

NOTE

EXPRESS YOURSELF: PROVIDING GREATER PROTECTION FOR INDEPENDENT ART AUTHENTICATORS WHO OFFER GOOD FAITH OPINIONS

I. INTRODUCTION

Opinions are dangerous things to give. Such is the prevailing school of thought in the world of art authentication, where auction houses, artists' foundations, authentication boards, and independent authenticators are facing costly litigation after offering their opinions as to artwork's authenticity, and, ultimately, value.¹ As the value of artwork increases, so too has the willingness of buyers and sellers to enter into long, costly disputes over the artwork's authenticity, leading some authentication boards to dissolve and stop authenticating work entirely.² Following the dissolution of numerous artists' foundations and authentication boards, the New York State Senate passed legislation that would amend the New York Arts and Cultural Affairs Law ("NYACAL") to offer greater protection to authenticators.³ By heightening the pleading standard and requiring plaintiffs to plead "with particularity," the bill attempts to weed out frivolous or meritless claims against authenticators.⁴ Further, the bill permits prevailing authenticators to recover legal costs, but only at the judge's discretion.⁵ Beyond its narrow jurisdictional scope, however, the bill fails to incorporate some of the protections proposed in an earlier version, which required not only that plaintiffs "plead with particularity," but that they prove each

1. Stacy Perman, *This is Bad News for People who Spend Millions on Art*, FORTUNE (Sept. 24, 2015), <http://fortune.com/2015/09/24/art-fakes-lawsuits>.

2. *Id.*; see also *Statement from the Board of Directors, ANDY WARHOL FOUND. FOR THE VISUAL ARTS*, http://warholfoundation.org/legacy/authentication_procedure.html (last visited Aug. 23, 2018) (announcing the Foundation's decision to disband).

3. S. 1229A, 138th Leg., 2015-2016 Reg. Sess. (N.Y. 2015).

4. *Sponsor Memorandum*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/S1229> (last visited Aug. 23, 2018).

5. S. 1229A.

element of their case by “clear and convincing evidence.”⁶ The earlier versions of the bill would also have permitted all prevailing authenticators to recover legal costs.⁷

The purpose of this Note is to suggest that any proposed legislation should distinguish between independent authenticators and authentication bodies such as galleries, auction houses, and artists’ foundations that have some inherent—often unavoidable—institutional, personal, or professional self-interest in an authentication.⁸ This Note proposes the legislation should specifically operate to encourage independent authenticators to offer their opinions by raising the burden of proof litigants must meet in cases brought against independent authenticators, and disinterested authentication bodies, to “clear and convincing evidence,” which would help to discourage frivolous claims and provide a more accommodating landscape for independent authenticators to provide essential authentication services to the art world.⁹

Part II of this Note discusses the pervasiveness of forgeries on the art market and their detrimental effect, the process by which artwork is authenticated, the present legal consequences that have silenced many authenticators, and the ineptness of courts to settle authentication disputes.¹⁰ Part III analyzes New York’s proposed legislation, and examines its deficiencies.¹¹ Part IV proposes an amendment to the proposed legislation, which would provide greater protection for independent, disinterested authenticators and decrease the number of authentication cases that reach the courts.¹²

II. AUTHENTICATION & THE ART MARKET

In the art world, an authenticator’s stamp of approval is often the difference between a few thousand dollars and several million.¹³ In 2015, one man sued Sotheby’s after he sold a potential Caravaggio for £42,000 on Sotheby’s advice that the work was fake.¹⁴ Later, it was

6. A. 9016, 2013-2014 Leg. Sess. (N.Y. 2014).

7. A. 9016.

8. *See infra* Part IV.A.

9. *See infra* Part IV.B.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. Perman, *supra* note 1.

14. Loulla-Mae Eleftheriou-Smith, *Sotheby’s Caravaggio Case: Former Owner of ‘The Cardsharps’ Loses Legal Bid After Sotheby’s Claimed Work—Later Valued at £10m—Was Fake*, INDEPENDENT (Jan. 16, 2015), <http://www.independent.co.uk/arts-entertainment/art/news/sothebys-caravaggio-case-former-owner-of-the-cardsharps-loses-legal-bid-after-sothebys-claimed-work->

discovered that the work was, in fact, authentic, and its value was estimated at £10 million.¹⁵ The Subparts that follow discuss what authentication is, why it is important, and the unique challenges it presents.¹⁶

*A. Art Authentication Attempts to Bring
Clarity to a Market Plagued by Uncertainty*

In the words of renowned art historian and curator Theodore E. Stebbins, Jr.: “The art market is tricky, unorganized, and unregulated.”¹⁷ Authentication is one of the means by which the industry attempts to provide some measure of certainty.¹⁸ Unlike automobiles, for example, pieces of artwork enter the market without dependable means of identification, leaving the art market uniquely susceptible to forgeries.¹⁹ Experts suggest that forgeries could represent fifty to seventy percent of the artwork in circulation on the market today, though an exact number is difficult to pinpoint since forgeries are, by nature, misrepresented and designed to go unnoticed.²⁰ The prevalence of forgeries on the market devalues the artwork of millions of artists by undermining buyers’ confidence that the work they seek to purchase is authentic and, ultimately, valuable.²¹ This Subpart will discuss the nature and pervasiveness of forgeries in the art market, the means by which authenticators detect forgeries, and the importance of authenticating artwork.²²

1. Types of Forgeries

Forgeries can be divided into three categories: (1) works “deliberately created to be sold as the product of another artist”; (2) innocently created pieces, such as reproductions or works created “in the style of” a particular artist, that are later misrepresented as original

9983980.html.

15. *Id.*

16. *See infra* Parts II.A–B.

17. Christopher Reed, *Wrong!*, HARV. MAG., <http://harvardmagazine.com/2004/09/wrong.html> (last visited Aug. 23, 2018).

18. *See* Leila A. Amineddoleh, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L.J. 59, 69 (2016) (explaining collectors’ reliance on connoisseurship).

19. Tom Mashberg, *Eyeing DNA as a Tool to Ensure Art’s Authenticity*, N.Y. TIMES, Oct. 13, 2015, at C3.

20. *See* Amineddoleh, *supra* note 18, at 68-69.

21. *See Sponsor Memorandum*, *supra* note 4.

22. *See infra* Part II.A.1–4.

masterpieces by that artist; and (3) genuine works that are fraudulently altered to increase their value.²³

The first category includes forging an artist's signature, falsifying authentication documents, or copying an entire work with the intent to sell it as the original.²⁴ Ken Perenyi, a notoriously skillful counterfeiter, fits largely into the first category.²⁵ He has fooled the experts for years, having learned to imitate even the most telling signs of age.²⁶ One of his most successful forgeries, a painting of a passion flower passed off as the work of Martin Johnson Heade, sold at Sotheby's in 1994 for \$717,500.²⁷ Mr. Perenyi's estimates that hundreds of his fakes remain on the market today.²⁸

Drained by years of FBI scrutiny, however, Mr. Perenyi has recently taken to selling his work as reproductions of the original masterpieces, thereby satisfying buyers' desire for museum quality paintings without the price tag.²⁹ Since a piece of artwork becomes a forgery only when it is misrepresented as the original, Mr. Perenyi's new business model, though slightly less lucrative, is entirely legal.³⁰ If, however, a buyer later re-sold one of his reproductions, claiming it was

23. Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 974-75 (1975); see also Lee Ann Houseman, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 509-10 (1982) (recognizing art forgeries are frequently categorized based on the method of fabrication).

24. DuBoff, *supra* note 23, at 974.

25. Patricia Cohen, *Forgeries? Call 'Em Faux Masterpieces*, N.Y. TIMES, July 19, 2012, at C1. Mr. Perenyi is not the only one to have made a career out of counterfeiting, however. See, e.g., LEONARD D. DUBOFF, *ART LAW IN A NUTSHELL* 67 (1984). Perhaps the most notorious counterfeiter was Han Van Meegeren, who successfully sold his fraudulent Vermeers until he himself admitted to forgery to escape persecution by the Dutch government for aiding and abetting its enemies during World War II. *Id.* The forgeries were so convincing, in fact, that the art world "refused to believe him until he created a 'masterpiece' in his jail cell." *Id.* More recently, in what has been described as perhaps "the greatest fake-art scam in history," German artist Wolfgang Beltracchi and his wife, Helene, were charged with selling fourteen counterfeit paintings for a total of \$22 million, though their total sales over the years is estimated to be much higher. Joshua Hammer, *The Greatest Fake-Art Scam in History?*, VANITY FAIR (Oct. 10, 2012), <http://www.vanityfair.com/culture/2012/10/wolfgang-beltracchi-helene-art-scam>.

26. Cohen, *supra* note 25 (noting Mr. Perenyi is proficient in simulating "the distinctive spider-web cracking in the paint, the tiny dots of fly droppings, and the slimy green look of old varnish when viewed under ultraviolet light").

27. *Id.*

28. *Id.* Mr. Perenyi occasionally recognizes his work in auction catalogs, an experience he likens to "bumping into an old friend." *Id.*

29. *Id.*

30. *Id.*; see also *State v. Wright Hepburn Webster Gallery, Ltd.*, 314 N.Y.S.2d 661, 664 (Sup. Ct. 1970) (finding that a convicted forger could not later be held liable for selling works as reproductions).

the original, it would fall into the second category: innocently created pieces of work subsequently misrepresented as an original.³¹

Also in the second category are works by students that are later misattributed to their masters.³² During the Renaissance, it was not uncommon for students to paint the background of their master's work.³³ To do so, these students were trained to paint in a style indistinguishable from that of their master, much to the confusion of later experts.³⁴

Finally, there are genuine works that have been in some way altered to enhance their value or marketability.³⁵ For example, Michelangelo himself once carved a cupid out of marble and then buried it in order to make it appear older, having been advised that the apparent age would increase the sculpture's value.³⁶ More commonly, it was at one point an acceptable practice to modify a painting in order to reflect contemporary tastes.³⁷ Such modifications are easily misconstrued as the work of the original artist, thus converting the work into a forgery.³⁸ Another example of this type of forgery would be a heavy-handed restoration, through which the restorer exceeds merely repairing a work for conservation purposes, and adds so much of their own work that it may no longer be accurately construed as a product of the original artist.³⁹

2. The Authentication Process

Art experts and courts alike agree that there are three lines of inquiry that are essential to the authentication of artwork: (1) connoisseurship; (2) provenance; and (3) scientific testing.⁴⁰

31. DuBoff, *supra* note 23, at 974; *see also* BERNARD EWELL, *ARTFUL DODGERS: FRAUD AND FOOLISHNESS IN THE ART MARKET* 168 (2014) (explaining that “[r]eproductions are copies made for honest purposes which may subsequently be used by others for dishonest reasons”).

32. DuBoff, *supra* note 23, at 977.

33. Houseman, *supra* note 23, at 510.

34. *Id.* at 510-11 (further suggesting this similarity in technique creates a unique opportunity for forgers to “convert a work authored by the apprentice into one attributed to the master”); *see also* Richard Lacayo, *A “New” Leonardo?*, *TIME* (May 6, 2009), <http://entertainment.time.com/2009/05/06/a-new-leonardo> (noting disagreements among experts often results in reattributed works “getting squabbled over and re-assigned again and again over time”).

35. DuBoff, *supra* note 23, at 974-75, 978-79.

36. Carol M. Richardson, *The Allure of Rome*, in *LOCATING RENAISSANCE ART* 25, 55-57 (Carol M. Richardson ed., 2007).

37. DuBoff, *supra* note 23, at 978-79.

38. *Id.* at 979.

39. *Id.* It is important to note that, while determining at which point the misrepresentation occurred is essential to attributing liability, the much more critical inquiry in the art market is whether the artwork purports to be something it is not. *Id.* at 979-80.

40. *See, e.g.*, Ronald D. Spencer, *Authentication in Court: Factors Considered and Standards Proposed*, in *THE EXPERT VERSUS THE OBJECT* 189, 195 (Ronald D. Spencer ed., 2004); Ameddoleh, *supra* note 18, at 72-73. This three-pronged approach is further endorsed by the

Connoisseurship, or examination of artwork by experts, is the primary method by which artwork is attributed to a particular artist.⁴¹ Connoisseurs have seen hundreds (if not thousands) of works by a particular artist and use their expertise to conduct an analysis of the composition, pigments, and techniques that are characteristic of that artist's "form."⁴² To detect a forgery, connoisseurs examine the artwork for noticeable deviations from the purported artist's form.⁴³

Much like a wine connoisseur, however, an art connoisseur relies heavily on instinct.⁴⁴ As one independent authenticator once told *The New Yorker*: "The initial thing is just that immediate reaction, as when we're recognizing the face of a friend in a crowd."⁴⁵ He explained: "You can go on later and say, 'I recognize her face because the eyebrows are like this, and that is the right color of her hair,' but, in effect, we don't do that. It's the totality of the thing. It feels instantaneous."⁴⁶ Other experts have similarly expressed difficulty nailing down exactly what it is they rely on to authenticate a work.⁴⁷ Thomas Hoving, former director of the Metropolitan Museum of Art, famously spoke of his "ineffable sense of connoisseurship," while another expert has referred to it as a "sixth sense."⁴⁸ After this initial reaction, much of a connoisseur's work is devoted to assembling evidence to make their opinion as apparent to others as it is to themselves.⁴⁹ This is where the connoisseur's more thorough examination of the artist's brushstrokes and pigments comes into play, as well as provenance and scientific examination.⁵⁰

International Foundation for Art Research ("IFAR"), one of the leading organizations in art authentication. Sharon Flescher, *The International Foundation for Art Research*, in *THE EXPERT VERSUS THE OBJECT* 95, 98 (Ronald D. Spencer ed., 2004).

41. See, e.g., Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 *COLUM. J.L. & ARTS* 71, 73 (2004).

42. Francis V. O'Connor, *Authenticating the Attribution of Art: Connoisseurship and the Law in Judging Forgeries, Copies, and False Attributions*, in *THE EXPERT VERSUS THE OBJECT* 3, 8 (Ronald D. Spencer ed., 2004).

43. *Id.* Experts hypothesize that forgers' interpretations of an artist's style are inevitably influenced by the qualities that were appreciated at the time the forgery was produced. Houseman, *supra* note 23, at 515. Therefore, overemphasis of a particular feature may unveil a forgery as contemporary trends change over time. *Id.* at 515-16.

44. See, e.g., Steven Mark Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 *WIS. L. REV.* 595, 596 (1991).

45. David Grann, *The Mark of a Masterpiece*, *THE NEW YORKER* (July 12, 2010), <http://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece>.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Levy, *supra* note 44, at 596; Grann, *supra* note 45.

Provenance refers to the historical documentation of ownership, or “chain of title.”⁵¹ Provenance documentation typically provides information regarding previous owners’ names, dates of ownership, means of transfer (such as inheritance, or sale by dealer or auction), and the locations where the artwork was kept.⁵² Provenance may be established in several ways, including a gallery sales receipt or a receipt directly from the artist, a gallery sticker attached to the artwork, a certificate of authenticity signed by a respected authority or expert on the artist, a film or recording of the artist discussing the work, or a statement by the artist that the work is authentic.⁵³ If the provenance can be traced all the way back to the artwork’s original creator without any gaps, there is convincing evidence that the artwork is authentic.⁵⁴ Records of provenance, however, are rarely complete, and art forgers can easily falsify provenance information by forging receipts of sale, ownership marks, or dealers’ records.⁵⁵ Records of provenance are further blurred by exogenous events like war and smuggling.⁵⁶ Therefore, although persuasive, provenance is seldom relied on as sole proof of a work’s authenticity.⁵⁷

For additional evidence, the experts and the courts turn to scientific testing, which typically involves a surface examination, and an analysis of a painting’s physical composition.⁵⁸ To conduct a surface examination, both optical microscopy and UV-testing are commonly used techniques.⁵⁹ Over time, small cracks develop in the paint, which

51. KEVIN P. RAY, *ART & BUSINESS: TRANSACTIONS IN ART & CULTURAL PROPERTY* 103 (2016).

52. *Provenance Guide*, INT’L FOUND. FOR ART RES. at 1, https://www.ifar.org/Provenance_Guide.pdf (last visited Aug. 23, 2018).

53. Nicole Martinez, *Can You Spot a Fake? The Trouble with Authenticating Art*, ART L.J. (July 22, 2015), <http://artlawjournal.com/authenticating-art>. Other ways to establish provenance include an appraisal by a recognized authority or expert on the artist, letters between recognized authorities or experts on the artist discussing the art, newspaper articles mentioning the art, inclusion of the artwork in an exhibit catalogue, or other information relayed by someone familiar with the art or artist and is qualified to speak about the artwork. *Id.*

54. Ronald D. Spencer, *supra* note 40, at 199; Amineddoleh, *supra* note 18, at 73. It is perhaps important to note that the authenticator looks at provenance only as it relates to authenticity, and not to provide the titleholder with a guarantee that their title is valid. See Jehane Ragai, *The Scientific Detection of Forgery in Paintings*, 157 PROCS. AM. PHIL. SOC’Y 164, 164-65 (2013), <https://amphilsoc.org/sites/default/files/proceedings/1570202Ragai.pdf> (distinguishing between the roles of the art historian and the curator).

55. *Provenance Guide*, *supra* note 52, at 1-2.

56. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 386 (Donald P. Arnava & N.G. Immen eds., 1st ed. 1977).

57. *Provenance Guide*, *supra* note 52, at 2.

58. Ragai, *supra* note 54, at 165.

59. *Id.*

become visible when viewed under a microscope.⁶⁰ Forgers attempt to simulate these cracks by adding a solvent to the paint which causes it to dry faster, or by drawing fine pencil lines.⁶¹ Under UV light, the varnish on older paintings will glow fluorescent green, whereas on paintings that have either been retouched or are more recent fabrications, the glow is more subtle, if it glows at all.⁶²

To examine the painting's composition, scientists employ a number of tests, including X-ray diffraction, Raman molecular spectroscopy, and pyrolysis-gas chromatography-mass spectrometry, the intricacies of which are beyond the scope of this Note.⁶³ In short, these methods examine the chemical make-up of the pigments or paint-binding materials used, which can provide important clues as to the authenticity of the artwork when they are compared to the materials commonly used at a certain point in time.⁶⁴

Like provenance, scientific analysis has its downfalls, and is generally better suited to rule out forgeries than it is to specifically identify a piece of artwork as the product of a particular artist.⁶⁵ For example, the tests could reveal that the pigment used was of a variety not available during the alleged artist's lifetime, thereby dispelling any notion he or she could possibly have painted the work.⁶⁶ Scientific analysis offers very little evidence in terms of who *did* paint the work, however, narrowing it down only so far as to determine the year that the pigment the artist used was discovered.⁶⁷ Compounding this problem are genuinely old forgeries that were painted during the purported artist's own era, and therefore cannot be detected through radiocarbon dating and pigment analysis alone.⁶⁸

60. *Id.*

61. *Id.*; see also *supra* note 26 and accompanying text. In 2010, a gallery displayed two identical paintings side by side. Ragai, *supra* note 54, at 165. One had been bequeathed to the gallery in 1924, with little knowledge of its provenance. *Id.* The second had appeared at auction in 1954, and belonged to art dealer Leonard Koester. *Id.* Under the microscope, it appeared that the 1924 version of the painting had fine pencil lines simulating cracks, suggesting the 1924 version of the painting was inauthentic. *Id.* at 165-66. Scientific testing later confirmed the painting's inauthenticity. *Id.* at 168.

62. Ragai, *supra* note 54, at 166; see also *supra* note 26 and accompanying text.

63. Ragai, *supra* note 54, at 167-69. For an illustration of how such scientific testing may be used to disprove authenticity, see Spencer, *supra* note 40, at 202-04.

64. See Ragai, *supra* note 54, at 167-69.

65. Spencer, *supra* note 40, at 202; DuBoff, *supra* note 23, at 981.

66. See, e.g., Ragai, *supra* note 54, at 168 (providing an example of scientific analysis disproving the authenticity of a purported Jackson Pollock where the work contained postdated pigments).

67. See *id.*

68. Grann, *supra* note 45.

In an attempt to clear up some of this uncertainty, the Global Center for Innovation at the State University of New York at Albany has recently begun to develop methods of infusing artwork with synthetic DNA as a sort of “forensic signature.”⁶⁹ The new technology would implant DNA that is unique to each item and connect to a database serving as the consensus of authoritative information on the work.⁷⁰ Until scientific analysis becomes more reliable, however, courts will continue to depend primarily on the opinions of experts, which makes encouraging independent, reliable authentication especially important.⁷¹

3. The *Catalogue Raisonné*

A *catalogue raisonné* is a scholarly compilation of all known works of art produced by a particular artist,⁷² which serves as the primary reference for the art market on that particular artist.⁷³ *Catalogue raisonnés* typically include a description of the artwork, its dimensions and medium, an illustration, the date the artwork was created, its provenance, and, usually, its exhibition history.⁷⁴ To determine whether or not a piece of artwork belongs in an artist’s *catalogue raisonné*, the author of the *catalogue raisonné* necessarily makes a determination as to the artwork’s authenticity.⁷⁵ Therefore, sales typically increase when artwork is added to a *catalogue raisonné*, since buyers have greater assurance that the work is genuine.⁷⁶

At the same time, absence of an authentic work from an artist’s *catalogue raisonné* may render the work unsaleable and, ultimately, worthless.⁷⁷ As a result, unhappy buyers resort to the courts to challenge

69. Mashberg, *supra* note 19, at C3.

70. *Id.* While synthetic DNA technology is new, the idea of a “forensic signature” is not. See DUBOFF, *supra* note 25, at 99. Previous scholars have proposed preserving the artist’s fingerprint on a painting with some sort of chemical treatment, then adding the fingerprint to an international art registry. *Id.*

71. See DUBOFF, *supra* note 25.

72. *Catalogues Raisonnés Users’ Guide*, INT’L FOUND. FOR ART RESEARCH, https://www.ifar.org/users_guide.php (last visited Aug. 23, 2018).

73. N.Y.C. BAR ASSOC., REPORT ON LEGISLATION BY THE ART LAW COMMITTEE 3 (2016), <http://www2.nycbar.org/pdf/report/uploads/20072498-SupportedAmendmentstoAuthenticityOpinions.pdf>.

74. *Catalogues Raisonnés Users’ Guide*, *supra* note 72. The amount of information included in a *catalogue raisonné* may range from minimalist details to extensive biographical information, provenance, exhibition history, bibliography, and commentary on individual pieces of artwork. *Id.*

75. *Id.*

76. *Collectors, Artists and Lawyers: Fear of Litigation is Hobbling the Art Market*, THE ECONOMIST (Nov. 24, 2012), <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers>. For example, it is estimated that sales of Modigliani drawings would increase by about twenty percent worldwide if a new, better *catalogue raisonné* was published for the artist. *Id.*

77. N.Y.C. BAR ASSOC., *supra* note 73, at 3. Both Sotheby’s and Christie’s tend to reject

determinations of authenticity (or, in most cases, inauthenticity) which they find unsatisfactory.⁷⁸ In 2010, the Andy Warhol Foundation, which produced the artist's *catalogue raisonné*, spent nearly \$7 million to defend allegations it had wrongly refused to authenticate a Warhol self-portrait.⁷⁹ In light of the high cost of litigation, the Warhol authentication board ultimately disbanded.⁸⁰ After the board disbanded, prices of the works that had been included in the artist's *catalogue raisonné* skyrocketed.⁸¹ This is due, in part, to the definitive nature of the artwork's authentication, since nothing more can be added or removed from the *catalogue raisonné* after the board's dissolution.⁸² However, as authentication boards and other authoritative bodies trend towards withholding their opinions, or disbanding entirely, uncertainty surrounding works that are uncertified or not yet included in the *catalogue raisonné* only continues to grow, and growing uncertainty further compounds the necessity for *catalogues raisonnés*.⁸³

In an effort to limit their liability, some authors of *catalogues raisonnés* are now publishing the catalogues online, where they are capable of being quickly and easily modified at a low cost.⁸⁴ As one expert put it, it's more difficult to sue a "constantly moving target."⁸⁵ There are downsides to the "constantly moving target," however, and it is possible that collectors will spend less on a piece of artwork if its stamp of approval can be easily revoked at the click of a button.⁸⁶

artwork that is not included in a *catalogue raisonné*. Laura Gilbert, *London's Mayor Gallery Files Lawsuit Against Agnes Martin Catalogue Raisonné*, THE ART NEWSPAPER (Oct. 25, 2016), <http://theartnewspaper.com/news/news/london-s-mayor-gallery-files-lawsuit-against-agnes-martin-catalogue-raisonne>; Eileen Kinsella, *A Matter of Opinion*, ARTNEWS (Feb. 28, 2012), <http://www.artnews.com/2012/02/28/a-matter-of-opinion>.

78. See, e.g., N.Y.C. BAR ASSOC., *supra* note 73, at 3-4 (noting the Pollock-Krasner Foundation continues to receive legal challenges to its determinations of authenticity, though the board disbanded upon completion of the artist's *catalogue raisonné*); Gilbert, *supra* note 77.

79. Rachel Spence, *Catalogues Raisonnés: The Corrected Works*, FIN. TIMES (June 26, 2015), <https://www.ft.com/content/0ea0b826-199a-11e5-8201-cbdb03d71480?siteedition=intl>.

80. *Statement from the Board of Directors*, *supra* note 2.

81. Perman, *supra* note 1.

82. *Id.*

83. *Id.*; Spence, *supra* note 79 (noting the absence of authentication services renders the *catalogues raisonnés* especially important). In response, some living artists have started their own digital archives or *catalogues raisonnés*, which have typically been done posthumously. Perman, *supra* note 1.

84. Caroline Rossiter, *Cézanne Goes Digital: Catalogue Raisonné Launches Online*, APOLLO (Dec. 22, 2014), <http://www.apollo-magazine.com/cezanne-goes-digital-catalogue-raisonne-launches-online> (noting the catalogue may be changed as new research becomes available); Spence, *supra* note 79; see, e.g., *The Paintings of Paul Cézanne*, <http://www.cezannecatalogue.com> (last visited Aug. 23, 2018).

85. *Fear of Litigation is Hobbling the Art Market*, *supra* note 76.

86. *Id.*

4. The Importance of Authenticating Artwork

Authentication is necessary to sustain a thriving art market by providing buyers with the confidence necessary to spend millions of dollars on a piece of artwork.⁸⁷ Additionally, it preserves the market's integrity by making it more difficult for forgeries to enter circulation.⁸⁸ This Subpart establishes how authentication creates value, and lays out the reciprocal relationship between increasing costs and the need for connoisseurs.⁸⁹

a. Authentication Increases Value

Opinions concerning the authenticity of artwork are inherently subjective and rarely static.⁹⁰ To obtain such a determination, we rely on connoisseurs whose line of work is entirely dedicated to understanding a particular artist's characteristic form well enough to identify even the most discreet deviation. This begs the question: why are consumers willing to pay millions of dollars more for an original piece of artwork than they would for an identical copy?⁹¹ Psychologists have identified two components essential to the valuation of artwork: performance, or the assessment of the artwork as a unique creative act, and contagion, or the degree of physical contact with the original artist.⁹² It has been suggested that people consider completed works of art as analogous to the end of a performance, assigning value to artwork based on their perceptions of the process by which the artwork was created.⁹³ An original piece of artwork, unlike a forgery, is the result of a creative process, and will therefore hold more value.⁹⁴ Under the "law of contagion," consumers place added value on the special quality a piece of artwork acquires through physical contact with its well-known author, and will likely pay more for a painting that was physically touched by Picasso than they would for a forgery that was not.⁹⁵

Additionally, consumers place value on artwork based on its perceived market value.⁹⁶ Original artwork is unique and therefore an

87. See *Sponsor Memorandum*, *supra* note 4.

88. See *id.*

89. See *infra* Part II.A.4.a–b.

90. See, e.g., DuBoff, *supra* note 23, at 980-81; Lacayo, *supra* note 34.

91. See George E. Newman & Paul Bloom, *Art and Authenticity: The Importance of Originals in Judgments of Value*, J. EXPERIMENTAL PSYCHOL. 1 (2011), <http://minddevlab.yale.edu/sites/default/files/files/art-and-authenticity.pdf>.

92. *Id.*

93. *Id.* at 2.

94. *Id.*

95. *Id.*

96. *Id.* at 3.

inherently “scarce commodity.”⁹⁷ When an artist dies, the price of their work tends to increase, presumably because no more work by that artist will be created, and supply is, at that point, permanently limited.⁹⁸ Beyond supply and demand, however, consumers tend to pay more for a piece of artwork if they suspect others would do the same.⁹⁹ There exists what some have coined the “ineffable mystique of the genuine,”¹⁰⁰ which causes buyers to associate “genuine” with “more valuable,” and, therefore, more expensive.¹⁰¹

b. The Cyclical Relationship Between Increasing Costs, the Increasing Incentive to Forge, and the Increasing Necessity of Authentication

In recent years, demand for fine art has skyrocketed, and with it, so has the price.¹⁰² The ten most expensive auction sales, after adjustment for inflation, all happened after 1990, the highest of which reached \$154 million.¹⁰³ In addition, artwork is increasingly viewed as an investment opportunity, and rightly so.¹⁰⁴ In 2013, Jackson Pollock’s *Number 19* sold at auction for more than \$58 million.¹⁰⁵ The painting had last sold for \$2.4 million in 1993, therefore yielding a staggering 2317% return on investment in twenty years.¹⁰⁶

Increased market value has led to an increase in the number of forgeries on the market by creating greater incentive to forge.¹⁰⁷ The

97. *Id.*

98. *Id.*

99. *Id.*

100. Cohen, *supra* note 25.

101. Newman & Bloom, *supra* note 91, at 3.

102. Amineddoleh, *supra* note 18, at 67.

103. *Id.* at 66-67 (noting that this price is adjusted for inflation).

104. Patrick Eoghan Murray & Edward Alan Woods, *Fighting the Forgers*, FIN. ADVISOR (Jan. 27, 2015), <http://www.fa-mag.com/news/fighting-the-forgers-20581.html>. According to the 2016 Deloitte Art & Finance Report, sixty-four percent of art collectors cite investment return as a motivating factor in their purchases, up from forty-seven percent in 2014. DELOITTE, ART & FINANCE REPORT 2016, 96 (2016), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artandfinancereport-21042016.pdf>.

105. Agustino Fontevicchia, ‘New Era’ for Art Markets as Collectors Drop Half a Billion at Christie’s Contemporary Sale, FORBES (May 20, 2013), <http://www.forbes.com/sites/afontevicchia/2013/05/20/new-era-for-art-markets-as-collectors-drop-half-a-billion-at-christies-contemporary-sale/#abf701d36917>.

106. *Id.*

107. Amineddoleh, *supra* note 18, at 67-68 (discussing the relationship between a robust marketplace and an increase in the prevalence of forgeries); *see also* DUBOFF, *supra* note 56, at 386 (“At present, the demand for quality art exceeds the existing supply of authentic pieces. Not surprisingly, this drives the prices up and creates the necessary incentive for fraud.”).

increased number of forgeries, combined with increased prices, has increased the necessity for buyers to consult with an expert before making a purchase.¹⁰⁸ This rise in connoisseurship has led to even greater increases in price, since determinations of authenticity inherently increase the artwork's value—the more confident a buyer is that a painting is authentic, the more they are willing to spend.¹⁰⁹ The relationship is circular, this increase in price again increasing the incentive to forge, and further necessitating the use of connoisseurs.¹¹⁰

*B. Authentication Presents Significant Challenges
that Need to Be Addressed*

The current legal system's failure to provide adequate liability protection for those who offer opinions regarding authenticity, as well as the high cost of litigation, has instilled fear in the artistic community.¹¹¹ Dr. Abigail Gerds, director of the Winslow Homer *catalogue raisonné*, opined, "The stakes are just too high. I believe we should all get out of the opinion giving business," which is precisely what a number of authenticators have done.¹¹² The following Subparts will discuss the variety of theories on which an authenticator can be sued, the lack of regulation surrounding authentication, and the effect of an increasingly costly and litigious environment, which has silenced a number of authenticators.¹¹³

1. History of Lawsuits Against Authenticators

Determinations of authenticity are rarely static.¹¹⁴ Opinions may vary from expert to expert, and often change over time as new information becomes available.¹¹⁵ When the value of a painting changes based on a shift in opinion, unhappy buyers and sellers may seek legal recourse.¹¹⁶ In *Hahn v. Duveen*,¹¹⁷ the first high profile authentication dispute, a plaintiff buyer sued for slander of title, claiming that the defendant authenticator falsely and maliciously stated to a reporter that the painting the plaintiff was in negotiations to sell was fake, without

108. See Amineddoleh, *supra* note 18, at 67-69.

109. *Id.* at 69.

110. *Id.*

111. See, e.g., Perman, *supra* note 1.

112. Amineddoleh, *supra* note 18, at 80-82.

113. See *infra* Part II.B.1-4.

114. See, e.g., Lacayo, *supra* note 34.

115. DuBoff, *supra* note 24, at 981.

116. See *id.* at 982.

117. 234 N.Y.S. 185, 187 (Sup. Ct. 1929).

ever having seen it.¹¹⁸ The case ultimately settled out of court, but continues to stand for the notion that art experts can be held accountable for their opinions when their conduct does not rise to the level of care expected of those in their position.¹¹⁹

It is difficult, however, to comprehensively describe the variety of lawsuits authenticators and artists' foundations must guard themselves against.¹²⁰ The seemingly unlimited list includes negligence,¹²¹ negligent misrepresentation,¹²² fraud,¹²³ product disparagement,¹²⁴ false designation of origin,¹²⁵ breach of warranty,¹²⁶ invasion of the right of property,¹²⁷ defamation,¹²⁸ interference with business relations,¹²⁹ and antitrust.¹³⁰

It is important to note that both those who have been retained to give a determination of authenticity and have therefore had an opportunity to enter into a "hold-harmless" agreement, and those who have not, may be subject to suit.¹³¹ For example, in *Hahn v. Duveen*,¹³²

118. *Id.*; see also Ameddoleh, *supra* note 18, at 70-72 (discussing the landmark case); Kai B. Singer, "Sotheby's Sold Me a Fake!"—Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art, 23 COLUM.-VLA J.L. & ARTS 439, 446 (2000) (same).

119. Singer, *supra* note 118, at 446.

120. See, e.g., RAY, *supra* note 51, at 104 (listing the variety of causes of action authenticators have been subject to in recent years).

121. See Levy, *supra* note 44, at 597-609. In *Luxmoore-May v. Messenger May Baverstock*, the plaintiffs, who wished to sell two small paintings of foxhounds, consulted a fine arts auction firm. *Id.* at 597-98. The auction house called the paintings "dirty" and "ill-drawn," valuing them at thirty to fifty pounds as a pair. *Id.* at 598. The paintings were eventually sold at auction to a rival dealer for £840, and, a few months later, the rival dealer sold the paintings at Sotheby's for £88,000. *Id.* Shortly thereafter, the painting was again resold for what was "presumably a good deal more than £88,000." *Id.* "The plaintiffs sued the auction firm for professional malpractice, alleging that it negligently failed to . . . inform them of the paintings' potential value." *Id.*

122. See, e.g., *Foxley v. Sotheby's, Inc.*, 893 F. Supp. 1224, 1232 (S.D.N.Y. 1995).

123. See *id.* at 1228-32.

124. See, e.g., *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1115-16 (S.D.N.Y. 1992).

125. See, e.g., *Boule v. Hutton*, 328 F.3d 84, 90 (2d Cir. 2003).

126. See, e.g., *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3, 4-7 (1st Cir. 1988). In *Wilson v. Hammer Holdings, Inc.*, the plaintiffs purchased a painting from the defendant gallery which came with a written note that stated "the authenticity of t[his] picture is guaranteed." *Id.* at 4. When the painting was later examined and pronounced fake, the plaintiffs sued the gallery for negligence and breach of warranty. *Id.*

127. See, e.g., *Hahn v. Duveen*, 234 N.Y.S. 185, 187 (Sup. Ct. 1929).

128. See, e.g., *McNally v. Yarnell*, 764 F. Supp. 838, 845 (S.D.N.Y. 1991).

129. See, e.g., *id.*

130. See, e.g., *Simon-Whelan v. Andy Warhol Found. for Visual Arts, Inc.*, No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *5 (S.D.N.Y. May 26, 2009).

131. See, e.g., Darlene Fairman, *The True Cost of Authentication Litigation*, ART & ADVOCACY, Spring/Summer 2013, at 11, <http://www.herrick.com/content/uploads/2016/02/Vol-15-SpringSummer-2013.pdf>. Those who offer their opinion without being retained may be referred to as "gratuitous" authenticators. *Id.*

132. 234 N.Y.S. 185 (Sup. Ct. 1929).

an authenticator was sued for defamation after an interview in which the reporter had asked his opinion of Hahn's painting.¹³³ Even where authenticators *do* have an opportunity to obtain a liability release from their clients, however, there is no guarantee the agreement will hold up in court.¹³⁴ In *Simon-Whelan v. Andy Warhol Foundation for Visual Arts*, the court stated that a provision releasing the foundation's authentication board and its directors from liability would not be upheld where doing so would allow the board to insulate itself from intentional wrongdoing such as fraud.¹³⁵

2. Authentication Lacks Regulation

Unlike doctors, lawyers, and other professionals, art experts are not required to obtain any kind of license or certification in order to practice, making the degree of skill required for qualification as an "expert" somewhat difficult to define.¹³⁶ In *Hahn*, the court instructed the jury "to determine just how much of an expert a witness is . . . by his knowledge, his experience, his study and his ability to assimilate and apply this knowledge, study, and experience."¹³⁷ This, however, is specific to just one case, and the legal standards for authenticators are difficult to anticipate.¹³⁸ The developing field of scientific testing in authentication further exacerbates the problem, as courts can decide on a case by case basis that even the most rigorous examination by a connoisseur is insufficient without additional scientific evidence.¹³⁹ This lack of uniformity within the industry and within the courts has contributed to the growing trend of authenticators remaining silent.¹⁴⁰ Currently, there is a French modernist¹⁴¹ whose suspected drawings and watercolors cannot be sold for their full market value because authenticators are too

133. *Id.*

134. *See Simon-Whelan*, 2009 WL 1457177, at *4.

135. *Id.*

136. *See Levy*, *supra* note 44, at 600. In the 1960s, New York State attempted to pass legislation which would impose a certification system and grant qualified immunity to accredited authenticators whose opinions turned out to be incorrect. *See infra* Part III.A. The legislation was never enacted. *See infra* Part III.A.

137. *Hahn*, 234 N.Y.S at 190.

138. Mostafa Heddaya, *Will the Sotheby's Caravaggio Decision Impact the Practice of Authentication?*, BLOUIN ARTINFO (Jan. 29, 2015), <http://www.blouinartinfo.com/news/story/1073843/will-the-sothebys-caravaggio-decision-impact-the-practice-of>.

139. *See id.*

140. *See Danielle Rahm*, *Lack of Authenticating Expert Renders Valuable Artwork Practically Worthless*, FORBES (May 16, 2013), <https://www.forbes.com/sites/daniellerahm/2013/05/16/lack-of-authenticating-expert-renders-valuable-artwork-practically-worthless/#1699cbf264ea>.

141. *Id.* Since the author of the article publicly offers her opinion as to the authenticity of one of the artist's drawings, she does not refer to him by name, but emphasizes his status and the effect his paintings had in shaping art history during the twentieth century. *Id.*

nervous to weigh in on their authenticity.¹⁴² The question at the heart of the matter is who is the recognized expert?¹⁴³ And what, exactly, *is* an expert?¹⁴⁴ While a general consensus has been formed as to the leading “experts” on his paintings and a *catalogue raisonné* has been assembled, the same cannot be said for his drawings.¹⁴⁵ One authenticator is certain of a drawing’s authenticity, but cannot publicly attest to it because it lacks the provenance for today’s market and “authentication confusion.”¹⁴⁶

3. Legal Consequences are Silencing Authenticators

The increasing cost of artwork has increased the number of lawsuits filed against authenticators.¹⁴⁷ Authenticators, who may earn \$5000 to \$10,000 for their services, risk being subject to lawsuits that could cost \$500,000.¹⁴⁸ Even for prevailing authenticators, the cost of litigation is seen as prohibitive.¹⁴⁹ After all, “[t]he problem is you may win in court but in the process spend thousands of hours and hundreds of thousands of dollars to defend your opinion rather than practice your profession.”¹⁵⁰

In light of the current legal climate, the trend among artists’ foundations and authentication boards has been to cease authenticating work entirely.¹⁵¹ In 2012, the Andy Warhol Foundation chose to dissolve its authentication board following a particularly costly year, having spent more than \$6 million to defend a single case.¹⁵² A statement by its board of directors indicates that the decision was made with the intention of reallocating its resources toward grant-making and other charitable efforts in support of the visual arts.¹⁵³ Other estates and foundations have followed suit, including those representing Keith Haring, Jean-Michel

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See, e.g.,* Daniel Grant, *New Legislation Would Protect Art Authenticators Against ‘Nuisance’ Lawsuits*, OBSERVER (June 4, 2014), <http://observer.com/2014/06/dont-shoot-the-messenger-if-passed-new-legislation-would-protect-art-authenticators-against-nuisance-lawsuits>.

148. *Id.*

149. *Id.* (“We won every single one of those lawsuits, but the process was extraordinarily expensive, costing us at least \$10 million defending ourselves.”).

150. *Id.* (quoting Judith Bresler, a New York lawyer who helped draft legislation that would provide greater protection for authenticators who offer their opinion in good faith).

151. N.Y.C. BAR ASSOC., *supra* note 73, at 4 n.2.

152. *Id.* at 4.

153. *Statement from the Board of Directors*, *supra* note 2.

Basquiat, and Roy Lichtenstein.¹⁵⁴ Independent authenticators are similarly reluctant to offer their opinions.¹⁵⁵

This silence by authenticators is increasingly common, and the art world felt its devastating effects in 2011, when New York City's Knoedler Gallery—now shut after 165 years of business—was caught selling millions of dollars of fake abstract expressionist paintings.¹⁵⁶ Several experts believe the scandal could have been avoided entirely had authenticators felt comfortable expressing their opinion that the work was inauthentic prior to its sale.¹⁵⁷

In addition to closing their doors, authentication boards are substantially increasing their liability insurance.¹⁵⁸ For example, the director of the Richard Diebenkorn Foundation predicted the Foundation would increase its liability insurance by millions of dollars before publishing its *catalogue raisonné* this year.¹⁵⁹ On the other hand, the

154. Perman, *supra* note 1. In 2014, the Keith Haring Foundation was sued for \$40 million after labeling nine collectors' works as fakes. Julia Halperin, *No More Silence of the Scholars*, THE ART NEWSPAPER (Mar. 14, 2014), <http://old.theartnewspaper.com/articles/No-more-silence-of-the-scholars/31622>. That same month, Basquiat's sisters sued Christie's to prevent the sale of some of their brother's work because they had doubts concerning its authenticity. *Id.* For The Roy Lichtenstein Foundation, the decision to close its doors was a response to the high cost of liability insurance premiums. *See infra* note 160 and accompanying text.

155. Halperin, *supra* note 154.

156. N.Y.C. BAR ASSOC., *supra* note 73, at 4. It has been noted that forgers favor modern abstract expressionist styles since "mimicking Jackson Pollock's drip paintings is easier than imitating old masters such as Rembrandt." Amineddolah, *supra* note 18, at 74.

157. Perman, *supra* note 1; *see also* N.Y.C. BAR ASSOC., *supra* note 73, at 4 (noting authenticators' silence can produce "graphic" results, as in the case of the Knoedler Gallery). The gallery and its former director, Ann Freedman, have since been subject to ten different lawsuits in which plaintiffs claim the gallery knew, or should have known, the artwork was fake. Laura Gilbert & Bill Glass, *Ann Freedman, Former Knoedler Director, Settles Final Lawsuit*, THE ART NEWSPAPER (Sept. 11, 2017), <https://www.theartnewspaper.com/news/ann-freedman-former-knoedler-director-settles-final-lawsuit>; Perman, *supra* note 1. In one such case, a collector had purchased a purported Jackson Pollock from the Gallery for \$17 million. Kinsella, *supra* note 77. When he brought the piece to Sotheby's and Christie's to explore the possibility of a sale, both auction houses rejected the work, citing its absence from Pollock's *catalogue raisonné* and uncertainty surrounding its provenance. *Id.* The collector sued both the Gallery and Ms. Freedman for false representation, alleging it had been represented to him that the pieces were in the process of being added to the *catalogue raisonné*. *Id.* The International Foundation for Art Research, which maintains a database for both published *catalogues raisonnés* as well as those still in preparation, confirmed the catalogue was not in the process of being updated. *Provenance Guide*, *supra* note 52, at 4; Kinsella, *supra* note 79.

158. N.Y.C. BAR ASSOC., *supra* note 73, at 4-5 n.2.

159. *Collectors, Artists and Lawyers: Fear of Litigation is Hobbiling the Art Market*, *supra* note 76. In 2012, a Diebenkorn painting sold at Christie's for \$13.5 million, a record high for the artist. *Id.* Following the sale, a number of collectors whose paintings the Foundation had previously refused to authenticate, rendering them much less valuable, reportedly sent the Foundation threatening letters. *Id.* The letters, in part, inspired the insurance hike prior to the release of the *catalogue raisonné*, which is likely to draw even more backlash from collectors whose paintings were not included. *See id.*

Roy Lichtenstein Foundation chose to cease authenticating entirely, rather than renew its costly insurance premium.¹⁶⁰ Multi-million dollar insurance is similarly not a viable option for independent authenticators, who often work for universities and live off modest incomes.¹⁶¹

4. Courts are Ill-Suited to Settle Authentication Disputes

In the world of art authentication, the court often finds itself at odds with perhaps an even more important judge: the market.¹⁶² In determining whether a piece of artwork is authentic or just an impressive forgery, a civil matter, the standard of proof is “more likely than not.”¹⁶³ However, a jury verdict declaring a painting is “more likely than not” the work of a particular artist is not always enough for a potential buyer to fork over millions of dollars for the painting, just as a gallery owner advertising the paintings displayed are “more likely than not” the work of a particular artist would not draw a crowd.¹⁶⁴ The market, therefore, is able to effectively overturn the jury’s verdict.¹⁶⁵ Following the settlement in *Hahn v. Duveen*, the market’s opinion of the disputed painting remained largely unaffected.¹⁶⁶ Duveen remained a prominent dealer in the international art market, and the painting wound up locked in a bank vault for the duration of the Great Depression and World

160. Kinsella, *supra* note 77.

161. N.Y.C. BAR ASSOC., *supra* note 73, at 4-5 n.2; *see also*, Irina Tarsis, *The Shifting Sands of Art Authentication: As Calder Foundation Finds Itself in Court Again Who Will Have the Last Word Regarding Authentication?*, CTR. FOR ART L. (Apr. 23, 2014), <https://itsartlaw.com/2014/04/23/shifty-art-authentication> (“[N]either authenticators nor art historians are able to access the insurance they require to protect them for providing their professional opinion.”).

162. Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. TIMES, Aug. 6, 2012, at C1. While authentication disputes typically deal with the foundations or estates of artists who are long since deceased, even a living artist’s own word may be overturned by the court. Graham Bowley, *You Didn’t Paint This? Prove It.*, N.Y. TIMES, Jul. 10, 2016, at AR1. A disgruntled buyer recently sued artist Peter Doig, who claims he didn’t actually paint a piece the buyer bought from a third party. *Id.* After a week-long bench trial, the judge ruled that the painting was “absolutely not by Mr. Doig,” as Mr. Doig himself confirmed. RAY, *supra* note 51, at 123. The value of the painting, had Mr. Doig lost the case, could have been up to \$25 million. Bowley, *supra*. Even if the artist’s word had been overturned by the court, however, it is unlikely that buyers would line up to purchase a painting that the artist himself, and the dealer who represents him, have publicly disavowed. *Id.*

163. Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, in THE EXPERT VERSUS THE OBJECT 143, 143 (Ronald D. Spencer ed., 2004).

164. *See id.*

165. Cohen, *supra* note 162.

166. *Important Old Master Paintings and Sculpture*, SOTHEBY’S (Jan. 28, 2010), <http://www.sothebys.com/en/auctions/ecatalogue/2010/important-old-master-paintings-and-sculpture-n08610/lot.181.html>.

War II.¹⁶⁷ Later attempts to sell the painting were unsuccessful, and the work eventually disappeared from public view.¹⁶⁸

Because of the overwhelming power of the art market in authentication disputes, the current legal system is unable to provide the definitive determination of authenticity that plaintiff buyers and sellers seek.¹⁶⁹ The litigants, of course, present a number of experts whose testimonies serve to guide the jury in their decision-making.¹⁷⁰ As in medical malpractice cases in which several doctors testify, juries must often decide between competing expert opinions.¹⁷¹ It has become clear that judges and juries in authentication cases, however, weigh evidence very differently from the connoisseurs.¹⁷² For example, while a judge may give added weight to a signature on a painting, an art historian is much more likely to value the artist's technique and the very particular details of the brushstrokes, visible only to the well-trained eye.¹⁷³ Further compounding the issue of competing testimonies is the growing divide between the opinions presented by old-school connoisseurs and the scientific evidence presented by new forensic analysts.¹⁷⁴ In *Thome v. Alexander & Louisa Calder Foundation*,¹⁷⁵ the judge concluded that courts lack the education necessary to appropriately weigh the experts' opinions.¹⁷⁶

167. *Id.*

168. *Id.*

169. *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 26 (App. Div. 2009) ("It is the aftermath of the *Greenberg Gallery* decision that illustrates the inability of our legal system to provide a definitive determination of authenticity such as is sought by plaintiff here.")

170. *See, e.g.*, Cohen, *supra* note 162.

171. *Id.* As discussed, there is currently no standard as to who may hold themselves out as an expert, which makes assessing the credibility of each expert all the more difficult. *See*, Rahm, *supra* note 140.

172. Cohen, *supra* note 162.

173. *Id.*

174. *See, e.g.*, Patricia Cohen, *A Real Pollock? On This, Art and Science Collide*, N.Y. TIMES, Nov. 25, 2013, at A1; Milko den Leeuw & Jane Sharp, *Should Paintings Stand Above the Law?*, AUTHENTICATION IN ART, <http://authenticationinart.org/aia-archive/art-law/art-law-aia-articles> (last visited Aug. 23, 2018). Recently, a disputed Jackson Pollock, purchased for just \$5, made headlines after a partial fingerprint on the canvas was matched to one on a paint can used by Pollock, and the paint was matched to samples from his studio. Dan Fletcher, *How do Experts Authenticate Art?*, TIME (Oct. 15, 2009), <http://content.time.com/time/arts/article/0,8599,1930303,00.html>. Despite this compelling forensic evidence, however, experts remain hesitant to certify the work for its lack of provenance and perceived deviation from Pollock's signature style. *Id.* The market, on the other hand, may bite. *Id.* The owner was recently offered \$5 million dollars for the painting, which she declined. *Id.*

175. 890 N.Y.S.2d 16 (App. Div. 2009).

176. *Id.* at 25 ("[C]ourts have neither the education to appropriately weigh the experts' opinions nor the authority to independently gather all available appropriate information . . ."). The judge further contrasted our legal system to that of France, where courts are permitted to appoint their own neutral expert with the requisite level of expertise to help them decide between competing

Ultimately, a declaration of authenticity by a court is an inappropriate remedy for plaintiffs, since their ability to sell a painting at a certain price is wholly a function of the marketplace, and determinations of authenticity rely on such complex and subjective assertions of fact.¹⁷⁷ One scholar has suggested that, in the wake of recent lawsuits, it is clear that “a breakthrough can only be reached when a forger pleads guilty or when suspected art spotters or dealers acknowledge the charges of tax fraud or money laundering pressed against them.”¹⁷⁸

III. THE CURRENT LAW IS INADEQUATE TO PROTECT AUTHENTICATORS

For decades, the art world has sought legislation that would protect experts from liability for rendering opinions on authenticity.¹⁷⁹ In 1968, New York passed the NYACAL, which protected collectors in transactions with art dealers, but failed to pass a provision extending protection to authenticators.¹⁸⁰ Now, fifty years later, authenticators remain unprotected, sharing these early concerns over the potential consequences of expressing their opinions.¹⁸¹ This Part will acknowledge the deficiencies in the current law, then examine the legislation the New York State Senate has proposed to fix it.¹⁸²

A. *Authenticators are Not Currently Protected Under the NYACAL*

In 1966, New York State Attorney General Louis J. Lefkowitz introduced a bill to the State’s legislature which would have granted qualified immunity from suit for accredited art experts that declare a work to be a forgery and subsequently appear incorrect.¹⁸³ The bill would have set up a system by which authenticators could obtain certification from the New York State University Board of Regents, something which doesn’t currently exist.¹⁸⁴ The bill, opposed by organizations such as the Art Dealers Association of America, was never

expert opinions. *Id.*

177. *See id.* at 23-26.

178. Leeuw & Sharp, *supra* note 174.

179. *See* Flescher, *supra* note 40, at 95.

180. *Id.*

181. *See, e.g.,* *Collectors, Artists and Lawyers: Fear of Litigation Hobbling the Art Market*, *supra* note 76; Halperin, *supra* note 154; Perman, *supra* note 1.

182. *See infra* Part III.A–B.

183. DUBOFF, *supra* note 56, at 414-15.

184. *Id.* at 414; Levy, *supra* note 44, at 600.

enacted into law.¹⁸⁵ There is, of course, a dangerous potential for fraud that could result from granting experts immunity.¹⁸⁶ By publicly discrediting an authentic piece of artwork, an expert could later purchase the work at a much lower cost.¹⁸⁷ Experts in the field further estimate that, had the statute been enacted, it would have been deemed unconstitutional for the State to deprive citizens of their right to redress an alleged wrong.¹⁸⁸ In 1968, following a series of major art frauds, New York State passed NYACAL, which established protections for collectors when purchasing from dealers.¹⁸⁹ However, an additional provision, which would have extended liability protections to authenticators in offering their opinions, did not pass.¹⁹⁰

*B. New York has Proposed Legislation
Which Would Amend the NYACAL*

The New York State Senate has proposed a bill described as “an act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship of works of fine art,” which aims to enhance protection of authenticators who offer their opinions in good faith, and to discourage the filing of invalid or frivolous claims against authenticators.¹⁹¹ The bill specifically addresses deficiencies in NYACAL, namely, the lack of protections for authenticators.¹⁹²

The drafters explain:

[T]he role of authenticators as drivers of the art market cannot be overstated. Art authenticators reduce the risk of counterfeits and imitations flooding the art market that could potentially devalue the work of millions of artists This bill would clarify the role of art authenticators to ensure that those who practice their profession, in good faith, would be afforded protections under the law to ensure that only valid, verifiable claims against authenticators are allowed to proceed in civil court.¹⁹³

185. DUBOFF, *supra* note 56, at 414; Levy, *supra* note 44, at 600.

186. DUBOFF, *supra* note 56, at 415.

187. *Id.*

188. *Id.*

189. Flescher, *supra* note 40, at 95.

190. *Id.*

191. *Sponsor Memorandum*, *supra* note 4.

192. *See id.*

193. *Id.*

This Subpart introduces the proposed legislation, then examines its deficiencies.¹⁹⁴

1. Summary of Proposed Legislation

The proposed legislation would, for the first time, grant specific protections for “authenticators,” which it defines as:

A person or entity recognized in the visual arts community as having expertise regarding the artist, work of fine art, or visual art multiple¹⁹⁵ with respect to whom such persons or entity renders an opinion as to the authenticity, attribution or authorship of a work of fine art or visual art multiple, or a person or entity recognized in the visual arts or scientific community as having expertise in uncovering facts that serve as a direct basis, in whole or in part, for an opinion as to the authenticity, attribution or authorship of a work of fine art or visual art multiple.¹⁹⁶

The term “authenticator” also includes authors of *catalogues raisonné* or other scholarly texts in which an opinion pertaining to the authenticity, attribution, or authorship of artwork is either express or implied.¹⁹⁷ The Art Law Committee of the New York City Bar Association, which has endorsed the bill, predicts courts will make a determination as to whether or not a person giving an opinion concerning authenticity qualifies as an “authenticator” using a process similar to that by which the court determines whether or not a witness qualifies as an expert.¹⁹⁸ Factors relevant to such qualification may include the extent to which the authenticator is known in the art or scientific community to have expertise concerning the artist, whether the authenticator has written scholarly texts or articles regarding the artist or the artist’s work, or whether the authenticator has personal knowledge of the creation of the artwork.¹⁹⁹ The phrase, “recognized in the visual arts community as having expertise” is analogous to the standard applied in similar legal

194. See *infra* Part III.B.1–2.

195. A visual art multiple is a piece of artwork that is “produced in more than one copy,” and includes prints, photographs, and editioned sculptures, which are part of a series. Judith Wallace, *Art Law on Consumer Protections for Purchasers of Prints and Multiples*, ARTNET (Aug. 16, 2015), <https://news.artnet.com/market/buying-and-selling-art-in-multiples-323824>. New York is one of very few states that afford specific protections for purchasers of visual art multiples. *Id.*

196. S. 1229A, 2015-2016, 238th Leg., Reg. Sess. (N.Y. 2015). This provision of the bill would amend § 11.01 of NYACAL, which provides a list of relevant definitions. See N.Y. ARTS & CULT. AFF. LAW § 11.01 (McKinney 2017).

197. S. 1229A.

198. N.Y.C. BAR ASSOC., *supra* note 73, at 6 n.3.

199. *Id.*

contexts.²⁰⁰ For example, the U.S. Congress requires members of the National Council on the Arts to be “widely recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts.”²⁰¹ This provision excludes authenticators who are unqualified to be offering their opinion, such as “impersonal boards or board members” who may have no experience in dealing with a particular artist.²⁰²

The bill further excludes those with a financial interest in the work, beyond compensation rendered for their authentication services.²⁰³ The bill provides that an

“[a]uthenticator” shall not include a person or entity that has a financial interest in the work of fine art or visual art multiple for which such opinion is rendered[,] or in any transaction concerning such work of fine art or visual art multiple for which the opinion is rendered, other than to be compensated for services such person or entity engaged in to provide an opinion as to the authenticity, attribution, or authorship of such work of fine art or visual art multiple or to provide information on which such an opinion is based in whole or in part.²⁰⁴

Next, the bill would require plaintiffs to “specify with particularity in the complaint facts sufficient to support each element of the claim or claims asserted” against authenticators.²⁰⁵ Pleading “with particularity” is commonly required of claimants in fraud cases,²⁰⁶ and is a higher standard than the “plausibility pleading” that is generally required in civil lawsuits.²⁰⁷ The heightened standard serves to discourage claimants from filing meritless claims and keeping authentication disputes out of the courts from the outset.²⁰⁸

Finally, the bill contains a fee-shifting provision which would prevent prevailing purchasers from collecting attorney’s fees in cases

200. *Id.* at 5 n.3 and accompanying text.

201. *Id.*

202. Fairman, *supra* note 131, at 11.

203. S. 1229A, 2015-2016, 238th Leg., Reg. Sess. (N.Y. 2015).

204. *Id.*

205. *Id.* Provided they meet the definition of authenticator, such protection would extend to experts who were never retained to provide a determination of authenticity (as in *Hahn*, where the statement was made to a third party), and therefore did not have the opportunity to enter into a hold-harmless agreement. Fairman, *supra* note 131, at 11.

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

207. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 669-70 (2009) (employing the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring plaintiffs to “state a claim to relief that is plausible on its face”).

208. *See, e.g.*, Fairman, *supra* note 131, at 10-11.

against authenticators.²⁰⁹ It would further allow prevailing authenticators to recover legal fees upon the judge's determination of good faith.²¹⁰ This provision serves both to dissuade plaintiffs from filing meritless suits and to encourage authenticators to act in good faith.²¹¹

2. Deficiencies in the Proposed Legislation

With these substantial substantive protections comes the danger that powerful authenticators may become too insulated.²¹² In an industry where global sales totaled \$63.8 billion in one year, authenticators and other experts hold a tremendous amount of financial power.²¹³ Sotheby's and Christie's are among the most influential, their in-house authentication practices largely setting the standard within the industry.²¹⁴ By shielding these institutions from litigation and not holding them accountable for questionable authentication practices, these auction houses could compound the problem and open the door for even more forgeries to enter the market.²¹⁵ While the due diligence of auction houses today has been described as "generally excellent,"²¹⁶ the current structure of the art market may still create an incentive for these powerful key players to authenticate work that isn't authentic.²¹⁷ Auction houses, museums, galleries, and the like all benefit from displaying or

209. S. 1229A, 2015-2016, 138th Leg., Reg. Sess. (N.Y. 2015).

210. S. 1229A.

211. Fairman, *supra* note 131, at 11.

212. *See* Singer, *supra* note 118, at 440 (discussing the dominance of both Sotheby's and Christie's).

213. *See* Georgina Adam, *Art Market Report Shifts its Focus as Author Moves to Art Basel*, FIN. TIMES (June 15, 2016), <https://www.ft.com/content/c2b15858-32d9-11e6-bda0-04585c31b153>.

214. Singer, *supra* note 118, at 440.

215. *See id.*

216. Isaac Kaplan, *Should the Art Market be More Heavily Regulated?*, ARTSY (May 23, 2016), <https://www.artsy.net/article/artsy-editorial-should-the-art-market-be-more-heavily-regulated>. Though largely unregulated and difficult to define, experts in the art industry are expected to adhere to minimal standards to avoid liability for negligence. *See* Levy, *supra* note 44, at 605 (explaining the standard of care for art authenticators). The College Art Association has proposed guidelines for authenticators, recommending opinions be rendered after studying the original artwork itself, unless the artwork is a "blatant fake." *Standards and Guidelines: Authentications and Attributions*, COLLEGE ART ASSOC. OF AM. (Oct. 25, 2009), <http://www.collegeart.org/guidelines/authentications>. It is not uncommon, however, for authenticators to render opinions based on a photograph alone. Levy, *supra* note 44, at 610. In one case, Sotheby's based the attribution of one of the paintings in their catalogue on a black and white photograph sent to an expert and returned with nothing more than "yes" written on the back. Singer, *supra* note 118, at 449. Similarly, Christie's was accused of authenticating a Fabergé egg without ever having seen it, though the case settled before going to trial. *Id.*

217. Kaplan, *supra* note 216 ("[I]f the behavior is legal, it may be undesirable, even unethical, but there is little incentive to change it especially if it brings significant economic benefit.").

selling authentic artwork, be it financially or otherwise, as in status or reputation.²¹⁸ This self-interest may pose a threat to their objectivity.²¹⁹

Independent authenticators, on the other hand, retain their independence and objectivity by not even charging a fee for their authentication services.²²⁰ As Martin Kemp, an Oxford University professor and expert on Leonardo da Vinci, once put it: “As soon as you get entangled with any financial interest or advantage, there is a taint, like a tobacco company paying an expert to say cigarettes are not dangerous.”²²¹ For this reason, the disbanding of authentication boards, for example, does not pose nearly the same threat to the art market as does the unwillingness of independent authenticators to offer their disinterested opinions.²²² Although the proposed legislation does exclude from its protections authenticators with a financial interest in the artwork, as drafted, the legislation fails to differentiate between wholly independent and disinterested authenticators and those whose interest, though not financial, is otherwise self-serving.²²³ Further, while a foundation’s authentication board may not have a detectable financial interest in an individual piece of artwork, it has been suggested that the board may have a financial interest in limiting the number of pieces on the market at a given time, since flooding the market would tend to drive up competition and reduce value.²²⁴ In order to control the supply, authenticators may find fault in a piece of artwork it would otherwise deem authentic.²²⁵ As drafted, the bill does nothing to protect against this.²²⁶ The Part that follows proposes an amendment to the proposed legislation that would distinguish between wholly independent and disinterested authenticators, and those authenticators that are in some way self-interested, financially or otherwise, and encourage more independent authenticators to offer their services by providing greater protections.²²⁷

In addition to its failure to distinguish between independent authenticators and those that are in some way self-interested, the

218. *See id.*

219. *See id.* (noting that conflicts of interest are “ingrained in the market”).

220. *See, e.g.*, Grann, *supra* note 45.

221. *Id.*

222. Fairman, *supra* note 131, at 10-11.

223. *See* S. 1229A, 2015-2016, 138th Leg., Reg. Sess. (N.Y. 2015).

224. Gregory Day, *Explaining the Art Market’s Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. 457, 484 (2014).

225. *Id.*

226. *See* S. 1229A, 2015-2016, 138th Leg., Reg. Sess. (N.Y. 2015).

227. *See infra* Part IV.

proposed legislation is narrow in jurisdictional scope.²²⁸ The art market is increasingly international, and so are the risks posed to authenticators.²²⁹ The suggested protections, however, would be limited to authentication within New York State.²³⁰ Although New York is currently the only state to have proposed such legislation, the Art Law Committee of the New York City Bar Association remains hopeful that, because of New York's status as the center of the nation's art commerce, and home to several international auction houses and art galleries, the legislation will serve as a model for similar legislation in other states.²³¹

IV. PROVIDING BROADER PROTECTIONS FOR AUTHENTICATORS

Stephen D. Brodie of Herrick Feinstein LLP summarized the issue well when he stated:

[T]here is simply no satisfactory way to deal with this problem. I am not especially bothered by the closing down of authentication boards,^[232] and do not think U.S. law should adopt the European approach, which gives credence to authentication boards controlled by friends and family of deceased artists. The conflicts of interest are simply too great, too often. However, at the same time, buyers and lenders . . . have no reliable way to minimize [the risks posed by forgery]. With this in mind, I strongly support legislation (although not necessarily the kind proposed in New York State) to better protect professional authenticators from frivolous lawsuits. I also think that the new initiatives involving synthetic DNA markers could prove valuable in the future, for newly created artworks; but presently this is one of those problems without a good solution.²³³

Others have criticized New York's proposed legislation as merely a "watered down" version of an earlier bill, which was never enacted, for its failure to incorporate some key provisions, including a higher burden of proof.²³⁴ "While the advancement of the Bill is a positive step toward

228. Perman, *supra* note 1.

229. RAY, *supra* note 51, at 107.

230. See N.Y.C. BAR ASSOC., *supra* note 73, at 1.

231. *Id.* at 1-2.

232. As Darlene Fairman, another attorney for Herrick, pointed out, authentication boards themselves are a fairly recent development in the art world. Fairman, *supra* note 131, at 10. "The art market operated without such boards for hundreds of years. Surely it will once again operate just fine without them." *Id.*

233. DELOITTE, *supra* note 104, at 150.

234. Sarah Cascone, *Art Authenticators Harassed by Lawsuits and Death Threats Get New Legal Protection*, ARTNET (June 30, 2015), <https://news.artnet.com/market/ny-state-senate-bill-protects-art-authenticators-harassed-lawsuits-death-threats-312967> ("Detractors allege that the bill is just a watered down version of one proposed last year."); Perman, *supra* note 1 ("This legislation

providing art authenticators with modest protections when giving good faith opinions, the Bill is imperfect.”²³⁵ As discussed in Part III, providing too much protection for powerful authentication bodies could be disastrous, and it remains to be seen whether the protections afforded are enough to incentivize independent authenticators to return to the field.²³⁶ This Part introduces a two-part solution aimed at both offering greater incentive for independent authenticators and limiting the number of authentication cases which reach the courts, which are ill-suited to provide a definitive determination of authenticity.²³⁷ The proposed solution will accomplish these twin aims by distinguishing between financially or otherwise self-interested authenticators and independent authenticators, whose objective opinions deserve more substantial protections, and incentivizing these independent authenticators to offer their opinions by raising the standard of proof in authentication cases to “clear and convincing evidence.”²³⁸

A. Exclude Those with a Financial “or Other Vested” Interest in the Authentication

New York’s proposed legislation withholds protection from authenticators with a financial interest in the authentication, or in transactions related to the authentication, beyond compensation for the authentication services performed.²³⁹ “[A]ny transaction concerning such work of fine art or visual art multiple for which the opinion is rendered” should exclude auction houses rendering an opinion on a piece of artwork they will later sell at auction.²⁴⁰ Since there is much more to be gained from selling a Caravaggio than a copy, there is an incentive for auction houses to deem artwork authentic.²⁴¹ Such a conflict of interest has the dangerous potential to further propagate the influx of forgeries onto the market, and should be avoided.²⁴²

is very watered down’ . . . and while it may hinder spurious lawsuits, ‘It will not solve the problem by any means.’”); Kevin P. Ray, NAT’L L. REV. (June 29, 2015), <http://www.natlawreview.com/article/new-york-senate-passes-bill-to-protect-art-authenticators> (“It is important to note it is weaker in several ways from a fundamentally similar bill that was introduced but not enacted last year.”). Compare A. 9016, 2013-2014 Leg. Sess. (N.Y. 2014), with S. 1229A, 2015-2016, 138th Leg., Reg. Sess. (N.Y. 2015) (omitting, for example, a heightened burden of proof for authentication disputes).

235. Ray, *supra* note 232.

236. See *supra* Part III.

237. See *supra* Part II.B.4.

238. See *infra* Part IV.A–B.

239. S. 1229A.

240. See *id.*

241. See Eleftheriou-Smith, *supra* note 14.

242. See *id.*

As written, however, the bill fails to exclude authenticators who do not have financial interest, but are otherwise self-interested in the outcome of the authentication, as in status or reputation.²⁴³ This would of course include museums and galleries who, much like the auction houses, depend heavily on the artwork in their collections' authenticity, as well as artists' foundations and their authentication boards.²⁴⁴ A museum that boasts pieces by Matisse and da Vinci will no doubt be considered more prestigious than one that does not.²⁴⁵ Likewise, the overall status and reputation of the authentication board is inextricably linked to the overall status and reputation of the artist the board represents, and therefore benefits from the number of quality works produced by the artist, and the promotion and pervasiveness of the artist on the market.²⁴⁶ It has further been suggested that authentication boards would benefit financially not from an individual transaction, which the legislation would protect against, but from the ability to control the number of pieces on the market at a given time.²⁴⁷

Without these protections, authentication boards would likely continue to disband. The consequence of authentication boards disbanding, however, is not seen within the industry as particularly troublesome.²⁴⁸ Indeed, “[i]t is not the lack of art authentication boards that will burden the art market. Rather, it is the lack of willingness on the

243. See S. 1229A; see also Kate Lucas, *Three Recent Suits Exemplify Some of the Legal Issues Surrounding Art Authentication*, GROSSMAN LLP (Apr. 7, 2014), <http://grossmanllp.com/art-law-blog/2014/04/three-recent-suits-exemplify-legal-issues-surrounding-art-authentication> (noting foundations and artists' estates may have other motivations for “seeking to control the public perception of an artist's oeuvre”). This Note does not affect or address the current protections available to authenticators that are in some way, financially or otherwise, interested in the authentication, beyond compensation for the services rendered. Current standards of liability and burden of proof will continue to operate for these institutions as they have in the past. This Note serves only to suggest that the art market would be better served by encouraging independent authenticators to more readily participate in the field. See Fairman, *supra* note 131, at 11.

244. See, e.g., *supra* notes 210-25 and accompanying text (discussing the potential self-interests of such organizations).

245. This is not to suggest that museums should not perform authentication services in house, but instead proposes that those who do should not receive the same substantial protections as independent authenticators under the proposed legislation. See DUBOFF, *supra* note 25, at 284. On the contrary, it would surely be beneficial to a museum's integrity to hire board members with expansive expertise and the ability to spot a fake, just as it is widely viewed that dealers' experience in estimating the value of artwork is valuable to a museum board, despite the potential for conflict. See *id.* This proposal does, however, create an option for “interested” authenticators to more easily outsource independent authenticators, who will be more willing to offer their services if somewhat shielded from the legal consequences that have led to their silence in recent years. See *supra* Part II.B.3.

246. See Lucas, *supra* note 243.

247. See Day, *supra* note 224, at 484.

248. See *supra* note 232-32 and accompanying text.

part of uninterested experts to opine on the authenticity of artwork that could have the most impact on the market.”²⁴⁹ Authentication boards, a fairly recent concept, serve largely as a way for artists’ estates to retain greater control over an artist’s body of work.²⁵⁰ This idea essentially emulates the French legal concept of *droit moral* (meaning “moral right”), which grants artists, and then their heirs, the right to authenticate their own work.²⁵¹ The concept of *droit moral*, however, has not gained much traction in the United States, despite Congress’ attempts to pass moral rights legislation.²⁵² This failure to take hold potentially results, at least in part, from the number of conflicts of interests it creates.²⁵³ Evidently, the market has not fully embraced the notion that there can only be one authoritative source of authentication for a particular artist, and would therefore be open to the opinions of any number of independent, disinterested authenticators.²⁵⁴

By adding the phrase “or other vested” interest, it would ensure that the proposed legislation extends its substantial protections to only the most objective, conflict-free opinions, like those of independent authenticators.²⁵⁵ This would serve the art market by creating more confidence in authentication services, and by expanding the pool from which those inevitably interested authenticators, like museums, galleries, and auction houses, may draw from.²⁵⁶

B. *Raise the Standard of Proof in Authentication Disputes*

As discussed, the proposed legislation requires that claimants “specify with particularity” facts sufficient to prove each element of their case, a provision legislators hope will weed out meritless claims at the outset of the litigation.²⁵⁷ An earlier version of the bill, however, further provided that, in cases against authenticators, claimants must “prove the elements of such claim or claims by clear and convincing

249. Fairman, *supra* note 131, at 10.

250. *Id.*

251. Van Kirk Reeves, *Establishing Authenticity in French Law*, in *THE EXPERT VERSUS THE OBJECT* 227, 230-31 (Ronald D. Spencer ed., 2004).

252. DUBOFF, *supra* note 25, at 225. Artists’ moral rights are recognized in a number of countries throughout the world and have been codified under the Berne Convention, which the United States is not a party to. *Id.* at 224. The United States is instead a party to the Universal Copyright Convention, which does not recognize moral rights. *Id.* at 225.

253. DELOITTE, *supra* note 104, at 150.

254. See Fairman, *supra* note 131, at 10.

255. See S. 1229A, 2015-2016, 138th Leg., Reg. Sess. (N.Y. 2015).

256. See *supra* Part II.B.3 (discussing the reluctance of independent authenticators to offer their opinion in the absence of such protections).

257. S. 1229A.

evidence.”²⁵⁸ By increasing the burden of proof to “clear and convincing evidence,” the legislation would further discourage frivolous lawsuits, both limiting the number of authentication disputes being decided by courts and providing additional incentive for independent authenticators to offer their opinions, to the benefit of the art market overall.²⁵⁹

The current standard, “more likely than not,” does little to persuade the overwhelmingly powerful art market that the disputed artwork is authentic and, therefore, worth the price.²⁶⁰ This fails to actually provide plaintiffs with the relief they seek,²⁶¹ or to encourage independent authenticators to offer their services—the cost of high insurance premiums²⁶² and lengthy litigation too prohibitive.²⁶³ Further, since determinations of authenticity by authenticators must essentially be made on clear and convincing evidence before the market will accept it, be it an expert evaluation of the artist’s form, scientific analysis, or a combination, it follows that so to should court determinations of authenticity.²⁶⁴

Increasing the burden of proof to “clear and convincing evidence” in cases against authenticators would make court judgments more meaningful, inspire confidence in the market, and discourage meritless yet costly and time-consuming lawsuits brought against authenticators.²⁶⁵ Limiting the number of lawsuits brought against authenticators will satisfy the twin aims of keeping authentication disputes out of the courts and encouraging independent authenticators to provide their invaluable services.²⁶⁶

V. CONCLUSION

In recognition of the complex legal challenges involved in authentication and the overall cultural and financial importance it bears, it is imperative to ensure the continuation of professional authentication services.²⁶⁷ Since the authentication of art depends primarily on the scholarship of experts, it is inherently subjective, and even the most

258. A. 9016, 2013-2014 Leg. Sess. (N.Y. 2014).

259. *See id.*

260. *See supra* Part II.B.4.

261. *See supra* notes 162-63 and accompanying text.

262. *Supra* note 161 and accompanying text.

263. *See Statement from the Board of Directors, supra* note 2 (announcing the board’s decision to cease authentication services).

264. *See supra* Part II.B.4.

265. *See, e.g., Sponsor Memorandum, supra* note 4.

266. *See id.*

267. *See id.*

well-qualified and knowledgeable experts may disagree.²⁶⁸ For this reason, the art world would be best served by encouraging a large pool of competent authenticators to offer their disinterested opinions, and keeping authentication disputes out of the courts.²⁶⁹ This objective can only be achieved by providing a legal environment that is accommodating to independent authenticators, for whom the high cost of litigation in recent years has become prohibitive.²⁷⁰

New York's proposed legislation is an important step in providing authenticators the protections they have long desired, but it is imperfect.²⁷¹ The legislation fails to distinguish between authenticators that are entirely disinterested and independent, and those that are in some way self-interested in the authentication, which would encourage more accurate results.²⁷² Further, the current burden of proof in cases against authenticators does little to incentivize independent authenticators to return to the field and offer their opinions.²⁷³ By raising the burden of proof to "clear and convincing evidence," an idea previously backed by the New York City Bar Association's Art Law Committee and a number of the most powerful organizations in the art world, it would further discourage the pursuance of meritless suits and motivate independent authenticators to continue providing their services.²⁷⁴

In the meantime, the sentiment remains: buyer—and authenticator—beware.

*Savannah Holzwarth**

268. See, e.g., *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 23 (App. Div. 2009).

269. See *id.*

270. See *supra* Part II.B.3.

271. See *supra* Part III.

272. See *supra* Part III.

273. See *supra* Part IV.

274. See *supra* Part IV.

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