 9. \textit{See also Note, Legal Control of the Fabrication and Marketing of Fake Paintings}, 24 \textit{Stan. L. Rev.} 930 (1972). Whether the new Consumer Product Warranties Act will apply to art warranties is an open question. See 15 U.S.C.A. §§ 2301-2312 (Pamphlet No. 1, Feb. 1975). It is believed, however, that this statute will suffer from the same difficulties as the Uniform Commercial Code since the law requires the warranty to become part of the basis of the bargain. Important aspects of the new act extend the Federal Trade Commission’s jurisdiction, give it new rule making authority, and expand its powers to proceed against violators. \textit{Id.} §§ 2309(b), 2310(c)(i). Perhaps the Federal Trade Commission will recognize the need for regulations and policing the art market and exercise its new power in this theater.

\textsuperscript{151} Section 2-313 states:

“(1) Express warranties by the seller are created as follows:

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

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

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

“(2) It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.” \textit{Uniform Commercial Code} § 2-313.
tended to focus on three problems: first, whether a description of the item in question (core description) is a warranty; second, whether a declaration is merely an opinion or instead an express warranty; and third, whether a statement is part of the basis of the bargain.

Basic to section 2-313 of the code is the core description. In *Hill Aircraft & Leasing Corp. v. Simon*, the plaintiff purchased an aircraft which was paid for in part by a check bearing the notation “Aero Commander, N-2677B, Number 135, FAA, Flyable.” Later, when the plane was test flown, the plaintiff was informed that numerous repairs would be necessary for it to be certified under Federal Aviation Regulation Part 135 for both visual and instrumental flight. The court found that the description “Number 135, FAA, Flyable” was an express warranty that the craft would qualify for full certification under the stated regulation.

The court in the *Hill* case dealt with terms having precise meanings. Thus, if the plane were unable to leave the ground, it would not be flyable. Similarly, by requiring repairs, it did not comply with the FAA regulation.

One must consider, then, whether the statement that an item is, for example, a “Rembrandt painting” constitutes a warranty that the picture in question was painted by Rembrandt. This phrase is subject to several interpretations; hence, its use may not necessarily serve as an express warranty that Rembrandt executed the work. A court will have to decide whether the term “Rembrandt painting” means that the picture in question was painted by that artist or merely that it is “in the manner of” or “from the school of” the great master. Thus, the designation “Rembrandt painting” may be a core description of the item in question, yet the words are sufficiently ambiguous that they may be deemed insufficient to create a warranty upon which a purchaser may rely.

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153. For a definition of these terms see *Art Legislation*, supra note 9.

154. In one case the plaintiff purchased a machine described as a “hay baler.” When the machine was unable to fulfill its named function, the plaintiff sued for breach of warranty. The case was tried under the Uniform Sales Act, and the majority of the appellate court concluded that no warranty had been breached. The dissent announced that a description of a machine as a “hay baler” should be recognized as an express
The second problem under section 2-313 is the necessity of distinguishing between an affirmation of fact or promise, which creates a warranty, and a mere opinion, which does not. The dividing line between these two forms of statements is difficult, if not impossible, to find.

In General Supply & Equipt. Co., Inc. v. Phillips,\textsuperscript{156} the defendant, a seller of plastic greenhouse panels, distributed advertising materials which stated: (1) “[T]ests show no deterioration in 5 years of normal use”; (2) “It won’t turn black or discolor . . . even after years of exposure”; and (3) “[I]t will not burn, rot, rust or mildew.”\textsuperscript{157} Approximately two years after the plaintiff installed these panels in his greenhouse, they turned black, and he commenced an action for breach of warranty. The court found that the statements in the advertisements were express warranties, noting that

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\text{the test for whether a given representation is a “warranty” or a mere expression of opinion is: did the seller assume to assert a fact of which the buyer is ignorant, or did he merely express a judgment about a thing as to which they may each be expected to have an opinion.}\textsuperscript{158}
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This test might appear to resolve the difficulty of distinguishing between representations which create warranties and mere puffing, which does not. Nonetheless, it is still necessary to decide whether a statement is a fact or a mere opinion. When the federal court sitting in Kentucky\textsuperscript{159} was presented with facts similar to those in Phillips, it reached the opposite result.\textsuperscript{160} The court found that a dealers' product manual merely stated an opinion when it described the “General Characteristics” of a type of seed in the following manner:

\begin{quote}
 a pure single cross, excellent yield in area of adaptation, ability to use high levels of fertility and available moisture, superior standability . . . [v]ery good standability, can stand high population under adequate fertility program, good blight tolerance, high test weight . . . .\textsuperscript{161}
\end{quote}

warranty that the item in question will bale hay. Moss v. Gardner, 228 Ark. 828, 210 S.W. 491 (1958). If the case had arisen under section 2-313 of the UCC, it is likely that the court would have reached the opposite conclusion, since the language is not susceptible to any other interpretation.

\textsuperscript{155} Uniform Commercial Code § 2-313(2).
\textsuperscript{156} 12 UCC Rep. Serv. 35 (1972).
\textsuperscript{157} Id. at 41.
\textsuperscript{158} Id. at 40.
\textsuperscript{160} The test used by the Texas court in Phillips was originally announced by the Kentucky state court in Wedding v. Duncan, 310 Ky. 374, 220 S.W.2d 564 (1949). It is interesting to note that the Bickett court did not even cite the test. See note 161 infra.
\textsuperscript{161} 12 UCC Rep. Serv. at 633.
Applying the *Phillips* test to a statement about a work of art, it might be argued that both buyer and seller can be expected to have an opinion about the genuineness of the object and that therefore no warranty is created. On the other hand, the dealer has made a statement about the authenticity of the item. If the buyer is otherwise uninformed about the piece’s origin, the test for finding a warranty may be satisfied. Yet only the true artist or eyewitness can make a factual statement about an art object’s pedigree. It could therefore be argued that a dealer’s statement of authenticity is always his opinion and that no warranty is created. The decision whether a seller’s statement of attribution is an express warranty of authenticity or mere sales talk must be made on a case-by-case basis. Section 2-313 may prove to be an illusive remedy for a purchaser of a counterfeit work of art when the seller’s statements are ambiguous.

Section 2-313 also provides that any statement or promise which becomes part of the basis of the bargain is an express warranty. The

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162. In an English case, the plaintiff purchased paintings described in the bill of sale as “Four pictures, Views in Venice, Canaletto, 1601.” Later, when the plaintiff learned that the pictures were forgeries, he commenced an action for breach of warranty. The trial judge let the jury decide whether the seller’s use of the name Canaletto was a warranty or merely his opinion. The jury found for the plaintiff and on appeal the judgment was affirmed. Lord Denman stated, “It was therefore, for the jury to say, under all circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion.” The judge suggested that there is a distinction between very old works, on which sellers can only express opinions, and more recent creations, which may be warranted as authentic by individuals having knowledge of this fact. Power v. Barham, 111 Eng. Rep. 865, 866 (1836), citing *Jediwine v. Slade*, 170 Eng. Rep. 459 (1797). Thus, it might be said that in the case of very old pieces, caveat emptor should apply unless the seller purports to warrant the authenticity of the object in question. A different rule should apply when both parties possess some expertise with respect to the goods to be sold and assume the item to have certain attributes. If it appears that they are both honestly mistaken about this fact and that it was difficult to ascertain its truth when the contract was made, the buyer should be entitled to rescission based on a mutual mistake of fact. See *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887); cf. *Smith v. Zimbalist*, 2 Cal. App. 2d 324, 28 P.2d 70 (1935). The distinction between the test cited in *Phillips* and a rule which permits rescission based on mutual mistake of fact is subtle but important. If the buyer and seller have independent opinions on the authenticity of a work, no warranty is created, and the buyer must rely on the validity of his own opinion. In this situation, authenticity would not be part of the basis of the bargain. On the other hand, if both parties honestly assume the fact of authenticity and this fact is part of the basis of the bargain, the contract should be voidable at the buyer’s option. This doctrine predates the UCC; nevertheless, it should still have vitality under section 1-103.

163. This very fact has worked against a forger who was apprehended in the act of creating a “masterpiece.” See D. GOODRICH, ART FAKES IN AMERICA 49 (1973).

164. *Uniform Commercial Code* § 2-313(1)(a). For a similar requirement imposed by the Consumer Product Warranties Act see note 150 *supra*.
difficulties generated by the application of the basis of the bargain test were stated by Professor Honnold in his analysis of this section for the New York Law Revision Commission.\textsuperscript{166} He pointed out that the test was not precisely defined and was apparently designed to change the Uniform Sales Act's requirement of buyer reliance.\textsuperscript{166} It is not clear what will be required under the code's standard.

Comment 3 to section 2-313 states that affirmations of fact relating to the goods, made by the seller to the buyer during the course of negotiations, become part of the sales contract unless there is clear affirmative proof to the contrary. No particular words are necessary to create a warranty, and the seller's intent when making the representation is immaterial. The pre-code requirement that a buyer must establish that he relied \textsuperscript{167} on the seller's statements when purchasing the item is abolished in face-to-face negotiations. Nonetheless, some problems remain unresolved. A buyer must establish that the seller's statements were facts rather than opinions.\textsuperscript{168} In addition, the comment appears to be confined to face-to-face transactions. While advertisements become part of the basis of the bargain, the buyer must demonstrate that he was aware of them in order to weave them into the contract.\textsuperscript{169}

The extent of buyer awareness necessary is unclear. In \textit{Putensen v. Clay Adams, Inc.},\textsuperscript{170} a patient was allowed to recover for breach of a warranty contained in sales literature read by her physician. The court found that the physician was the plaintiff's agent and that the agent's knowledge of the representations was sufficient to allow them to become part of the basis of the bargain, notwithstanding that the plaintiff was unaware of the statements. This result is sound, since the doctor performed the medical procedure, and it was his knowledge that was important in the transaction. Whether this reasoning can be extended to a case in which the agent plays a more passive role is unclear. Comment 3 points out that the issue is one of fact and will have to be decided on a case-by-case basis. The art purchaser who negotiates

\begin{thebibliography}{170}
\bibitem{165} 1 N.Y. State Law Rev. Comm'n 392-93 (1955).
\bibitem{166} \textit{See Uniform Commercial Code} § 2-313, Comment 3, ("no particular reliance . . . need be shown"). Yet some courts appear still to require that the buyer rely on the representations before they become part of the basis of the bargain. \textit{See} Stang v. Hertz Corp., 83 N.M. 217, 490 P.2d 475 (Ct. App. 1971), \textit{aff'd in part} 83 N.M. 730, 497 P.2d 732 (1972).
\bibitem{168} \textit{See text accompanying notes} 188-89 \textit{infra}.
\bibitem{169} 12 UCC Rep. Serv. 35 (1972).
\end{thebibliography}
through an agent but executes the contract himself may find that his representative's knowledge of a false advertisement is not part of the basis of his bargain.

Another unresolved issue is the point at which the representations must be made in order to become part of the basis of the bargain. Comment 1 to section 2-313 suggests that the representations are part of the contract negotiations. Thus, it would seem that all pre-contract statements communicated to the buyer or his active agent should be considered part of the basis of the bargain. Comment 7 expands this notion by pointing out that the precise time the statements are made is immaterial and that the sole question is whether they can fairly be regarded as part of the contract. It states further that if the statements are made after the closing they may be deemed modifications and thus part of the basis of the bargain. There seems to be an inconsistency between the notion in comment 1 of contract negotiations to induce the bargain, and the allowance in comment 7 of post-closing statements; however, this apparent conflict may be resolved by referring to the language of the code, which defines a contract as "[t]he total legal obligation which results from the parties' agreement . . . ." Agreement is in turn defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance . . . ." Apparently, a statement may become part of the basis of the bargain whether it is made before or after the contract is executed so long as it is part of the total bargain. Perhaps the allowance of post-closing statements is the draftsmen's recognition that as a practical matter, a buyer may be able to force a seller to rescind an otherwise valid contract after payment has been made but before the goods are actually received. This interpretation suggests that the post-closing representation must be made within a reasonable time. Comment 7 reinforces this point by providing an illustration of a post-closing warranty given while the goods are being delivered.

The statement must also relate to the goods included in the con-

171. In this situation, the code does not require additional consideration. Uniform Commercial Code § 2-313, Comment 7.
172. Id. § 1-201(11).
173. Id. § 1-201(3).
174. Indeed, many states allow consumers a period of time during which certain contracts may be rescinded. See, e.g., Ore. Rev. Stat. § 83.720 (1971). In addition, many sellers may, as a practical matter, be willing to rescind a contract with a regular customer in order to preserve buyer good will for future sales.
tract in order to become part of the basis of the bargain. When the New Mexico Court of Appeals was presented with a case in which the defendant's agent stated "you have got good tires" immediately after a car had been rented, it found the representation was not part of the basis of the bargain. The court also found that the rental agreement had not been relied on by the plaintiffs before they leased the vehicle. The court apparently felt that the contract between these parties extended only to the car rental and did not include an express warranty regarding the tires. Rather than viewing the representation as part of the basis of this bargain, the court probably considered it a separate contract which, since it was not supported by consideration, was unenforceable.

The art purchaser will have to demonstrate that he or his active agent was aware of the seller's representation, that it was a statement of

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177. Id. at 218, 490 P.2d at 476.
178. Id. at 219, 490 P.2d at 477. The court assumed that a lessor was equivalent to a seller and that therefore the transaction was within the scope of article two of the UCC. Id. at 218, 490 P.2d at 476.
179. Id. at 219, 490 P.2d at 477. This conclusion appears to fly in the face of section 2-313, Comment 3. See note 166 supra. If the contract was embodied in the lease agreement and it contained an express warranty, the plaintiff should not have to rely on the representation in order to have it become part of the basis of the bargain. Parties to a contract are generally bound by all of its terms, whether they read them or not. They should therefore be entitled to take advantage of any beneficial provision contained in the agreement.
180. The soundness of the position is questionable. Perhaps the case can be analyzed by another theory. Section 2-316, which deals with the exclusion or modification of warranties, provides that it is subject to the parol evidence rule contained in section 2-202. Comment 2 to section 2-316 points out that the purpose of this rule is to protect a seller from false allegations of oral warranties and from alleged warranties given by unauthorized agents when the principal has limited the agents' authority in the contract. Therefore, if the lease agreement in Stang was the complete and exclusive statement of the parties' agreement, then the subsequent oral representation could not have become part of the contract, and it would thus not have been part of the basis of the bargain. Similarly, if the lease agreement contained a clause which provided that the lessor's agent did not have authority to make warranties, then the unauthorized warranty would not have been part of the lessor's contract, and hence, would have been unenforceable as to him. Yet the court found that the lease agreement itself was not part of the basis of the bargain. See note 179 supra. Assuming the court was correct in its conclusion that the plaintiff contracted to lease the car before receiving any express warranty, it could have found that a vehicle with defective tires was not merchantable. The plaintiff would then have been entitled to recover for breach of the implied warranty of merchantability. See Uniform Commercial Code § 2-314. See notes 206-10 & accompanying text infra.
fact, that it related to the piece in question, and that it was made either before or within a reasonable time after the contract was executed in order to have it become part of the basis of his bargain. If the art dealer merely proclaims that his pieces are all authentic, it is likely that a court will not allow the representation to become part of the basis of the bargain.

UCC section 2-316(1) allows the seller to disclaim express warranties; however, it provides that

> words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.¹⁸¹

In *Weisz v. Parke-Bernet Galleries, Inc.*,¹⁸² the plaintiffs purchased a painting listed in the catalogue as the work of Raoul Dufy. Several years later, they learned that the picture was a forgery and sued to rescind the contract. The plaintiffs alleged that they had purchased the piece only because they believed it to be the work of the named artist, as represented in the auction’s catalogue. Parke-Bernet claimed this warranty had been negated by the disclaimer printed in slightly smaller type at the beginning of the catalogue.

The trial court found for the plaintiffs, stating:

> Surely it is unrealistic to assume that people who bid at such auctions will ordinarily understand that a gallery catalogue overwhelmingly devoted to descriptions of works of art also includes on its preliminary pages conditions of sale. Even less reasonable does it seem to me to expect a bidder at such an auction to appreciate the possibility that the conditions of sale would include a disclaimer of liability for the accuracy of the basic information presented throughout the catalogue in unqualified form with every appearance of certainty and reliability.¹⁸³

On appeal, the judgment was reversed, the appellate court concluding, in a brief per curiam opinion, that

> since no element of a willful intent to deceive is remotely suggested in the circumstances here present, the purchasers assumed the risk that in judging the paintings as readily-identifiable, original works of the named artist, and scaling their bids accordingly, they might be mistaken. . . . They will not now be heard to complain

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¹⁸¹ The omitted portion of this section refers to the parol evidence rule which is designed to protect the seller from false allegations of oral warranties. *See Uniform Commercial Code* § 2-316, Comment 2. *See note 178 supra.*


¹⁸³ 67 Misc. 2d at 1081, 325 N.Y.S.2d at 580.
that, in failing to act with the caution of one in circumstances abounding with signals of *caveat emptor*, they made a bad bargain.\textsuperscript{184}

It is worth noting that the auction occurred before the UCC became effective in New York; the case was tried under the Uniform Sales Act, which did not have any provision dealing with disclaimers of express warranties in contracts.\textsuperscript{185} The court was therefore forced to rely on common law doctrines of contract construction to interpret the disclaimer. On the other hand, the trial occurred in 1971, almost seven years after the UCC was enacted in New York.\textsuperscript{186} Perhaps the trial judge was influenced by the presence of the code even though the appellate court was not. Had the case been brought under the UCC, a more persuasive argument might have been made that the disclaimer should have been inoperative. Comment 1 to section 2-316 points out that the section is designed to protect buyers from unbargained-for and unexpected disclaimers of express warranties. The draftsmen apparently felt that it was unreasonable to allow a seller to warrant goods expressly and in the same agreement to negate that warranty. Yet even under the code, the trier of facts must decide in each case whether the express warranty and disclaimer can be construed in such a way as to be consistent with each other.

Some state legislatures, recognizing these difficulties, have enacted laws dealing specifically with art warranties. To supplement section 2-313, the New York legislature approved a bill in 1966 which provides that any art merchant who sells a work to a buyer who is not a merchant creates an express warranty if, in describing the work, he identifies it with an author or authorship.\textsuperscript{187} It is recognized that the consumer relies upon the art merchant's experience, education, and skill in designating pedigree. Therefore, the art dealer is prohibited by this law from "fall[ing] back upon his 'built-in disclaimer'—that his attribution of authorship was, after all, only his judgment."\textsuperscript{188} The art merchant

\textsuperscript{184} 77 Misc. 2d at 80-81, 351 N.Y.S.2d at 912.

\textsuperscript{185} See *Uniform Commercial Code* § 2-316, Official Comment. See also Moss v. Gardner, 228 Ark. 828, 310 S.W.2d 491 (1958). "The cases are uniform in holding that . . . § 71 of the Uniform Sales Act allows parties to contract away and exclude from their transaction all implied warranties under the Uniform Sales Act, and all express warranties except those contained in the contract." *Id.* at 831, 310 S.W.2d at 492.

\textsuperscript{186} The UCC took effect in New York on September 27, 1964. See *N.Y. U.C.C.* §§ 1-101 to 10-105 (McKinney 1964).


\textsuperscript{188} FELDMAN & WEIL, *supra* note 47, at 406.
cannot avoid the legal sanctions for misrepresentations by alleging his statement of authenticity was merely one of opinion, rather than one of fact. He may not indulge in puffing to induce his buyer to purchase a questionable work.\textsuperscript{189} The section also creates a presumption that statements concerning authenticity become part of the basis of the bargain.

Furthermore, to negate an express warranty of authenticity as to the authorship of a work of art, a disclaimer must be in writing and conspicuously set out in a separate provision "in words which would clearly and specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of the authorship . . . ."\textsuperscript{189} The New York General Business Law affords the purchaser greater protection than UCC section 2-316(1) by providing that the express disclaimer of warranty will be ineffectual if it is shown that the piece is counterfeit or if

\begin{quote}
[i]the work of fine art is unqualifiedly stated to be the work of a named author or authorship and it is proved that, as of the date of sale or exchange, such statement was false, mistaken or erroneous.\textsuperscript{191}
\end{quote}

Sections 219-b to 219-e of the New York General Business Law are not penal provisions; rather, they are aimed at consumer protection. They allow the purchaser to recover damages when he pays for an authentic work of art and receives only a forgery.\textsuperscript{192} Moreover, article 12-D provides for rescission if a sales catalogue states that a work is by a named artist and it is discovered that it was done by a student or contemporary of that artist. Such works are to labeled "attributed to a named author."\textsuperscript{193} Therefore, if the \textit{Weisz} case had arisen under this statute, the plaintiff would have been allowed to recover.

Michigan enacted a similar statute in 1970.\textsuperscript{194} While the Michigan and New York statutes go far in protecting the art consumer, they do have some limitations worth noting. First, they apply only to transactions between a merchant seller and a non-merchant purchaser.\textsuperscript{195} A merchant is defined by the Michigan law as

\textsuperscript{189}. \textit{Id.} at 177.
\textsuperscript{191}. \textit{Id.} § 219-d(3).
\textsuperscript{192}. \textsc{Feldman \\& Weil, supra note 47, at 176.}
\textsuperscript{194}. \textsc{Mich. Comp. Laws Ann. §§ 442.321-324 (West Supp. 1975).}
\textsuperscript{195}. \textit{Id.} § 442.322(a); \textsc{N.Y. Gen. Bus. Law} § 219-c (McKinney Supp. 1975).
A person who deals in works of fine art or by his occupation holds himself out as having knowledge or skill peculiar to works of fine art or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. [The term “art merchant”] includes an auctioneer who sells works of fine art at public auction as well as such auctioneer's consignor or principal.196

Whether a collector can be said to hold himself out as having such knowledge or skill is unclear.197 Second, the statutes apply only to written representations198 and would presumably not affect oral statements, which would still be governed by UCC section 2-313. Third, the laws are effective only in New York and Michigan. An attempt to enact a similar statute in Illinois was unsuccessful.199 One author suggests that the reason for the Illinois legislature’s failure to act was its belief that the UCC adequately covered the situation.200 As previously discussed, section 2-313 leaves unanswered many questions concerning art forgeries.

The code also provides for at least two201 implied warranties202

197. The collector is brought within the definition of “merchant” when he employs an art merchant or auctioneer and when he consigns works of art to an auctioneer.
199. See Art Legislation, supra note 9.
200. Id.
201. There is, however, another warranty implied in every sale of a work of art. Section 2-312 of the Uniform Commercial Code provides for a warranty of title in every contract for the sale of goods. This warranty is breached if the seller does not have good title or lacks the right to convey the item in question. Thus, a stolen or looted work of art would be subject to reclamation by its true owner, and its buyer would presumably have a cause of action for breach of this warranty. The legal problems generated by the international movement of looted works of art are very complex. In United States v. McClain, No. 74-CR-191 (D. Tex., Aug. 14, 1975), the defendants were convicted of interstate transportation of stolen goods. It appears that the defendants had sold several pieces of prehispanic art to an undercover FBI agent in Texas. Sometime before becoming involved in the ill-fated transaction, one of the defendants had contacted the FBI and had been informed that the agency could see nothing wrong with the arrangement. Id., Trial Record at 368, 581. Another defendant had embarked on the enterprise only after receiving an opinion of counsel that no illegality would be involved. Id., Trial Record at 568, 577-78. The appeal is currently pending in the United States Court of Appeals for the Fifth Circuit. United States v. McClain, No. 75-3368 (5th Cir., filed Sept. 4, 1975).

Another case is currently being litigated in three jurisdictions. In this situation the defendants claim that they purchased good title to a bronze statue, known as the Nataraja. When a newspaper article announced its location and the purchase price, India demanded its return, asserting it was a national treasure which had been stolen. See India v. Simon, Civil No. 74-3581 (C.D. Cal., filed Dec. 6, 1974); India v. Simon,
which at least one writer believes may be available to an aggrieved purchaser. 203 Section 2-314, titled "Implied Warranty of Merchantability," states:

(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. 204 Paragraph (a) of section 2-314(2) provides that for goods to be merchantable they must at least "pass without objection in the trade under the contract description . . . ." 205 Thus for a purchaser who acquires from a dealer a forgery which has passed as authentic for some time, this paragraph probably offers no remedy.

Paragraph (c) of the section indicates another test for merchantability. The goods must at least be "fit for the ordinary purposes for which such goods are used . . . ." 206 Comment 8 explains this paragraph as requiring the goods to be "'honestly' resalable in the normal course of business because they are what they purport to be." 207 If the work is discovered to be a forgery, it is not what it purports to be; however, this paragraph is apparently limited to a purchaser buying for resale rather than including the ultimate consumer. 208 While the art collector, who is not purchasing for resale, may be unable to rely on this provision, the art investor might conceivably find a remedy under it.

Paragraph (f) of the section offers still another definition of merchantability. It states that goods must at least "conform to the promises or affirmations of fact made on the container or label if

74 Civil No. 5331 (S.D.N.Y., filed Dec. 5, 1974); India v. Plowden, 1974 I. No. 9308 (High Ct. of Justice, Q.B. Div., filed Dec. 6, 1974).


202. UNIFORM COMMERCIAL CODE § 2-314 (merchantability); id. § 2-315, (fitness for particular purpose).

203. See note 150 supra.

204. UNIFORM COMMERCIAL CODE § 2-314.

205. Id. § 2-314(2)(a).

206. Id. § 2-314(2)(c).

207. Id. § 2-314, Comment 8.

208. The code provides: "protection, under this aspect of the warranty, of the person buying for resale . . . is equally necessary." Id.
If the work is signed or bears a descriptive plate on its frame, it might be argued that to be merchantable, the item must have been created by the named artist. This paragraph may afford the aggrieved purchaser relief. It is limited, however, to situations in which the object is signed or labeled and sold by a merchant dealing in goods of that kind.\textsuperscript{210}

The other implied warranty, that of "Fitness for Particular Purpose," is found in section 2-315, which provides that

where the seller . . . has reason to know [of] any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.\textsuperscript{211}

Comment 2 to this section defines "particular" purpose as specific and peculiar to the nature of the buyer's business. The comment distinguishes "ordinary" purpose, which is governed by section 2-314. When a collector acquires a work of art for aesthetic reasons alone, section 2-315 has no application. Even if the piece is purchased only because the buyer thinks it is authentic, and it is actually a forgery, the section is inapplicable, since the purpose is ordinary.

It is only when a seller has reason to know that a piece is being purchased specifically to complete a special collection or an object is desired for some other specific purpose\textsuperscript{212} that section 2-315 appears to be available. The buyer must rely on the seller's skill and judgment in order to take advantage of this implied warranty. Comment 5 points out that if the buyer insists on a particular brand, then he is not relying on the seller's skill and judgment. Thus, it can be argued that the art purchaser who, for example, desires a Fabergé egg to complete his collection is relying on the work's label rather than the dealer's skill and judgment. This argument would fail if the article was "recommended by the seller as adequate for the buyer's purposes."\textsuperscript{213}

This discussion points out the marginal utility of the code's implied warranties for the purchaser of a counterfeit work of art. In addition,

\begin{footnotes}
\item[209] Id. § 2-314(2)(f).
\item[210] Id. § 2-314(2). It should be noted that the definitions of merchantability contained in the statute are merely illustrative; other possible attributes of merchantability are intentionally left open. See id., Comment 6.
\item[211] Id. § 2-315.
\item[212] For example, the buyer may wish to donate an authentic Rodin sculpture to a museum for study. If the piece is a forgery, the museum will probably reject the donation, and the buyer's particular purpose will have been thwarted.
\item[213] Uniform Commercial Code § 2-315, Comment 5.
\end{footnotes}
they are more easily disclaimed\textsuperscript{214} than express warranties and their application to a transaction involving a spurious piece would present the plaintiff with difficult problems of proof.\textsuperscript{215}

One form of art which has received special treatment by some state legislatures is the fine print. To date, however, only Illinois\textsuperscript{216} and California\textsuperscript{217} have enacted laws which are designed to police the fine

\begin{quote}
\textsuperscript{214} "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" \textit{Uniform Commercial Code} § 2-316(2).

Section 2-316(3) provides exceptions, including "all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." \textit{Id.} § 2-316(3)(a).

\textsuperscript{215} The evidentiary problems might prove insurmountable. The difficulty is apparent when it is remembered that Van Meegeren was forced to create a forgery in jail in order to convince the authorities that several "Vermeers" were really his work. See note 14 & accompanying text \textit{supra}.

\textsuperscript{216} \textit{Ill. Rev. Stat.} ch. 121-1/2, § 361-69 (1975).


Examination of the proposed changes is helpful, however, since they illustrate the trend which legislation may be expected to take in this area of art law. Assembly bill 1054 expanded the scope of the existing act to include photographs, collages, and sculptures, as well as fine prints. The value of works covered was raised to $50, framed or unframed. The bill would have broadened the statute's disclosure provisions by requiring the seller to disclose the source of information which is required to be given the buyer under the statute. Presumably with this information, the prospective purchaser could verify any questionable statements made by a dealer.

One of the most limiting features of the existing legislation is that it applies only to prints made after the statute's enactment. A.B. 1054 would have broadened the existing law by providing that all sales after its effective date would be covered.

The most heated aspect of the controversy was sparked by the new penalty provisions. When the seller violated one disclosure requirement, the purchaser could demand a refund at any time within two years. If the buyer could prove an intentional violation, he could recover three times the purchase price, again at any time within two years. If the purchaser were forced to sue to recover the refund, the court could award attorneys' fees plus interest. Perhaps if the imposition of the penalties had been restricted to failure to disclose material facts, the critics would have been satisfied. Yet the bill would have been substantially weaker, since it would have forced courts to decide what was "material."

Beyond civil remedies, A.B. 1054 would have imposed criminal penalties for failure to inform customers of their rights and for intentionally withholding information which the seller had about the item to be sold.

In addition to this bill, the California legislature considered four other bills dealing with art law. Two were not passed. \textit{See A.B. 1053} (1975) (requiring 1% of the cost of
print market.  

Other Solutions

Registration

The most impressive suggestion to reduce the possibility of a purchaser being defrauded by acquiring a fake is the establishment of an art registry. There are a variety of possible cataloging methods. Living artists could file a certificate of authenticity, a photograph of the work in question and the name of the first purchaser. The central file could be patterned after the automobile licensing system. As an alternative, the artist could place his signature or distinctive design on the creation, followed by a number of a special code impressed in a color of the spectrum with a high atomic weight. Archives of the artists' designs would be kept. A variation of this method would be to use the artist's fingerprints on the painting, preserved by a chemical treatment.

One difficulty presented by this scheme is the reluctance of many artists to become involved in what they consider bureaucratic control; however, the registry would be as beneficial to the artists as to the consumer. It would make their work more marketable by eliminating forgeries, which tend to affect adversely the saleability of all art. Even if some artists failed to cooperate, dealers or collectors could register

certain new buildings to be spent on art); A.B. 1391 (1975) (providing an artist with a 5% royalty on the subsequent resale of his creation). The legislature did approve the remaining two, which became effective on January 1, 1976. See A.B. 1051 (1975) (concerning common law copyright); A.B. 1052 (1975) (establishing an artist-dealer fiduciary relationship). Mr. Joseph Rothman is currently circulating a draft for a fine print bill which he hopes will be introduced into the 1976 New York Legislature. See note 59 supra. See "An act to amend the general business law relating to deceptive acts in the sale to consumers of fine print in limited edition; remedies," 12th draft, Jan. 1, 1976, Joseph Rothman.

218. There have been two unsuccessful attempts to enact federal laws to regulate the fine print market. See H.R. 15578, 92d Cong., 2d Sess. (1972); H.R. 15968, 92d Cong., 2d Sess. (1972). Federal regulation would, of course, be the most effective means of policing this market since, like the Indian handicraft trade, the fine print market is nationwide.

219. For a suggested methodology, see Note, Legal Control of the Fabrication and Marketing of Fake Painting, 24 STAN. L. REV. 930, 938 (1972). See also Turning the Heat on Hot Art, ART NEWS, Jan. 1976, at 20. The article announces that the International Foundation for Art Research is undertaking a feasibility study under a grant from the Jerome Foundation for the establishment of a registry of stolen art. Ms. Bonnie Burnham, formerly Ethics of Acquisition Coordinator for the International Council of Museums, will be coordinating this project. The article stated that cataloging would be a problem since photographs would not always be available; therefore, the system will probably be based on a number of descriptive features of the art object in question.
their authenticated works of art. The fingerprinting of art need not be
confined to contemporary artists. Works of art themselves possess
unique characteristics which may be identified; therefore, any work of
art—contemporary, old, or ancient—could be cataloged. The owner
could file a certified copy of the piece's certificate of authenticity with a
central registry.

In England, two bobbies developed a grid fingerprinting method
and incorporated it into an existing centralized file of art works known
as the International Art Registry. The registry itself is modeled after
Lloyd's Register of Shipping. A duplicate file is stored at Interpol
headquarters.

A bill which would have authorized the Smithsonian Institution to
found a repository for the voluntary recording of artists' certificates of
authenticity was placed before the United States Congress in 1966. The
introduction of this bill by Congressman Jonathan B. Bingham, was
the first major step on the federal level. Unfortunately, it did not
pass, though the seed of the concept was planted.

In connection with the bicentennial celebration, the United States
government has recently established a registry for paintings created
during or before 1914. It is hoped that this catalog will expand in
scope after the 1976 celebration. If it does, it will not only reduce the
number of forgeries on the market but also decrease the incidence of art
theft, since stolen works would become virtually unsaleable.

The registry will be extremely costly and will take a long time to

220. For scientific methods of establishing authenticity see notes 43-114 & accom-
panying text supra.

221. This certificate should contain the artist's name if known, the title of the work,
the date and place of completion or approximate period, a description of the subject, the
materials and media used, a description of the method (stylistic or scientific) employed
by the expert(s) in authenticating the piece, the name(s) of the expert(s), a citation to
any published material about the piece, and any additional information which might aid
in identifying any unique characteristics of the work of art. This certificate should be
signed by the authenticating expert, if living, or certified by one who is familiar with the
work of the deceased expert. In addition, the certificate should identify the present
owner and location of the piece. In the event experts disagree on the authenticity of the
work of art, the conflict should be noted and the index should reflect the work's
questionable authenticity. Therefore, the only items not eligible for registration would
be unquestioned frauds.


224. See also Fake Art, supra note 6.

225. See Rocchia, Huge Art Inventory Launched, Oregon J., Feb. 7, 1975, § B, at 4,
col. 1. See also note 45 supra. Apparently, several eastern museums have already
begun to collect data on known works of art in a centralized computer.
become functional if it is expanded by Congress. For the present, at least, the buyer must rely on experts to authenticate works for him and current law to redress any wrong. The existence of so many counterfeit works of art, coupled with the inadequacy of the meager remedial legislation, has frightened many would-be purchasers. Until the legislators recognize the problem and act accordingly, caveat emptor must be the byword for the art purchaser.

Self-Policing

An alternative to legislation would be for the members of the art community to police themselves. There have been some modest attempts in this direction among French and American art dealers.

A code of ethics formulated and enforced rigidly by the members of the art-dealing community would be helpful in stemming the tide of forgeries. Without a means of enforcement, however, such a code would be of questionable value. Even if no code were formulated, discussion of the issues and methods of self-regulation might be beneficial, since the airing of differing viewpoints would assist dealers in developing their own ethical standards. Moreover, a show of solidarity by the dealers could help improve their image.

In France, a coalition of reputable museums and commercial art galleries finances a group of legal and technical experts authorized to track down and expose art dealers engaging in questionable practices. The Art Dealers Association of America did consider forming a panel of experts to determine the authenticity of works of art, but this idea was never implemented, and no means of affirmatively seeking out the errant art dealers exist in America.

One method which could be effective for dealer self-policing is the creation of a nongovernmental licensing association. Membership should be available to any interested party, since a large organization could keep dues low while providing many services. In addition, a

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226. See, e.g., Goetze, Antique Collectors Cautioned by Couple about 'Investment' Purchases, Oregonian, May 6, 1974, at 9, col. 1; see also Saxon, Anyone Here Want to Buy a Rubens?, ESQUIRE, Jan., 1971, at 58.


230. Cf. ART LAW, supra note 45, at 309. Of course, governmental licensing would be desirable; yet it would require legislation and implementation. It is not clear whether dealers would favor or oppose government control.
strong national or multinational organization with high visibility would be able effectively to censure wayward members. Dealers could be encouraged to publicize their affiliation, while the association could advertise its goals and standards. These procedures would enable the art-dealing community to clean its own house and thus aid the consuming public. At present, the only means of determining whether a dealer has engaged in shady practices is to contact the local Better Business Bureau, the consumer protection division of the state’s attorney general’s office, or the consumer fraud division of the local police department. These agencies may disclose any past complaints upon which action has been taken; however, many questionable practices go undetected.

Each dealer should utilize his own skills to prevent fraud. While no one but the artist may authoritatively guarantee that a work is authentic, not all works which lack this form of authentication need be labeled forgeries. The use of key phrases such as “from the school of,” “in the manner of,” or “attributed to,” could alert a purchaser to the fact that authorship is in doubt. When new information supplied by more advanced methods of authentication casts doubt upon the provenance of a work of art, a prospective buyer should be informed.

The New York Attorney General recognized the difficulty of having a work of art authenticated and the significant existing potential for fraud. He therefore urged the art community to create an organization consisting of lawyers, scientists, art historians, and members of the public interested in curtailing art fraud. The International Foundation for Art Research was thus established.

It should be noted that an organization such as this one can be even more dangerous than a corrupt dealer, since it possesses the aura of

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231. It might be claimed that the Art Dealers Association of America is this very organization. Id. Yet its main goal is not the disclosure of fraudulent practices and corrupt dealers. Perhaps it could expand its present goals and formally adopt a code of ethics as discussed above. This organization is apparently concerned with the ethics of its members in some situations. See Glueck, Marlborough Is Expelled From Art Dealers Group, N.Y. Times, Dec. 23, 1975, at 13, col. 1, discussing the expulsion of Marlborough Gallery from the association after “[t]he board decided that Marlborough, having been publicly declared by a court of justice guilty of several charges of misconduct and having been penalized accordingly, no longer meets the standards required for membership in the association.” Id. This action was taken after the decision in the Rothko case, discussed in note 221 infra.

232. In fact, several auction houses have instituted a practice of not only utilizing these terms, but defining them in the sales catalogue. See, e.g., Sotheby Parke Bernet, Los Angeles, Auction Catalog, Oct. 28, 1974, Glossary.

impartiality and scholarship. Unfortunately, the organization's internal procedures are secret, and it has been involved in some questionable practices. In one case, the foundation announced that it had tested a sculpture by subjecting it and a known ancient terracotta Ushabti to an ultraviolet examination. The conclusion of the unidentified foundation expert was that since the fluorescence produced by the two pieces was different, the sample was a forgery. This result is dubious. The sculpture in question was carved from limestone and therefore is not likely to react the same way as terracotta. In addition, leading authorities have stated, "The value of ultraviolet examinations of limestone has never been demonstrated in any publication as far as we can ascertain."  

It is hoped that the attorney general will recognize the danger of secrecy when money or power are involved and will cause the foundation to change its techniques. Attorney General Lefkowitz has been extremely active in policing nonprofit corporations which affect the public interest. When the Museum of the American Indian Heye Foundation was believed to be involved in some unlawful endeavors, a

235. Id.
237. Rorimer, Utraviolet Rays and Their Use in the Examination of Works of Art, METROPOLITAN MUSEUM OF ART (1931).
239. This diligence is quite unusual since there appear to be only four attorneys general actively fulfilling their statutory mandate and protecting the public interest by policing nonprofit corporations or public trusts. See Office of the Attorney General, Ohio Attorney General's Report to the Commission on Private Philanthropy and Public Needs, Dec. 28, 1974. An interesting question raised by this state of affairs is whether members of the public have standing to enforce public trust purposes and the fiduciary duties of those in control of the entity absent some special injury. Thus far the courts have been reluctant to allow this type of suit, although a recent article suggests that the field may be opening up, at least when the plaintiffs are within the class intended to be benefited by the public trust or charitable corporation. See Berry & Buchwald, Enforcement of College Trustees' Fiduciary Duties: Students and the Problem of Standing, 9 U.S.F.L. REV. 1 (1974).
240. The New York statute provides that the attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational, or benevolent purposes and that it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts. N.Y. EST., POWERS & TRUSTS LAW § 8-1.1(f) (McKinney 1967).
suit was brought to correct the problem. It is hoped that a similar process will cure the difficulties of the International Foundation for Art Research.

Conclusion

During the past decade, governmental officials, concerned citizens, and progressive members of the bar have focused interest on the plight of the consumer. This attention has resulted in a wave of protective legislation designed to aid aggrieved consumers. In addition, the courts have begun to lean toward this form of protection. While some jurisdictions have acknowledged the parallel problem faced by the art purchaser and have taken steps to remedy it, the effort has been modest and is by no means universal. It is hoped that consumer protection will be extended to the art market and be effectively applied to reduce the incidents of art fraud.

241. See Lefkowitz v. Museum of the Am. Indian Heye Foundation, Petition for a Compulsory Accounting, (N.Y. Sup. Ct. 1st Dept., filed June 27, 1975); Stipulation File No. 41416/75, entered Aug. 27, 1975. See also Estate of Mark Rothko, in N.Y. Times, Dec. 22, 1975, at 10, col. 4. In Rothko the New York Attorney General intervened on behalf of the Mark Rothko foundation in an action commenced by the heirs of Mark Rothko against the trustees of his estate and the Marlborough Galleries. The court held the three trustees liable for breaching their fiduciary duty to the estate and Marlborough liable for receiving excessive commissions. Id. See also Glueck, The Man the Art World Loves to Hate, N.Y. Times, June 15, 1975, § 6 (Magazine), at 12, col. 1.