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Counterfeiting Dali and Other Artists: The Art of Surrealist Deception

I. Introduction

Picture it: socialites at elegant auctions in Manhattan, bidding on elite, expensive pieces of art with small, numbered paddles. This was the quintessential version of art acquisition for decades. Over time, this method of transferring fine art has become less glamorous and more obsolete as other, more efficient methods of acquiring art work have come to fruition. Art is a tangible, movable thing--, a good, a finite resource. Plenty of copies, authorized or not, may be created, but there is a limited number of originals available for purchase.

Several types of venues facilitate the sale of art. Traditional venues include auction houses such as Christie's and Sotheby's. Christie's was founded in 1766, and remains one of the leading auction houses in the world, pricing items from \$200 to \$80 million.¹ Sotheby's, the other leading auction house, was founded in 1744 and has sold billions of dollars worth of merchandise to date, including the *Star of the Season* diamond for approximately \$16.5 million in 1995.² Newer platforms of selling art work include small businesses and of course, the internet. The internet has caused much heated debate over art forgery.³ eBay has acted as the host for some of the most sought after con artists of today.⁴ Though eBay attempts to control the counterfeit art registered on its site, buyers still have a chance to purchase this art before eBay can effectively intervene.⁵ Because venues have yet to find fully effective methods of preventing art forgery, it remains one of the most lucrative illegal activities, third only to drug smuggling and arms dealing.⁶

Counterfeit art takes its fair toll on the economy. Regardless of whether the infringement is innocent or intentional, the economic consequences remain constant. Flooding the market

with counterfeit works artificially decreases the prices of authentic original pieces of art.⁷

Notwithstanding the economic impact of forged art, there are social and communal consequences as well. In many instances, forged art is unloaded on unsuspecting tourists visiting a foreign country. Occasionally, the victims are unsophisticated and inexperienced art buyers.⁸ The issue remains, how to protect consumers' and artists' rights in a world where counterfeiting art is a low-risk, high-reward crime.⁹

Criminal prosecution bears a high burden of proof, beyond a reasonable doubt, and intent is a requirement for conviction.¹⁰ Civil actions are also unlikely to prove fruitful since, typically, the counterfeiter does not have the capital to satisfy the judgment. Moreover, many buyers simply rely on a dealer's reputation instead of hiring an independent expert, which in turn makes novice buyers frequent victims of fraud.¹¹

This paper will serve to explain why the existing federal and state protections against selling forged art are insufficient. First, there will be a discussion regarding the federal statutes, then state protections, and finally a proposed solution to the shortcomings of the existing legal protections and consequences of profiting from counterfeited art work. The creation of counterfeit art is beyond the scope of this paper. The concern here is centered on those who profit from selling counterfeit art and those harmed by this practice. Whether the counterfeit work originated with the original artist or the artist sold the counterfeit art to another who knew or should have known the work was counterfeit is irrelevant because the end result is still fraud.

II. Federal Protections: "Good Artists Copy, Great Artists Steal."—Picasso

a. Copyright Concerns

Several federal statutes purport to protect artists' and consumers' rights in some fashion. They include: the Copyright Statute,¹² the Racketeer Influenced and Corrupt Organizations

(“RICO”) statute,¹³ the Federal Trade Commission Act (“FTC”),¹⁴ the Trademark and Trade Dress statutes,¹⁵ the Visual Artists Rights Act of 1990 (“VARA”),¹⁶ and the National Stolen Property Act (“NSPA”).¹⁷

Under Article 1, Section 8, Clause 8 of the U.S. Constitution, “the Congress shall have the Power.... [T]o promote the progress of science and useful arts, by securing and limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁸ To qualify for copyright protection under this statute the work must be of a copyrightable subject matter, fixed in a tangible medium of expression and must have originated with the author. Works that fall outside the durational provision provided in 17 U.S.C. §102(a) are in the public domain and therefore are not protected by this statute.¹⁹

Black’s Law Dictionary defines “public domain” as “the universe of inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge.”²⁰ Any work created before the 1909 Copyright Act²¹ is in the public domain as well as any work where the copyright has lapsed. Another alarming issue with copyright protection particularly in the realm of the art world, is the fact that copyrights do not automatically transfer with the sale of a work.²² The copyright protection originates with the author of the work. This right may be transferred or assigned; however, the transfer is not automatic upon the sale of the tangible work itself.²³

For works protected under the 1909 Copyright Act, the copyright endured for an initial period of 28 years plus a renewal period of 28 years and if the author failed to renew the copyright, the work was injected into the public domain.²⁴ This Act leaves an inordinate amount of art work unprotected and therefore in the public domain. Works created before 1923²⁵ enjoy no copyright protection. Works such as Michelangelo’s *David* or Leonardo Da Vinci’s *Mona*

Lisa are not entitled to copyright protection because they were created before the 1909 Copyright Act, thus these works of art are in the public domain and high susceptible to art forgery. Because the work is in the public domain, another cause of action is eliminated and this contributes to art forgery being classified as a low-risk, high-reward crime. If one was sold a counterfeit work that falls outside the scope of protection, he would have to rely on another cause of action because he would not own the copyright to the work of art in the public domain.

Under the 1976 Copyright Act works created on or after January 1, 1978 are entitled to a copyright period for the life of the author plus 50 years.²⁶ When considering the copyright of a joint work, copyright protection lasts for the life of the last surviving author plus 70 years.²⁷ Copyright protection lasts 95 years from the first publication or 120 years from its creation, whichever expires first for anonymous works, works created under pseudonyms, and works created by a corporation.²⁸ Moreover, in 1998, the Sonny Bono amendment was passed extending the duration of a copyright by 20 years, effectively extending the copyright protection from the life of the author plus 50 years to the life of the author plus 70 years.²⁹

Museums have concerns regarding the copyrightable images that the museum has secured of a work of art. According to the associate general counsel of the Museum of Modern Art (“MoMA”), Henry Lanman, the MoMA restricts distribution of the high resolution photographs taken of art works.³⁰ Art works that are displayed in the MoMA are transported to a studio in Queens, New York to be photographed. This arduous process takes several days and high resolution cameras are used to procure the best quality photograph possible. There are no restrictions on visitors taking pictures with a personal camera once inside the museum because the quality of the picture could not possibly rise to the level of quality that would be competitive with the photos taken at the Queens location.³¹

Mr. Lanman has experience with forged labels that are affixed to the art works. Every time a work is displayed in the MoMA, a label is placed on the work identifying that the MoMA has displayed it. This label is valuable because it bolsters the authentication of the work, if it is under question. Mr. Lanman said, “a couple times a year we receive calls from galleries or dealers researching a work that has a label indicting it was on loan or owned by MoMA...people try to forge labels all the time, dealers looking for an answer of authentication will scan the label, send it to me, and I will authenticate it, but it is pretty obvious when it is a fake, there have never been any close calls.”³² The label is part of the provenance which is the chain of ownership that should accompany each valuable work of art. A genuine label affixed to the back of a work indicates the work is genuine. In addition to authenticating forged labels, Mr. Lanman does manage the MoMA’s copyright claims to certain works.

Mr. Lanman also posited “museums usually do not own copyrights of the work, but they do assert copyrights in the images of the work taken in high definition usually for the purpose of merchandise in the museum gift shop. This type of assertion is very frequent and the museum controls access to the physical object then issues licenses in the high definition photographs.”

Mr. Lanman described the insurance process for stolen art. “Insurance policies are written in such a way to allow recovery of art work; for example, let’s say in 1970 a work was insured for \$10,000, and that amount was paid out to the museum after the work was stolen. Then in 2012, the work is recovered and now worth now \$500,000, the question becomes, who owns the work of art. Many insurance policies will allow the insured to repay the proceeds and premiums to recover the work.” Mr. Lanman then explained the purpose of stealing art in the first place. Obviously, any art dealer would know or come to find out the work was stolen. Mr. Lanman responded, “There is essentially no art market for stolen work, except for black markets

that would maybe trade the art work for another illicit commodity and the art work be sold at a fraction of its real value.”³³

b. Defenses to Copyright Infringement

Several defenses to copyright claims exist, including: the innocent infringer defense,³⁴ *de minimus* taking,³⁵ fair use,³⁶ independent creation,³⁷ and parody.³⁸ The “innocent infringer” defense is available if the infringers were not aware or had no reason to believe that their acts constituted infringement. If the plaintiff registered the copyright, that notice of copyright makes this defense unavailable to defendants. The *de minimus* defense contains three components necessary for analysis: 1) a technical violation so trivial that the law will not impose legal consequences, 2) copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, 3) relevant to fair use [the amount of substantiality of the portion used in relation to the copyrighted work as a whole].³⁹ The fair use defense uses a four factor test, 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the substantiality of the portion used in relation to the copyrighted work as a whole and 4) the effect on the potential market for the value of the copyrighted work.⁴⁰ The Independent creation defense indicates that the infringer had no previous exposure or access to the work he is being accused of infringing upon.⁴¹ For a parody defense to be successful the copy must be poking fun at the original work and the primary use must not be commercial.⁴² However, in *Campbell v. Acuff-Rose Music* the Supreme Court held that parody could be a fair use and thus not subject to copyright infringement, and a commercial use was not presumptively unfair since that presumption would render the fair use defense effectively useless.⁴³ In addition, the parody “must make some critical comment or statement about the original work which reflects the

original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function.”⁴⁴

c. Other federal protections

The Racketeer Influenced and Corrupt Organizations statute creates criminal and civil liability for acts performed as part of a continuing criminal organization. Specifically, the statute creates liability for the different ranking leaders of groups of organized crime. The relevant statutes of the RICO provisions include § 472⁴⁵ and § 473.⁴⁶ Successful RICO cases are far and few between, because the standard of prosecution is very high. This statute is insufficient to protect consumers who fall victim to art forgers.

The Federal Trade Commission Act⁴⁷ is another federal protection afforded to prevent unfair trade practices. Federal Trade Commission Act attempts to essentially prevent unfair trade practices that affect commerce. Under this Act, the Commission is empowered “to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive...”⁴⁸ In one case where the FTC Act was utilized, Salvatore Dali signed blank sheets of paper to have his works reprinted on them because he was in poor health and soon would be unable to write his signature.⁴⁹ The publishing company then forged more of Dali’s signatures to sell more Dali works and the defendant earned millions from these forged Dali prints.⁵⁰ This act would constitute an unfair and deceptive act affecting commerce and therefore the defendants would be liable under the FTC Act. This statute is vague regarding the characterization of unfair trade practices and the appropriate remedy to protect consumers is not clearly defined here.

Typically, trademark statutes cannot afford protection to artists because no trademark exists within the work and their signature on art work itself does not constitute a trademark.⁵¹ A trademark is a “word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others.”⁵² The Lanham Act bars individuals from reproducing or imitating a registered trademark in connection with a sale of a product that is likely to cause confusion to a consumer or account for dilution of that trademark.⁵³ Despite this protection, no damages may be recovered by the registrant of the trademark unless there is intent to cause confusion, or to cause mistake, or to deceive.⁵⁴ Again, this makes counterfeiting art work, which may be otherwise protected by trademark, a lucrative, low-risk offense since intent must be proven before damages can be awarded. Another trademark statute protects against false designation of origin.⁵⁵ In other words, this statute creates liability for those who falsely claim a work is authentic.⁵⁶ An example would be if an artist actually signed blank sheets of paper which his work is to be reprinted and the publisher sold these prints as originals instead of authorized signed copies.⁵⁷

Trade dress may act as another federal protection to art work. Trade dress is the design and shape of the materials in which a product is packaged.⁵⁸ “Product configuration, the design and shape of the product itself, may also be considered a form of trade dress.”⁵⁹ The Lanham Act protects trade dress if it serves the same source-identifying function as a trademark. It is possible to register trade dress as a trademark, but for practical reasons most trade dress and product configurations are protected without registration under 15 U.S.C. § 1125(a).⁶⁰ This protection may be difficult to utilize, because most art works would typically not fit within the description of the definition of trade dress.

The Visual Artists Rights Act of 1990 (“VARA”) protects artists’ moral rights and provides for selected artists’ rights in their work regardless of ownership later in time.⁶¹ An artist’s moral rights essentially protect the work from being bastardized or distorted in anyway.⁶² “The term ‘moral rights’ has its origins in the civil law and is a translation of the French *le droit moral*, which captures those rights of a spiritual, non-economic and personal nature.”⁶³ VARA, affords protection only to authors of works of visual art.⁶⁴

The statute also includes a negative definition of works falling outside the scope of narrow protection.⁶⁵ American copyright laws do not give rise to a cause of action for mutilation of an artist’s work or the presentation of the work that is portrayed to the public. American courts have used contract law and the law of unfair competition to provide this protection.⁶⁶ VARA allows for a cause of action protecting artists’ moral rights offering protection on which the authors’ livelihood depends. VARA only offers protection to artists, not copyright holders generally, therefore the breadth of VARA’s protection is very narrow. For example, if artist A sells his painting to buyer B, VARA only protects artist A’s rights and not buyer B’s rights.

Another federal criminal statute used in prosecuting is the National Stolen Property Act.⁶⁷ This Act provides for criminal liability for any person who “transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .”⁶⁸ This statute is used for stolen property generally, not just works of art. In addition, the value of the property must be at least \$5,000 in order for criminal liability to attach, leaving victims of art forgery that lose less than \$5,000 vulnerable and not protected by this statute.

III. State Protections

The broadest of state protections to protect art work stems from the state adopted Uniform Commercial Code (“U.C.C.”). Karl Llewellyn served as the principle drafter of the U.C.C. and this code serves to codify the law of sales and other commercial transactions.⁶⁹ Here, the focus of consumer protection circles around Article 2 of the U.C.C. which governs the sale of goods.⁷⁰ The U.C.C. proposes several remedies for those victims of art forgery which include in part: breach of contract and warranties.

The U.C.C. provides several bases for breach of contract for causes of action based on fraud, duress, unconscionability and others. For example, if patrons relied to their detriment in purchasing a work of art that they were led to believe was authentic when negotiating the contract. If that work turned out to be fake that would establish a breach of contract induced by fraud. A specific prohibition against selling unauthorized works of art lies in U.C.C. §2-312.⁷¹ This provision states that “title conveyed shall be good and its transfer rightful and shall not unreasonably expose the buyer to litigation because of any colorable claim to or interest in the goods.”⁷² In this regard, sellers cannot sell art work if they themselves do not know the rightful owner of the work. This is particularly helpful in cases of stolen art work, since the title may belong to a previous, rightful owner and the victim was a good faith bona fide purchaser. The bona fide owner could maintain a claim against the seller of the work under U.C.C. §2-312.

Liability is created when a seller gives a buyer an express warranty about the goods being tendered. For example, if a seller on eBay describes a work of art as authentic, that may be considered an express warranty. This liability can be enforced under U.C.C. §2-313.⁷³ Specifically, the portion of the statute applicable in the previous example is “[A]ny affirmation of fact or promise made by the seller 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.”⁷⁴ In this example, the seller expressly stated that the work is authentic and therefore not a copy. If the work is found to be counterfeit, the buyer may bring a claim under U.C.C. §2-313 for breach of express warranty.

A colorable claim regarding the breach of implied warranties may exist as well. If Christie’s auctions a Picasso worth \$50 million dollars, the buyer may infer that this Picasso is genuine and has been authenticated by an expert. This claim may be brought under U.C.C. §2-314(2) (c) where the warranty implies that the good is fit for its ordinary purpose, which also may be interpreted as the good is authentic.⁷⁵ Another claim may be brought under U.C.C. §2-314(3) where implied warranties of merchantability are created by the course of dealing or usage in the trade.⁷⁶ Over time, Christie’s has established a reputation for selling priceless art work. Christie’s provided an implied warranty of merchantability in this hypothetical because a world renowned auction house would presumably not sell a fake Picasso for \$50 million dollars.

Another state protection is the Consumer Fraud Act. Each state has a similar statute protecting consumers from fraudulent sales of goods.⁷⁷ This Act typically extends express warranties about the work's authenticity and prohibits material misrepresentation or omissions.⁷⁸

Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:

- (a) Shall be presumed to be part of the basis of the bargain; and
- (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.⁷⁹

Here, the New York Consumer Fraud Act analog to the Federal Trade Commission Act is §13.01 Express Warranties in the New York Consolidated Laws Service.⁸⁰ Express warranties that are presumed to be a basis of the bargain are created. However, this statute only applies to

art merchants, thus the seller must be in the business of selling art to be found liable under this statute.⁸¹

There are several criminal causes of action that the state may bring against a seller of counterfeit or stolen art. First and most frequently utilized to prosecute art forgery is the crime of larceny. New York's statute reads "a person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."⁸² A person commits larceny when he or she intentionally takes the property of another.⁸³ If an individual steals a piece of artwork then resells it, it would constitute a second crime of larceny in addition to the original crime of stealing the work.⁸⁴ The statute goes on to state:

Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways: (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses; (b) By acquiring lost property.⁸⁵

Reselling stolen artwork would constitute larceny by deceit. Specifically, a person commits grand larceny in the fourth degree if "[T]he property, regardless of its nature and value, is taken from the person of another."⁸⁶ A crime that an offender may typically be charged with is possession of stolen property. Even if the criminal does not intend to resell what he or she has stolen, simply possessing the stolen property is an actionable crime.⁸⁷ Possession of stolen property ranges from first to fifth degrees depending on the monetary amount the goods that were stolen are worth.⁸⁸ "A person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof."⁸⁹ Intent is the first element of the crime, therefore individuals that are bona fide purchasers would be protected from

this crime since they are unaware they are possessing stolen property. California's statute of theft is similar to New York's for larceny. The statute reads:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.⁹⁰

Similar to New York, California's statute requires intentionally taking another's property without permission in some manner, including deceitfully or fraudulently taking the property.⁹¹

State statutes afford trademark protection which range from first to the third degree. A person is guilty of trademark counterfeiting in the third degree when, with the "intent to deceive or defraud some other person or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark, or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods."⁹² A parallel may be drawn here in relation to affixing fake labels to art works.⁹³ Those individuals guilty of fraudulently affixing labels to art works known to be fake may be infringing upon the MoMA's trademark in those labels. This protection would be insufficient to protect wronged consumers on the immoral end a deal because the cause of action rests with the MoMA, and not with the average consumer.

IV. Federal and State Application of Current Laws

a. Federal application

Several claims may be asserted against sellers of counterfeit art. However, a vast majority of these causes of actions do not afford the buyer of fake art complete relief. Several federal and state statutes purport to protect against art forgery. However, none of them provide

the artist with adequate relief, criminally or civilly. There is no uniform method of punishing the sale of forged art. Within the existing copyright laws, trademark laws, and laws governing goods, a victim of art forgery must marry themselves to the statute most likely to provide relief. Art forgers recognize these asymmetries and frequently are able to slip through the well-established cracks. For example, if one is the rightful owner of a work of art but not of its copyright, that individual may only bring claims based on the fact that the art work is a good and therefore must rely on only the U.C.C. for protection. The owner would not be able to bring a claim based in copyright infringement because that owner does not own the copyright to the work, he only owns the physical good.

Another issue an artist may face is a work for hire dispute. In a work for hire contract, the artist agrees to create a work for the hiring party, preserving the copyright in the hiring party, in exchange for compensation.⁹⁴ According to 17 U.S.C §101, a work made for hire is a “work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work...”⁹⁵ If an artist is hired by a patron of the arts to create a work, the copyright of that work belongs to the patron, and not the artist. The hiring patron would have a copyright interest in that work of art if it were to be counterfeited and then later sold. If the artist is an independent contractor and not an employee of the patron, it is more difficult to ascertain who the rightful owner of the copyright is. The artist will argue he is not an employee of the patron and the work was not specially commissioned, resulting in him owning the copyright. The patron will argue first that the artist is his employee and in the alternative that the patron specially commissioned the work, making the Patron the rightful owner of the copyright.

A looming issue of utilizing intellectual property law to combat the sale of forged art exists. A juxtaposition exists between using intellectual property laws and classifying art work as a good. Intellectual property is not considered a “good” and therefore not afforded protection under the Uniform Commercial Code. Two different types of claims are available when bringing a claim for art forgery: intellectual property claims infringement and goods. If one chooses to bring a claim under an intellectual property statute, the claim would be who owns the copyright or trademark. However, for those individuals who do not own the copyright or trademark, a U.C.C. claim may be the proper channel and, in fact, the intellectual property statutes afford no protection to a rightful owner of a work, even if that counterfeit work of art infringes on a copyright owned by a third party.

Copyright infringement should include specific punishments, criminal and civil for art forgery. The statute must outline parameters as to what constitutes infringement and what specifically does not constitute infringement. To establish copyright infringement several factors include: whether the defendant had access to the copyrighted work prior to the creation of the defendant’s work and whether a substantial similarity exists in the idea and expression between the copyrighted work and defendant’s work. Jurisdictions have different tests in establishing a copyright infringement claim.

Two popular jurisdictions that litigate several copyright claims include the Second and Ninth Circuits. In the Ninth Circuit, intrinsic and extrinsic fairness tests are applied to determine whether copyright infringement occurred whereas in the Second Circuit, the ordinary observer test is used to determine if infringement has occurred. The Ninth Circuit describes intrinsic fairness as whether the two works’ “total concept and feel” are substantially similar and the extrinsic test compares specific, objective criteria on the basis of several elements such as

setting, plot, characters, etc. or in the case of art work, the elements present in the painting, perhaps the subject matter portrayed.⁹⁶ If the Ninth Circuit found that two works of art were substantially similar in feel and concept then that fact may be enough evidence to maintain a copyright infringement action. Again, there are issues with bringing a copyright infringement claim. First, the plaintiff must actually hold the copyright. Second, the intrinsic and extrinsic fairness tests were designed to gauge similarities in movies and books, not necessarily art work. It is possible that a court would stretch the factors to incorporate art works if presented with a persuasive enough argument.

The Second Circuit's test of substantial similarity asks if an ordinary observer would be "disposed to overlook the [similarities] and regard the aesthetic appeal [of the two works] as the same."⁹⁷ The Second Circuit would gauge if an ordinary reasonable observer would regard the offensive work as aesthetically the same as the original plaintiff's work. Since only expressions of ideas are copyrightable and ideas themselves are not copyrightable,⁹⁸ and the art work itself is an expression of an idea aesthetic element is incorporated into the copyright infringement test.

Federal trademarks are designated with this symbol: "®" and common law trademarks are simply marked "TM."⁹⁹ Registration is not required to maintain trademark protection. The three functions of a trademark include: to identify the source of the commercial object, guarantee the constancy of quality, and advertise the manufacturer and attract customers.¹⁰⁰ Trademark claims may be a superior vessel to combat art forgery since intent is not a prerequisite to liability as in copyright infringement cases. Trademarks are significant to artists because trademarks facilitate and evoke a specific perception by the artists' admirers. Buyers know that when they see "Picasso" signed across the bottom of a painting that they are purchasing a certain quality art work. However, a person's image or likeness cannot function as a trademark, but his or her

name may possibly.¹⁰¹ Even if Picasso's face graced the bottom of his art work, that picture of his face would generally not be trademarkable. Picasso's name evokes a specific perception, a visceral feeling that is associated with Picasso. An individual knows that Picasso's works are worth millions of dollars, that the art work comes with a certain level of prestige, and that the art work was created in a certain time period.

In the Southern District of New York, a plaintiff seeking damages for a trademark infringement claim must show that "...[E]ither 1) the challenged advertisement is literally false or 2) while the advertisement is literally true, it is nevertheless likely to mislead or confuse consumers."¹⁰² Art forgers, no doubt, intend to cause confusion to the unsuspecting buyer. However, the challenge in proving a trademark infringement case is twofold. First, the plaintiff bringing the suit must own the trademark to the work. Second, typically the artists' signatures on the work of art itself are not sufficient to constitute trademarkable material. This cause of action would only be successful if the plaintiff holds a registered trademark on the work of art and that work of art is trademarkable under the statute.

The Lanham Act is applied to trademark infringement cases.¹⁰³ Trademarks allow customers to identify the manufacturer or sponsor of a good or a provided of a service.¹⁰⁴ Section 43 of the Lanham Act provides any person in connection with any goods using a work, symbol or any false designation of origin, false or misleading the description of fact which is likely to cause confusion by another person in commercial advertising.¹⁰⁵ Essentially, if a trademark is misleading and promotes confusion as to that registered trademark, it is a violation under the Lanham Act. Section 43(a) of the Lanham Act prohibits false advertising the use of the author's name in connection with a work in which the author's true participation or contribution is misrepresented.¹⁰⁶ In the earlier example where the artist signed a blank paper to

be used as an authorized reproduction only, the defendant would be liable under Section 43(a) of the Lanham Act. The author's true contribution would be misrepresented as the prints being sold as if they were originals when they really are simply authorized reproductions.

b. State Protections

To utilize state protections, the typical direction a plaintiff must take is that the art work is a "good." These state protections stem from the fact that the art work is a good. Plaintiffs may choose to employ a state claim over a federal intellectual property claim for the simple reason that they do not own the intellectual property rights associated with the art. For example, artist A retains all copyright interest for the next 70 years and sells the work to Sotheby's. Sotheby's then sells the artwork for \$10 million dollars to buyer B. However, during the time which Sotheby's was storing the art work, a disgruntled employee stole the original work of art and replaced it with a well-executed copy. When buyer B asserts a claim against Sotheby's he would have no intellectual property claims because B does not own a copyright or trademark to the art work as the artist retained those rights. Buyer B is left with the ability to assert several claims under state law, including claims supported by the U.C.C., the Consumer Fraud Act, and common law breach of contract.

The U.C.C. was adopted by each state as a method of streamlining commercial transactions. Prior to the adoption, most transactions were governed by "the law merchant,"¹⁰⁷ which simply was the collective interpretation of how sales should operate according to merchants in the business of selling a particular good.¹⁰⁸ Article 2 of the U.C.C. governs the sale of goods. Since art work is a good, Article 2 of the U.C.C. applies. In the aforementioned hypothetical, buyer B is not the copyright or trademark owner, therefore, the best claim he can make is buttressed by the Uniform Commercial Code. First, there must be some type of breach

of contract. A contract¹⁰⁹ is a legally enforceable agreement. A breach occurs when one or both parties deviate from the agreed upon contract.¹¹⁰ Within the agreement, obligatory express and implied warranties apply to the contract. U.C.C. §2- 312, Warranty of Title and Against Infringement, is one example of an implied warranty. Sotheby's gave an implied warranty that the work sold to buyer B is authentic because of Sotheby's reputation, and the price at which the auction house sold the work of art.

The U.C.C. defines "genuine" as "free of forgery or counterfeiting."¹¹¹ An individual paying \$10 million dollars for a work of art assumes that the work is genuine, and that is part of the basis of negotiation for that contract. If the work is not authentic, that automatically should preclude a legally binding agreement based on a litany of claims.

Buyer B could argue that he never accepted the art work. However, since he bought it at an auction that may be a difficult argument. Alternatively, buyer B could revoke his acceptance.

Another colorable claim by the buyer lies within U.C.C. § 2-513(3). This section applies when there is a "Cash on Delivery" ("C.O.D.") situation. Here, the buyer had to pay Sotheby's before inspecting the good, unless the defect was overtly detectable (if for example the Picasso had been drawn in crayon). Since the buyer did not have an opportunity to inspect the good, mere payment does not constitute acceptance under U.C.C. § 2-606. A buyer, who pays for the goods in C.O.D setting before inspecting, must do so and therefore will not suffer the adverse consequences of acceptance. If the court agrees that an auction is a C.O.D. situation then the buyer will be found to have rejected the good, and therefore will not be bound by the contract.

If the good is non-conforming or if the good is counterfeit, the buyer's remedial entitlements depend on whether the buyer has accepted or not. If the buyer has not accepted, then the buyer can reject under U.C.C. § 2-601 to § 2-605 and be entitled to the remedies

provided in § 2-712, § 2-713, § 2-715, § 2-716. The remedies range from the seller replacing the good to what damages the plaintiff is entitled.¹¹² Under §2-602 if the buyer seasonably notifies the seller of rejection, that precludes acceptance.¹¹³ If the buyer has accepted then the buyer cannot reject and must try to revoke his acceptance. The buyer can attempt to revoke under U.C.C. § 2-608 and if he can do so, then the buyer is put in the same place as if he rejected the good in the first place. If revocation is not available, then B is left with the sole remedy of money damages under U.C.C. § 2-714 and U.C.C. § 2-715.

The standard for revocation is very high because the buyer must show substantial impairments in value to him personally on a subjective standard and the buyer must further demonstrate one of three situations in addition to substantial impairment: (1) On a reasonable assumption that nonconformity would be cured and it was not cured, (2) if when acceptance was reasonable at the time, but now because of a latent defect it is no longer acceptable (3) Seller's repeated assurances.¹¹⁴ B's acceptance was induced by S's aggressive assurances which deprived Buyer of meaningful opportunity for B to discover the defect. In this hypothetical, there would be substantial impairment to the buyer, since he spent \$10 million dollars on this counterfeit work of art. However, the second requirement is more difficult to prove. The best argument would be the second alternative, that acceptance was reasonable at the time because both the buyer and Sotheby's reasonably thought this work of art was authentic and it was not found until later that the art work was actually an outstanding, worthless copy.

As noted, the U.C.C. contains a host of sections that create some liability for the seller and some remedy for the wronged buyer. However, the sections are geared to goods that are regularly bought and sold on the market and can be easily replaced as opposed to very expensive and seldom transferred goods, such as a multi-million dollar work of art that is a one of a kind.

In the hypothetical, it might prove difficult if not impossible to cure this counterfeit art situation since this work is the only one of its kind. In order for Sotheby's to cure this problem, the auction house would have to find the original work to replace the fake. Sotheby's would most likely end up refunding the buyer's purchase price and may be liability for other damages under breach of contract.

These works deserve an appropriately tailored statute creating liability, especially for intentional art forgers. If the art forger intentionally and actively attempts to create and sell forged works, the punishment should be swift, harsh, and liability should be simple to impose. Liability should be less harsh for defendants of unintentional forgeries, similar to that in music infringement cases. Of course, counterfeiting occurs on a much smaller basis as well, which often makes "the juice not worth the squeeze." In other words, the small nature of the offensive material does not make prosecution worth the resources. This lack of enforcement of these statutes leads the forgers to continue their inapt behavior.

If a buyer spends \$300 on an "original" work that is later discovered to have been forged, the attorney's fees alone make pursuing this claim unreasonable. Therefore, the only plaintiffs that would enjoy any type of relief are those that spend an extravagant amount of money on a work of art. Another recommendation would be to have the legislature craft a statute that would allow a simple class action suit against the defendant. Therefore, everyone who spends \$300 on an "original" work of art would aggregate into a class and thus stand a chance at pursuing relief. These are examples of civil liability. Where there is a breach of contract claim or any claim promulgated by the U.C.C., it provides a civil private right of action.

V. **Levels of Deceit: Criminal and Civil**

“The goal of criminal law is to punish bad acts, whereas civil causes of action enforce the rights of private parties through compensation.”¹¹⁵ Civil claims are to remedy private disputes between two parties because of harm done directly to that plaintiff. The remedies in civil cases typically range from monetary damages to put the aggrieved party in the place they were before the contract and specific performance, which gives the party exactly what they bargained for.¹¹⁶ Criminal claims are brought by the state government or federal government against a defendant as a crime against the community as a whole. The remedies in criminal cases typically range from monetary compensation to time served in prison. Usually, criminal liability does not preclude civil liability. Thus, a statute crafted should allow for both remedies, if needed.

a. Real Life Applications and Examples

Frequently, fake art turns up with most respected art dealers as well as on eBay. It may be argued that the well-established art dealer situation is more troubling than that of a novice buyer. First, if patrons are spending an extravagant amount of money on a piece of art, they will most likely hire an independent expert to authenticate the work. At the same time, because patrons are paying such a high price for the art work, the sophisticated, experienced art buyers may rely to their detriment simply on the dealer’s reputation. After all, how could Sotheby’s sell someone a fake work of art? In October 2000, Sotheby’s, “the world’s largest art auction house, ha[d] been under investigation for alleged price-fixing and securities fraud.”¹¹⁷ In October of 2000, Sotheby’s former President and CEO, Diana Brooks, pled guilty to price-fixing.¹¹⁸ Diana Brooks was sentenced to probation, 1000 hours of community service, 6 months house arrest, and ordered to pay a \$350,000 fee after being found guilty of colluding with Christie’s to fix commission prices.¹¹⁹

Another high-powered Sotheby's employee received a harsher sentence after being implicated by Diana Brooks. In 2001, A. Alfred Taubman, the former chairman of Sotheby's Holdings was convicted of price-fixing, sentenced to a year and a day in prison and fined \$7.5 million dollars.¹²⁰ Taubman maintained his innocence even after serving his sentence and claimed Diana Brooks lied to mitigate her crime.¹²¹

Another prominent and once respected art dealer, Larry Salander was found guilty of grand larceny and ordered to pay \$114 million dollars in restitution for selling artwork he did not own and pocketing the profit himself.¹²² Salander was entrusted with millions of dollars' worth of art work and then sold it without permission and kept the proceeds.¹²³ Salander made a statement to the court and the victims of his crime and the defense introduced evidence of mental health problems on behalf of Salander.¹²⁴

Another art dealer in Los Angeles, Matthew Taylor, was arrested and accused of money laundering, possession of stolen property and transportation of stolen property and is facing 100 years in prison if convicted.¹²⁵ "Prosecutors say Taylor also affixed on some paintings fake labels from museums, such as the Guggenheim in New York, to make it appear the works had once been part of the collections at those institutions."¹²⁶

More recently in 2012, a group of impressionist paintings that have been in circulation in the art world for years were deemed fake.¹²⁷ "The [FBI] has been investigating at least two dozen paintings supplied by a Long Island dealer named Rosales and sold by Knoedler and another New York dealer."¹²⁸ The works are attributed to Modernist masters like Rothko, Jackson Pollock, Franz Kline, Willem de Kooning and others, but several experts have called them forgeries."¹²⁹ The defendant maintains that the works are authentic, however. In addition, another instance of crime was a mixture of selling counterfeit art and stealing an original art

work. A museum in Venezuela was contacted by a Miami Gallery indicating that someone had offered to sell the Gallery the painting *Odalisque in Red Pants* by Matisse.¹³⁰ “Experts at the museum inspected the likeness [in Venezuela] and were shocked to find that it was a fake...Someone had removed the original painting from its frame and put the fake in its place, leaving it to be exhibited as if it were the real thing. And no one noticed.”¹³¹

One art forger, John Myatt, was complicit in selling fake art on a much smaller scale. John Myatt, a single father, living in England, plead guilty to fraud and served four months in prison. Myatt made about \$144,000 during this time.¹³² Myatt started creating works of art commissioned by friends for a fee.¹³³ Then he was contacted by Drewe and he asked Myatt to paint some works for his own personal use.¹³⁴ Then, without notice, Drewe passed one work off to Christie’s successfully without Myatt’s consent.¹³⁵ Myatt painted about 200 works of art, while the operation was maintained by John Drewe, who was sentenced to six years in prison and made about \$2.4 million dollars during the operation.¹³⁶ John Drewe handled all of the sales as well as the forged provenances, the chain of ownership that should accompany each valuable work of art.¹³⁷

As time went on, Myatt was ignorant as to how Drewe was providing him with this money support his family. An interesting caveat to this story is the fact that his fakes were unable to be detected for such an extended period of time. Not only were the materials used inauthentic for the time period they were supposed to be painted in, the provenances were forged and also remained undetected.¹³⁸ This is troubling since not even a large auction house like Christie’s was able to detect the forgery. These are all large scale art forgeries and understandably there have been consequences including jail time and monetary compensation.

b. Proposed Federal Statute

Despite the remedies for those swindled out of substantial amounts of money, no adequate remedies exist for those conned out of more modest amounts. The federal legislature may be able to remedy this problem by constructing a statute that makes counterfeit art a strict liability offense and by imposing a financial statutory cap that would limit the reach of this strict liability statute. For example, the criminal misdemeanor statute could read “[A]ny person who creates, sells, or auctions counterfeit or non-genuine art for \$500 or less is strictly liability to the purchaser to the extent of the purchaser’s initial investment, up to five (5) times the amount of the purchaser’s initial investment but in no case less than double the amount originally sold for, and a maximum of 1 year in prison.” This would protect the average, unsophisticated art buyer and allow for a remedy that would not require an unreasonable amount of attorney or expert fees.

The guidelines for handing down criminal sentences must be refined for larger offenses as well. As the valued amount of the work of art increases so should the punishments, however, intent must be introduced as a factor. Strict liability should not be imposed if the statute outlines harsh penalties. The felony statute should read “[A]ny person who knowingly or recklessly sells or auctions counterfeit or non-genuine art for more than \$500 shall be liable to the purchaser to the extent of the purchaser’s initial investment, plus a fine up to five (5) times the purchaser’s investment, but in no case less than double the amount originally sold for, and prison time minimum one (1) year to maximum twenty (20) years.” Judges should have clear guidelines in imposing sentences on convicted of selling or creating forged art. Perhaps these unambiguous punishments will act as enough of a deterrent that they will discourage selling forged art. The crime of selling forged art must ripen into a low-reward, high-risk crime in order to effectively stop this crime.

As seen above, many individuals, in a position of power also succumb to breaking the law. The reasons for this may be purely speculative; however, one may suggest greed is the number one motivating factor. Most disturbing is a high powered person, entrusted with art work, taking advantage of innocent consumers. Common criminals are one group of people that are punished for selling counterfeit art. Is Diana Brooks, former CEO of Sotheby's, a common criminal? It strikes a nerve when considering Ms. Brooks' position of power being used for a criminal purpose, to defraud innocents. One may expect that behavior from a "common criminal," perhaps desperate for money to feed his family, like John Myatt. Diana Brooks was not desperate for money; she was not on the brink of poverty, yet she defrauded people out of millions of dollars. Of course the reason for committing a crime should be irrelevant, often Judges do take this information into account but it may provide for some leniency. One may fail to see the commonality and justification as to why Diana Brooks received the sentence she did. Three months house arrest, a \$350,000 fine, community service, and probation hardly seem appropriate for conspiracy that cost people collectively millions of dollars.

A common theme here is that people entrusted with these precious art works yield to greed. Perhaps if the law provided a stronger deterrent and imposed a higher standard of care on these individuals, less fraud and conspiracy would take place. This standard would be similar to those of financial advisories who have a fiduciary duty to their clients. These advisors are entrusted with client's money and are expected to behave morally. Similarly, the CEO of Sotheby's is entrusted with items of high monetary and cultural value. These individuals are put in a position where their decisions can have long range consequences and they should have to be held responsible for that privilege. The CEO of Sotheby's has the ability to defraud the public

out of millions of dollars where as a private vendor on eBay would not be able to gross that high amount of profit without detection, or so one would hope.

VI. Conclusion: “Those who do not want to imitate anything, produce nothing.-Dali

Art forgeries may be prosecuted federally, by the state, criminally and civilly with permutations of each of the previous four categories. Despite the vast array of existing legal heroism aimed to prevent art forgery and guidelines to remedy it, the question must be articulated, is this enough? Obviously, art work cannot and is not produced in a vacuum. For thousands of years, artists have been inspired by each other’s work, always attempting to add an extra creative element somewhere. Dali’s quote above exemplifies this in the sense that imitation in art work is perfectly acceptable, but brazen, brush stroke for brush stroke copying and reselling a work of art for pecuniary gain is not acceptable. Those who do the latter should have to face devastating consequences.

An analogy to forgery in the art world is “biting” in the hip hop world. Biting is simply copying another artist’s work whether it is music or lyrics without giving proper credit.¹³⁹ Of course there are legal ramifications that entitle an artist to monetary or injunctive relief under a copyright infringement statute. However, the consequences of biting extend further than the legal consequences to social failure. If an artist is even accused of biting, that artist will suffer irreparable social consequences and lose all respect from other members of the community for this offense.¹⁴⁰

Regardless of which industry the forgery stems from, there is one critical, central take away: liability or punishment is proper and must be imposed to remedy this great moral failure. A balance must be struck between the punishment and the offense, whether it is criminal or civil, state or federal. Imposing a federal statute such as the one proposed earlier, would greatly deter

criminals from selling forged art and would transform the crime of counterfeiting art from a low-risk, high-reward crime into a high-risk, low-reward crime.

¹ Christie's, <http://www.christies.com/about/company/> (last visited Oct. 25, 2012).

² Sotheby's, <http://www.sothebys.com/en/inside/about-us.html> (last visited Oct. 25, 2012).

³ Patricia Cohen, A Picasso Online for Just \$450? Yes, It Is a Steal, N.Y. Times, Sept. 3, 2012 http://www.nytimes.com/2012/09/03/arts/design/growth-in-online-art-market-brings-more-fraud.html?pagewanted=all&_r=0.

⁴ *Id.*

⁵ *Id.*

⁶ Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 Am. Crim. L. Rev. 971, 1007 (2001); See Joseph C. Giocanda, *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?*, 31 Hastings Comm. & Ent. L.J. 47, 53 (2008).

⁷ Giocanda, *supra* note 6 at 53.

⁸ See generally *Balog v. Center Art Gallery-Hawaii*, 745 F. Supp. 1556 (Haw. Dist. Ct. 1990).

⁹ Giocanda, *supra* note 6 at n53.

¹⁰ Ralph E. Lerner & Judith Bressler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists* 251 (3rd ed. 2005); See also Giocanda, *supra* note 6 at 53.

¹¹ Noonan & Raskin, *supra* note 6.

¹² U.S. CONST. art. 1 § 8, cl. 8.

¹³ 18 U.S.C. §1961-68 (2012).

¹⁴ 15 U.S.C. § §41-58 (2012).

¹⁵ 15 U.S.C. § 1125(a) (2012).

¹⁶ 17 U.S.C § 106A (2012).

¹⁷ 18 U.S.C.S § 2314 (2012).

¹⁸ U.S. CONST. art. 1 § 8, cl. 8.

¹⁹ Copyright Act of 1909, ch. 320, 9-10, 35 Stat. 1075, 1077-78 (1909) (amended by the Copyright Act of 1976 and currently codified at 17 U.S.C. 101-1101 (2000)) [hereinafter Copyright Act of 1909].

²⁰ Black's Law Dictionary (9th ed. 2009).

²¹ Copyright Act of 1909, *supra* note 19.

²² See generally *Ringgold v. Black Entm't T.V.*, 126 F.3d 70 (2d Cir. 1997).

²³ *Id.*

²⁴ United States Copyright Office, <http://www.copyright.gov/circs/circ15a.pdf> (last visited Oct. 25, 2012).

²⁵ Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 Minn. J.L. Sci. & Tech. 193, 193 n.5 (2000) (explaining that 1923 is the operative date of the 1909 Copyright Act).

²⁶ 17 U.S.C. §302 (2012).

²⁷ *Id.*

²⁸ 17 U.S.C. §302 (c) (2012).

²⁹ 17 U.S.C. §304 (b) (2012).

³⁰ Telephone Interview with Henry Lanman, Associate General Counsel, Museum of Modern Art (Oct. 26, 2012).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Maverick Recording Co. v. Harper*, 598 F.3d 193, 198 (5th Cir. 2010).

³⁵ *Ringgold v. Black Entm't T.V.*, 126 F.3d 70, 73 (2d Cir. 1997).

³⁶ 17 U.S.C. § 107 (2012).

³⁷ See generally *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

³⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

³⁹ *Ringgold*, 126 F.3d at 198.

⁴⁰ 17 U.S.C. § 107 (2012).

⁴¹ *Sheldon*, 309 U.S. at 390.

⁴² *Campbell*, 510 U.S. at 594.

⁴³ *Id.*

⁴⁴ *Id.* at 599.

⁴⁵ 18 U.S.C § 472 (2012). “Uttering counterfeit obligations or securities: Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.”

⁴⁶ 18 U.S.C § 473 (2012). “Dealing in counterfeit obligations or securities: Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.”

⁴⁷ 15 U.S.C. §§ 41-58 (2012).

⁴⁸ *Id.*

⁴⁹ See generally *FTC v. Magui Publishers, Inc.*, 1991 U.S. App. LEXIS 3239 (9th Cir. 1991).

⁵⁰ *Id.*

⁵¹ *FTC*, 1991 U.S. App. LEXIS 3239.

⁵² *Id.*

⁵³ 15 U.S.C § 1114 (2012). “Remedies; infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.”

⁵⁴ 15 U.S.C § 1114 (2012).

⁵⁵ 15 U.S.C § 1125 (2012). “False designations of origin, false descriptions, and dilution forbidden

(a) Civil action (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. (2) As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.”

⁵⁶ *Id.*

⁵⁷ *FTC*, 1991 U.S. App. LEXIS 3239.

⁵⁸ See generally *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.* 659 F.2d 695 (5th Cir. 1981).

⁵⁹ *Id.*

⁶⁰ 15 U.S.C. § 1125(a) (2012).

⁶¹ 17 U.S.C § 106A (2012). “Rights of certain authors to attribution and integrity

(a) Rights of Attribution and Integrity.— Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and
(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113 (d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”

⁶² 17 U.S.C. § 106 (2012).

⁶³ *Carter v. Helmsley-Spear*, 71 F.3d 77, 81 (2d Cir. 1995).

⁶⁴ 17 U.S.C.S. § 101 (2012). “A work of visual art is (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”

⁶⁵ *Id.*

⁶⁶ *Gilliam v. Am. Broad. Co., Inc.*, 538 F.2d 14, 24 (2d Cir. 1976).

⁶⁷ 18 U.S.C.S § 2314 (2012).

⁶⁸ *Id.*

⁶⁹ See generally Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 Buffalo L. Rev. 359, 364 (2001).

⁷⁰ U.C.C § 2-103 (2001). “‘Goods’ means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, or choses in action.”

⁷¹ U.C.C. § 2-312 (2001). “Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (3), there is in a contract for sale a warranty by the seller that:

(a) the title conveyed shall be good and its transfer rightful and shall not unreasonably expose the buyer to litigation because of any colorable claim to or interest in the goods; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) Unless otherwise agreed, a seller that is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer that furnishes specifications to the seller must hold the seller harmless against any such claim that arises out of compliance with the specifications.

(3) A warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the buyer reason to know that the seller does not claim title, that the seller is purporting to sell only the right or title as the seller or a third person may have, or that the seller is selling subject to any claims of infringement or the like.”

⁷² *Id.*

⁷³ U.C.C. § 2-313 (2001). “Express Warranties by Affirmation, Promise, Description, Sample.

(1) In this section, “immediate buyer” means a buyer that enters into a contract with the seller.

(2) Express warranties by the seller to the immediate buyer are created as follows:

(a) Any affirmation of fact or promise made by the seller 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 that 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.

(3) It is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that the seller 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.

(4) Any remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of the specified event.”

⁷⁴ U.C.C. §2-313 (2001).

⁷⁵ U.C.C. §2-314(3) (2001).

⁷⁶ *Id.*

⁷⁷ Donald M. Zupanec, *Practices forbidden by state deceptive trade practice and consumer protection acts*, 89 A.L.R.3d 449 (2012).

⁷⁸ *Id.*

⁷⁹ N.Y. Arts & Cult. Aff. Law §13.01 (Bender 2012).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² NY CLS Penal § 155.05 (1) (2012).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ NY CLS Penal § 155.05 (2) (2012).

⁸⁶ NY CLS Penal § 155.30 (5) (2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ NY CLS Penal § 165.40 (2012).

⁹⁰ Cal Pen Code § 484 (a) (2012).

⁹¹ *Id.*

⁹² NY CLS Penal § 165.71(2012).

⁹³ Telephone Interview with Henry Lanman, Associate General Counsel, Museum of Modern Art (Oct. 26, 2012).

⁹⁴ 17 U.S.C. §101 (2012).

⁹⁵ *Id.*

⁹⁶ *MGM v. Am. Honda Motor Co., Inc.*, 900 F.Supp. 1287, 1297-98 (C.D.C.A. 1995).

⁹⁷ *Allen v. Scholastic Inc.*, 2011 WL 43448 (S.D.N.Y. 2011).

⁹⁸ 17 U.S.C. §102 (2012).

⁹⁹ 15 U.S.C §1111 (2012).

¹⁰⁰ The United States Patent and Trademark Office, <http://www.uspto.gov/trademarks/index.jsp> (last visited Oct. 25, 2012).

¹⁰¹ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 914 (6th Cir. 2003).

¹⁰² *Columbus Rose LTD. V. New Millennium Press*, 2002 WL 1033560 (Dist. Ct. 2002).

¹⁰³ 15 U.S.C. § 1125(a) (2012).

¹⁰⁴ *Kassbaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487, 492 (9th Cir. 2000).

¹⁰⁵ *Columbus Rose LTD, supra* note 102.

¹⁰⁶ *Id.*

¹⁰⁷ *See generally Leon E. Trakman, The Twenty-First-Century Law Merchant*, 48 Am. Bus. L.J. 775 (2011).

¹⁰⁸ *Id.*

¹⁰⁹ U.C.C §1-201(12) (2001).”’Contract’, as distinguished from ‘agreement’, means the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.”

¹¹⁰ U.C.C § 1-201(2001).

¹¹¹ U.C.C § 1-201(19) (2001). ”’Genuine’ means free of forgery or counterfeiting.”

¹¹² U.C.C. § 2-712, 713, 715, 716 (2001).

¹¹³ U.C.C. § 2-602 (2001).

¹¹⁴ U.C.C. § 2-608 (2001).

¹¹⁵ Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 Wash. U. L. Rev. 1315, 1318 (2008).

¹¹⁶ *Id.*

¹¹⁷ Noonan & Raskin, *supra* note 6.

¹¹⁸ *Id.*

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- ¹³⁵ *Id.*
- ¹³⁶ *Id.*
- ¹³⁷ *Id.*
- ¹³⁸ *Id.*
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