Schriften zum Kunst- und Kulturrecht 8

Kerstin Odendahl/Peter Johannes Weber (Hrsg.)

# Kulturgüterschutz – Kunstrecht – Kulturrecht

Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars „Kunst und Recht“

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# Liability for the Acquisition of Faked or Wrongly Attributed Works of Art in US Law*

*Marc Weber***


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* To my teacher, mentor and dear friend Kurt Siehr.

** Dr. iur., LL.M. (Berkeley), TEP, Attorney-at-law, Zurich.

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## *I. Introduction*

A work of art isn't always what it seems to be. Sometimes the buyer learns that he has just purchased a forgery and sometimes the seller realizes that he has just sold an original.[1] As with other contract dispute, the dissatisfied party will seek redress in the courts, but the courts are faced with problems that are specific to dispute arising from the sale of art when it comes to fakes, the provenance and authenticity[2] of works of art.

If the sold piece of art is a forgery,[3] the buyer sues for the repayment of the purchase price in exchange for the return of the work of art. The buyer will seek

1 There is currently a controversy on a work allegedly by Leonardo da Vinci (1452–1519), called *La Bella Principessa,* which is said to have a market value of USD 150m. On 30 January 1998, the picture in chalk, pen and ink on vellum and catalogued as "German School, early 19th century" was sold at Christie's in New York for USD 21'850 to Kate Ganz, a New York art dealer. Christie's summarily rejected – after a fifteen-minute examination – the attribution made by Giannino Marchig (1897–1983), a well-known Italian painter and art restorer "with considerable expertise in Renaissance art" and later husband of the former owner Jeanne Marchig, a Swiss animal rights activist. In 2007, Mrs Ganz sold it to the Canadian art dealer Peter Silverman, who bought it on behalf of a Swiss collector for USD 22'000; see *Milton Esterow,* The Real Thing, ARTnews, January 2010, 82–87. On 3 May 2010, the former owner Mrs Marchig filed a suit in Manhatten federal court seeking unspecified damages accusing Christie's of failing to "exercise due care" when it made the attribution; see *Marisa Mazria Katz,* Collector sues over "Leonardo", The Art Newspaper, June 2010, 77. As to the historical research and technical analysis of the work, see *Martin Kemp/Pascal Cotte,* La Bella Principessa: The Story of the New Masterpiece by Leonardo Da Vinci, London: Hodder & Stoughton 2010.

2 The terms "provenance" and "authenticity" have distinct meanings when properly used in reference to works of art. "Provenance" refers to a work's chain of ownership from the artist to the present owner, while "authenticity" refers to the source that created the work.

3 The affair "van Meegeren" is a bad example for forgeries, since the Dutch painter Han van Meegeren (1889–1947) did not copy original works but imitated the style of Jan Vermeer (1632–1675) in an indistinguishable manner without using the same subjects chosen by Vermeer; for a discussion of this affair, see *John Henry Merryman,* Counterfeit Art, Int'l. J. Cult. Prop. 1 (1992) 28–30, 34 (27–77). Still today, paintings turn up which are said to be by the hand of van Meegeren, e.g., the painting "The Procuress" (1622), of which it is unknown whether it is by Dirck van Baburen (1595–1624) or a 17th-century copy or a van Meegeren fake; see *Martin Bailey,* Courtauld "fake" exposed as a real Dutch period piece, The Art Newspaper, October 2009, 7; as to van Meegeren's

to do the same after having bought a work of art which is not executed by the artist but by his school. The seller attempts to sue the buyer for the return of the work of art in exchange for the restitution of the purchase price, should a work of art sold as a real copy turn out to be the work of the master or a painting from a school is actually a work of the master himself. The legal remedies of the first case (warranty) differ from the ones of the second case (mistake).

In addition to the remedy of rescission of the contract, under certain circumstances, a cause of action for product disparagement may arise. Finally, if artists' authentication boards or committees are considered as the only authority to authenticate certain pieces of art, breaches of antitrust laws could be claimed.

## *II. Problems*

Most jurisdictions view contracts involving art the same way that they view contracts involving any other form of chattel.[4] As we will see, there are some exceptions. As with the sale of any object, the doctrines of mistake and warranty, both expressed and implied, apply. However, the unique nature of most works of art makes it very difficult to apply these doctrines.

life, see *Luigi Guarnieri,* La doppia vita di Vermeer, Milano: Mondadori 2004 [German translation: Das Doppelleben des Vermeer, München: Antje Kunstmann 2005]; *Jonathan Lopez,* The Man Who Made Vermeers: Unvarnishing the Legend of Master Forger Han Van Meegeren, Orlando: Hartcourt 2008. – Another controversy is the one on the portrait of the first President of the US, George Washington (1732–1799). It still remains unclear whether the painting that has hung in the White House since 1800 is authentic or a copy; see *Bonnie Barrett Stretch,* If Stuart Didn't Paint It, Who Did?, ARTnews, October 2004, 162–163.

4 See *Kurt Siehr,* Ist ein Carracci ein schlechter Poussin? Zum Irrtum beim Kauf von Kunstwerken, in Eltje Aderhold/Kurt Lipstein et al. (eds.), Festschrift für Hans Hanisch, Köln et al.: Carl Heymanns 1994, 247 (247–255).

## *III. Warranty*

### 1. Express warranty

Although art buyers claim various warranties under U.C.C. § 2, the predominant challenge is that the art is inauthentic,[5] a claim often framed as a breach of express warranty[6] under U.C.C. § 2-313.[7] No court has squarely resolved the guess/guarantee conundrum by deciding authorship classification under U.C.C. express warranty.[8]

#### a) Greenwood v. Koven

In *Greenwood v. Koven*[9], the court itself was not called upon to decide whether the work was actually by a certain artist, but the buyer was admitted to rescind the sale based on the terms of a consignment agreement. In 1948, defendant and

5 It is the buyer-plaintiff who bears the burden of showing that the work of art is not authentic; see Dawson v. Malina, 463 F.Supp. 461, 462 (1978): buyer of antique chinese objects sues the dealer for breach of express warranty.

6 An interesting regulation on express warranties is provided by § 13.01(1)(b) New York State Consolidated Laws Services Arts and Cultural Affairs Law (Mc Kinney 1984 & Supp. 2004; reprinted in *Patty Gerstenblith,* Art, Cultural Heritage, and the Law. Cases and Materials, Durham: Carolina Academic Press 2004, 873), which only applies between a seller who is an art merchant and a buyer who is not an art merchant, and according to which a certificate of authenticity or a similar written instrument shall create an express warranty.

7 U.C.C. § 2-313 reads, inter alia, as follows: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description (c) […] (2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

8 Foxley v. Sotheby's, Inc., 893 F.Supp. 1224 (S.D.N.Y. 1995): challenge of authentication of a painting by Mary Cassatt (1844–1926) which, however, was time-barred by U.C.C. statute of limitations.

9 Greenwood v. Koven, 880 F.Supp. 186 (S.D.N.Y. 1995); reproduced in *John Henry Merryman/Albert E. Elsen/Stephen K. Urice,* Law, Ethics and the Visual Arts, 5th ed., London/The Hague/New York: Kluwer Law International 2007, 1029–1035, with comments at 1035–1036; *Gerstenblith* (*supra* note 6), 322–328.

his wife bought a pastel by Georges Braque (1882–1963) from the Rosenberg Gallery in New York, which served as Braque's exclusive dealer, for USD 1'400. Before being sold to Barbara Lee Diamonstein for USD 600'000 in 1990, two art experts of Christie's had concluded that the work's authenticity was "unquestionable"[10]. The auction house did not believe it necessary to consult an outside expert opinion. Shortly after the sale, the successful bidder raised questions about the pastel's authenticity, demanding written verification of the work's authenticity by a scholar. Christie's contacted the individual in France who, under French law, possesses the legal authority to authenticate which works were done by the artist.[11] That individual informed the auction house that the pastel could not be recognized as a work by Braque and that a certificate of authenticity would not be issued. The District Court granted summary judgment requiring the seller (defendant) to return the sale proceeds, rejecting the seller's claims that the auction house had acted improperly and dismissing the seller's claims against the buyer.

### b) Greenberg Gallery, Inc. v. Bauman

In *Greenberg Gallery, Inc. v. Bauman*[12], the buyers claimed express warranty and mutual mistake but were not granted rescission. They claimed that the seller had sold them (for USD 500'000) a forgery of a mobile entitled *Rio Nero* by Al-

10 Greenwood v. Koven (*supra* note 9), 189.

11 Under French law, after the death of an artist, an heir or designee by will is given authority to assert the artist's "moral rights", including the right to authenticate which works are done by the artist. That person is said to hold the droit moral for that artist; see art. L121-1 Code de la propriété intellectuelle (amended by loi no. 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle, J.O. no. 153, 3.7.1992, 8801): "L'auteur jouit du droit au respect de son nom, de sa qualité et de son œuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible. Il est transmissible à cause de mort aux héritiers de l'auteur. L'exercice peut être conféré à un tiers en vertu de dispositions testamentaires." For a discussion, see *John Henry Merryman,* The Moral Right of Maurice Utrillo, Am. J. Comp. L. 43 (1995) 445–554, reprinted in *John Henry Merryman,* Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law, 2nd ed., Austin: Wolters Kluwer Law & Business 2009, 432–440.

12 Greenberg Gallery, Inc. v. Bauman, 817 F.Supp. 167 (D.D.C. 1993), aff'd 36 F.3d 127 (D.C. Cir. 1994); reproduced in *Merryman/Elsen/Urice* (*supra* note 9), 1062–1070, with comments at 1070–1071; as to the case and its aftermath, see *Judd Tully,* When Is a Calder Not a Calder?, ARTnews, February 1997, 88–95; *Ronald D. Spencer,* Authentication in Court. Factors Considered and Standards Proposed, in Ronald D. Spencer (ed.), The Expert versus the Object. Judging Fakes and False Attributions in the Visual Arts, New York: Oxford University Press 2004, 196–197 (189–215).

exander Calder (1898–1976) and sued on fraud and contract claims. The trial court rejected the view of the plaintiffs' expert that the work was not the authentic work,[13] and therefore dismissed the complaint. Its conclusion was based largely on its view that the plaintiffs' expert, who had been Calder's exclusive dealer and was an acknowledged preeminent expert on Calder's work, had conducted too cursory an examination of the sculpture to warrant the adoption of his opinion that the work was inauthentic.[14]

## 2. Implied warranty

Whether the U.C.C. applies to actions of implied warranties for art authentications is unclear. U.C.C. § 2-314 provides in relevant part:

> "(1) […] a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. […].
>
> (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and […] (f) conform to the promise or affirmations of fact made on the container or label if any."

In *Balog v. Center Art Gallery-Hawaii, Inc*.,[15] the District Court for the District of Hawaii rejected the applicability of implied warranties to authentication actions. In *McKie v. R.H. Love Galleries, Inc*.,[16] the District Court for the Northern

13 See Greenberg Gallery, Inc. v. Bauman (*supra* note 12), 174: "I conclude the record and the circumstantial evidence […] creates a strong presumption that it is an authentic Calder". The same view was taken in a French case, Cour de cassation, 28.11.1995, pourvoi no. 93-16478, unpublished, where the court did not follow the opinion of the holder of the moral right of attribution on some paintings by Jean Fautrier (1898–1964); see *Spencer* (*supra* note 12), 194.

14 See Greenberg Gallery, Inc. v. Bauman (*supra* note 12), 174 and 175, respectively: „This is not the market, however, but a court of law, in which the trier of fact must make a decision based upon a preponderance of the evidence. […] I conclude that it is more likely than not that the mobile is not a forgery but the original Rio Nero which has been misassembled and abused to the point that, on a cursory examination, it does not exactly resemble the original photo". During the following years – and surely still today – the mobile has not been on the market and was considered as "worthless"; see *Tully* (*supra* note 12), 90.

15 Balog v. Center Art Gallery-Hawaii, Inc., 745 F.Supp. 1556 (D. Hawaii 1990); reproduced in *Gerstenblith,* (*supra* note 6), 354–362: defendants' motion for judgment on the pleadings denied without determining whether the work of art is authentic or not.

16 McKie v. R.H. Love Galleries, Inc., 1990 WL 179794 (N.D. Ill. 1990): breach of warranty of merchantability and breach of warranty for a particular purpose upheld

District of Illinois has found that an implied warranty of merchantability applies to art, allowing claims under U.C.C. § 2-314.

### 3. Mutual mistake

If the parties to a contract both make a mistake about material facts in existence at the time of contracting, the equitable doctrine of mutual mistake allows rescission of the contract.[17]

In *Firestone & Parson, Inc. v. Union League*,[18] the District Court for the Eastern District of Philadelphia contended no mutual mistake occurred since both parties believed the painting was by Albert Bierstadt (1830–1902).

In *Feigen v. Weil*,[19] the New York courts found the doctrine applicable to the purchase and sale of an ink drawing by Henri Matisse (1869-1954) consigned for resale to the plaintiff-seller by the defendant-buyer. Feigen sold the Matisse to a third party for USD 165'000 and remitted USD 100'000 to Weil. One year later, the Matisse estate declared it a forgery. Feigen notified Weil that he had returned to his client the USD 165'000, plus interest, and demanded that Weil reimburse Feigen for the USD 100'000. After the demand was refused, the dealer brought the action, inter alia, to rescind the contract and moved for summary judgment. The defendant (like the defendant in *Firestone*) agreed that both parties mistakenly believed the work of art was authentic. But Weil argued that Feigen was consciously ignorant. The New York trial court found that Feigen was not uncertain as to a crucial fact, ignored it, and contracted notwithstanding the uncertainty. Furthermore, it held that even though Feigen had limited knowledge about the authenticity of the Matisse painting, both parties assumed that the work of art was authentic.

against motion to dismiss for failure to state a claim in connection with certificate of autheniticity for purchase of a painting by William Merritt Chase (1849–1916).

17 *Jessica L. Darraby,* Art, Artifact & Architecture Law, vol. 1, 8th ed., St. Paul: Thomson West 2009, § 4:49, 262, footnote 1, with references.

18 Firestone & Parson, Inc. et al. v. Union League of Philadelphia, 672 F.Supp. 819 (E.D. Pa. 1987).

19 Richard L. Feigen & Co. v. Weil, no. 13935/90 (N.Y. Sup. 1992), aff'd, 595 N.Y.S.2d 68.

## *IV. Consumer contract*

Whether consignments and sale agreements constitute consumer transactions within the meaning of state consumer protection laws is determined by state law. The Federal District Court for the Southern District of New York held in *Mickle v. Christie's*[20] that a consignment agreement for sale of a painting[21] by an auction house was not a consumer transaction "primarily for personal, family or household purposes."[22] Furthermore, it stated that "a unique, one-of-a-kind painting [is not] a typical consumer good, nor [is] an agreement governing the consignment for auction sale of […] work[s] of art a consumer transaction within the meaning of [the statute]."[23]

According to a decision rendered by the State Court of Appeals of Arizona, a misled consumer could use a state consumer fraud statute to sue an auctioneer for damages for concealing the provenance of art and misrepresenting its value, found that plaintiffs did not prove the requisite injury was caused by the alleged misrepresentations.[24]

## *V. Liability*

### 1. Liability of auction houses

Buyers of art may also sue auction houses and galleries which shall illustrate the following cases.

20 John T. Mickle v. Christie's, Inc., 207 F.Supp.2d 237 (S.D.N.Y. 2002), reh'g denied, 214 F.Supp.2d 430, 432 (S.D.N.Y. 2002).

21 The case was about the unsigned work known as *Billy Bowlegs* attributed to the American artist Carl Wimar (1828–1862).

22 NY CPLR § 4544 provides, in relevant part, as follows: "the term 'consumer transaction' means a transaction wherein the money, property or service […] is primarily for personal, family or household purposes."

23 John T. Mickle v. Christie's, Inc., 214 F.Supp.2d 430, 432 (S.D.N.Y. 2002), with reference to Christie's, Inc. v. Croce, 5 F.Supp.2d 206, 207–208 (S.D.N.Y. 1998) holding that a transaction for an auction house's services and an advance of funds against the proceeds of sale of certain paintings did not constitute a consumer transaction under NY Gen. Oblig. Law § 5-327(1)(a) (McKinney 2001).

24 Nataros v. Fine Arts Gallery of Scottsdale, Inc., 126 Ariz. 44, 612 P.2d 500 (1980).

a) Voitier v. Antique Art Gallery

In *Voitier v. Antique Art Gallery*,[25] a court in Louisiana granted rescission of a sale contract by which plaintiff bought at auction a painting by George Inness (1825–1894) subsequently determined to be a fake. The plaintiff purchased the work of art by telephone bid. When the painting was delivered to the plaintiff, it lacked the auction house's promised letter of authenticity. Authentications determined the painting to be fake. Since before the auction defendant represented the painting as an Inness to plaintiff and advertised it as by Inness, the court found the buyer was entitled to rescission under unilateral mistake.[26]

b) Shafrazi v. Christie's

In *Shafrazi v. Christie's*[27] New York State Supreme Court Justice Cahn denied a motion to dismiss a claim for fraud made by a buyer who had acquired a counterfeit work from an art gallery which had purchased the work from Christie's auction house in New York. As a consequence, the plaintiff may be entitled to a claim for fraud and punitive damages from Christie's despite the fact he did not buy the work (directly) from the auction house.

In 2001, Guido Orsi purchased a painting described as being by Jean Michel Basquiat (1960–1988) from the Tony Shafrazi Gallery in New York. The gallery had itself acquired the painting from Christie's New York in 1990. When the gallery sold the painting to Mr Orsi it is alleged that it was described as "Pur-

25 Robert Voitier v. Antique Art Gallery et al., 524 So.2d 80 (Louisiana Ct. App. 3d Cir. 1988), writ denied, 531 So.2d 271 (Louisiana 1988); see *Darraby* (*supra* note 17), § 5:58, 332, footnote 1.

26 Notice that the catalogue recited that neither the auction house nor its consignor was liable for description, genuineness, or provenance, and that no statement constituted warranty. According to the court, the defense's arguments were ineffective, since it did not appear anywhere on bills of sale or invoices presented to the buyer that the terms were not brought to the buyer's attention nor explained to him, and that contrary to the catalogue disclaimer, the auction house had assured the buyer when he viewed the painting that the work of art was genuine, as well as advertising the painting as created by George Inness.

27 Tony Shafrazi Gallery, Inc. v. Christie's, Inc., 2008 WL 4972888 (N.Y.Sup. 2008); *Derek Fincham,* Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities, Syracuse J. Int'l. L. & Com. 37 (2009) 47–48 (1–66); *Jo Laird,* Christie's Faces Trial Over "Fraud on the Market" Allegations by a Buyer Who Didn't Buy at Christie's, The Legal Canvas, Summer 2009, 17–19; *M[artha]L[ufkin]*, Christie's sued. Dealer says he was sold a fake, The Art Newspaper, November 2007, 70; *Martha Lufkin,* Christie's fraud claim, The Art Newspaper, January 2009, 47.

chased from Christie's [New York East] Contemporary Art, Friday February 23, 1990 Lot 176", and that Mr Orsi relied on Christie's representation in the catalogue that the painting was an authentic work of Basquiat. In 2006, the Basquiat Committee advised Mr Orsi that the painting was counterfeit. In 2007, Mr Orsi and the gallery proceeded to sue Christie's. They alleged that Christie's fraudulently represented the painting to be an authentic Basquiat, despite requests by two members of the Basquiat Committee to withdraw the painting from the auction in 1990 because, the Committee members claimed, the painting was counterfeit. The claimants seek damages of USD 2m from Christie's – the alleged current value of an authentic Basquiat painting.[28]

The New York State Supreme Court observed that the claimants had submitted evidence that "art purchasers rely on the expertise of a prestigious auction house" which have been termed a "market maker" and that "when Christie's provides a warranty concerning the authenticity, or provenance of a painting, the custom and practice of the art industry is that the provenance of the work of art has been firmly and permanently established".[29] The Court concluded that reliance by Mr Orsi on Christie's warranties of authenticity and provenance was therefore "sufficiently alleged" as was the claimants' allegation of fraud.[30]

The decision may be read as a warning to auction houses that if they publish fraudulent misrepresentations about the authenticity and provenance of works of art in their catalogues, their liability may extend beyond buyers at auction to subsequent purchasers of the works of art. The issue would be whether the auction house could "reasonably anticipate" that the subsequent purchaser of the work of art had relied upon the published information.[31] It shows that potentially any other buyer could have a claim – irrespective the time considerations or the number of intervening transactions.[32] Accordingly, the New York State Supreme Court's decision seem to widen the potential liability of auction houses, where fraudulent misrepresentation is involved.

28 In comparison to works by Basquiat auctioned before and after the filing of the complaint, USD 2m seem to be low: 15.5.2007, Sotheby's New York, lot. 15, "untitled" (1981), USD 14.6m; 13.11.2007, Christie's New York, lot. 47, "untitled – Black figure" (1982), USD 9.9m.

29 Tony Shafrazi Gallery, Inc. v. Christie's, Inc. (*supra* note 27), 3.

30 The claims for (i) negligent misrepresentation, (ii) deceptive and misleading business malpractice, (iii) breach of contract and (iv) breach of warranty were all time-barred; Tony Shafrazi Gallery, Inc. v. Christie's, Inc. (*supra* note 27), 4.

31 Tony Shafrazi Gallery, Inc. v. Christie's, Inc. (*supra* note 27), 3.

32 *Fincham* (*supra* note 27), 48.

## 2. Liability of Art Authentication Committees

Another issue is the challenge of art authentication committees' decisions on the authenticity of a work of art and the question whether such institutions breach antitrust law. Authentication boards that exist for artists such as Basquiat, Calder, Lichtenstein, Pollock, Rembrandt and Warhol, are generally accepted by the art market as the essential arbiter of artistic authenticity. These committees offer to opine on the genuineness of works presented before them, claiming absolute discretion in the making of such judgments and closely guarding their procedures.

### a) Vitale v. Marlborough Gallery

In *Vitale v. Marlborough Gallery* [33], the court was faced with an antitrust claim and other federal and state law claims against the defendants based on the following facts:

In 1969, Joan Vitale, an art dealer, purchased a painting purportedly by Jackson Pollock (1912–1956) at an auction in Pennsylvania. The next day she inquired about its potential value at the Parke Bernet Gallery in New York. She was allegedly told that as a Pollock original, the painting would bring between USD 125'000 and USD 165'000 at auction, but that she would not be able to sell without obtaining the approval of Lee Krasner (1908–1984), Pollock's widow. She arranged to meet Lee Krasner at the Marlborough Gallery in New York, but was instead asked to leave the painting until the next day. When she returned, the Manhattan District Attorney's office took possession of the painting, advising Vitale it was needed in a criminal investigation. Five years passed before she got the painting back. In 1978, the painting was listed in the Pollock catalogue raisonné as a forgery. Despite the listing, the plaintiff tried to sell the painting, but was told that without the authentication by the Marlborough Gallery, the Krasner Foundation or the Krasner Committee, the painting could not be sold.

After failing to sell it for more than ten years, Vitale brought suit in 1993 on several grounds, including antitrust claims. The court recognized that antitrust was a potentially viable claim, given the distinct nature of the Pollock market and found that Jackson Pollock paintings may constitute a submarket, the mono-

33 Vitale v. Marlborough Gallery, The Pollock-Krasner Foundation et al., 32 U.S.P.Q.2d 1283, 1994 U.S. Dist. LEXIS 9006 (S.D.N.Y. 5.7.1994); reproduced in part in *Merryman/Elsen/Urice* (*supra* note 9), 1096–1099, with comments at 1099–1100.

polization of which may be unlawful under 15 U.S.C. § 1 or § 2. However, the court dismissed the claim as time-barred.

### b) Kramer v. The Pollock-Krasner Foundation

In *Kramer v. The Pollock-Krasner Foundation*[34] the court dismissed antitrust claims premised upon an alleged conspiracy to monopolize the auction market.

Plaintiff David Kramer, a fine art and antiques dealer in Arizona, bought a painting privately for USD 15'000, which he alleges could be worth USD 10m[35] if it were authenticated as Jackson Pollock (1912–1956) and sold at auction. Kramer contacted Christie's and Sotheby's and asked them to auction it. Christie's informed the plaintiff that it would auction the painting if he obtained authentication from the Pollock-Krasner Authentication Board. Kramer did, and the Board refused to authenticate it. Kramer sued the Board, Sotheby's and Christie's claiming federal antitrust violations[36] and New York antitrust law[37].

Plaintiff failed in alleging that a relevant geographic and product market in which trade was unreasonably restrained or monopolized. The court pointed out that as a dealer in fine art, "Kramer could avoid the auctioneer's commission by selling the painting himself" and, therefore, he has "a reasonable alternative to selling his painting at auction."[38] Furthermore, the court affirmed the defendants' argument that Sotheby's and Christie's "are incapable of singularly dominating or monopolizing the Pollock market because it is, in fact, not limited to auctions."[39] When it comes to the conspiracy claim, the court also granted the motion to dismiss, stating that plaintiff failed in showing that "the allegedly conspi-

34 Kramer v. The Pollock-Krasner Foundation et al., 890 F.Supp. 250 (S.D.N.Y. 1995).

35 For a comparison regarding the purchase price: On 1 November 2006, the Hollywood entertainment magnate David Geffen sold the Pollock work "No. 5" (1948) to David Martinez, a Mexican financier, for the record price of USD 140m. This is the highest price ever paid for an artwork; see *Carol Vogel,* A Pollock Is Sold, Possibly for a Record Price, The New York Times, 2.11.2006, 8.

36 Sherman [Antitrust] Act, codified as 15 U.S.C. §§ 1–7; especially §§ 1 and 2.

37 New York's antitrust statute is the Donnelly Act, codified as NY Gen. Oblig. Law §§ 340 *et seq.* (McKinney 1988).

38 Kramer v. The Pollock-Krasner Foundation et al. (*supra* note 34), 255.

39 *Id.,* 257.

ratorial actions resulted from some sort of an agreement, and not merely from independent, parallel conduct by firms acting in their own self-interest."[40]

There is a current controversy in the art world over 32 works (27 paintings, drawings and unfinished works) owned by Swiss-born photographer Alex Matter, the son of close friends of the couple Jackson Pollock and Lee Krasner, Herbert and Mercedes Matter.[41] According to Alex Matter, in late 2002, the paintings were discovered in a storage his father had rented. Labels by his father identified them as Pollock's works. However, preliminary conclusion, based on an examination of six of the new works, is that they were not done by Pollock, and that they may have been painted by different hands. The discovered paintings were exhibited in 2007 and lead the way to a dispute that is likely to continue for years.[42]

### c) Thome v. The Calder Foundation[43]

In 1936, the American sculptor and artist Alexander Calder (1898–1976) created a set for Erik Satie's musical composition *Socrate*. The set was later destroyed, but in 1976 Joel Thome, a musician, composer and conductor of contemporary music, sought to recreate the set. Calder agreed to the reconstruction but died before the sets were completed and the production was performed.

In 1997, plaintiff Thome decided to sell the work. Before he could, however, he needed to have the Alexander & Louisa Calder Foundation[44] authenticate the

40 *Id.,* 255. According to § 2 Sherman Act, a plaintiff must allege facts sufficient support (i) concerted action, (ii) overt acts in furtherance of the conspiracy and (iii) specific intent to monopolize.

41 See *Randy Kennedy,* Is This a Real Jackson Pollock?, The New York Times, 29.5.2005, 1, 28–29; *Jason Edward Kaufman,* "New paintings" discovered, The Art Newspaper, June 2005, 2; *Kelly Devine Thomas,* The Newfound Pollocks: Real or Fake?, ARTnews, Summer 2005, 66, 68; *Kelly Devine Thomas,* Piecing Together a Pollock Puzzle, ARTnews, October 2005, 66; *Jason Edward Kaufman,* Doubts remain over unprecedented Pollock finds, The Art Newspaper, January 2006, 6; *Kelly Devine Thomas,* Pollock Debate Escalates, ARTnews, April 2006, 64; *Jane Whitehead,* For art's sake, Boston College Magazine, Summer 2007, 18–25.

42 The paintings were shown at the exhibition "Pollock Matters" in the McMullen Museum of Art at Boston College, Chestnut Hill, Massachusetts, from 1 September to 9 December 2007; see *Ellen G. Landau/Claude Cernuschi (eds.),* Pollock Matters, Chicago: Chicago University Press 2007.

43 Thome v. The Alexander & Louisa Calder Foundation et al., 890 N.Y.S.2d 16 (2009); *M[artha]L[ufkin],* Courts cannot dictate authentication board's decisions, The Art Newspaper, January 2010, 8.

work and include it in the Foundation's Calder catalogue raisonné. Without the authentication, the work was essentially unmarketable.

Over the years, despite repeated requests, the Foundation refused without explanation to include the work in its catalogue raisonné. In response, in 2007, Thome brought an action in New York state court seeking, among others, (i) a mandatory injunction compelling the work's inclusion in the catalogue raisonné and (ii) a judgment declaring the work to be an authentic work by Calder.

Judge Saxe dismissed the first claim stating that the courts may not "by mandatory injunction affirmatively compel a private entity to include a particular work in its catalogue raisonné based solely on the court's independent finding that the work is authentic"[45] and that neither the creation of such a catalogue nor its inclusion or exclusion of particular works "creates any legal entitlements or obligations."[46] In addition, he stated that the fact alone that the Calder Foundation has been accepted by the art world as the body to create an authoritative Calder catalogue raisonné "does not give a court the right to dictate what the Foundation will include in that catalogue".[47]

The second claim, i.e. the judicial declaration of the work to be an authentic work by Calder, was dismissed as well. Since "the courts are not equipped to deliver a meaningful declaration of authenticity", the plaintiff is not entitled to a declaration of authenticity.[48] Finally, according to the appellate division of the New York Supreme Court, plaintiff failed in alleging that the cause of action was supported by New York antitrust law.[49]

44 The Calder Foundation was founded by Calder's grandson, Alexander Rower, in 1987 at the age of 24; until today, the foundation has documented ca. 22'000 works; see *Clare Finn/Gilles Bensimon*, Calder's legacy, Apollo, November 2009, 54–58.

45 Thome v. The Calder Foundation (*supra* note 43), 8.

46 *Id.,* 9.

47 *Id.,* 9–10.

48 *Id.,* 15, contrary and with reference to the French legal system. In France, declarations of authenticity are made by the courts. They appoint their own neutral judicial experts and put them on a national list; see art. 2 loi no. 71-498 du 29 juin 1971 relative aux experts judiciaires, J.O. 30.6.1971, 6300 (modified by art. 47 loi no. 2004-130 du 11.2.2004, J.O. no. 36, 12.2.2004, 2847); as to the French judicial experts and their appointment, see *Van Kirk Reeves,* Establishing Authenticity in French Law, in *Spencer* (*supra* note 11), 228–230 (227–234); *Stéphanie Lequette-de Kervenoaël,* L'authenticité des œuvres d'art, Paris: L.G.D.J. 2006, no. 219.

49 Thome v. The Calder Foundation (*supra* note 43), 32. Under the Donnelly Act (codified as NY Gen. Oblig. Law §§ 340 *et seq.*), plaintiff must (i) identify the relevant product market, (ii) allege a conspiracy between two or more entities and (iii) allege that the economic impact of that conspiracy was to restrain trade in the relevant market; see Newsday, Inc. v. Fantastic Mind, 237 AD2d 497 (1997). – In European law, defendant who refuses an expertise or refuses to include a particular work in the artist's catalogue raisonné

In my point of view, the decision is correct. The court firmly stated that it has not the ability to judge on the authenticity of a work of art. However, if it does,[50] the judicial statement on the authenticity might influence the artmarket.[51]

### d) Simon-Whelan v. The Andy Warhol Foundation

In a lawsuit filed at the United States District Court for the Southern District of New York in 2007 against an artist's foundation arising from a refusal to authenticate, claims were permitted to proceed under federal and state antitrust laws.[52]

Plaintiff Joe Simon-Whelan, a film writer and producer, sued the Andy Warhol Foundation because the Warhol Authenticate Board denied twice the authenticity of a self-portrait which is one of a series of paintings by Andy Warhol (1928–1987) created in 1964 and bought by the plaintiff two years after the artist's death for USD 195'000. In 2001 and 2003, he submitted the work to the Authentication Board, and twice the authenticity was denied. In 2002, the painting

could be faced with a violation of art. 102 [Lisbon] Treaty on the Functioning of the European Union (ex art. 82 EC Treaty), O.J. C 83/47 of 30.3.2010. Art. 102, 1st sentence and 2nd sentence lit. b read as follows: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers." As to this issue, see *Friederike Gräfin von Brühl,* Marktmacht von Kunstrechtsexperten als Rechtsproblem. Der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis, Lausanne 2008 (diss. Lausanne 2007), 175–193 and 227–232, respectively.

50 See Greenberg Gallery, Inc. v. Bauman (*supra* III 1 b), where the court disagreed on the expert's opinion and made a positive statement regarding the authenticity of a mobile by Calder.

51 This presumption was implicitly affirmed. However, Judge Saxe continued as follows: "a declaration of authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace. If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work 'authentic'. Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusion in its catalogue raisonné to dictate what is worthy of purchase." See Thome v. The Calder Foundation (*supra* note 43), 19.

52 Simon-Whelan v. The Andy Warhol Foundation for the Viusal Arts, Inc., No 07 Civ 6432, 2009-1 Trade Cases P 76, 657, 2009 WL 1457177, 2009 US Dist LEXIS 44242 (S.D.N.Y. 2009).

was excluded from recent publication of the Warhol catalogue raisonné. The Court found that – at least in part – plaintiff had suffiently alleged violations of sect. 43(a) of the Lanham Act.[53] Accordingly, the stay of discovery was lifted and the parties were invited to file further pre-trial statements.[54]

### 3. Liability of the owners

It is remarkable that not only the owners of works of art are suing the experts having given an unfavourable expertise but it is also the expert who may have a cause of action against the owner.

#### a) Seltzer v. Morton

In *Seltzer v. Morton*[55], the law firm Gibson Dunn & Crutcher, sued W. Steve Seltzer on behalf of Steve Morton, an art collector who owned the watercolour painting *Lassoing a Longhorn*. Morton, the plaintiff, and his brother purchased the painting (which was signed with "C.M. Russell 1913.") from Kennedy Galleries of New York for USD 38'000 in 1972. The Kennedy Galleries had bought the work three months earlier from the Amon Carter Museum, Fort Worth, Texas. When Morton sought to sell the painting at auction in 2001, a partner at the auction house questioned whether the painting was done by Charles M. Russell (1864–1926). He contacted Seltzer and another expert to authenticate the painting. The plaintiff concluded the painting was the work of his grandfather, Olaf Carl Seltzer (1877–1957) and not Russell which reduced the value from approximately USD 750'000 to USD 75'000.

Rather than sue Kennedy Galleries, Morton hired Gibson Dunn & Crutcher to send a letter threatening to sue Seltzer if he did not lie regarding the authenticity of the painting. Seltzer refused, and Gibson Dunn filed suit on behalf of Morton

53 The relevant provison of the Lanham Act (15 U.S.C. 1125[a][1][A][&[B]) reads in its relevant part as follows: "Any person who […] uses […] any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which […] is likely to cause confusion […] in commercial advertising […] shall be liable […]."

54 *Jason Edward Kaufman,* New evidence uncovered in Warhol Foundation lawsuit. Collector says a signed work from the same series confirms his work is genuine, The Art Newspaper, October 2009, 9; *Marisa Mazria Katz,* Subpoenas for Warhol trial, The Art Newspaper, July/August 2010, 43.

55 Seltzer v. Morton, 336 Mont. 225, 154 P.3d 561, 2007 MT 62 (S.Ct. Montana 2007).

in 2002 accusing Seltzer of fraud, malice and bad faith and seeking several million dollars in damages. Seltzer then produced affidavits from nine experts who said the painting was not a Russell and that the signature on the painting had been forged. The defendants dismissed Morton's lawsuit, with prejudice, when faced with a motion for summary judgment. Seltzer then sued the law firm and Morton accusing them of engaging in "malicious prosecution" and "abuse of process" and causing Seltzer emotional distress and damaging his reputation. The jury agreed and awarded USD 21.4m to Seltzer in actual and punitive damages. On appeal, the Montana Supreme Court upheld USD 9.9m of the jury's punitive damage award against the law firm and accused the firm of engaging in "legal thuggery".

### b) Larivière v. Thaw

In *Larivière v. Thaw*[56] the court held that an owner of a painting, alleged to be by Jackson Pollock (1912–1956), could not sue a group of experts who had formed an authentication board to render opinions on the authenticity of works said to be by Pollock. The owner had signed the board's application, which contained an agreement not to sue the experts for their opinion.

In 1994, Kenneth Larivière, the owner and plaintiff asked the Pollock-Krasner Authentication Board for examination his painting entitled *Vertical Infinity*. Although the same work was examined by the Board in 1993, it examined it a second time and concluded again that the painting was not by Pollock. In 1999, the owner sued the Board alleging the experts had failed to maintain a standard of care. The plaintiff sought monetary damages as well as an order for the Authentication Board to publish a supplement to the Pollock catalogue raisonné that included *Vertical Infinity* as a work by Pollock. The judge dismissed the claim, however, she granted the defendants' counterclaim for damages and imposed sanctions of USD 1'000 each against the owner and his lawyer on the grounds that the claim was frivolous.

56 Larivière v. E.V. Thaw, the Pollock-Krasner Authentication Board et al., 2000 N.Y.SlipOp. 5000(U); 2000 WL 33965732 (N.Y.Sup.); 2000 N.Y.Misc. LEXIS 648; N.Y.Sup.Ct. County, index no. 100627/99 (26.6.2000); see *Jeffrey Orenstein,* Show me the Monet: the Suitability of Product Disparagement to Art Experts, George Mason L. Rev. 13 (2005) 932–933 (905–934); *Ronald D. Spencer,* A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity, in: *Spencer* (*supra* note 12), 218–223 (217–226).

## *VI. Product disparagement*

Product disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property.[57] Such kind of action might arise when the defendants fail to authenticate and list a particular work in the catalogue raisonné. This failure reflects their purposeful effort to prevent the plaintiff from selling the work at its true market value in order to benefit themselves. A court would award the plaintiff-owner damages if he or she showed that the defendant-expert maliciously communicated a false statement of authenticity regarding his work to a third party, causing special damages in the form of lost market value.[58]

### 1. Hahn v. Duveen

The case *Hahn v. Duveen*[59] has been the subject of scholarly debates and has been followed by the public in detail for decades.

In 1920, an American serviceman of World War I named Harry Hahn and his wife, Andrée Lardoux, received a painting entitled *La Belle Ferronnière* as a wedding present from Andrée's godmother, Louise de Montaut. The painting was believed to be by Leonardo da Vinci (1452–1519).[60] Soon after, the couple decided to sell the painting to the Kansas City Art Institute for at least USD 250'000. That prompted a reporter to call the influential art dealer Joseph Duveen (1869–1939)[61], who pronounced it a later copy without ever seeing it. That

57 "Product disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property, and […] the elements which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages." See Thome v. Calder (*supra* note 43), 23, with reference to 44 NY Jur 2d Defamation and Privacy § 273.

58 *Orenstein* (*supra* note 56), 906.

59 Hahn v. Duveen, 133 Misc. 871 (1929), 234 N.Y.S. 185 (Sup. Ct. 1929); reproduced in part in *Barnett Hollander,* The International Law of Art, London: Bowes & Bowes 1959, 208–209; *Gerstenblith* (*supra* note 6), 373–377; *Merryman/Elsen/Urice* (*supra* note 9), 1090–1093, with comments at 1093–1096; for a short summary of the case in German, see *Kurt Siehr*, La Belle Ferronnière Américaine. Ende der Affäre Hahn v. Duveen nach 90 Jahren, Bulletin Kunst & Recht 1 (2010) 13-14.

60 *Adolfo Venturi,* Leonardiana, L'Arte 27 (1924) 49–50.

61 To Duveen's life see *S[amuel] N[athaniel] Behrman,* Duveen: The Story of the Most Spectacular Art Dealer of All Time, London: Hamisch Hamilton 1952, reprint New York:

set off newspaper headlines, and the Hahns sued Duveen for slander and damages of USD 500'000 claiming that the painting was in fact authentic and that, as a result of Duveen's comment, they could no longer sell the work for its actual value.[62]

Duveen, who had rallied a series of highly-respected experts to corroborate his opinion, expected a handy victory; however, as the trial began, it became clear that the jury was not in his favour. The American jury had little patience for European experts who offered their superior eyes as proof of the painting's attribution and could provide little concrete evidence. At the trial's conclusion, the jury[63] was unable to reach a decision, voting nine to three in favour of the Hahns. Sir Joseph Duveen settled out of court before a retrial began, paying Andrée Hahn USD 60'000 in damages.

The portrait is another version of a composition in the Louvre,[64] now believed to be by either Leonardo[65] or Giovanni Antonio Boltraffio (ca. 1466–1516)[66], depicting Lucrezia Crivelli[67], a mistress of Ludovico Sforza, the Duke of Milan.

Little Book Room 2003; *Meryle Secrest,* Duveen: A Life in Art, New York: Alfred A. Knopf 2004.

62 See, among others, "$500'000 Suit Hangs on Da Vinci Fingers", The New York Times, 5.11.1921, 1–2; "Poor Da Vinci Copy, Duveen says in Court", The New York Times, 22.1.1922, 25; "Duveen Challenges 'Da Vinci' in Court", The New York Times, 6.2.1929, 23.

63 As to the composition of the jury, see *Ella S. Siple,* Art in America – A Critical Attitude is Developing, The Burlington Magazine 54 (1929) 154 (154–155).

64 The attribution of the Louvre version to Leonardo had been uncertain and challenged by the experts long before the issue of the "Hahn version" arose; see *Andrew Decker,* The Multimillion Dollar Belle, ARTnews, Summer 1985, 93–94 (86–97).

65 *Janice Shell/Grazioso Sironi,* Cecilia Gallerani: Leonardo's Lady with an Ermine, Artibus et Historiae 13 (1992) 47 (47–66): "which is at least in good part by the Florentine." See also *L[uisa] Cogliati Arano,* Boltraffio, in: Dizionario Biografico degli Italiani, vol. 11, Roma: Società Grafica Romana 1957, 361, with references (360–362): "Leonardo abbia tolto il ritratto dal cavalletto del suo allievo (probabilmente il B[oltraffio]) e l'abbia terminato col suo pennello."

66 See *H[enryk] Ochenkowksi,* The Quatercentary of Leonardo da Vinci I. The Lady with the Ermine: A Composition by Leonardo da Vinci, The Burlington Magazine 23 (1919) 192 (186–194) and footnote 11. For the most widely known professional connoisseur of early Italian paintings, Bernard Berenson (1865–1959), the Louvre version was by Boltraffio; see "Hahn Art 'A Joke', Verdict of Expert", The New York Times, 22.2.1929, 21. Even this statement was challegend by another expert, R. Langton Douglas, who testified that "the Louvre painting was too fine to be by Boltraffio, especially since it was painted before Boltraffio was associated with Leonardo." See "Condemns Hahn Art in 5-Second Glance", The New York Times, 21.2.1929, 7.

67 See, e.g., *Francesco Malaguzzi Valeri,* Il ritratto femminile del Botraffio lasciato dal Senatore d'Adda al commune di Milano, Rassegna d'Arte 12 (1912) 10 (9–11). On the contrary, according to *Jack M. Greenstein,* the work might portray Beatrice d'Este, see *Jack*

Since the trial being reported in the press[68] but also before the court proceedings,[69] the painting's attribution has been contested, raising questions of connoisseurship, authenticity, and the role of science in art history in the 21st century.[70] Since the trial and until 1946 the painting was kept in a warehouse in New York and was shown in public in several museums in the US. In 1946, Harry Hahn published a book[71] which blamed the art establishment for its treatment of the painting, and which claimed conclusively prove that it was by Leonardo. However, recent scientific analysis of the pigments used confirms that conjecture and suggests the work was painted by a French artist, or someone using French materials, in the first half of the 18th century.[72]

In 2009, the painting was returned to the heirs of Harry and Andrée Hahn. They sold it at Sotheby's in New York as a work by a follower of Leonardo da Vinci[73] for USD 1'538'500 on 28 January 2010.[74]

*M. Greenstein,* Leonardo, Mona Lisa and "La Gioconda". Reviewing the Evidence, Artibus et Historiae 25 (2004) 30 (17–38).

68 See, e.g., "Mme. Hahn Gets Another Chance to Sue Duveen", The New York Herald [European Edition of the New York Herald Tribune], 14.4.1929, 1; "Duveen Settles", The Art Digest, 1.5.1930, 13.

69 See, e.g., *Charles Holmes,* Leonardo and Boltraffio, The Burlington Magazine 39 (1921) 107–108 (107–110).

70 See, e.g., *Andrew Decker,* (*supra* note 64), 86–97; reproduced on p. 86, details on pp. 92, 94, 95; *Secrest* (*supra* note 61), 224–243; *John Brewer,* Art and Science: A Da Vinci Detective Story, Engineering and Science 68 (2005) 32–41; *John Brewer,* The Lure of Leonardo, in Stephen Melville (ed.), The Lure of the Object*,* New Haven/London: Yale University Press 2005, 3–14; *John Brewer,* The American Leonardo: A Tale of Obsession, Art and Money*,* Oxford/New York: Oxford University Press 2009.

71 *Harry Hahn,* The Rape of La Belle, Kansas City: Frank Glenn Publishing Co. 1946.

72 Examination has confirmed that the Hahn *La Belle Ferronnière* was not originally painted on panel and then transferred to canvas at a later date, as the inscription on the back suggests; see Sotheby's New York, Important Old Master Paintings and Sculpture, catalogue of auction of 28 January 2010, lot no. 181, 105, endnote 4 (102–105).

73 See Sotheby's New York (*supra* note 72), 102: "Follower of Leonardo Da Vinci, probably before 1750".

74 The price of more than USD 1.5m seems to be high, since dealers had pointed out that the painting (with an auction estimate price between USD 0.3m and USD 0.5m) was worth only between USD 50'000 and USD 100'000; see *Lindsay Pollock,* Old master and 19th-century sales, The Art Newspaper, March 2010, 60.

## 2. Kirby v. Wildenstein[75]

The plaintiff Roger Kirby had consigned a painting entitled *La rue de la paix* by the French impressionist Jean Béraud (1849–1935) to Christie's in New York. The work was withdrawn after dealer Daniel Wildenstein (1917–2001), then head of the Fondation Wildenstein in Paris and a specialist in the artist's works, determined it was either „skinned" (meaning that it had suffered the removal of paint through overcleaning) or a copy. Later the gallery Bernheim-Jeune in Paris which had bought the work directly from the artist in 1907 provided documents showing that it was authentic. As a result, the Fondation Wildenstein stated that it would include the painting in the catalogue raisonné it was preparing, with a note that the work had been damaged by "an abusive restoration and cleaning." When the painting was offered for sale at Christie's in New York in 1988, there were no bidders. The plaintiff sued Wildenstein and the foundation for USD 250'000 in damages, alleging the tort of product disparagement. The court dismissed the suit and granted the defendant's motion for summary judgment, reasoning in part that neither the plaintiff did identify potential buyers who would have purchased the painting were it not for Wildenstein's allegedly disparaging statements nor could he plead special damages.

## 3. Thome v. The Calder Foundation

The application of the product disparagement cause of action failed in *Thome v. The Calder Foundation*[76]. Plaintiff has alleged no affirmative publication of a false statement to third persons. Rather, he relies on the assertion that the defendants' actions "in refusing to authenticate the Work tend to disparage and reflect negatively on the Work and its quality, condition, and value."[77] Furthermore, the court held that the contention that defendants remained silent when they should have spoken has never been held to satisfy the requirement of a statement published to a third person.[78]

Nevertheless, the court recognized the possibility that "as a practical matter, the denial of authentication is arguably indistinguishable from a direct assertion

75 Kirby v. Wildenstein, 784 F.Supp. 1112 (S.D.N.Y. 1992); see *Ronald D. Spencer,* The Risk of Legal Liability for Attributions of Visual Art, in: *Spencer* (*supra* note 12), 153–155 (143–187).

76 Thome v. The Alexander & Louisa Calder Foundation et al. (*supra* note 43), 22–27.

77 *Id.,* 24.

78 *Id.,* 24.

of inauthenticity",[79] i.e. the fact that non-inclusion in a catalogue raisonné is understood in the art world as conclusion that the work is not authentic,[80] tends to support the application of the cause of action. However, at the case at hand, the claim failed on statute of limitation grounds.[81]

### *VII. Racketeer Influenced and Corrupt Organizations Act*

Further remedies are offered by the federal Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO)[82]. The Act provides for extended criminal penalties and a civil cause of action for multiple acts performed as part of an ongoing or active criminal organization and is nowadays widely used against many types of crime, including white collar crime. The statute does not refer expressly to art fraud, but case law has given RICO an expanding context because of the comprehensive but not exhaustive categories of "predicate acts". RICO is convenient for plaintiffs because under the statute treble damages and attorney's fees can be claimed.[83] However, for faked works of art, RICO is applicable only in a very limited number of cases.

In *Galerie Furstenberg v. Coffaro*[84], RICO was applied to recover damages arising from the advertisement, distribution and sales of counterfeit reproductions of works by Salvador Dalí (1904–1989). The plaintiff's complaint identifies eight Dalí drawings or etchings which defendants (art merchants and retail outlets) illicitly reproduced and to which the plaintiff, a French enterprise, has exclusive rights. The court affirmed the alleged violation of § 1962(c),[85] which requires a conduct through a "pattern of racketeering activity".[86]

79 *Id.,* 25, with reference to *Ronald D. Spencer,* Authentication in Court. Factors Considered and Standards Proposed, in: *Spencer* (*supra* note 12), 191 (189–215), and *Orenstein* (*supra* note 56), 915.

80 *Id.,* 25 and 26, with reference to Kirby v. Wildenstein (*supra* note 75), 1113.

81 Thome v. The Alexander & Louisa Calder Foundation et al. (*supra* note 43), 26. The statute of limitation is one year (CPLR § 215[3]).

82 Codified as 18 U.S.C. §§ 1961–1968.

83 See 18 U.S.C. § 1964(c); however, punitive damages are not available under RICO.

84 Galerie Furstenberg v. Philip Coffaro, 697 F.Supp. 1282 (S.D.N.Y. 1988).

85 18 U.S.C. § 1962(c) reads as follows: „It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

86 In many other cases, the applicability of RICO has been denied; see, e.g., Schlaifer Nance & Company v. The Estate of Andy Warhol et al., 119 F.3d 91 (U.S. Ct. App. 2nd Cir.):

## *VIII. Statute of limitations*

### 1. Four-year rule

There are very few claims of authenticity brought within the four-year period of U.C.C. § 2-725(1)[87]. The reason for that presumably falls within the realities of art trading and the attributes of art. The authenticity or spuriousness of many works of art is not known until well after four years of purchase, when the work of art is publicly displayed, e.g., at auction, a catalogue raisonné is published on the artist, or the art is seen by an expert.[88]

### 2. Discovery rule

The U.C.C. § 2-725(2) discovery rule is a two-part test requiring: (i) a warranty explicitly extending to future performance; and (ii) discovery of the breach must await future performance.[89]

In *Firestone & Parson, Inc. v. Union League*[90], an action was brought by dealers for lost profits based upon their claim that the painting *Bombardment of*

production – without any licence – of a limited edition watch that had Warhol's name and photographs on its face.

87 U.C.C. § 2-725(1) reads as follows: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

88 Ketcham v. Franklyn Gesner Fine Paintings, Inc., 181 Ga.App. 549, 353 S.E.2d 44 (1987): action for breach of contract brought within four years of purchase of painting by Martin Johnson Heade (1819–1904) deemed to be inauthentic; fraud action dismissed by directed verdict in favour of seller, breach of contract issue not before jury; cited by *Darraby* (*supra* note 17), § 4:28, 247, footnote 1. – In Rosen v. Spanierman, 894 F.2d 28 (2d Cir. 1990), plaintiffs' breach of warranty claims were barred by the statute of limitations, N.Y.U.C.C. § 2-725(1). In 1968, plaintiff purchased a painting entitled *The Misses Wertheimer* from Ira Spanierman Gallery for USD 15'000 and gave it as a gift to her daughter and son-in-law. Twenty years later, they wanted to sell it at auction and were informed that it was a fake. The plaintiffs commenced an action against the Gallery for common fraud, negligent misrepresentation, breach of warranty, and professional negligence.

89 U.C.C. § 2-725(2) provides in relevant part: "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

90 Firestone & Parson, Inc. et al. v. Union League of Philadelphia, *supra* note 18.

*Fort Sumter* by Albert Bierstadt (1830–1902) purchased at a price of USD 50'000 from the defendant in 1981 had been reattributed in 1986. None of the parties claimed an authentication had been made prior to or at the time of sale of the painting. The reattribution was sourced to one article published in 1986 by an art historian and its subsequent acceptance by art experts at the time of suit in 1987.[91] The court, rather than the parties, recast the lawsuit for rescission based upon mutual mistake as a U.C.C. action, contending that no mutual mistake could have occurred since both parties believed the prevailing market attribution to Bierstadt was correct. The plaintiffs were, according to the court, not rescinding for mistake, but were revoking acceptance. The breach occurred in 1981 at the time of delivery under U.C.C. § 2-725(2), irrespective of when the plaintiffs gained knowledge of the breach. The district court held that the contract claims were time-barred since the suit was filed more than four years after the delivery date. Without discussing the merits of the claim, the court dismissed the plaintiffs' argument that a discovery rule should apply;[92] U.C.C. § 2-725(2) precluded the action and state law did not otherwise allow it.

## *IX. Conclusion*

1. Case law illustrates the inability of the legal system to provide a definitive determination of authenticity of works of art.
2. An implied warranty of merchantability applies to art and can be claimed under U.C.C. § 2-314. If the parties to a contract both make a mistake about material facts in existence at the time of contracting, the doctrine of mutual mistake allows rescission of the contract.
3. Three potential solutions exist with regard to the rescission of the contract of sale: (1) When the parties are mistaken as to an important quality of a specified good and the lack of this quality is disadvantageous to the party challenging the agreement, then both parties should have the right to challenge the agreement. (2) Only the party that was unintentionally or willfully misled by the counter-party should have the right of challenge. (3) When the parties

91 In general, a one-year period is not a sufficient time for a reattribution to garner consensus among art experts; it barely allows time for scholarly public debate or published response to the new attribution; see *Darraby* (*supra* note 17), § 4:31, 249, footnote 2.

92 The only case involving an authentication issue in which the discovery rule under U.C.C. § 2-725(2) was applied, is Balog v. Center Art Gallery-Hawaii, Inc., *supra* note 15.

are in agreement as to the aleatory nature of the legal transaction, neither party has a right to challenge when their expectations are not met.

4. Buyers of faked or wrongly attributed works of art may sue the action houses which sold the works as agents of the consignors/owners. If auction houses publish fraudulent misrepresentations about the authenticity or provenance of works of art in their catalogues, their liability may extend beyond buyers at auction to subsequent purchasers.
5. Art experts may successfully sue the owners of works of art if the owners' claims were frivolous or ruthless.
6. Works of art are not typical consumer goods, nor is an agreement on the consignment for auction sale of works of art a consumer transaction within the meaning of consumer protection laws.
7. Works by a specific artist may constitute a submarket, and therefore, the monopolization of which may be unlawful under antitrust laws.
8. Product disparagement has been applied in cases involving defendants who refused to authenticate or list a particular work in the catalogue raisonné.
9. US courts have neither granted to challenge Art Authentication Boards' decisions on the authenticity of a particular work nor compelled the work's inclusion in a catalogue raisonné. Since case law recognizes that the non-inclusion in a catalogue raisonné is understood in the art world as conclusion that the work is not authentic, tends to support the application of the product disparagement doctrine.
10. For faked works of art, Racketeer Influenced and Corrupt Organizations Act is applicable only in a very limited number of cases.