Express Yourself: Providing Greater Protection for Independent Art Authenticators Who Offer Good Faith Opinions

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NOTE

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

I. INTRODUCTION

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


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


\(^5\) S. 1229A.
element of their case by "clear and convincing evidence." The earlier versions of the bill would also have permitted all prevailing authenticators to recover legal costs.

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

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

II. AUTHENTICATION & THE ART MARKET

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

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7. A. 9016.
8. See infra Part IV.A.
9. See infra Part IV.B.
10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
13. Perman, supra note 1.
discovered that the work was, in fact, authentic, and its value was estimated at £10 million. The Subparts that follow discuss what authentication is, why it is important, and the unique challenges it presents.

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

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

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

9983980.html.
15. Id.
16. See infra Parts II.A–B.
20. See Amineddoleh, supra note 18, at 68-69.
masterpieces by that artist; and (3) genuine works that are fraudulently altered to increase their value.23

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

Drained by years of FBI scrutiny, however, Mr. Perenyi has recently taken to selling his work as reproductions of the original masterpieces, thereby satisfying buyers’ desire for museum quality paintings without the price tag.29 Since a piece of artwork becomes a forgery only when it is misrepresented as the original, Mr. Perenyi’s new business model, though slightly less lucrative, is entirely legal.30 If, however, a buyer later re-sold one of his reproductions, claiming it was
the original, it would fall into the second category: innocently created pieces of work subsequently misrepresented as an original.\footnote{DuBoff, supra note 23, at 974; see also Bernard Ewell, Artful Dodgers: Fraud and Foolishness in the Art Market 168 (2014) (explaining that "[r]eproductions are copies made for honest purposes which may subsequently be used by others for dishonest reasons").}

Also in the second category are works by students that are later misattributed to their masters.\footnote{DuBoff, supra note 23, at 977.} During the Renaissance, it was not uncommon for students to paint the background of their master’s work.\footnote{Houseman, supra note 23, at 510.} To do so, these students were trained to paint in a style indistinguishable from that of their master, much to the confusion of later experts.\footnote{Id. at 510-11 (further suggesting this similarity in technique creates a unique opportunity for forgers to “convert a work authored by the apprentice into one attributed to the master”); see also Richard Lacayo, A “New” Leonardo?, TIME (May 6, 2009), http://entertainment.time.com/2009/05/06/a-new-leonardo (noting disagreements among experts often results in reattributed works “getting squabbled over and re-assigned again and again over time”).}

Finally, there are genuine works that have been in some way altered to enhance their value or marketability.\footnote{DuBoff, supra note 23, at 974-75, 978-79.} For example, Michelangelo himself once carved a cupid out of marble and then buried it in order to make it appear older, having been advised that the apparent age would increase the sculpture’s value.\footnote{Carol M. Richardson, The Allure of Rome, in Locating Renaissance Art 25, 55-57 (Carol M. Richardson ed., 2007).} More commonly, it was at one point an acceptable practice to modify a painting in order to reflect contemporary tastes.\footnote{DuBoff, supra note 23, at 979.} Such modifications are easily misconstrued as the work of the original artist, thus converting the work into a forgery.\footnote{Id. at 979.} Another example of this type of forgery would be a heavy-handed restoration, through which the restorer exceeds merely repairing a work for conservation purposes, and adds so much of their own work that it may no longer be accurately construed as a product of the original artist.\footnote{Id. It is important to note that, while determining at which point the misrepresentation occurred is essential to attributing liability, the much more critical inquiry in the art market is whether the artwork purports to be something it is not. Id. at 979-80.}

2. The Authentication Process

Art experts and courts alike agree that there are three lines of inquiry that are essential to the authentication of artwork: (1) connoisseurship; (2) provenance; and (3) scientific testing.\footnote{See, e.g., Ronald D. Spencer, Authentication in Court: Factors Considered and Standards Proposed, in The Expert Versus the Object 189, 195 (Ronald D. Spencer ed., 2004); Amineddoleh, supra note 18, at 72-73. This three-pronged approach is further endorsed by the}
Connoisseurship, or examination of artwork by experts, is the primary method by which artwork is attributed to a particular artist. Connoisseurs have seen hundreds (if not thousands) of works by a particular artist and use their expertise to conduct an analysis of the composition, pigments, and techniques that are characteristic of that artist's "form." To detect a forgery, connoisseurs examine the artwork for noticeable deviations from the purported artist's form.

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


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


46. Id.

47. Id.

48. Id.

49. Id.

50. Levy, supra note 44, at 596; Grann, supra note 45.
Provenance refers to the historical documentation of ownership, or “chain of title.” Provenance documentation typically provides information regarding previous owners’ names, dates of ownership, means of transfer (such as inheritance, or sale by dealer or auction), and the locations where the artwork was kept. Provenance may be established in several ways, including a gallery sales receipt or a receipt directly from the artist, a gallery sticker attached to the artwork, a certificate of authenticity signed by a respected authority or expert on the artist, a film or recording of the artist discussing the work, or a statement by the artist that the work is authentic. If the provenance can be traced all the way back to the artwork’s original creator without any gaps, there is convincing evidence that the artwork is authentic. Records of provenance, however, are rarely complete, and art forgers can easily falsify provenance information by forging receipts of sale, ownership marks, or dealers’ records. Records of provenance are further blurred by exogenous events like war and smuggling. Therefore, although persuasive, provenance is seldom relied on as sole proof of a work’s authenticity.

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

53. Nicole Martinez, *Can You Spot a Fake? The Trouble with Authenticating Art*, ART L.J. (July 22, 2015), http://artlawjournal.com/authenticating-art. Other ways to establish provenance include an appraisal by a recognized authority or expert on the artist, letters between recognized authorities or experts on the artist discussing the art, newspaper articles mentioning the art, inclusion of the artwork in an exhibit catalogue, or other information relayed by someone familiar with the art or artist and qualified to speak about the artwork. Id.
54. Ronald D. Spencer, supra note 40, at 199; Amineddoleh, supra note 18, at 73. It is perhaps important to note that the authenticator looks at provenance only as it relates to authenticity, and not to provide the titleholder with a guarantee that their title is valid. See Jehane Ragai, *The Scientific Detection of Forgery in Paintings*, 157 PROCS. AM. PHIL. SOC’Y 164, 164-65 (2013), https://amphilsoc.org/sites/default/files/proceedings/1570202Ragai.pdf (distinguishing between the roles of the art historian and the curator).
58. Ragai, supra note 54, at 165.
59. Id.
become visible when viewed under a microscope. Forgers attempt to simulate these cracks by adding a solvent to the paint which causes it to dry faster, or by drawing fine pencil lines. Under UV light, the varnish on older paintings will glow fluorescent green, whereas on paintings that have either been retouched or are more recent fabrications, the glow is more subtle, if it glows at all.

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

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

60. Id.
61. Id.; see also supra note 26 and accompanying text. In 2010, a gallery displayed two identical paintings side by side. Ragai, supra note 54, at 165. One had been bequeathed to the gallery in 1924, with little knowledge of its provenance. Id. The second had appeared at auction in 1954, and belonged to art dealer Leonard Koester. Id. Under the microscope, it appeared that the 1924 version of the painting had fine pencil lines simulating cracks, suggesting the 1924 version of the painting was inauthentic. Id. at 165-66. Scientific testing later confirmed the painting’s inauthenticity. Id. at 168.
62. Ragai, supra note 54, at 166; see also supra note 26 and accompanying text.
63. Ragai, supra note 54, at 167-69. For an illustration of how such scientific testing may be used to disprove authenticity, see Spencer, supra note 40, at 202-04.
64. See Ragai, supra note 54, at 167-69.
65. Spencer, supra note 40, at 202; DuBoff, supra note 23, at 981.
66. See, e.g., Ragai, supra note 54, at 168 (providing an example of scientific analysis disproving the authenticity of a purported Jackson Pollock where the work contained postdated pigments).
67. See id.
68. Grann, supra note 45.
In an attempt to clear up some of this uncertainty, the Global Center for Innovation at the State University of New York at Albany has recently begun to develop methods of infusing artwork with synthetic DNA as a sort of “forensic signature.” The new technology would implant DNA that is unique to each item and connect to a database serving as the consensus of authoritative information on the work. Until scientific analysis becomes more reliable, however, courts will continue to depend primarily on the opinions of experts, which makes encouraging independent, reliable authentication especially important.

3. The Catalogue Raisonné

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

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

69. Mashberg, supra note 19, at C3.
70. Id. While synthetic DNA technology is new, the idea of a “forensic signature” is not. See Duboff, supra note 25, at 99. Previous scholars have proposed preserving the artist’s fingerprint on a painting with some sort of chemical treatment, then adding the fingerprint to an international art registry. Id.
71. See Duboff, supra note 25.
74. Catalogues Raisonnés Users’ Guide, supra note 72. The amount of information included in a catalogue raisonné may range from minimalist details to extensive biographical information, provenance, exhibition history, bibliography, and commentary on individual pieces of artwork. Id.
75. Id.
76. Collectors, Artists and Lawyers: Fear of Litigation is Hobbling the Art Market, THE ECONOMIST (Nov. 24, 2012), http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers. For example, it is estimated that sales of Modigliani drawings would increase by about twenty percent worldwide if a new, better catalogue raisonné was published for the artist. Id.
77. N.Y.C. BAR ASSOC., supra note 73, at 3. Both Sotheby’s and Christie’s tend to reject
determinations of authenticity (or, in most cases, inauthenticity) which they find unsatisfactory.\textsuperscript{78} In 2010, the Andy Warhol Foundation, which produced the artist’s \textit{catalogue raisonné}, spent nearly $7 million to defend allegations it had wrongly refused to authenticate a Warhol self-portrait.\textsuperscript{79} In light of the high cost of litigation, the Warhol authentication board ultimately disbanded.\textsuperscript{80} After the board disbanded, prices of the works that had been included in the artist’s \textit{catalogue raisonné} skyrocketed.\textsuperscript{81} This is due, in part, to the definitive nature of the artwork’s authentication, since nothing more can be added or removed from the \textit{catalogue raisonné} after the board’s dissolution.\textsuperscript{82} However, as authentication boards and other authoritative bodies trend towards withholding their opinions, or disbanding entirely, uncertainty surrounding works that are uncertified or not yet included in the \textit{catalogue raisonné} only continues to grow, and growing uncertainty further compounds the necessity for \textit{catalogues raisonnés}.\textsuperscript{83}

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

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


\textsuperscript{80} Statement from the Board of Directors, supra note 2.

\textsuperscript{81} Perman, supra note 1.

\textsuperscript{82} Id.

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


\textsuperscript{85} Fear of Litigation is Hobbling the Art Market, supra note 76.

\textsuperscript{86} Id.
4. The Importance of Authenticating Artwork

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

a. Authentication Increases Value

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

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

87. See Sponsor Memorandum, supra note 4.
88. See id.
89. See infra Part II.A.4.a-b.
90. See, e.g., DuBoff, supra note 23, at 980-81; Lacayo, supra note 34.
92. Id.
93. Id. at 2.
94. Id.
95. Id.
96. Id. at 3.
When an artist dies, the price of their work tends to increase, presumably because no more work by that artist will be created, and supply is, at that point, permanently limited. Beyond supply and demand, however, consumers tend to pay more for a piece of artwork if they suspect others would do the same. There exists what some have coined the “ineffable mystique of the genuine,” which causes buyers to associate “genuine” with “more valuable,” and, therefore, more expensive.

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

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

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

B. Authentication Presents Significant Challenges that Need to Be Addressed

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

1. History of Lawsuits Against Authenticators

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

\begin{footnotes}
\footnotetext[108]{See Amineeddoleh, supra note 18, at 67-69.}
\footnotetext[109]{Id. at 69.}
\footnotetext[110]{Id.}
\footnotetext[111]{See, e.g., Perman, supra note 1.}
\footnotetext[112]{Amineeddoleh, supra note 18, at 80-82.}
\footnotetext[113]{See infra Part II.B.1–4.}
\footnotetext[114]{See, e.g., Lacayo, supra note 34.}
\footnotetext[115]{DuBoff, supra note 24, at 981.}
\footnotetext[116]{See id. at 982.}
\footnotetext[117]{234 N.Y.S. 185, 187 (Sup. Ct. 1929).}
\end{footnotes}
ever having seen it.118 The case ultimately settled out of court, but continues to stand for the notion that art experts can be held accountable for their opinions when their conduct does not rise to the level of care expected of those in their position.119

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

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

118. Id.; see also Amineddoleh, supra note 18, at 70-72 (discussing the landmark case); Kai B. Singer, “Sotheby’s Sold Me a Fake!”—Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art, 23 COLUM.-VLA J.L. & ARTS 439, 446 (2000) (same).
119. Singer, supra note 118, at 446.
120. See, e.g., RAY, supra note 51, at 104 (listing the variety of causes of action authenticators have been subject to in recent years).
121. See Levy, supra note 44, at 597-609. In Luxmoore-May v. Messenger May Baverstock, the plaintiffs, who wished to sell two small paintings of foxhounds, consulted a fine arts auction firm. Id. at 597-98. The auction house called the paintings “dirty” and “ill-drawn,” valuing them at thirty to fifty pounds as a pair. Id. at 598. The paintings were eventually sold at auction to a rival dealer for £840, and, a few months later, the rival dealer sold the paintings at Sotheby’s for £88,000. Id. Shortly thereafter, the painting was again resold for what was “presumably a good deal more than £88,000.” Id. “The plaintiffs sued the auction firm for professional malpractice, alleging that it negligently failed to . . . inform them of the paintings’ potential value.” Id.
123. See id. at 1228-32.
125. See, e.g., Boule v. Hutton, 328 F.3d 84, 90 (2d Cir. 2003).
126. See, e.g., Wilson v. Hammer Holdings, Inc., 850 F.2d 3, 4-7 (1st Cir. 1988). In Wilson v. Hammer Holdings, Inc., the plaintiffs purchased a painting from the defendant gallery which came with a written note that stated “the authenticity of [his] picture is guaranteed.” Id. at 4. When the painting was later examined and pronounced fake, the plaintiffs sued for negligence and breach of warranty. Id.
129. See, e.g., id.
132. 234 N.Y.S. 185 (Sup. Ct. 1929).
an authenticator was sued for defamation after an interview in which the reporter had asked his opinion of Hahn’s painting.\textsuperscript{133} Even where authenticators \textit{do} have an opportunity to obtain a liability release from their clients, however, there is no guarantee the agreement will hold up in court.\textsuperscript{134} In \textit{Simon-Whelan v. Andy Warhol Foundation for Visual Arts}, the court stated that a provision releasing the foundation’s authentication board and its directors from liability would not be upheld where doing so would allow the board to insulate itself from intentional wrongdoing such as fraud.\textsuperscript{135}

2. Authentication Lacks Regulation

Unlike doctors, lawyers, and other professionals, art experts are not required to obtain any kind of license or certification in order to practice, making the degree of skill required for qualification as an “expert” somewhat difficult to define.\textsuperscript{136} In \textit{Hahn}, the court instructed the jury “to determine just how much of an expert a witness is . . . by his knowledge, his experience, his study and his ability to assimilate and apply this knowledge, study, and experience.”\textsuperscript{137} This, however, is specific to just one case, and the legal standards for authenticators are difficult to anticipate.\textsuperscript{138} The developing field of scientific testing in authentication further exacerbates the problem, as courts can decide on a case by case basis that even the most rigorous examination by a connoisseur is insufficient without additional scientific evidence.\textsuperscript{139} This lack of uniformity within the industry and within the courts has contributed to the growing trend of authenticators remaining silent.\textsuperscript{140} Currently, there is a French modernist\textsuperscript{141} whose suspected drawings and watercolors cannot be sold for their full market value because authenticators are too
nervous to weigh in on their authenticity. 142 The question at the heart of the matter is who is the recognized expert? 143 And what, exactly, is an expert? 144 While a general consensus has been formed as to the leading “experts” on his paintings and a catalogue raisonné has been assembled, the same cannot be said for his drawings. 145 One authenticator is certain of a drawing’s authenticity, but cannot publicly attest to it because it lacks the provenance for today’s market and “authentication confusion.” 146

3. Legal Consequences are Silencing Authenticators

The increasing cost of artwork has increased the number of lawsuits filed against authenticators. 147 Authenticators, who may earn $5000 to $10,000 for their services, risk being subject to lawsuits that could cost $500,000. 148 Even for prevailing authenticators, the cost of litigation is seen as prohibitive. 149 After all, “[t]he problem is you may win in court but in the process spend thousands of hours and hundreds of thousands of dollars to defend your opinion rather than practice your profession.” 150

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

142. Id.
143. Id.
144. Id.
145. Id.
146. Id.
148. Id.
149. Id. (“We won every single one of those lawsuits, but the process was extraordinarily expensive, costing us at least $10 million defending ourselves.”).
150. Id. (quoting Judith Bresler, a New York lawyer who helped draft legislation that would provide greater protection for authenticators who offer their opinion in good faith).
151. N.Y.C. BAR ASSOC., supra note 73, at 4 n.2.
152. Id. at 4.
153. Statement from the Board of Directors, supra note 2.
Basquiat, and Roy Lichtenstein. Independent authenticators are similarly reluctant to offer their opinions.

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

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

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


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

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

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

159. Collectors, Artists and Lawyers: Fear of Litigation is Hobbling the Art Market, supra note 76. In 2012, a Diebenkorn painting sold at Christie’s for $13.5 million, a record high for the artist. Id. Following the sale, a number of collectors whose paintings the Foundation had previously refused to authenticate, rendering them much less valuable, reportedly sent the Foundation threatening letters. Id. The letters, in part, inspired the insurance hike prior to the release of the catalogue raisonné, which is likely to draw even more backlash from collectors whose paintings were not included. See id.
Roy Lichtenstein Foundation chose to cease authenticating entirely, rather than renew its costly insurance premium. Multi-million dollar insurance is similarly not a viable option for independent authenticators, who often work for universities and live off modest incomes.

4. Courts are Ill-Suited to Settle Authentication Disputes

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

160. Kinsella, supra note 77.
161. N.Y.C. BAR ASSOC., supra note 73, at 4-5 n.2; see also, Irina Tarsis, The Shifting Sands of Art Authentication: As Calder Foundation Finds Itself in Court Again Who Will Have the Last Word Regarding Authentication?, CTR. FOR ART L. (Apr. 23, 2014), https://itsartlaw.com/2014/04/23/shifty-art-authentication ("[N]either authenticators nor art historians are able to access the insurance they require to protect them for providing their professional opinion.").
162. Patricia Cohen, Ruling on Artistic Authenticity: The Market vs. the Law, N.Y. TIMES, Aug. 6, 2012, at Cl. While authentication disputes typically deal with the foundations or estates of artists who are long since deceased, even a living artist’s own word may be overturned by the court. Graham Bowley, You Didn’t Paint This? Prove It., N.Y. TIMES, July 10, 2016, at AR1. A disgruntled buyer recently sued artist Peter Doig, who claims he didn’t actually paint a piece the buyer bought from a third party. Id. After a week-long bench trial, the judge ruled that the painting was “absolutely not by Mr. Doig,” as Mr. Doig himself confirmed. Ray, supra note 51, at 123. The value of the painting, had Mr. Doig lost the case, could have been up to $25 million. Bowley, supra. Even if the artist’s word had been overturned by the court, however, it is unlikely that buyers would line up to purchase a painting that the artist himself, and the dealer who represents him, have publicly disavowed. Id.
164. See id.
165. Cohen, supra note 162.
Later attempts to sell the painting were unsuccessful, and the work eventually disappeared from public view.\textsuperscript{168}

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

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\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Thome v. Alexander \& Louisa Calder Found., 890 N.Y.S.2d 16, 26 (App. Div. 2009) (“It is the aftermath of the \textit{Greenberg Gallery} decision that illustrates the inability of our legal system to provide a definitive determination of authenticity such as is sought by plaintiff here.”).
\textsuperscript{170} See, e.g., Cohen, supra note 162.
\textsuperscript{171} Id. As discussed, there is currently no standard as to who may hold themselves out as an expert, which makes assessing the credibility of each expert all the more difficult. See, Rahm, supra note 140.
\textsuperscript{172} Cohen, supra note 162.
\textsuperscript{173} Id.
\textsuperscript{174} See, e.g., Patricia Cohen, \textit{A Real Pollock? On This, Art and Science Collide}, N.Y. TIMES, Nov. 25, 2013, at A1; Milko den Leeuw \& Jane Sharp, \textit{Should Paintings Stand Above the Law?}, AUTHENTICATION IN ART, http://authenticationart.org/aia-archive/art-law/art-law-aia-articles (last visited Aug. 23, 2018). Recently, a disputed Jackson Pollock, purchased for just $5, made headlines after a partial fingerprint on the canvas was matched to one on a paint can used by Pollock, and the paint was matched to samples from his studio. Dan Fletcher, \textit{How do Experts Authenticate Art?}, TIME (Oct. 15, 2009), http://content.time.com/time/arts/article/0,8599,1930303,00.html. Despite this compelling forensic evidence, however, experts remain hesitant to certify the work for its lack of provenance and perceived deviation from Pollock’s signature style. Id. The market, on the other hand, may bite. Id. The owner was recently offered $5 million dollars for the painting, which she declined. Id.
\textsuperscript{175} 890 N.Y.S.2d 16 (App. Div. 2009).
\textsuperscript{176} Id. at 25 (“Courts have neither the education to appropriately weigh the experts’ opinions nor the authority to independently gather all available appropriate information . . . .”). The judge further contrasted our legal system to that of France, where courts are permitted to appoint their own neutral expert with the requisite level of expertise to help them decide between competing
Ultimately, a declaration of authenticity by a court is an inappropriate remedy for plaintiffs, since their ability to sell a painting at a certain price is wholly a function of the marketplace, and determinations of authenticity rely on such complex and subjective assertions of fact. One scholar has suggested that, in the wake of recent lawsuits, it is clear that "a breakthrough can only be reached when a forger pleads guilty or when suspected art spotters or dealers acknowledge the charges of tax fraud or money laundering pressed against them."178

III. THE CURRENT LAW IS INADEQUATE TO PROTECT AUTHENTICATORS

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

A. Authenticators are Not Currently Protected Under the NYACAL

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

expert opinions. Id.
177. See id. at 23-26.
179. See Flescher, supra note 40, at 95.
180. Id.
181. See, e.g., Collecters, Artists and Lawyers: Fear of Litigation Hobbling the Art Market, supra note 76; Halperin, supra note 154; Perman, supra note 1.
182. See infra Part III.A-B.
183. DUBOFF, supra note 56, at 414-15.
184. Id. at 414; Levy, supra note 44, at 600.
enacted into law.\textsuperscript{185} There is, of course, a dangerous potential for fraud that could result from granting experts immunity.\textsuperscript{186} By publicly discrediting an authentic piece of artwork, an expert could later purchase the work at a much lower cost.\textsuperscript{187} Experts in the field further estimate that, had the statute been enacted, it would have been deemed unconstitutional for the State to deprive citizens of their right to redress an alleged wrong.\textsuperscript{188} In 1968, following a series of major art frauds, New York State passed NYACAL, which established protections for collectors when purchasing from dealers.\textsuperscript{189} However, an additional provision, which would have extended liability protections to authenticators in offering their opinions, did not pass.\textsuperscript{190}

\textbf{B. New York has Proposed Legislation Which Would Amend the NYACAL}

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

The drafters explain:

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

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\textsuperscript{185} DuBOFF, supra note 56, at 414; Levy, supra note 44, at 600.
\textsuperscript{186} DuBOFF, supra note 56, at 415.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Flescher, supra note 40, at 95.
\textsuperscript{190} Id.
\textsuperscript{191} Sponsor Memorandum, supra note 4.
\textsuperscript{192} See id.
\textsuperscript{193} Id.
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This Subpart introduces the proposed legislation, then examines its deficiencies.\footnote{194 See \textit{infra} Part III.B.1–2.}

1. Summary of Proposed Legislation
The proposed legislation would, for the first time, grant specific protections for “authenticators,” which it defines as:

A person or entity recognized in the visual arts community as having expertise regarding the artist, work of fine art, or visual art multiple\footnote{195 A visual art multiple is a piece of artwork that is “produced in more than one copy,” and includes prints, photographs, and editioned sculptures, which are part of a series. Judith Wallace, \textit{Art Law on Consumer Protections for Purchasers of Prints and Multiples}, ARTNET (Aug. 16, 2015), https://news.artnet.com/market/buying-and-selling-art-in-multiples-323824. New York is one of very few states that afford specific protections for purchasers of visual art multiples. \textit{Id.}} with respect to whom such persons or entity renders an opinion as to the authenticity, attribution or authorship of a work of fine art or visual art multiple, or a person or entity recognized in the visual arts or scientific community as having expertise in uncovering facts that serve as a direct basis, in whole or in part, for an opinion as to the authenticity, attribution or authorship of a work of fine art or visual art multiple.\footnote{196 S. 1229A, 2015-2016, 238th Leg., Reg. Sess. (N.Y. 2015). This provision of the bill would amend § 11.01 of NYACAL, which provides a list of relevant definitions. \textit{See N.Y. ARTS & CULT. AFF. LAW} § 11.01 (McKinney 2017).}

The term “authenticator” also includes authors of \textit{catalogues raisonn\'e} or other scholarly texts in which an opinion pertaining to the authenticity, attribution, or authorship of artwork is either express or implied.\footnote{197 \textit{Id.}} The Art Law Committee of the New York City Bar Association, which has endorsed the bill, predicts courts will make a determination as to whether or not a person giving an opinion concerning authenticity qualifies as an “authenticator” using a process similar to that by which the court determines whether or not a witness qualifies as an expert.\footnote{198 \textit{N.Y.C. BAR ASSOC.}, \textit{supra} note 73, at 6 n.3.} Factors relevant to such qualification may include the extent to which the authenticator is known in the art or scientific community to have expertise concerning the artist, whether the authenticator has written scholarly texts or articles regarding the artist or the artist’s work, or whether the authenticator has personal knowledge of the creation of the artwork.\footnote{199 \textit{Id.}} The phrase, “recognized in the visual arts community as having expertise” is analogous to the standard applied in similar legal
contexts. For example, the U.S. Congress requires members of the National Council on the Arts to be “widely recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts.” This provision excludes authenticators who are unqualified to be offering their opinion, such as “impersonal boards or board members” who may have no experience in dealing with a particular artist.

The bill further excludes those with a financial interest in the work, beyond compensation rendered for their authentication services. The bill provides that an authenticator shall not include a person or entity that has a financial interest in the work of fine art or visual art multiple for which such opinion is rendered, or in any transaction concerning such work of fine art or visual art multiple for which the opinion is rendered, other than to be compensated for services such person or entity engaged in to provide an opinion as to the authenticity, attribution, or authorship of such work of fine art or visual art multiple or to provide information on which such an opinion is based in whole or in part.

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

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

200. Id. at 5 n.3 and accompanying text.
201. Id.
204. Id.
205. Id. Provided they meet the definition of authenticator, such protection would extend to experts who were never retained to provide a determination of authenticity (as in Hahn, where the statement was made to a third party), and therefore did not have the opportunity to enter into a hold-harmless agreement. Fairman, supra note 131, at 11.
207. See Ashcroft v. Iqbal, 556 U.S. 662, 669-70 (2009) (employing the plausibility standard set forth in Bell Atlantic Corp. v. Twombly); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring plaintiffs to “state a claim to relief that is plausible on its face”).
208. See, e.g., Fairman, supra note 131, at 10-11.
against authenticators.\textsuperscript{209} It would further allow prevailing authenticators to recover legal fees upon the judge's determination of good faith.\textsuperscript{210} This provision serves both to dissuade plaintiffs from filing meritless suits and to encourage authenticators to act in good faith.\textsuperscript{211}

2. Deficiencies in the Proposed Legislation

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

\textsuperscript{210} S. 1229A.
\textsuperscript{211} Fairman, supra note 131, at 11.
\textsuperscript{212} See Singer, supra note 118, at 440 (discussing the dominance of both Sotheby’s and Christie’s).
\textsuperscript{213} See Georgina Adam, Art Market Report Shifts Its Focus as Author Moves to Art Basel, FIN. TIMES (June 15, 2016), https://www.ft.com/content/c2bl5858-32d9-11e6-bda0-04585c31b153.
\textsuperscript{214} Singer, supra note 118, at 440.
\textsuperscript{215} See id.
\textsuperscript{216} Isaac Kaplan, Should the Art Market Be More Heavily Regulated?, ARTSY (May 23, 2016), https://www.artsy.net/article/artsy-editorial-should-the-art-market-be-more-heavily-regulated. Though largely unregulated and difficult to define, experts in the art industry are expected to adhere to minimal standards to avoid liability for negligence. See Levy, supra note 44, at 605 (explaining the standard of care for art authenticators). The College Art Association has proposed guidelines for authenticators, recommending opinions be rendered after studying the original artwork itself, unless the artwork is a “blatant fake.” Standards and Guidelines: Authentications and Attributions, COLLEGE ART ASSOC. OF AM. (Oct. 25, 2009), http://www.collegeart.org/guidelines/authentications. It is not uncommon, however, for authenticators to render opinions based on a photograph alone. Levy, supra note 44, at 610. In one case, Sotheby’s based the attribution of one of the paintings in their catalogue on a black and white photograph sent to an expert and returned with nothing more than “yes” written on the back. Singer, supra note 118, at 449. Similarly, Christie’s was accused of authenticating a Fabergé egg without ever having seen it, though the case settled before going to trial. Id.
\textsuperscript{217} Kaplan, supra note 216 ("[I]f the behavior is legal, it may be undesirable, even unethical, but there is little incentive to change it especially if it brings significant economic benefit.").
sensing authentic artwork, be it financially or otherwise, as in status or reputation.\textsuperscript{218} This self-interest may pose a threat to their objectivity.\textsuperscript{219}

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

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

\textsuperscript{218} See id.
\textsuperscript{219} See id. (noting that conflicts of interest are “ingrained in the market”).
\textsuperscript{220} See, e.g., Grann, supra note 45.
\textsuperscript{221} Id.
\textsuperscript{222} Fairman, supra note 131, at 10-11.
\textsuperscript{224} Gregory Day, Explaining the Art Market’s Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem to Care), 16 VAND. J. ENT. & TECH. L. 457, 484 (2014).
\textsuperscript{225} Id.
\textsuperscript{227} See infra Part IV.
proposed legislation is narrow in jurisdictional scope. The art market is increasingly international, and so are the risks posed to authenticators. The suggested protections, however, would be limited to authentication within New York State. Although New York is currently the only state to have proposed such legislation, the Art Law Committee of the New York City Bar Association remains hopeful that, because of New York’s status as the center of the nation’s art commerce, and home to several international auction houses and art galleries, the legislation will serve as a model for similar legislation in other states.

IV. PROVIDING BROADER PROTECTIONS FOR AUTHENTICATORS

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

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

Others have criticized New York’s proposed legislation as merely a “watered down” version of an earlier bill, which was never enacted, for its failure to incorporate some key provisions, including a higher burden of proof.

228. Perman, supra note 1.
229. RAY, supra note 51, at 107.
230. See N.Y.C. BAR ASSOC., supra note 73, at 1.
231. Id. at 1-2.
232. As Darlene Fairman, another attorney for Herrick, pointed out, authentication boards themselves are a fairly recent development in the art world. Fairman, supra note 131, at 10. “The art market operated without such boards for hundreds of years. Surely it will once again operate just fine without them.” Id.
233. DELOITTE, supra note 104, at 150.
234. Sarah Cascone, Art Authenticators Harassed by Lawsuits and Death Threats Get New Legal Protection, ARTNET (June 30, 2015), https://news.artnet.com/market/ny-state-senate-bill-protects-art-authenticators-harassed-lawsuits-death-threats-312967 (“Detractors allege that the bill is just a watered down version of one proposed last year.”); Perman, supra note 1 (“This legislation
providing art authenticators with modest protections when giving good faith opinions, the Bill is imperfect.\textsuperscript{235} As discussed in Part III, providing too much protection for powerful authentication bodies could be disastrous, and it remains to be seen whether the protections afforded are enough to incentivize independent authenticators to return to the field.\textsuperscript{236} This Part introduces a two-part solution aimed at both offering greater incentive for independent authenticators and limiting the number of authentication cases which reach the courts, which are ill-suited to provide a definitive determination of authenticity.\textsuperscript{237} The proposed solution will accomplish these twin aims by distinguishing between financially or otherwise self-interested authenticators and independent authenticators, whose objective opinions deserve more substantial protections, and incentivizing these independent authenticators to offer their opinions by raising the standard of proof in authentication cases to “clear and convincing evidence.”\textsuperscript{238}

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

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

\textsuperscript{235} Ray, supra note 232.
\textsuperscript{236} See supra Part III.
\textsuperscript{237} See supra Part II.B.4.
\textsuperscript{238} See infra Part IV.A–B.
\textsuperscript{239} S. 1229A.
\textsuperscript{240} See id.
\textsuperscript{241} See Eleftheriou-Smith, supra note 14.
\textsuperscript{242} See id.
As written, however, the bill fails to exclude authenticators who do not have financial interest, but are otherwise self-interested in the outcome of the authentication, as in status or reputation. This would of course include museums and galleries who, much like the auction houses, depend heavily on the artwork in their collections’ authenticity, as well as artists’ foundations and their authentication boards. A museum that boasts pieces by Matisse and da Vinci will no doubt be considered more prestigious than one that does not. Likewise, the overall status and reputation of the authentication board is inextricably linked to the overall status and reputation of the artist the board represents, and therefore benefits from the number of quality works produced by the artist, and the promotion and pervasiveness of the artist on the market. It has further been suggested that authentication boards would benefit financially not from an individual transaction, which the legislation would protect against, but from the ability to control the number of pieces on the market at a given time.

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

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

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

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

246. See Lucas, supra note 243.

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

248. See supra note 232-32 and accompanying text.
part of uninterested experts to opine on the authenticity of artwork that could have the most impact on the market." Authentication boards, a fairly recent concept, serve largely as a way for artists' estates to retain greater control over an artist's body of work. This idea essentially emulates the French legal concept of droit moral (meaning "moral right"), which grants artists, and then their heirs, the right to authenticate their own work. The concept of droit moral, however, has not gained much traction in the United States, despite Congress' attempts to pass moral rights legislation. This failure to take hold potentially results, at least in part, from the number of conflicts of interests it creates. Evidently, the market has not fully embraced the notion that there can only be one authoritative source of authentication for a particular artist, and would therefore be open to the opinions of any number of independent, disinterested authenticators.

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

B. Raise the Standard of Proof in Authentication Disputes

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

249. Fairman, supra note 131, at 10.
250. Id.
252. Duboff, supra note 25, at 225. Artists' moral rights are recognized in a number of countries throughout the world and have been codified under the Berne Convention, which the United States is not a party to. Id. at 224. The United States is instead a party to the Universal Copyright Convention, which does not recognize moral rights. Id. at 225.
253. Deloitte, supra note 104, at 150.
254. See Fairman, supra note 131, at 10.
256. See supra Part II.B.3 (discussing the reluctance of independent authenticators to offer their opinion in the absence of such protections).
257. S. 1229A.
By increasing the burden of proof to "clear and convincing evidence," the legislation would further discourage frivolous lawsuits, both limiting the number of authentication disputes being decided by courts and providing additional incentive for independent authenticators to offer their opinions, to the benefit of the art market overall.259

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

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

V. CONCLUSION

In recognition of the complex legal challenges involved in authentication and the overall cultural and financial importance it bears, it is imperative to ensure the continuation of professional authentication services.267 Since the authentication of art depends primarily on the scholarship of experts, it is inherently subjective, and even the most
well-qualified and knowledgeable experts may disagree. For this reason, the art world would be best served by encouraging a large pool of competent authenticators to offer their disinterested opinions, and keeping authentication disputes out of the courts. This objective can only be achieved by providing a legal environment that is accommodating to independent authenticators, for whom the high cost of litigation in recent years has become prohibitive.

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

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

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