The Perfect Fake: Creativity, Forgery, Art and the Law

Michael J. Clark

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I. INTRODUCTION

... [I]f it is later proven that the painting had been wrongly attributed to a master when it was the work of a student, what is left but the painting?
- Scott Hodes, ‘Legal Rights in the Art and Collectors’ World’

Art [is] the truly metaphysical activity of man. . . .
[T]he existence of the world is justified only as an aesthetic phenomenon.
- Friedrich Nietzsche, ‘The Birth of Tragedy’

The more total society becomes, the greater the reification of the mind and the more paradoxical its effort to escape reification on its own . . . To write poetry after Auschwitz is barbaric.

* Assistant Professor of Literature, Film and Law, Department of English, Portland State University.

1. Scott Hodes, Legal Rights in the Art and Collectors’ World 44 (1986).
Great art remains stable and unobscure because the feelings that it awakens are independent of time and place, because its kingdom is not of this world.

- Clive Bell, ‘Art’

... [A] ll the rulers are the heirs of those who conquered before them . . . Whoever has emerged victorious participates to this day in the triumphal procession in which present rulers step over those who are lying prostrate. According to traditional practice, the spoils are carried along in the procession. They are called cultural treasures, and a historical materialist views them with cautious detachment. For without exception the cultural treasures he surveys have an origin which he cannot contemplate without horror. They owe their existence not only to the efforts of the great minds who have created them, but also to the anonymous toil of their contemporaries. There is no document of civilization which is not at the same time a document of barbarism; barbarism taints also the manner in which it was transmitted from one owner to another.

- Walter Benjamin, *Theses on the Philosophy of History*

Legal concerns surrounding the forgery of artworks are often deeply vexing, largely because such questions inevitably demand the kind of interdisciplinary discussions that the law is ill suited to

undertake. For example, questions about the forgery of paintings invariably raise questions about the very elements that constitute “originality” and “authenticity” from an artistic perspective. Although such terms have grown to possess specific legal meanings, particularly in the area of copyright law, they are more properly suited to the aesthetic dimension.

Such questions place legal practitioners in a difficult spot. In spite of the generally omnivorous and insatiable character of legal thinking, forays into the world of art and aesthetics have often been greeted with skepticism by the very lawyers and judges charged with such ventures. The reasons have much to do with a series of unstated presumptions about the role of art in its relation with the larger “society.” That is, many hold that the artistic sphere is by nature exempt from rules that operate in other social arenas. Prohibitions against censorship are just one manifestation of such beliefs. But there is a simpler, more straightforward reason for the tendency of judicial reason to avoid substantive discussions of works of art as well—a lack of expertise. Judges are, in general, well versed in legal reasoning and history, but may well be generally ignorant of the central issues, themes, and historical circumstances that drive the art world. In this regard, law’s relation to art is much (though not wholly) like law’s relation to religion: to the largest extent possible (and at least in principle), it adheres to a position of carefully guarded non-interference. This attitude is famously articulated by Oliver Wendell Holmes in *Bleistein, v. Donaldson Lithography Co.*, where he supported a plaintiff’s right to copyright a circus poster:

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6. Copyright law demands that works of authorship (i.e., anything owing its existence to an author) possess a *de minimis* level of originality in order to receive protection from infringement. 17 U.S.C. § 102 (a).

7. The strongest statement of art’s autonomy is found in Immanuel Kant’s *Critique of Judgment*, where he points out that judgments of art (unlike more pragmatically concerned judgments) are the product of an “entirely disinterested satisfaction or dissatisfaction.” Such a posture underscores the belief that art is exempt from the demands of everyday life. **Immanuel Kant, The Critique of Judgment** 55 (1931).
It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke... At the other end, copyright would be denied to a public less educated than the judge.8

Justice Holmes’ admonition has served as a touchstone of American copyright law for almost a century, but it has implications far beyond the particular circumstances it addressed. First, his elitism is apparent: He presumes that the “public” (who he apparently assumes has less well-developed aesthetic sensibilities than other segments of the population) would reject any art form with which they were not wholly familiar.9 Further, he assumes that judges – given their education and tolerance – would be more open to new forms. This is a highly dubious presupposition. But most important for our purposes here, Justice Holmes points out perhaps the central aesthetic and legal paradox regarding forgery of works of art: the question of the creative act and its embodiment as the “signature” of an authentic work. When pressed, one finds that the law is indeed ill equipped to understand the forgery of works of art qua art. Or, to use a slightly different formulation, we might say that law must engage in a form of translation of the work itself into a fungible commodity when concerned with the forgery of artworks. To be addressed

9. One wonders, for instance, what Justice Holmes would have thought of rap or hip-hop music. The innovative and anti-elitist elements of rap and hip-hop are apparent to anyone who has ever listened to such music, and its appreciation is obvious to the uneducated public that mills about in the background of Justice Holmes’ world. Indeed, it is likely that an “educated” judge would be more likely to be “repulsed” by some of the elements of the most radical moments in rap.
appropriately, art must become an object of property and contract in the eyes of the law.

In what follows I shall attempt to discuss three separate elements in legal and aesthetic considerations of the forgery of paintings. First, I will discuss the question of the authentic work itself. In that section I offer various definitions of forgery, as well as of ancillary terms such as authenticity, originality, and creativity. My central concern will be the development of an aesthetic understanding of genuineness as a component in our apprehension of a work of art, as well as aesthetic theories which address the question of what art does for us. Second, I will raise questions about authenticity or genuineness in an era of mechanical reproduction. What, for instance, do we make of mass-produced artworks of the sort produced by Andy Warhol in the sixties and seventies of the twentieth century? How does Warhol’s work challenge notions of aesthetic authenticity? In that context, I will briefly discuss Walter Benjamin’s famous essay, “The Work of Art in the Age of Mechanical Reproduction,” where he argues that although the perfectly reproduced work of art (as in a reproduction of the Mona Lisa) may fulfill the central demands of an aesthetic experience of the work, there is still something lacking – a nebulous element he calls the work’s “aura.” I will also address some troubling questions raised by Nelson Goodman in his book Languages of Art, particularly his questions about the relevance of a “perfect fake” to the act of aesthetic appreciation. Finally, I will discuss the specifically legal responses to incidents of forgery, emphasizing the (not altogether unreasonable) translations in perception of the work of art that legal remedies for forgery demand; and I will also discuss some important questions about intent to deceive as a component in forgery cases.

The latter point is of central importance, for the perception of an artwork is on some level an act of faith and historical trust. To perceive a work of art is not only to look at pigments on a canvas, nor is it merely to perceive technical arrangements of color and shape. It is also a way to perceive various histories or traditions. During a time when histories and traditions are being eradicated by commercial and political forces far beyond the understanding or
control of ordinary individuals, it is a charming twist that the law—which must convert artworks into commercial entities in order to protect the ownership interests of private buyers—should serve to protect those traditions. Such are the ironies of law, ironies that seem to multiply when it comes into contact with art.

II. WHAT IS WRONG WITH FORGERY?

A. Aesthetic Background

From a strictly formal aesthetic perspective, the fact that a work of art is an exact duplication of another work should be of no import. A simple scenario suffices to prove this point: Late one night thieves enter the Louvre and replace Leonardo’s *Mona Lisa* with an exact visual and tactile reproduction. The next day, thousands of museum-goers shuffle by, stopping for a moment to admire the enigmatic character of the model’s smile, perhaps joking about the way the model’s eyes seem to follow the viewer throughout the room. In short, the audience has “experienced” the *Mona Lisa*. Or have they?

While this scenario seems to raise more questions than it could ever answer, it nonetheless shows that any conclusions about the problem will depend in large part upon how we think about art. Put differently, we might say that every perception of a work of art entails some kind of theory about what art does and should do. To view a work of art is to have (either overtly or unconsciously) a theory of art.

This point may be made more clear by outlining the general parameters those theories may take. In his study of romanticism and aesthetics, *The Mirror and the Lamp*, Meyer Abrams argues that there are four primary coordinates for aesthetic appreciation—the mimetic, pragmatic, expressive, and formalist. Abrams diagrams these coordinates in the following fashion:

11. Id. at 6.
Abrams' point is to illustrate that various and often quite distinct demands can be made by the perceiver of an artwork. For the mimetic theorist, for instance, the work of art is judged according to the degree with which it is able to imitate the world around it – verisimilitude is the central critical principle.\textsuperscript{12} Such a perspective might endorse realism in its most extreme form, as in the stark "superrealism" of sculptor John De Andrea.\textsuperscript{13} The central characteristic of a work judged from this perspective is the technical skill or craft of the artist: how well has she portrayed the external world? The idea of the artist imparting some unique ingredient to the artwork is absent here; indeed, such addition by the artist would entail a flaw in the work.

The pragmatic theorist asks that the work do something for its audience.\textsuperscript{14} The work should teach, or inform, or emotionally

\textsuperscript{12} \textit{Id.} at 7.

\textsuperscript{13} De Andrea's work takes the circumstance of persons in everyday life reproduces them in sculptural forms that are virtually indistinguishable from the real thing. \textit{See} EDWARD LUCIE-SMITH, ART TODAY 481 (1989).

\textsuperscript{14} ABRAMS, \textit{supra} note 10, at 14.
move us. This theory finds its origins in the work of Aristotle, who in his classic work, On the Art of Poetry, introduced the famous theory of catharsis: a demand that the work of art move us emotionally, purge us of these emotions, and ultimately, by that process of immersion in the emotional life of the work, make us more rational. The criteria for judgment is thus the distance between what we think a work ought to do and what a particular work in fact does.

The expressive theorist holds that work of art is the embodiment of the artist’s powerfully held feelings. The work is thus a signal of the artist’s innermost secrets. This attitude is embodied most profoundly in the work of romantic artists and is probably the prevailing attitude toward works of art today. According to Wordsworth (probably the most influential theoretical representative of expressive theories), a work of art is “the spontaneous overflow of powerful feelings.” As such, the viewer of a work of art is in some sense exposed to the particular circumstances of the author at the moment of the work’s creation.

Finally, the formalist theorist attempts to look at the work in the absence of any external forces. That is, she attempts to isolate the work from any circumstances that surrounded its production, history, and current status. For the formalist, what counts is simply what is on the canvas – how the images, colors, shapes, and dynamics of the work hold together.

The question of how one responds to a forged artwork depends to a large extent upon which of these four aesthetic perspectives one occupies. To some extent, the mimetic and pragmatic critics would only be partially troubled by the knowledge that a work has a “perfect fake.” In both cases, the essential aesthetic demand made by the viewer would be met. This is even more strongly the

16. Id. at 50. See also MONROE BEARDSLEY, AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT 48 (1990).
17. ABRAMS, supra note 10, at 20.
19. ABRAMS, supra note 10, at 23.
case with the formalist, for whom a work is an embodiment of images and symbols separate from historical contingency. Indeed, formalist critics argue that it is only from such a perspective that the notion of the "timeless" masterpiece can make any sense. It is only the work - what we see or experience on canvas - that matters. All else is history, or confusion, or extraneous data. Philosopher of art Alfred Lessing characterizes this strict formalist position in the following:

Considering a work of art aesthetically superior because it is genuine, or inferior because it is forged, has little to do with aesthetic judgment or criticism.... [I]t is impossible to understand what is wrong with a forgery unless it be first made quite clear that the answer will not be in terms of its aesthetic worth.  

Lessing points out a number of other important elements surrounding the concept and practice of forgery. First, he says, we should note that the concept of forgery implies a concept of authenticity - the one cannot exist without the other. Although this may seem obvious on its face, the idea of an authentic work (with the special characteristics of unique authorship, history, and symbolic force) is a relatively recent phenomenon: an artwork did not always circulate as a manifestation of individual authorship, nor was the question of its "genuineness" raised. Indeed, the origins of forgery as such can be traced back to a relatively recent period in the history of art. Furthermore, it is only with the growth of capital transfers of painting that a non-aesthetic impulse for forgery came about. In the classical era, for instance, "copying" was a common and unremarkable artistic activity. It is

22. Id. at 931.
23. Id.
only in an era when artworks become exchangeable as commodities that the concept of the forged artwork arises. 24

Second, Lessing points out that forgery is a negative concept. 25 It refers not to any specific characteristics that a work possesses, but to those characteristics that the work fails to possess. In short, it implies the absence of pedigree.

Lessing concludes from such observations that the concept of forgery is a moral claim that has only post hoc effects upon aesthetic claims. It is by no means clear that a work of art is inferior, qua work of art, simply because it is a forgery:

The plain fact is that aesthetically it makes no difference whether a work of art is authentic or a forgery, and instead of being embarrassed at having praised a forgery, critics should have the courage of their convictions and take pride in having praised work of beauty. 26

Expressive theories of art provide a stark contrast to the formalist position. For the expressive theorist, the work of art embodies the specific historical and personal circumstances of the author at the time of the work’s creation. As such, the work is more than the formal concatenation of visible images; it is an historical artifact as well. For the expressive theorist, who is speaking, from what perspective, matters as much as what is being said. Indeed, what is being said can only be understood by knowing who spoke. In short, the work of art is a bundle of elements not restricted to the four corners of the work itself. It embodies extra-aesthetic materials, or what philosopher of art Walter Benjamin calls the work’s “aura.” 27

Obviously, the aesthetic response of an expressive theorist to a fake will be markedly different than that of the formalist. The latter assiduously attempts to expel any extra-textual or extra-aesthetic concerns from the process of aesthetic reception, while the former includes the work’s conditions of production and

24. Lessing, supra note 20, at 58.
25. Id. at 62.
26. Id.
history, as well as the name and importance of the author, as essential elements in the process of aesthetic reception. The result of such differences in approach and interpretation lead to a number of differences in the response one has to the forgery of artworks, especially when based on strictly aesthetic grounds. Most importantly, the formalist may not care if a work is a perfect fake or not; what matters is how the work looks, not who made it, owned it, or signed it. 28

B. Commodification of the Work of Art

In the contemporary art world it has become virtually impossible to separate aesthetic from economic concerns. 29 As was suggested earlier, this transformation in our understanding of an artwork is irretrievably intertwined with the advent of capitalism, whereby all objects of production (in this case painting) became convertible into a monetary value. Current-day obsession with the sale value of a particular artwork evinces this intermingling of aesthetic and monetary criteria of judgment, almost certainly to the detriment of our relation with artworks themselves.

The dramatic increases in the value of artworks in the past two decades provide further evidence of the transformation of our

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28. The flip-side of this situation can be found in works associated with celebrities. A recent auction of part of the collection of Barbara Streisand saw artworks selling at what experienced collectors felt were extraordinarily high prices. The reason for the high prices was found in the fact that the works' provenance could be traced at some point to Streisand herself. In this case the value of an artwork became a function of celebrity. See Streisand Collection on the Market, NEW YORK TIMES, July 7, 1994, at 32.

29. The fundamental intertwining of economics and painting (in particular) was exemplified by a New York City Department of Consumer Affairs order to post prices on all artworks in commercial galleries. The policy was intended to assist consumers in an arena traditionally filled with arcane and snobbish rules of behavior. As one might expect, the proposal was lambasted by gallery owners, dealers, and members of the inner circle of art as “creat[ing] a psychological barrier that inhibits the viewer from reacting to work on its own merits.” Douglas McGill, Galleries are in Distress over Order to Start Posting Prices on Artworks, N.Y. TIMES, Feb. 12, 1988, at C20.
relationship to such works. Works of art appear on the front pages of major newspapers not as a consequence of their aesthetic virtues (ostensibly the reason they matter to us in the first place) but only when their sale value rockets skyward. In 1990, Van Gogh's "Portrait of Dr. Gachet" was sold at Christie's auction house in New York City for the sum of $82.5 million. Immediately afterward, Renoir's "Au Moulin de la Galette" was sold for $78.1 million. Much less well-known works saw their values inflate wildly during the 1980's and 1990's. During the 1970's works of art emerged as a far superior investment than the securities markets themselves. From roughly 1960 to 1975, the Dow Jones industrial average rose approximately 38% in value; a sampling of French Impressionist works rose 230% during the same period.

Such astronomical commodity fetishism makes the artworld ripe for swindlers of many sorts. As artworks further undergo the transformation from object of aesthetic expression or formal beauty into a mechanism for increasing wealth, the likelihood of forgery increases. Most importantly, as this transformation continues, an understanding of art in its modern sense – as an object designed for disinterested aesthetic contemplation – diminishes in importance, and specifically legal remedies for various forms of manipulation and deceit surrounding artworks will move further and further in the direction of simple protection of property rights. There is no visible alternative to such a

31. Id. at 693.
32. Id. at 694.
33. The notion that the work of art should be an object of "disinterested aesthetic satisfaction" stems from Immanuel Kant, who argued that only by seeing the work as a non-utilitarian object could an authentic aesthetic judgment take place. Thus to judge an artwork by its economic value is utterly non-aesthetic. See IMMANUEL KANT, THE CRITIQUE OF JUDGMENT 74 – 94 (1975).
34. ADORNO, supra note 3, at 32. The idea that aesthetic contemplation should be disinterested, and that art should be exempt from the rules and circumstances of everyday life is a fundamental condition of art in the modern (post-1800) world. Theodor Adorno characterizes this tendency in the
development; as a result, the commodification of art will continue, codified in the legal mechanism of contemporary life. The irony—or tragedy, depending upon where one sits—is that it is impossible in the contemporary art world to look at a painting without considering the vast sums spent for it; its commercial worth, its prior owners, and the fights one had to undergo to “acquire” it all become components of the work’s aura. In short, the work’s worth as art has become a function of its worth as commercial object. In such a context, art and utility, once so profoundly opposed, merge.

C. Nelson Goodman and the Impossibility of the “Perfect Fake”

Among contemporary philosophers of art, few have delved as deeply into the dynamics of authenticity, reproduction, and fakery surrounding painting as Nelson Goodman. His work raises important questions about what is at stake in the very distinction between original and fake, and in the process, he challenges many of our easy presumptions about how to perceive a work of art. He begins, for instance, by pointing out that the question of a certain kind of forgery—exact reproduction—makes no sense with what he calls “allographic” works. These are works which are the product of notation, like music or novels, whose very reproducibility is part of the essence of their identity as artworks. There is, says Goodman, no sense in saying that the Chicago Symphony recently faked a version of Beethoven’s Sixth symphony. Nor is there sense in purchasing the notes of a particular score by Beethoven as an investment or commodity: once in the public domain, the work is free for all to “possess” and use as they see fit.

This is not the case with all forms of art, however. Goodman following cryptic but powerful passage: “[T]he abstractness of modernism is a provocative challenge to the illusory notion that life still subsists. In addition, abstraction is a means to achieve the kind of aesthetic distancing which traditional phantasy no longer provides.” THEODOR ADORNO, AESTHETIC THEORY 32 (1984).

35. NELSON GOODMAN, LANGUAGES OF ART 113 (1976).
36. Id. at 118.
also offers the term "autographic" to refer to that class of works for which a specific "signature" counts. More specifically, we might say that the work's signature is both what uniquely counts about the work (it carries the artist's specific "touch") and what guarantees that the particular work is what it claims to be (the work is authenticated by the signature). Painting, sculpture, and other plastic and visual arts epitomize autographic works, and thus their capacity to be faked becomes an important issue.

It may be worthwhile at this point to revisit our hypothetical situation of an audience of visitors to the Louvre who saw not the Mona Lisa of Leonardo, but an exact reproduction of the same. From a strictly formalist perspective, one might conclude that there was no relevant aesthetic difference between the experience of the audience on that particular day and the experience of another audience that had the good fortune to view the real Mona Lisa (i.e., the Mona Lisa whose pigments were applied by Leonardo himself).

But Goodman points out that in fact the audiences may well have had unique experiences, even though they were not aware of the fact. First, he points out that there is a difference between "merely looking" at a painting and placing oneself in an "aesthetic posture" with relation to a painting. It is a fortunate or unfortunate fact (depending on myriad extraneous factors) that one can acquire a certain degree of training in perceiving works of art, just as one can acquire special insights into basketball by watching a number of games closely, or into rock and roll by listening to early Beatles albums with special attentiveness and care. Aesthetic perception is thus distinguished from merely looking; it is, rather, looking from a specifically aesthetic stance.

Yet when we are looking at a painting to determine whether it was in fact painted by Leonardo, we will look for different things than we might were we looking from an aesthetic perspective. Obviously, the kind of delight and befuddlement we might

37. Id. at 113.
38. Id. at 115.
39. Id. at 113.
experience in considering the expression on the model’s face will be virtually expelled as an element in our reception. Such an (entirely legitimate) aesthetic response is irrelevant in the context of looking for the work’s authenticity. Second, the kinds of things we might look for to ascertain the work’s genuineness – again, in contrast to “just” looking – will change the focus of our reception. Brush-stroke style, pigment thickness, the movement of light in and through the work, will become evidentiary rather than aesthetic signifiers. In short, aesthetic reception becomes aesthetic interrogation.

Ultimately, Goodman concludes that the inquiry into a work’s authenticity may well be unsolvable by aesthetic means. Something about the identity of the painting may be beyond any given looking at the painting. Consequently, the identity of a painting may not be found in any discernible aesthetic difference whatsoever. At this point we find ourselves in the peculiar position of ceasing to consider the work of art qua work of art and instead begin to see it as an historical artifact. We have moved, in short, from the formalist to expressive/historicist perspective. Or perhaps we have begun to look at an artwork as an element in an evidentiary puzzle. Indeed, Goodman asks whether our interest in the lineage of a work has something to do with our peculiar dependency upon authorship as a principle of understanding. In an enormously individualist and romantic era, do we need to hang what we see on the name of a person in order for it to make sense? Has authorship become more important than the object itself? Has art fallen prey to the cult of the celebrity?

From a legal perspective, Goodman’s conclusion makes perfect sense. Legal considerations about works or art are concerned with

40. *Id.* at 117.

41. Michel Foucault, *What is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 113 (1977). Foucault points out that modern art analyzes works largely according to what he calls the “author-principle.” In such an environment, names mean more than the raw substance of the work itself. In Foucault’s words: “[T]he ‘author-function’ is tied to the legal and institutional discourses . . . [I]t is not defined by the spontaneous attribution of a text to its creator, but through a series of precise and complex procedures.” *Id.*
a characteristic of the work beyond the visual. Such considerations see the work as property. Thus is the law beyond the aesthetic. For law to work, it must translate art into an entity defined in the law’s own terms.

D. Kinds and Purposes of Forgery

Although Goodman’s analysis raises fascinating aesthetic questions, it is presented in such a fashion that more common “real world” situations concerning forgery are understated. Indeed, the “perfect fake” is a highly unlikely possibility in the case of great masterpieces, since they generally have quite clear records of provenance. In short, Goodman’s hypothetical case is idealized to such an extent that it moves beyond virtually all of the circumstances the law is likely to face.

The perfect fake, in fact, is only one member of a class of forgeries whose essential feature lies in the fact that a work of art’s origin and history is somehow misrepresented. We can identify a number of different kinds of such misrepresentations:

1. **Exact copying**: Producing and selling a reproduction as the original (Goodman’s “perfect fake”).

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42. There are fascinating exceptions, however. The intentional production of a perfect fake in the contemporary art world is highly unlikely, largely due to the massive development of communications capacity in the world of the information network. Nonetheless, there are examples of artworks purported to be classical masterpieces whose authenticity are in serious doubt. Georges de la Tour’s *The Fortune Teller*, a part of the Metropolitan Museum of Art’s collection, is an example of a work whose status as an original or forgery is still unresolved, despite the work’s representation as an authentic masterpiece. A more playful example is found in Michelangelo’s *Cupid*. After producing the sculpture, the artist himself decided to attempt to pass the work off as a work in acidic soil to induce a patina, then shipped the work to Rome where it was sold as a piece of the classical era. See **Ann Waldron, True or False? Amazing Art Forgeries** 8-10 (1983).
2. **Completion:** Taking the unfinished work of an artist and completing that work without clear statement of the fact that the work is not the sole product of the original artist.

3. **Signature or Provenance forgery:** Ascribing the signature of a famous artist to a piece actually created by someone else, and producing false records of creation and ownership to support the false claim.

4. **Pastiche:** Using various elements from diverse or unfinished works combining them to create an artwork with a claim of integrity such that the work is ascribed to the original artist.43

5. **"School" misrepresentation:** Attributing the work of a member of an artist’s school (a student of Rubens, for instance) to the master’s hand.

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43. Completion and Pastiche forgeries are, interestingly enough, quite prevalent in literary works of art, particularly in cases where an author dies with large numbers of unfinished manuscripts on hand. Usually the work of assembling and publishing such works is left to the executor of the author’s estate. Although such an arrangement is clearly within the bounds of legality, it has led to important debates among literary scholars about the appropriateness of issuing such posthumous works, and about the appropriateness of attributing such works to the dead author. Mark Twain’s brooding, melancholy work, *The Mysterious Stranger* is virtually a case study of the issue. That work, in a highly fluid manuscript form (Twain had 3 separate versions of the text in process at the time of his death), was later published by one of his editors in a remarkably shortened and bowdlerized version which still circulates today as the “definitive” edition, despite compelling evidence to the contrary. See *Mark Twain’s Mysterious Stranger Manuscripts* (William M. Gibson, ed., University of California at Berkeley Press) (1969).
6. **Stylistic forgery**: Painting a novel image in the style of another (usually dead) artist and claiming that the work was a hitherto unknown product of that artist's hand.44

Misrepresentation of one sort or another is the fundamental legal concern common to all of the types of forgery listed above, an issue which we shall turn to in the next section. It is important to note, however, that each of these modes of forgery may have specific factual peculiarities that make it likely that legal responses and remedies might vary dramatically depending upon the circumstances of the case.

 Forgery in the strict sense – the intentional deception by artists, owners, collectors, or dealers concerning the origin and history of a work – is relatively rare when compared to cases of innocent misattribution. The latter do not include the element of intent, and are an ongoing and troubling occurrence in museums throughout the world. Our concerns here will skirt the particularities of innocent misattribution, though one should note that many of the remedies involved will be quite similar whether a misrepresentation is made innocently or with intention to deceive.

Obviously, the most frequent incentives for art forgery in its strict sense lie in the hope of financial reward.45 Given the enormous growth in the value of artworks on the open market, a talented forger stands ready to earn astronomical sums.46


46. The case of David Stein provides a powerful example. Stein was an art dealer and artist with remarkably chameleon-like talents. At one point he had produced some forty-one paintings in the style of such artists as Picasso, Chagall, Matisse, Miro, Bracque and Klee. Ultimately he was arrested and charged with grand larceny and forgery; while in prison he continued to paint works “in the style of” his various subjects. The irony of his case is found in the fact that his works actually gained notoriety and collectibility as a result of his
However, non-monetary motives exist as well, as was seen in the case of Hans van Meegeren, whose career as a producer of great fakes in the style of the great 17th century Dutch painter Jan Vermeer was the product of a desire to wreak revenge upon and havoc within a critical establishment in the artworld that he found repulsive. In many ways, van Meegeren was remarkably successful, and we shall return to his extraordinary tale later.47

E. Non-legal protections from forgery

The best protection from forgery lies in acquiring unimpeachable guarantees of provenance. The likelihood of this increases when one purchases artworks from reputable dealers. Indeed, reputable dealers have made great efforts to guarantee the propriety of all transactions they conduct.48 Unfortunately, the world is filled with disreputable dealers who will do their best to thwart any impulse toward propriety. Furthermore, even the greatest auction houses may fall prey to accusations of misrepresentation. Areiyh v. Christie’s International is a case in point.49 There, Eskandar Areiyh, a New York businessperson, purchased a Faberge imperial egg in 1977 for the price of $250,000—at that time the highest price ever paid for such a work. Areiyh refused delivery when he began to have doubts about the egg’s authenticity. Christie’s provided an additional letter of certification, but Areiyh refused to accept the letter as sufficient proof of the egg’s authenticity and once again refused delivery. Shortly thereafter, Christie’s filed criminal and civil proceedings against him in Swiss court.

As those proceedings were underway, Christie’s provided an additional letter of certification, this time from A. Kenneth
Snowman, an internationally renowned expert on Faberge eggs. Aryeh accepted this certification, and paid Christie's the $250,000 price of the egg as well as $150,000 in legal fees, interest, and costs. Christie's dropped the suits.

Eight years later, Aryeh decided to sell the egg at Christie's New York. At the time, an authentic Faberge egg might sell for as much as $1.6 million. On the eve of the sale, Snowman (the same expert who had authenticated Aryeh's egg eight years earlier) revised his opinion and declared the egg inauthentic. Aryeh immediately brought suit against Christie's claiming that the 1977 sale was fraudulent, seeking $37 million in damages. The suit was settled before coming to trial.

The point, of course, is that even the best auction houses make mistakes, some of which are made with less ingenuousness than others. In Aryeh, the mistakes made were particularly egregious: the same expert (Snowman) came to radically different conclusions on two separate occasions, each one in support of the auction house's interests at the time. The mercenary quality of both expert and auction house would seem to be evident.

Aryeh is illuminating for another reason. The buyer in that case was well informed, as evidenced by his initial refusal of delivery. His case is unique. The vast majority of purchases of artworks are impulsive, with buyers "shockingly uninformed" about the nature of the object to be purchased, its provenance, or its physical condition.

The degree to which buyers can be "shockingly uniformed" is made clear in a 1990 case, Balog v. Center Art Gallery-Hawaii.

50. Id. at 88.
51. Lerner and Bresler suggest that Aryeh's suit would have succeeded, largely due to the fact that strong evidence existed pointing to fraudulent conspiracy on Christie's behalf. Indeed, Snowman himself had issued uncertainties about the egg's authenticity just prior to the 1977 auction at which Aryeh had purchased it. LERNER & BRESLER, supra note 44, at 59.
52. LERNER & BRESLER, supra note 44, at 49. They add: "Defects abound in artwork as frequently as in other property. Accordingly, the art buyer should observe the same precautions ordinarily used by the prudent buyer in other commercial transactions of like value."
Inc. There, Edward and Helen Balog, non-professional collectors of art, purchased a number of pieces from the Center Art Gallery in Hawaii; the gallery claimed that the works were either originals or limited editions by the surrealist painter Salvador Dali. Over a period of four years, the Balogs spent approximately $36,200 on seven different works. During that time, the Balogs received periodic notices entitled “Confidential Appraisal – Certificates of Authenticity” from the Center Art Gallery, which maintained that (1) the works were “produced by Dali as exclusive originals or limited editions,” and (2) that the works had appreciated in value since their purchase by the Balogs. After seeing media reports questioning the veracity of the claims made by the Center Art Gallery, and after ascertaining that the artworks they had purchased had uncertain provenance, the Balogs sued, asserting breach of express warranty under the Uniform Commercial Code.

The case is interesting for two reasons. First, defendant Center Art Gallery asserted that the statute of limitations under the U.C.C. had expired, barring any action by the plaintiffs. The court

54. Id. at 1556. The court draws explicit attention to the fact that the plaintiffs in this case “were private collectors but . . . claim to have no special expertise regarding the authenticity of the artwork in their collection.” Later, the court adds that the value of the works in question – approximately $36,000 – rendered extensive authentication of provenance by the buyer both “redundant and ridiculous,” due to the costs such authentication would entail. This holding, while laudable in many respects, raises extremely difficult questions concerning definitions and thresholds: What, after all, makes a buyer a “nonexpert?” And at what point does the value of a work of art become sufficiently substantial to shift responsibility for authentication from seller to buyer? Compare this case to Areyh v. Christie, supra note 49, where even the most even-handed and expert circumstances of both buyer and seller did not eliminate the vexatious difficulties of forgery, mislabeled, or fake art.

55. U. C. C. § 2-313. Under that section of the Code, “a breach occurs when tender of delivery is made,” and “a cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” Under such governing provisions, the statute of limitations would have expired by the time the Balogs brought their case. However, the next sentence in the Code adds that the breach upon tender rule is suspended where the warranty “explicitly extends to future performance of the goods and discovery of the
dismissed this claim, holding that even though breach of warranty occurs under the U.C. C. when tender of delivery is made (that is, when the non-complying paintings were delivered), the statute was tolled by the fact that the warranty extended to "future performance of the goods," and by the fact that discovery of the breach would necessarily have to "await the time of such performance." The court made a compelling analogy to the wine collector who purchases 100 cases of a wine held out by the seller to be of great complexity, from a superior vintage, and thus almost certain to accrue in value; since the investment value of such a commodity is maximized by holding it unopened for ten, twenty, or even thirty years, a breach would only be discovered long after the statute of limitations has run, thus leaving the aggrieved buyer, who "discovers that his wine is not Romanee Conti at all, but Algerian Rouge," without recourse.

The court rejected Central Art's plea for dismissal, and it did so by pointing out that paintings, like wine, are peculiar commodities, and that the scrutiny they receive under the law must be of a special order. Since any "test of the promise of authenticity" of such works is often deferred until the moment of a future sale, the initial buyer must rely on representations by the seller concerning

breach must await the time of such performance."


57. Id. at 1571.

58. Id. at 1571. The court's stunningly intelligent, if not brilliant, decision reads as follows:

Since artwork does not 'perform' in the traditional sense of goods covered by the U.C.C., and since the authenticity of a work of art, i.e., its 'performance' would not change over time, Center Art's warranty necessarily guaranteed the present and future existence of the art as authentic works of Salvador Dali. To force buyers to secure an additional warranty of future performance... would be not only redundant, but ridiculous. ... This is especially the case where, as is often the situation with art, no test of the promise of authenticity is expected or required until a future time – namely, the time of future sale.

Id.

59. Id. at 1571.
the certification of the artwork. Those representations create an explicit “warranty of future performance,”\textsuperscript{60} sufficient to toll the applicable statute of limitations.\textsuperscript{61}

Second, and most importantly, the court makes an explicit – though definitionally nebulous – distinction between the kind of purchasers that one finds in transfers of artworks, resulting in what would seem to be a two-part analysis. In such circumstances, where the seller was a dealer in artworks and the buyer was a nonprofessional “private collector,” the court establishes a standard by which responsibility for discovery of breach rests almost entirely with the seller, provided the seller had made affirmations of fact about the artwork that the buyer relied upon. If such facts exist (in which the description by seller to a nonprofessional buyer is part of the basis of the bargain), a second step must take place, in which the relative value of the artwork to the cost of buyer-funded authentication must take place. In short, if the artwork in question is not so valuable as to warrant buyer-financed authentication, responsibility for discovery of the breach tolls the statute of limitations.\textsuperscript{62} In the court’s words, “where buyers are sold artwork of such a value that it would be prohibitively expensive to obtain a verification of authenticity in addition to the representations of the seller, and where the merchant is a seller of such artwork, the buyer is justified in relying on those representations and their claim for breach of warranty will accrue at the time they discover or reasonably should have discovered that the artwork was not authentic.”\textsuperscript{63}

This is a remarkably consumer-friendly result. And although it provides important protections for private collectors who have “no special expertise regarding the authenticity of the artwork in their collection,” the decision raises extremely difficult questions about the threshold at which such a rule will be invoked. The court does not establish a standard; it might have said, for instance, that in sales where the initial sale value of the work of art is more than

\textsuperscript{60} Id. at 1571.
\textsuperscript{61} Balog, 745 F. Supp. at 1573.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
four times (or five, or six) the cost of securing additional certification, the buyer is required to do so to ensure protection under U.C.C. 2-313. In short, although the decision of the District Court is in this instance quite laudable, the application of their methodology for determining where and how this new rule will apply makes its future cloudy at best. The "non-expert" collector would be wise to use all methods possible to guarantee provenance well in advance of purchase – in short, via non-legal, private means.

F. Methods of authentication

When suspicions about the provenance or authenticity of an artwork arise, three basic courses of action are available to the concerned party. The first, and most obvious, is to re-evaluate the documentation concerning the work. Unfortunately, documentation is more easily forged than the work itself, and can thus be an extremely unreliable method for assuring authenticity.

A second method of verification is termed "stylistic" inquiry. In such instances an expert in the particular field, or someone with exceptional knowledge regarding the stylistic dynamics of the artist in question reviews the work at hand. Often this entails some degree of comparative analysis: A work from the painter’s past is compared to the questioned work in the hope of detecting any anomalies in brushstroke technique, foundation structure, and the like. A classic example is found in brushstroke analysis of the Otto Wacker gallery’s *Reaper in a Cornfield* by Van Gogh. In that case, a number of Van Gogh experts had immediate suspicions about the authenticity of the work, confirmed by a comparison of minor style differences. The conclusion – that the work was a forgery – was proven further by scientific analysis.

There are vast difficulties with stylistic analysis, however, which we shall turn to in our discussion of Hans van Meegeren below.

64. LERNER & BRESSLER, supra note 44, at 57.

Most importantly, however, stylistic analysis is a classic example of a subjective test. It rests on the particular status and stance of the expert in question. Such a mode of analysis thus carries with it all the inherent difficulties of such tests in the other areas of law and criticism – most importantly, the likelihood of bias or nonuniversalizable conclusions.

The third method of analysis is scientific. Such analysis is often used in addition to, or in conjunction with, the subjective analysis described above (such was the case in the Otto Wacker/Van Gogh forgeries). The greatest virtue of such a mode of analysis is its objectivity: results are inherently universalizable and thus subject to absolute verification by other, identically situated testing methods. Tests may also be targeted to specific characteristics of the artwork itself. Radiocarbon dating, for instance, can help establish differences in the age and nature of the materials used, and in the artist’s technique, that may betray a forger’s hand.

The difficulty with all of these methods is they are both expensive and logistically difficult to undertake. The unfortunate result is that a number of forged artworks continue to go undetected in various art sales, with each additional transfer increasing the difficulty of exposing their fraudulence.

III. LEGAL PROTECTION AND REMEDIES CONCERNING FORGERY AND MISREPRESENTATION

A number of different areas of law are applicable to questions surrounding misrepresentation, fraud, or mistake in the sale of artworks. The most obvious and well-established relevant law is found in common law rules pertaining to contract, particularly as they are codified in the Uniform Commercial Code. In addition, buyers unfairly injured in an art sales transaction may find useful legal recourse in tort law, Federal and State Penal statutes

66. An in-depth discussion of tort remedies is beyond the scope of this particular analysis, although a defrauded or misled purchaser would be well advised to look into this avenue as a means of recovery. Such a strategy would aim at proving professional malpractice as a result of some degree of negligence in any area surrounding the sale. In addition, such claims as breach of fiduciary
(particularly in cases where intent to deceive or defraud is present), and in legislation enacted in specific jurisdictions where sales are particularly prevalent in commercial transactions. New York State and California, for instance, have both enacted business laws aimed at insuring the propriety of sales involving artworks.

The Uniform Commercial Code (hereinafter, U.C.C.) is the most important legal instrument for insuring the propriety of transactions involving artworks. Section 1-203 of the Code mandates good faith in the creation and execution of any sales contract. In addition, it provides a site from which to compel restitution in the event of a faulty sale. Unfortunately, the fact that the U.C.C. covers only transactions of tangible personal property entails that certain types of artwork will not be governed by it. Environmental art, for instance, is not “personal property” of the sort envisioned under the U.C.C. Furthermore, the degree to which the characteristics of an artwork are “tangible” in a traditional commercial sense is highly uncertain. This is particularly the case given the enormous volatility of price and prestige accorded various artists and artworks in different periods.

In their hornbook entitled *Art Law*, Lerner and Bressler cite three basic ways in which express warranties may be created: warranty by affirmation of fact or promise; warranty by description; statements of opinion by an art merchant (a merchant dealing in goods of that kind).

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67. LERNER & BRESLER, supra note 44, at 58.
68. Id.
69. Id. at 90.
70. U.C.C. § 1-203.
71. Environmental art is one of many novel forms developed in contemporary or postmodern art. This form utilizes existing geographical conditions and various types of artistic embellishment to create an artistic scene – as in the case of Christo’s “Running Fence” (a white cloth fence running for miles along the northern California landscape).
72. LERNER & BRESLER, supra note 44, at 59-61.
In addition, they suggest the following two methods for the creation of an implied warranty: warranty of merchantability; warranty of fitness for a particular use.\(^73\)

What follows will survey the applicability of each of these forms of warranty arising under the U.C.C. as applied to artworks.

**A. Express Warranties under U.C.C. 2-313**

The U.C.C. offers powerful mechanisms to discourage misrepresentation in the case of paintings. It also provides means for restitution in the event of a faulty sale. More specifically, U.C.C. 2-313 provides an automatic presumption that the sale in question is conducted in accordance with "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..."\(^74\) A representation which becomes a part of the basis of the bargain may manifest itself in an "affirmation of fact or promise,"\(^75\) a mere "description" of the goods\(^76\) (as in, "this is a fine example of Rauschenberg's early work"), or even in "statements of opinion" by the seller.\(^77\)

The last mechanism for generating a warranty is particularly troubling and dangerous for art dealers. What a dealer thinks is "mere opinion" rises to the level of warranty of authenticity if the dealer is an art merchant.\(^78\) From a legal perspective, what matters is whether the seller is someone who ordinarily deals in goods of the kind. This supports the general tenor of U.C.C. provisions, which aim at protecting the sanctity and fairness of business dealings. When an art dealer (who in principal has greater knowledge concerning the goods in question) makes a representation about a painting, it rises to the level of factual claim. The kind of puffing one sees on an automobile sales lot has

\(^73\) *Id.* at 64-9.
\(^74\) *U.C.C.* § 2-313(1)(a).
\(^75\) LERNER & BRESLER, *supra* note 44, at 60.
\(^76\) *Id*.
\(^77\) *Id.* at 61.
\(^78\) *U.C.C.* § 2-313, note 8; *U.C.C.* § 2-103.
no place in the transfer of artwork.

Furthermore, disclaimers have no effect unless they are clearly and prominently displayed, and the dealer has made no assertion of authenticity. Hence a dealer who purported to sell a Picasso lithograph would give rise to an express or implied warranty which would be unaffected by the attachment of disclaimer. The rationale of the U.C.C. is simple: contracts of sale should be made within relatively uniform commercial circumstances; these circumstances imply relatively full disclosure of all pertinent facts to the parties involved.\(^79\) Disclaimers serve to undermine such a covenant, and, in the language of U.C.C. 2-313, are "repugnant" and without effect save in extremely limited circumstances.\(^80\)

A number of important consequences flow from the various provisions attached to U.C.C. Section 2-313. First, for an express warranty to spring into existence, there must be a core description of the goods to be sold\(^81\) which becomes part of the "basis of the bargain" itself.\(^82\) Moreover, an express warranty may be created regardless of the seller's intention to make such a warranty.\(^83\) Thus when a dealer or gallery\(^84\) makes representations about an artwork, and those representations are part of the basis of the bargain between seller and buyer, an express warranty will arise. Moreover, if a "merchant" makes in good faith an assertion that turns out to be false, an action will still lie; in short, good faith is no defense to a false assertion.\(^85\) Thus as express warranty may arise in any number of representations found in the ordinary course of business revolving around transactions of art: documents, brochures, catalogs, advertisements, even announcements, may

\(^79\) U.C.C. § 2-313, note 1.

\(^80\) Id.

\(^81\) U.C.C. § 2-313(1)(b).

\(^82\) U.C.C. § 2-313(1)(a).

\(^83\) U.C.C. § 2-313(2).

\(^84\) U.C.C. § 2-104 defines "merchant" as a person who deals in goods of the kind (here, a painting or similar artwork), or as one who by her occupation holds herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

\(^85\) U.C.C. § 2-313(2); See also Overstreet v. Norden Laboratories, Inc., 669 F.2d 1286 (6th Cir. 1982).
give rise to a warranty under U.C.C. 2-313.

The precise time when affirmations about an artwork are made is not material in establishing an express warranty.86 In other words, a warranty may arise from oral representations about the quality of a work made prior to, during, or after a sale. The fundamental standard is that of good faith and fair dealing. The latter point – comments made after a sale – deserves special notice. For instance, a representation made after a sale by a dealer can give rise to increased liability in the form of a warranty.

B. Implied Warranties under U.C.C. 2-314

An implied warranty of merchantability springs into existence when the goods in question (here again, a painting) are purchased from a seller who is a "merchant with respect to goods of that kind."87 An art dealer is such a merchant, and her sale of an artwork implies in relevant part that the artwork sold will meet the following conditions:

1. It will "pass without objection in the trade under the contract description."88
2. It is fit for the "ordinary purposes" such works are put to.89
3. It will "confirm to the promise or affirmations of fact made on the . . . label."90

The effect of these provisions is not hard to determine in the case of artworks. Once a sale is made, any objection to a work’s authenticity (by a future buyer or third-party, or instance) will suggest that a breach has occurred.91 Further, "ordinary purposes"

86. U.C.C. § 2-313, note 7.
87. U.C.C. § 2-314(1).
88. U.C.C. § 2-314(1)(a).
89. U.C.C. § 2-314(1)(c).
90. U.C.C. § 2-314(1)(f).
91. In theory and in general practice, this is a non-problematic assertion. Dealer A sells a work to buyer B, who is then told that the work is inauthentic, or that its certification is faulty. B has a straightforward cause of action against A. Why? Because the work would not "pass without objection" under the circumstances of ordinary trade practices. But some fakes (as in the case of van Meegeren’s Vermeer works) pass for some time in the trade without objection.
can be construed broadly. Aesthetic enjoyment is not the outer limit of such ordinary usage; part of the ordinary purpose of an artwork is as an investment, and this property of the work is protected under U.C.C. Sec. 2-314. Finally, "label" in this context may be read as "certificate of provenance." A faulty certificate, even if its inaccuracy is unknown to the merchant-seller, does not alleviate the merchant’s warranty obligation. Case law has shown that inquiries into the validity of title are part of an art dealer’s ordinary course of business. Hence a dealer has a duty to ascertain the status of title of any work she sells.92

C. Circumstances in which Breach Occurs

If a buyer purchases an artwork on the strength of affirmations which provide the basis of the bargain, and the goods in question ultimately fail to conform, a breach of express warranty has occurred.93 The buyer may bring suit regardless of whether the seller acted in good faith or with malicious intent (though the latter might give rise to criminal action for fraudulent
galleries and art merchants have attempted to protect themselves from the consequences of implied warranties by making explicit representations of the degree of certainty with which they endorse (1) the artwork’s authenticity; (2) the artwork’s provenance; and (3) the certainty of the work’s certification. The effect of such disclaimers (acceptable under 2-314 if the buyer is afforded full opportunity to examine the goods in question and the defect is visible by such means of examination) is to alleviate the exposure of the merchant-seller to liability under the implied warranty sections of the U.C.C., and to increase the risk confronted by the buyer. See U.C.C. § 2-316, Comment 8; see also LERNER & BRESLER, supra note 44, at 69.

92. See Porter v. Wertz, 416 N.Y.S.2d 254 (1979) aff’d, 53 N.Y.2d 696 (1981). In this case, the bizarre circumstances that surrounded the consignment of a painting owned by Porter to an individual posing as Wertz, who then sold the painting to the Feigen gallery, led to the court’s ruling in support of Porter’s action both intermediary and gallery. The gallery was held to be operating outside the standard commercial standards applicable at the time—particularly in its failure to inquire who sold the painting—and was ordered to reimburse Porter (the original owner) the value of the painting at the time of sale, plus costs.

93. LERNER & BRESLER, supra note 44, at 60.
misrepresentation). This applies as well to cases where a work which is likely to be authentic is affixed with forged documentation to further allay any fears about authenticity. In such a case the mere fact of inauthentic documentation might render the pedigree of the work questionable. The seller may be forced to reimburse the buyer for an diminution in value stemming form the faulty certification (potentially a massive sum); or he may be forced to compensate the buyer for any costs incurred in assuring certification; or, finally, he may be subject to punitive damages in the event that he acted in bad faith.

The crucial issues for both buyer and seller of artworks are that a warranty of genuineness is presumed in the very fabric of the sale. This is underscored by Note 8 to U.C.C. Sec. 2-313: “What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary.” In this context, “good reason” would probably entail no less than a written disclaimer by an established expert in the field. Hence an art merchant is cautioned that standards for “puffing” legitimate to the used auto market are simply inapplicable in the transfer of “autographic” artworks.94

Other protections are available under the U.C.C., but they are beyond the scope of this paper. The general fact is that protections and remedies exist under the U.C.C. for a variety of transactional elements which are present in the sale of an artwork. In sum, the U.C.C. provides express and implied warranties applicable to a number of the sale characteristics of an artwork, including those of title, fitness for ordinary use, fitness for a particular use, merchantability, and conformity to representations made before, during, and after a sale. The purchaser of an autographic artwork would be wise to create a checklist with the U.C.C. in mind; indeed, a wise purchaser would ask that the merchant or non-merchant dealer agree in writing to conform to the requirements of such a list. Such a practice would alleviate uncertainty from both ends of the seller-purchaser dynamic, and would certainly be

a contract into which a reputable art dealer would enter without hesitation.

D. New York Business Law

New York's position as a world center for the sale of major artworks has led to its passage of statutes aimed specifically at regulating the art market. Such laws have come to serve as litmus tests for the validity of a transfer and have been emulated by other states, most notably Michigan, Illinois, and California.95 Sales that fail to meet the standards established by New York law are generally held with great suspicion in other large art markets.96

Two areas of New York law are of specific importance here. The first specifically concerns forgery, and follows general laws prohibiting the intentional falsification or creation of written documents like checks, promissory notes, and the like. Such laws have been modified for specific application to the artworld and are generally referred to as "criminal-simulation statutes." These statutes provide criminal penalties for the intentional production or modification of any object such that its age, uniqueness or authorship is falsely represented.97 Although such statutes may serve to discourage fraudulent misrepresentation, the astronomical sums available to the unscrupulous art dealer tend to blunt their effect. Furthermore, the utility of such penal statutes to the defrauded buyer or seller are negligible; more effective remedies are found in U.C.C. provisions and tort law. Finally, the criminal intent requirement of N.Y. Penal Law 170.45 creates proof issues

95. LERNER & BRESLER, supra note 44, at 92.
96. Id. at 93.
97. The specific language of the statute reads as follows:
A person is guilty of criminal simulation when: 1) With intent to defraud, he makes or alters any object in such manner that it appears to have antiquity, rarity, source or authorship which it does not in fact possess; or 2) With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated. Criminal simulation is a class A misdemeanor.
that maybe extremely difficult to meet in the often nebulous and arcane world of international art sales.

A second New York law may prove more useful in guaranteeing the authenticity and propriety of transfers of painting. These statutes work to extend and underscore the express warranty requirements found in U.C.C. 2-313. In essence, any written instrument involved in the transfer of an artwork will result in the creation of an express warranty of authenticity. Such warranties are intended to be unaffected by any disclaimer. Finally, the opinion of a seller becomes a factual element of the bargain: “puffing” rises to the level of material fact.98

IV. HANS VAN MEEGEREN: FORGERY FOR OTHER THAN FINANCIAL ENDS

The foregoing analyses would be incomplete without a brief discussion of the stunning case of Hans van Meegeren’s forgery of the works of Jan Vermeer. Van Meegeren’s case crystallizes many of the legal issues surrounding the faulty or misrepresentational transfer of artworks, but it also reiterates many of the questions raised earlier about contemporary relationships of the audience to an artwork. In van Meegeren’s case, we find the question of art qua art posed once again.

Van Meegeren, while commercially employed as an illustrator and decorative artist, entertained the perfectly legitimate wish that his work be received with some degree of appreciation by the high-critical elements of the Dutch artistic community. Early in his career, the critical community saw his works with promise; in particular, his technical skill was deemed remarkable. Unfortunately, his work was increasingly seen as lacking “psychological penetration.”99 One critic referred to his work as combining a “unique, fluid way of painting” with “insipid and sweet, sometimes miserably forsaken” images.100 Such

100. Id.
disappointments led to his decision, sometime during the late 1920's, to prove two things: First, the pomposity and fraudulence of the world of art experts; and second, his own status as a brilliant painter.101

To this end van Meegeren produced nine of the greatest forgeries in the history of Western art. He chose to create works so intimately in the style of Pietr de Hooch and Jan Vermeer that they would be received as authentic “undiscovered” paintings by the masters. One of his works, “Christ and the Disciples at Emmaus” was hailed by J. Decoen, a leading expert on the work of Vermeer, as Vermeer’s greatest accomplishment, done in a style that would demand a rethinking of the entirety of that painter’s corpus.102 The quality of his forgeries was so great that the European critical community refused to believe van Meegeren’s claims even after he admitted his fraud. Indeed, even after the trial was completed, and after van Meegeren had created another painting “in the style of” Vermeer to prove his culpability, some critics continued to doubt that all of the works were forgeries. Decoen, the critic alluded to earlier, uttered the following while van Meegeren’s sentence was being determined:

I must recall that the moment of greatest anguish for me was when the verdict [of van Meegeren] was being considered. The court might, according to an ancient Dutch Law, have ordered the destruction of all the pictures. One shudders at the thought that one could, officially, have destroyed two of the most moving works which Vermeer has created.103

Van Meegeren’s tale continued still further: In the 1950’s a group of critics, still unconvinced that the stylistic analysis employed by the Dutch court in determining that the works were forgeries, sought to show that at least two of the paintings were

101. Id. at 11.
102. Id. at 22.
103. Id. at 61.
authentic. These efforts – so illuminative of the enormous importance of “authenticity” as an element in determining the validity of an artwork – were finally laid to rest by radiographic analysis, which concluded that the works were in fact produced in the 20th century.\(^{104}\)

Van Meegeren’s ironic and sad end tells much about ineluctability and enigmatic character of art. Depressed and battered by his court case, van Meegeren died in prison at the age of 58. His works—both his forgeries and his original works—have gained status and commercial value as a result of their exposure as frauds. Perhaps in van Meegeren’s case the raw fact of art expresses itself in pure form: In his work, questions about authenticity, originality, and beauty emerge, and art presents itself in its enigmatic, unknowable character.

\(^{104}\) Id. at 20.