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## **Experts' Role in Art Authentication**

### **Introduction**

Once an artist creates a piece, it has some value to the public. However, when a piece of art is claimed to be created by a renowned artist, such as Warhol, Van Gogh, or Monet, authentication of said piece is the difference between thousands and millions of dollars. Thus, the art market relies on experts and their authentication services. Despite authenticators' importance, the art world has had its fair share of legal troubles, with many authentication boards sued over their authentication decisions. A good example is the Andy Warhol Foundation for the Visual Arts, which spent nearly seven million dollars over recent years in defense against an antitrust lawsuit.<sup>1</sup> The result was the Board's announcement of dissolution "informed by a strategic review of [its] core programs and reflect[ion] [of] the Foundation's intent to maximize its grant-making and other charitable activities".<sup>2</sup> One can make the inference that the true reason of dissolution was the enormous loss from lawsuits.

### **History of Art Forgery**

The issue of art authentication arose out of the need to attribute works to the appropriate artist. Since art increases in value over the years, the idea of wealth gives individuals incentives to commit fraud, with the most basic form in the art community being forgery. Forgery, in art, is

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<sup>1</sup> Eileen Kinsella, *A Matter of Opinion*, ARTnews.com (2012), <https://www.artnews.com/art-news/news/a-matter-of-opinion-512/> (last visited Mar 18, 2020).

<sup>2</sup> *Statement from the Board of Directors*, The Andy Warhol Foundation for the Visual Arts - Authentication Procedure, [https://warholfoundation.org/legacy/authentication\\_procedure.html](https://warholfoundation.org/legacy/authentication_procedure.html) (last visited Mar 18, 2020).

defined as a work of literature, painting, or sculpture that claims to be the work of someone other than its true maker.<sup>3</sup> Copying is the easiest form and usually is the easiest to detect: when a duplicate arises, one would just need to determine which is the original and which is the copy.<sup>4</sup> Artists often copy other works to further their own artistic ability. Renaissance artist Michelangelo gained reputation in the early years through this method, with one example of him working in the studio of Domenico Ghirlandaio. Michelangelo, given a drawing of a head to copy, recreated it with such quality and even smoked the paper to make it appear old that his master thought it to be the original drawing.<sup>5</sup> This example highlights a difference in intention. Artists copy to further their ability and gain reputation in the art world. While their copied work might deceive lookers into thinking the piece is an original, there is no intent to deceive. Such is the difference between artists and art forgers. Forgers have the intent to defraud others, taking advantage of the lucrative art market. Thus, when a duplicate arises claiming to be the original, the art world takes measures to determine what is claimed is true.

### **Methods of Art Authentication**

There are generally three methods in which an expert authenticates artwork: (1) connoisseurship or judgment by eye, (2) historical documentation or provenance, and (3) scientific analysis. Before getting into the details of each method, it should be noted that the title of “art expert” is not legally regulated, meaning there is no certification board such as for forensic document examiners. Instead the art market establishes its own rules to recognize only

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<sup>3</sup> Joseph Veach Noble & Gerald Bonner, *Forgery* Encyclopædia Britannica (2016), <https://www.britannica.com/art/forgery-art> (last visited Mar 22, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> Derek Fincham, *AUTHENTICATING ART BY VALUING ART EXPERTS*, 86 Miss. L.J. 567 (2017).

the opinion of certain individuals or expert groups.<sup>6</sup> This could lead to issues in authentication lawsuits when one side is attempting to bring in a witness claiming to be an art expert. Initially the standard for expert testimony came from *Frye v. United States* and whether the method was generally accepted in the relevant scientific community. Viewing this standard as too rigid, courts turned to Federal Rule of Evidence 702 where a witness may testify if qualified as an expert by knowledge, skill, experience, training, or education and if it would help the trier of fact in understanding the evidence. This seems to allow art authentication especially with helping the trier of fact, as many persons could not claim to have the ready knowledge about the time period, materials used, or style of a particular art work. Nonetheless the idea of an art expert becomes clearer following *Kumho Tire Co. v. Carmichael*, where any such knowledge might become the subject of expert testimony so long as the testimony rests on a reliable foundation and is relevant to the task at hand.<sup>7</sup> With this idea of how an expert may testify in court, one can look at each method of art authentication and determine its reliability.

#### 1. Connoisseurship or judgement by eye

The first method is connoisseurship or "informed visual perception" where a trained art expert has examined hundreds or thousands of works by the artist in question and has an understanding of the artist's method. Indeed one can see that this evaluation is subjective, particularly since the specific group of experts undertaking authentication includes the artist's friends, family, or well-established gallerists.<sup>8</sup> However, these experts' ability to perceive usually

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<sup>6</sup> Anne Laure Bandle, *Fake or Fortune? Art Authentication Rules in the Art Market and at Court*, International Journal of Cultural Property (2015).

<sup>7</sup> *Kumho Tire Company, Ltd. v. Carmichael*, Oyez, <https://www.oyez.org/cases/1998/97-1709> (last visited Mar 27, 2020).

<sup>8</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 Cardozo Arts & Ent LJ 515 (2017).

indicate authenticity or inauthenticity before the need for a board or lab arises. Many connoisseurs are noted for their visual memories, with their decisions informed by immediate gut reactions. Their identification equated to “recognizing ‘the face of a friend in a crowd.’”<sup>9</sup> Giving nuance to attribution and acknowledging involvement of third-party artists, these experts may use formulations, such as “studio of”, “circle of”, “follower of”, or “attributed to”, terms that further differentiate authorship and affect value of the piece. In addition, references are made to existing certificates, expertise reports, or catalogues.

Such subjectivity of course leads to many disagreements and headaches in litigations. Therefore, the art world has gradually turned away from depending solely on connoisseurship, the effects of which will be developed more thoroughly later in this paper. Connoisseurship is thus seen as an initial method needing support of other evidence.

## 2. Historical Documentation or Provenance

The second method is provenance or historical documentation of the ownership of the piece of art. Chain of ownership is important and viewed as persuasive evidence of a work’s authenticity. To build the strongest provenance, art historians examine the totality of records, including sale receipts, artists’ records, museum records, and catalogues raisonnés, viewing a paper trail that can be traced back with no gaps.<sup>10</sup> In particular, a catalogue raisonné holds great weight on the market.<sup>11</sup> A catalogue raisonné documents all of the works currently known by an artist, providing for each known work the size, year of creation, where it was exhibited, or when it was discussed in publications. They are considered to be well-respected sources of information

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<sup>9</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>10</sup> *Id.*

<sup>11</sup> Anne Laure Bandle, *Fake or Fortune? Art Authentication Rules in the Art Market and at Court*, International Journal of Cultural Property (2015).

on an artist. If there is an expressed approval of authorship of a piece, leading such work to be included in a catalogue raisonné, this can greatly enhance the market value of the given work. On the other hand, a negative opinion or the failure to include a work in a catalogue can have just a negative impact on the value.<sup>12</sup>

Although provenance could be considered the best proof of authenticity, a piece of art's history and documentation can be faked. A great example is the art forger Wolfgang Beltracchi, who went to great lengths to demonstrate authenticity. Beltracchi invented a story about a recent inheritance of a pre-World War II art collection which came into the hands of his wife. The two intentionally overexposed photographs on pre-World War II photo paper to ensure appearance of age and bought frames and canvases from particular eras at flea markets.<sup>13</sup>

### 3. Scientific Analysis

The third and final method is scientific testing or forensics to determine the work's physical properties. This includes analysis testing art materials, such as paint samples and canvas fibers and utilizing of tools such as x-ray diffraction, scientific photography, radiocarbon dating, and fingerprint analysis.<sup>14</sup> These examinations help pinpoint whether the work was made at the time and place that the seller claims or whether materials post-date a particular artist.<sup>15</sup> Due to the ever-evolving technology available, forensics allows for a more objective evaluation of

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<sup>12</sup> Derek Fincham, *AUTHENTICATING ART BY VALUING ART EXPERTS*, 86 Miss. L.J. 567 (2017).

<sup>13</sup> Naomi Blumberg, Wolfgang Beltracchi, Encyclopædia Britannica (2020), <https://www.britannica.com/biography/Wolfgang-Beltracchi> (last visited Apr 2, 2020).

<sup>14</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 Cardozo Arts & Ent LJ 515 (2017).

<sup>15</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

authenticity. However, forgers are also aware of scientific testing and are thinking of new ways to escape detection.

### **Issues in Art Authentication**

There are two main issues with art authentication. The first issue is that the art world does not approach art authentication objectively, instead one is always financially interested.<sup>16</sup> This can be traced back to the catalogue raisonné and the enhanced market value of the artwork if included. The second issue is admissibility of testimony by art experts, particularly with the subjectivity of connoisseurship.<sup>17</sup>

#### **1. The Catalogue Raisonné**

Increasingly the job of authenticating art work has shifted to artist foundations and authentication boards created by the artist or from the artist's estate. However, these foundations receive income from the sale of or holding of works of art, causing potential conflicts of interests between the foundation itself and its board members and officers.<sup>18</sup> As opposed to an art dealer who typically owns a work of art and sells it, an auction house seldom owns the works it sells. Before each sale, auction houses generally consult the authority for the specific artist of a work's authenticity before offering the work for sale. When attributing art, auction houses rely on information, such as authenticity certificates, expertise reports, and provenance supporting documents.<sup>19</sup> Authentication in this sense is limited since it is only for the purpose of the sale of

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<sup>16</sup> Derek Fincham, *AUTHENTICATING ART BY VALUING ART EXPERTS*, 86 Miss. L.J. 567 (2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Anne Laure Bandle, *Fake or Fortune? Art Authentication Rules in the Art Market and at Court*, *International Journal of Cultural Property* (2015).

the work. While there is a general authenticity guarantee for the buyers, there is the sense of pre-purchase diligence that favors sellers over buyers.

Looking at the context of the art market, it is easy to see why litigation has grown in this area. The importance of the catalogue raisonné can be seen in the recent New York case of *Lagrange v. Knoedler Gallery, LLC*. The facts describe that plaintiff Pierre Lagrange sued the Knoedler Gallery and its former director and president, Ann Freedman, over the sale of a painting advertised as *Untitled, 1950* by Jackson Pollock. The plaintiff alleged reliance on the defendants' representations in purchasing the purported Pollock painting for \$17 million, and added that he hired an unnamed consulting company who concluded in a report that the painting was a fake.<sup>20</sup> One of the false representations made by defendants included that the painting “would be listed in [a catalogue raisonne of Pollock paintings and] that twelve scholars of Pollock's work opined that it was in fact a Pollock”. The forensic report was provided for the Gallery stating that two paints used did not exist at the time of Pollack's death, and immediately the next day, the chairman of the Gallery announced its closing.<sup>21</sup> While the results of this case are unusual (rejection of injunction relief prohibiting the Gallery from disposing of its assets)<sup>22</sup>, it greatly shows the influence of provenance. The plaintiffs attempted to later sell their painting but were unable to because of the absence of its inclusion in a catalogue.

#### a. Litigation Generally

Like depicted in *Lagrange*, many lawsuits regarding authentication involve a contractual relationship pertaining to a sale between buyers and sellers. Courts have come to expect art

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<sup>20</sup> Cherchez les Catalogues Raisonné, *The National Law Review* (2011), <https://www.natlawreview.com/article/cherchez-les-catalogues-raisonn> (last visited Apr 3, 2020).

<sup>21</sup> *Lagrange v. Knoedler Gallery*, 2011 U.S. Dist. LEXIS 163035 (S.D.N.Y. December 23, 2011).

<sup>22</sup> *Id.*



collectors to use due diligence by hiring their own experts—connoisseur, forensics scientist, and provenance researcher—instead of relying on the seller’s promises. It is also helpful to include warranty clauses and limited liability clauses in the sales agreements.<sup>23</sup> This method not only protects the buyer but the seller as well. Particularly lawsuits can be categorized as resulting from these scenarios: (1) the expert expresses a positive opinion about the artwork that is relied upon by a purchaser but is later called into question, (2) the expert expresses negative opinions that make the artwork unmarketable, (3) the expert omits a work submitted from a catalogue raisonne, or (4) the expert declines to express an opinion or decides that a determination cannot be made regarding authenticity.<sup>24</sup>

#### b. Litigation Effects on Authentication

While authenticators and authentication boards have attempted to protect themselves from litigation by way of contract law, this has not stopped the many lawsuits arising out of the authentication process. There has been a rise in antitrust claims, as they have the “practical advantage of overriding any contractual promises not to sue.”<sup>25</sup> The most relevant case is the aforementioned case concerning the Andy Warhol Foundation for the Visual Arts. The basic facts describe that Mr. Simon-Whelan requested the Board to examine a painting believed to be created by Warhol. The Board issued opinion letters twice notifying their determination that the painting was not created by Warhol. This result led to a filing by Mr. Simon-Whelan of a class action complaint, including the claim of monopolization and conspiracy in violation of the

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<sup>23</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>24</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 Cardozo Arts & Ent LJ 515 (2017).

<sup>25</sup> *Id.*

Sherman Act.<sup>26</sup> The inclusion of this claim alleged that the Board was purposely monopolizing the art market and lessening the amounts of credible Warhols on the market to increase their value. While the case ultimately settled in favor of the Board, the fact that Foundation spent nearly seven million dollars over the years should be reiterated.

The Andy Warhol Foundation is not the only board to feel the sting of litigation. The Haring Foundation was sued for forty million dollars and the Calder Foundation was sued for nearly four million dollars.<sup>27</sup> Due to the threat of litigation, there has been a rise of scenario four and the refusal to authenticate out of fear. In addition to this chilling effect on authentication is the rise of many boards disbanding.

## 2. Admissibility of Expert Testimony

The subjectivity of connoisseurship has been stated many times within this paper, rightly so given the context of legal battles over authenticity. A famous case pertains to the well-known connoisseur Bernard Berenson and the art dealer Joseph Duveen. These two men made a secret agreement with each other which provided Berenson with proceeds from sales of works that he authenticated.<sup>28</sup> In a legal suit brought by André Hahn relating to a Leonardo da Vinci attribution, Duveen was sued for slander of title. The dealer stated that a work was not by da Vinci, even though he himself never saw the work. He reasoned that the real work was not in the US, but in the Louvre, and therefore, Hahn could not possibly have the original.<sup>29</sup> Both parties

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<sup>26</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Philadelphia Indem. Ins. Co.*, 2012 N.Y. Misc. LEXIS 5487 (N.Y. Sup. Ct. December 6, 2012).

<sup>27</sup> Charles Danziger & Thomas Danziger, Exploring Real World Art Law Issues artnet News (2014), <https://news.artnet.com/market/on-the-case-exploring-real-world-art-law-issues-11677> (last visited Apr 5, 2020).

<sup>28</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>29</sup> *Hahn v. Duveen*, 133 Misc. 871 (N.Y. Sup. Ct. April 13, 1929).

relied on expert testimony related to scientific evidence and historical documents about the work. Equally qualified experts disagreed on the attribution. The case ultimately resulted in a hung jury.<sup>30</sup> The takeaway from the case is the somewhat harsh critiques by the presiding Judge Black over the art market's use of connoisseurs. Had the trial not been a jury trial, it would be easy to see how Judge Black would have ruled. Holding onto the fact that Duveen had not seen the painting and merely had an opinion of its attribution, Judge Black made various charges to the jury, including "whenever a man unnecessarily intermeddles with the affairs of others, with which he is wholly unconcerned, such officious interference will be deemed malicious and he will be liable if special damage follow."<sup>31</sup> He cautioned the jury about the experts in this case "when such conclusions are not founded upon knowledge, experience and study."<sup>32</sup> He also warned the jury that "an expert is no better than his knowledge. His opinion is taken or rejected because he knows or does not know more than one who has not studied a particular subject....Because a man claims to be an expert, that does not make him one."<sup>33</sup> In addition, the judge noted two ways that experts could help in this case: by their study of the authentic history of a painting or by their study of the methods or materials used.<sup>34</sup> It is easy to see why the art world has gradually turned away from connoisseurship, as courts can only establish authenticity shown by available evidence and not merely by bases of intuition. However, the case could also be seen as an example of how not to be an expert witness.

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<sup>30</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>31</sup> *Hahn v. Duveen*, 133 Misc. 871 (N.Y. Sup. Ct. April 13, 1929).

<sup>32</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>33</sup> *Hahn v. Duveen*, 133 Misc. 871 (N.Y. Sup. Ct. April 13, 1929).

<sup>34</sup> *Id.*

As shown by the critiques by Judge Black, there is some disconnect between the art world and the legal world. First, there are differing authentication standards and practices. Court proceedings are governed by procedural and evidentiary rules, with rules on admissibility of evidence, the qualification of expert witnesses, and the burden of proof, with courts referring to a preponderance standard. Contrast such proceedings with the art market resorting to the expert authority for a specific artist.<sup>35</sup> This emphasizes that there is no regulation for art authentication. While connoisseurship has been tossed to the wayside in favor of provenance and forensics, it is in response to such lawsuits. Second, art scholars and lawyers use different language when making statements on a work's authenticity. Lawyers argue at court using strategy, attempting to convince judges that the other party's case is not strong enough. This contrasts with connoisseurs and art experts who are generally honest and direct about an art piece's attribution.<sup>36</sup> Such a statement is to an extent, as there is still a factor of financial interest as a motivation. Third, the authentication process itself differs with result to the outcome. When courts decide on authenticity, it is limited by the case's facts, the parties' claims, and civil procedure and evidence rules. The result is established with a degree of probability with decisions as generally final. In contrast, catalogues and experts' reports usually make a clear statement about authenticity or inauthenticity. Attribution by art experts is subject to change with more information in the future, because, except for scientific analysis, an art expert's authenticity statement is not truly exact.<sup>37</sup>

### **Long-term Reforms to Art Authentication**

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<sup>35</sup> Anne Laure Bandle, *Fake or Fortune? Art Authentication Rules in the Art Market and at Court*, International Journal of Cultural Property (2015).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Due to the issues with art authentication, from financially-interested parties to the differing views between the courts and the art world in terms of admissibility, there has been a chilling effect on art experts. Many foundations and boards have disbanded, and experts have refused to give opinions for fear of later litigation.<sup>38</sup>

Some initial long-term remedies that have been proposed to provide protection to authenticators are coverage under the First Amendment with regard to free speech and anti-strategic lawsuit against public participation (“SLAPP”) statutes.<sup>39</sup> The First Amendment could assist with this issue since art experts give their honest opinions regarding authenticity, affecting the value of the art work in the art market. However, such opinions are mostly in behind-the-door private settings between the owners of the work and the buyers. For opinions to be covered, it would have to be made publicly, particularly in a catalogue raisonne or a scholarly publication.<sup>40</sup> The effect would be similar to the case of *Hahn v. Duveen* with a very public statement about authenticity, having a great effect on the value of art pieces. One could see this solution as a double-edged sword: great protections for authenticators, potentially great loss of value for sellers.

The extension of anti-SLAPP statutes to art authenticators could be a solution to the chilling effect and silence on art expert opinion. SLAPP suits are “generally meritless suits brought primarily to chill the exercise of free speech” with the primary goal of plaintiffs usually not seeking recovery from defendants, but rather to silence a group or individual that has spoken

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<sup>38</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>39</sup> Derek Fincham, *AUTHENTICATING ART BY VALUING ART EXPERTS*, 86 Miss. L.J. 567 (2017).

<sup>40</sup> *Id.*

out against them by initiating costly and time-consuming litigation.<sup>41</sup> Although many plaintiffs in lawsuits against art authenticators are not attempting to silence them but instead sue in want of remedies for the alleged harm the authenticator caused. Nonetheless, the result of SLAPP suits with the chilling of free speech is very much what has happened to the art authentication community.

Many states have enacted anti-SLAPP statutes, such as California, to encourage the public to participate in “matters of public significance” without the potential threat of litigation.<sup>42</sup> These statutes provide the defendant a special motion to strike the suit when the cause of action arises from “any act of [the defendant] in furtherance of the person's right of petition or free speech under” either the United States or [state] Constitutions. The plaintiffs must establish a probability that they will prevail on their claim in order to survive the motion.<sup>43</sup> Similar to protection under the First Amendment, opinions by art authenticators would need to be public issues. Characterization of public issues include statements that concern a person in the public eye, conduct that directly affects many people beyond the direct participants, or a topic of widespread, public interest.<sup>44</sup> While art authentication is usually a private matter between the seller and buyer, the ultimate decision regarding authenticity goes beyond the two direct participants. When the buyer decides years later to sell the artwork, more individuals will become involved. In California, this statute also clarifies that the Anti-SLAPP motion may be used by “any person engaged in dissemination of ideas or expression in any book...[and] any

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<sup>41</sup> Anna Haslinsky, *LANCE ARMSTRONG WINS AGAIN BY SURVIVING A LAWSUIT FOR MISREPRESENTATIONS AND FRAUD WITHOUT SO MUCH AS A "SLAPP" ON THE WRIST*, 22 Jeffrey S. Moorad Sports Law Journal 109 (2015).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary...or artistic work.”<sup>45</sup> The inclusion of the piece in a catalogue raisonne will greatly affect the market price of the work and qualifies a defendant under this clarification to use an anti-SLAPP motion. Therefore, the area of art authentication is of public interest and falls within the protection of these statutes.

The implementation of anti-SLAPP statutes would greatly diminish the chilling effect on authenticators, but not all states have implemented them. In recent years. New York has made headway into a protective stance with a proposal by the State's Art Law Committee hoping to shield art authenticators.<sup>46</sup> New York State began to work on this proposal following the *Lagrange v. Knoedler Gallery* case. The bill would amend §13.04 of New York's Art and Cultural Affairs Law to provide protections for authenticators giving opinions regarding authenticity. In addition, the legislation would prevent forcing art experts to provide positive opinions about authorship, attribution, or authentication.<sup>47</sup> The Bill S1229, sponsored by Betty Little, would define the term “authenticator” to emphasize that they make opinions and stipulates that in a civil action regarding authenticity, the claimant must specify with particularity the facts and prove the elements by clear and convincing evidence. It would also entitle the authenticator to recover reasonable attorneys' fees and expenses if he/she prevails.<sup>48</sup> The proposed amendment

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<sup>45</sup> Anna Haslinsky, *LANCE ARMSTRONG WINS AGAIN BY SURVIVING A LAWSUIT FOR MISREPRESENTATIONS AND FRAUD WITHOUT SO MUCH AS A "SLAPP" ON THE WRIST*, 22 Jeffrey S. Moorad Sports Law Journal 109 (2015).

<sup>46</sup> Derek Fincham, *AUTHENTICATING ART BY VALUING ART EXPERTS*, 86 Miss. L.J. 567 (2017).

<sup>47</sup> Leila Amineddoleh, *Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers*, International Journal of Cultural Property (2015).

<sup>48</sup> NY State Senate Bill S1229, NY State Senate (2015), <https://www.nysenate.gov/legislation/bills/2015/s1229/amendment/original> (last visited Apr 9, 2020).

placed a higher burden on plaintiffs with the change from “preponderance of the evidence” to “clear and convincing”, as well as additional risk to suing with the authenticator potentially recovering attorneys’ fees and expenses.<sup>49</sup> However, the bill was not enacted because the New York State Trial Lawyers Association opposed it. Little then sponsored another version of the bill but eliminated the higher burden of proof and changed the attorney's fees language from the mandatory “*shall* be entitled to attorney's fees, costs and expenses” resulting from “any action” if the authenticator prevails to the permissive “the court *may* allow the prevailing authenticator the costs of the action.”<sup>50</sup> As of today, the bill has not gone further than passing the Senate.<sup>51</sup> Even with the passing of such an act, because of the changes made from its earlier version, authenticators would still have a difficult time. Having the higher burden of proof gave the much needed protection against the chilling effect of lawsuits.

Another proposal to protect art experts is to extend absolute immunity or privilege to their opinions. Having absolute immunity grants immunity from certain forms of process, without exception, for all acts within a particular scope of conduct and for a particular time.<sup>52</sup> Contrast the notion of absolute immunity with qualified immunity, where qualified immunity has an additional “good faith” requirement. The concept of privilege is different from immunity in that it protects the speaker's statement, allowing them to speak opening and honestly about a

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<sup>49</sup> Justine Mitsuko Bonner, *LET THEM AUTHENTICATE: DETERRING ART FRAUD*, 24 UCLA Ent. L. Rev. 19 (2017).

<sup>50</sup> *Id.*

<sup>51</sup> NY State Senate Bill S1229, NY State Senate (2015), <https://www.nysenate.gov/legislation/bills/2015/s1229/amendment/original> (last visited Apr 9, 2020).

<sup>52</sup> *Absolute Immunity*, *Bouvier Law Dictionary*. (The Wolters Kluwer Bouvier Law Dictionary Desk Ed. 2012).



subject matter of public importance, but its result is the same to immunities.<sup>53</sup> New York attempted a bill using these legal concepts to protect art authenticators. In the mid-1960s, then New York State Attorney General Louis Lefkowitz recognized art fraud as a long-term issue affecting the art market and that problem was directly traceable to an unwillingness of art experts to authenticate art work because of the threat of costly litigation.<sup>54</sup> Thus, Lefkowitz proposed a bill in 1966, including provisions that granted absolute immunity to “recognized museum, college or university” for any damages alleged as a result of “any opinion respecting the authenticity of a work of fine art...”<sup>55</sup> The bill also provided a qualified privilege for opinions of “accredited” art experts, providing “no action for damages” for an [authentication] opinion unless it was given in “bad faith or out of actual malice.”<sup>56</sup> Lefkowitz noted that art dealers had a financial interest and specifically precluded them from qualifying as an accredited art authenticator entitled to qualified privilege.<sup>57</sup> The bill failed to pass, most likely due to the opposition of a great number of art dealers. Lefkowitz’s mindset was admirable and his bill could be useful as it was created to target the very same issue present today. Absolute immunity is rare in itself and would completely cut off litigation altogether, potentially leading to abuse of power. Qualified immunity or privilege would be the more appropriate courses since authenticators’ opinions are what causes suits to be filed against them.

One last long-term proposal that has been made goes to the core of the issue of art authentication: licensing and accreditation of art experts. As aforementioned when introducing

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<sup>53</sup> Justine Mitsuko Bonner, *LET THEM AUTHENTICATE: DETERRING ART FRAUD*, 24 *UCLA Ent. L. Rev.* 19 (2017).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

the methods art experts take to authenticate pieces, there is no certification board determining who is an expert. Instead the art world has its own rules in recognizing the opinions of certain groups or individuals. Indeed there are individuals who are great at their craft, having spent years upon years studying the work of one artist and can determine that artist's work. However, there are also individuals who would simply claim to be an expert to bolster the value of a forgery, and it could take years and many victims before such individuals are restricted from authenticating. There are two specific models for licensing of art experts that will be discussed: the first is contained within the 1966 proposed New Year bill by Louis Lefkowitz and the second is a system in which France has adopted.

The Lefkowitz's 1966 bill defined an "accredited fine arts expert" as someone certified by [an accrediting agency] or by a corporation formed or chartered by such board, possessing the necessary training, skill and qualifications to form a sound judgment to the authenticity of art works within the scope of qualifications as defined and certified by the aforesaid accrediting agency.<sup>58</sup> Such a proposal would allow appropriate regulation of the number of accredited art experts. It also allows for admissibility of such experts aligning with Federal Rule of Evidence 702—qualification as an expert by knowledge, skill, experience, training, or education—and Federal Rule of Evidence 703—basis of opinion within the scope of such qualifications.

France has created a comprehensive model for professionalism of art experts and appraisers. French law requires art experts to join a professional organization in order to hold the title of an expert. However, admission to organizations holds certain stringent requirements. For example, admission to the *Chambre Nationale des Experts Spécialisés* entails written and oral

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<sup>58</sup> Justine Mitsuko Bonner, *LET THEM AUTHENTICATE: DETERRING ART FRAUD*, 24 *UCLA Ent. L. Rev.* 19 (2017).

examinations, followed by two years of professional training, and a final round of oral and written exams. For the final oral exam, “the candidate faces twenty objects, consisting of five fakes, five exceptional pieces, and ten common pieces. The candidate must successfully attribute these works for full membership.”<sup>59</sup> These examinations for the title of art expert provide some relief to the public that those who claim to be art experts indeed gained that title appropriately, especially with the meaning that the candidate must correctly identify each of the twenty objects with no mistakes or uncertainty.

### **Short-term Solutions to Art Authentication**

While the implementation of laws could take years, such as the New York bill sponsored by Little, which has merely gone past the Senate, and a system of regulation for art experts is barely on the horizon, there are some short-term forms of relief for art authenticators.

The first short-term solution is title insurance alongside the method of provenance. There is always a risk that there are defects in the chain of title. Art title insurance policies provided two distinct benefits: defense and indemnity. If an ownership challenge arises, the insurer pays for the legal defense of the insured's title. If that defense is unsuccessful, the insurer pays out the value of the art work (up to policy limits and subject to any deductibles) in indemnity payments. The defense cost coverage is important, because disputes over ownership are common and costly. The indemnity coverage is important because of “the long-standing industry practice of maintaining the confidentiality of buyers and sellers.”<sup>60</sup> However, the largest problem with insurance coverage is that it is difficult to tailor art authentication activities so that they fit within

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<sup>59</sup> Justine Mitsuko Bonner, *LET THEM AUTHENTICATE: DETERRING ART FRAUD*, 24 *UCLA Ent. L. Rev.* 19 (2017).

<sup>60</sup> Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 *Quinnipiac L. Rev.* 611 (2011).

the standard criteria that insurers use in evaluating risk in their errors and omissions policies. The process is complicated and time consuming, because it requires “experts to thoroughly describe their activities in advance and requires that they stay within the scope of these activities as a condition of coverage.”<sup>61</sup> The unregulated system of art authentication makes the costs of insurance usually very high, particularly in the situation of unclear chain of title.<sup>62</sup>

The second short-term solution is the College Art Association (“CAA”) protocol. While France provides a model for accrediting and regulating art authenticators, there is no official association taking up the feat of regulating the entirety of art authenticators. Instead the CAA, located in New York, is a group of professionals concerned about and/or committed to the practice of art, teaching, and research of and about the visual arts and humanities.<sup>63</sup> The CAA developed a set of standards and guidelines for authentication that encourage greater due diligence on the part of the art authenticator. The guidelines indicate that art-historical documentation, stylistic connoisseurship, and technical or scientific analysis are the three “necessary aspects of best practices for authentication and attribution”, creating a “consensus of evidence” as the best defense against litigation.<sup>64</sup> The CAA also recommends that independent art experts refrain from rendering an opinion unless they have “insurance, indemnification, and a signed release of all claims by the owner of the work.”<sup>65</sup> Because of the rampant issue of lawsuits, art professionals have come together to figure out protection for themselves. Incredible

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<sup>61</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 *Cardozo Arts & Ent LJ* 515 (2017).

<sup>62</sup> Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 *Quinnipiac L. Rev.* 611 (2011).

<sup>63</sup> College Art Association, About About | CAA, <https://www.collegeart.org/about> (last visited Apr 10, 2020).

<sup>64</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 *Cardozo Arts & Ent LJ* 515 (2017).

<sup>65</sup> *Id.*

is the fact that such an organization is set in New York, liken to the bill proposed to provide more protections. Coupled with the next solution, one can see that New York could be the forefront for change for art authenticators.

The final short-term solution is the International Foundation for Art Research (“IFAR”). The IFAR is a not-for-profit educational and research organization dedicated to integrity in the visual arts, offering impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects.<sup>66</sup> The IFAR was established in 1969 in New York to fill a need for an impartial and scholarly body to educate the public about problems and issues in the art world and to research the attribution and authenticity of works of art. In the 1970s, IFAR expanded to include art theft and looting, and art and cultural property law and ethics, working to prevent the circulation of forged, misattributed, or misappropriated art.<sup>67</sup> With an authentication board of their own, IFAR undertakes its own research by enlisting the appropriate specialists, but has the right to keep the names of the experts it consults confidential at the experts' request.<sup>68</sup> Thus, IFAR's experts and researchers are free from litigation and have no financial interest in the outcome, making them free to render objective opinions. IFAR can also freely publish its research in the IFAR Journal or elsewhere. In this way, IFAR can inform the public and scholars about issues relating to authenticity.<sup>69</sup> With these short-term reliefs, mainly the CAA and the IFAR, one can hope a bridge can be formed to connect the art world with the legal world. New York seems to have a foot in the game with two

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<sup>66</sup> About IFAR, International Foundation for Art Research (IFAR)-About IFAR, <https://www.ifar.org/about.php> (last visited Apr 10, 2020).

<sup>67</sup> *Id.*

<sup>68</sup> Andrea Sobolewski, *THE AUTHENTICITY DEBACLE: WHY ART AUTHENTICATION AND LITIGATION DON'T MIX*, 35 *Cardozo Arts & Ent LJ* 515 (2017).

<sup>69</sup> About IFAR, International Foundation for Art Research (IFAR)-About IFAR, <https://www.ifar.org/about.php> (last visited Apr 10, 2020).

organizations and the attempted proposals of not one but two bills for further protection of art authenticators.

### **A Look into the Future?**

While many long-term proposals and short-term solutions have been described pertaining to the chilling effect of litigation on art authentication, there still lies the fact that the art world in general has gradually been moving away from connoisseurship. The subjectivity of this authentication method coupled with financially-motivated parties to a transaction has led to the art world looking at alternatives to the authentication process. The method of provenance, while considered better than the previous method, still has issues when the tracing back of ownership reveals some gaps. Thus, the art world has relied more on the objective method of scientific testing and forensics. While technology has greatly advanced in this field, so too does the method involved in authenticity. This comes from a constant cycle, akin to an arms race against forgers also coming up with new ways to pull off better frauds.

A string of shocking forgeries occurred in 2015, started when French police appeared at a gallery in Aix-en-Provence and seized a painting from display: Venus, by the German Renaissance master Lucas Cranach the Elder.<sup>70</sup> The painting was placed in the market by a French collector, Giuliano Ruffini, who sold a total of around 25 paintings. Authenticity of four paintings have been questioned. Constantly denying that he presented these paintings as old masters, Ruffini protested, “I am a collector, not an expert.”<sup>71</sup> The auction-house in which Ruffini sold the paintings, Sotheby’s, sent them to Orion Analytical, a conservation science lab

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<sup>70</sup> Samanth Subramanian, How to spot a perfect fake: the world's top art forgery detective The Guardian (2018), <https://www.theguardian.com/news/2018/jun/15/how-to-spot-a-perfect-fake-the-worlds-top-art-forgery-detective> (last visited Apr 12, 2020).

<sup>71</sup> *Id.*

in Williamstown, Massachusetts. Orion was run by James Martin, an individual who has assisted the FBI with many art forgery investigations in the past twenty-five years. Within days, Martin had an answer for Sotheby's: the paintings were fakes.<sup>72</sup> This had led Sotheby's to make an unprecedented purchasing decision: buying Orion Analytical and becoming the first auctioneer to have an in-house conservation and analysis unit.<sup>73</sup> The decision is understandable within an art world where authenticators are constantly in fear of the next lawsuit following their opinion of artwork.

However, even with the move toward scientific testing and forensics, there is still an individual performing the tests and thus chances of human error. There are others who go even further and view the absence of humans as the right direction. Two women in Switzerland, Dr. Carina Popovici and co-founder Christiane Hoppe-Oehl, have developed an algorithm that has correctly detected several known fakes using a single photograph of the artworks in question. Their Art Recognition algorithm looks at brushstrokes and produces an easy-to-read heat map that pinpoints which areas of the painting are most suspect. Their neural network technology is trained using machine learning and a comprehensive set of images of the artist's works.<sup>74</sup> In an interview, Popovici further explained that training consisted of "'learn[ing]' the characteristics of an artist from a set of original artworks by that artist. Once the training has been completed, the algorithm has learned with extremely high precision the characteristics of that artist."<sup>75</sup> Images

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<sup>72</sup> Samantha Subramanian, How to spot a perfect fake: the world's top art forgery detective The Guardian (2018), <https://www.theguardian.com/news/2018/jun/15/how-to-spot-a-perfect-fake-the-worlds-top-art-forgery-detective> (last visited Apr 12, 2020).

<sup>73</sup> *Id.*

<sup>74</sup> Jason Bailey, Can AI Art Authentication Put An End To Art Forgery? Artnome (2019), <https://www.artnome.com/news/2019/9/12/can-ai-art-authentication-put-an-end-to-art-forgery> (last visited Apr 12, 2020).

<sup>75</sup> *Id.*

themselves are good quality photographic reproductions of artworks by that artist or images from trusted and verified sources, such as catalogue raisonnés or museum databases.<sup>76</sup> The technology is likened to a black box, with the only input being the brushstroke. Due to the fact there is no knowledge of what features the algorithm has learned, the two had come up with the idea of the heat map to provide visual interpretation of the decision process.<sup>77</sup> The heat maps are described as being generated by evaluating the “importance” of each pixel or “weighted evidence” in the decision process. Popvici stated in an interview, “...this is done by removing a small number of pixels, replacing it by the average of the environment, and recalculating the overall class probability with this modified input. By comparing this new probability with the original class probability, one can check what is the influence of this group of pixels on the probability value...heat spots occur in the regions which comprise more structure (corners, edges, shapes, etc.), but they can also appear on flat pieces where the brushstroke changes direction.”<sup>78</sup> The advantages of this approach include testing with images only so transport of the artwork is not necessary, speedy results in a few hours or days instead of months, less invasion on the painting without taking of samples, and objectivity of a computer software program.<sup>79</sup>

Switzerland is not alone with endorsing the use of artificial intelligence. Researchers at Rutgers University in New Jersey had developed an earlier method of analyzing a painting’s brushstrokes—its shape, curvature, the velocity with which a brush- or pencil-stroke is applied.<sup>80</sup>

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<sup>76</sup> Jason Bailey, Can AI Art Authentication Put An End To Art Forgery? *Artnome* (2019), <https://www.artnome.com/news/2019/9/12/can-ai-art-authentication-put-an-end-to-art-forgery> (last visited Apr 12, 2020).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Andrew Dickson for Medium, The new tool in the art of spotting forgeries: artificial intelligence *The Guardian* (2018), <https://www.theguardian.com/us-news/2018/aug/06/the-new-tool-in-the-art-of-spotting-forgeries-artificial-intelligence> (last visited Apr 12, 2020).



In a paper published by the researchers, their method involved examining three hundred authentic drawings by Picasso, Matisse, Egon Schiele, and a number of other artists and broke them down into more than 80,000 strokes. Machine-learning techniques refined the data set for each artist. Forgers were then commissioned to produce a batch of fakes, and these forgeries were fed into the system. When analyzing individual strokes, it was over 70% accurate; when whole drawings were examined, the success rate increased to over 80%. The researchers claim 100% accuracy “in most settings.”<sup>81</sup>

One can have some hesitance with these new methods. Although they seem like great alternatives to resolve the issues surrounding art authentication, they are new developments with not much known of their intricacies. There are still many issues with which Rutgers is still working, such as accounting for the many art styles an artist could have had over the years.<sup>82</sup> Think of Picasso. Additionally, the Rutgers system has been tested mainly on drawings from a handful of artists and a brief time period. Paintings generally contain thousands more strokes and pose a tough challenge, with older paintings as tougher challenges given numerous layers of restoration or overpainting.<sup>83</sup> The statistical accuracy themselves seem almost too good to be true with a claim of 100% accuracy in most settings. The 70% accuracy seems more appropriate, but there needs to be an explanation of how the technology came to that percentage, which the Swedish Art Recognition algorithm somewhat has with its heat map depiction.

The more recent Swedish Art Recognition algorithm as well poses its own issues. Although the images they scan with the algorithm to have it learn could be of good quality,

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<sup>81</sup> Andrew Dickson for Medium, The new tool in the art of spotting forgeries: artificial intelligence The Guardian (2018), <https://www.theguardian.com/us-news/2018/aug/06/the-new-tool-in-the-art-of-spotting-forgeries-artificial-intelligence> (last visited Apr 12, 2020).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

initially they seem to be relying on reproductions by artists still living. Even with images from trusted and verified sources of catalogue raisonnés for deceased renowned artists, who is to say that the images included in the catalogues are not forgeries themselves. Not knowing exactly what features the algorithm has learned with only the brushstroke input may lead to difficulties in admitting the method into court. This new method however can rejuvenate the art world in these hard times as an additional tool. In an investigation, when it comes to valuable pieces, one should include other aspects, such as provenance research in addition to scientific analysis. The Art Recognition results could be also be used as a precheck before approaching an art expert, or even by the art connoisseurs as an additional piece of evidence when delivering their expertise.<sup>84</sup>

### **Conclusion**

The increase of the amount of art forgery has led to the need for art authentication. However, the methods for authenticating are a double-edged sword: they are needed to appropriately accredit pieces of art to their creator, but either a false positive or a false negative could come back to the authenticator in the form of a lawsuit. The increase of litigation for art authenticators have led to a chilling effect of closures of boards or refusal by authenticators. It is unfortunate that those who have decided to immerse themselves into a craft and dedicate years to learning about an artist in order accurately identify that artist's work could simply be punished and expected to pay damages. Thus, there has been movement to better protect such individuals in the form of legislature. However, such resolution has come to a halt after passing the Senate.

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<sup>84</sup> Jason Bailey, Can AI Art Authentication Put An End To Art Forgery? Artnome (2019), <https://www.artnome.com/news/2019/9/12/can-ai-art-authentication-put-an-end-to-art-forgery> (last visited Apr 12, 2020).

There has been short-term solutions with a look at other fields of law, such as contract law with no-sue clauses or warranties and corporate law and title insurance.

Despite these movements, the art world has started to take matters into their own hands with abandoning their experts and looking toward the scientific realm and objective computer technology. Indeed, this would resolve the issue courts have with the subjectivity of connoisseurship. Nonetheless, there are issues of their own with computerized technology. There is no knowledge of what goes on in the black box when analyzing the brushstrokes of a painting. Art history itself contains years upon years of artwork and changing styles; creating a computerized program to analyze it all would be too complex a feat. Overall, art itself is a form of expression for humans. It may allow for human error and motivation out of wealth, but it does not mean abandonment of experts who spent years attempting to perfect their craft.

Instead of striving away from connoisseurship, there should be more push for greater protections in the law. There should also be a regulated method of confirming authenticators so there would be less issues when presenting such experts into the court. There can be continued work into developing analyzing methods with computerized technology but merely as an additive to the three methods of authentication: connoisseurship, provenance, and scientific analysis.