PROTECTION FROM LEGAL CLAIMS FOR OPINIONS ABOUT THE AUTHENTICITY OF ART

Ronald D. Spencer

This essay addresses legal protection for expert opinion - opinion which has been the subject of many recent and highly publicized legal claims. These claims, past and current, have "chilled" scholarly expression and driven authentication boards and committees of experts out of existence. In order for robust art scholarship about authenticity in the visual arts — the essence of which is connoisseurship — to flourish, protection is needed for expert opinion rendered by the academic scholars, curators and other specialists. This essay will propose that this protection can be had in the courts (as opposed to legislatures) based on (1) the recent successful defense of claims against rating agencies like Moody's for their ratings of residential mortgage-backed bonds, and (2) a line of court decisions providing First Amendment protection for opinion, so long as the facts or reasoning upon which the opinion is based is fully disclosed. — RDS

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First, this essay will briefly examine the nature of the opinion about authenticity we are proposing to protect. In most circumstances it is expressed by an expert — usually an art scholar, who is expressing his ideas in the form of scholarly judgment, evaluation, deduction or (even) conjecture based on art-historical information and tangible physical facts about the art, and upon the connoisseur’s informed visual perceptions. When the recognized connoisseurs have the same idea (more or less) about the identity of the artist who created the work in question, the scholarly art community, and then the art market, will usually accept the work as “authentic”.

The Authentication Process

Of course a determination of authenticity does not proceed directly from ideas in the head of a scholar or connoisseur. Indeed, three lines of inquiry are basic to the determination of authenticity in art: (1) the provenance of the work, (2) the application of connoisseurship to a work’s visual and physical aspects, and (3) scientific testing to determine the work’s physical properties. The courts, as well as the art market, have accepted the importance of these three lines of inquiry.¹

Connoisseurship is informed visual perception, based upon a trained scholar or other art expert having looked long and hard at hundreds, maybe thousands, of works by the artist in question — and absorbing their salient characteristics into visual memory — combined with an understanding of the artist’s method of working (known as “facture”). This informed visual perception (supported by provenance and any available information on the work’s physical properties) is expressed in an expert judgment, usually referred to as expert opinion on authenticity.

It is the expression of this expert opinion, in essence, the expert’s idea, based on connoisseurship, which today is at risk (or “chilled”) from a proliferation of legal claims, or perceived threats, over the authentication of visual art.

Protecting the Expert’s Idea

It is the well and truly held view that an idea can never result in liability for the person who expresses it, because ideas are so personal and subjective and because society should protect ideas as inherently beneficial, even if sometimes wrongheaded, and, indeed, negligently so. In art attribution this unexceptional view of the value of ideas is equated with an “opinion”.²
Experts who determine the authenticity of a work of art, whether in the context of the publication of a catalogue raisonné, curating an exhibition, a sale or purchase, an appraisal of the value, or a scholarly essay, almost always describe their conclusion as their opinion on the authenticity or attribution of the work.3

Of course, they use the term opinion because that is the nature of what they are rendering: their judgment, evaluation, or deduction, based upon an interpretation of existing facts which they have collected and analyzed, and to which they have applied their learning and experience.4

In 1984 a U.S. federal Court of Appeals attempted to describe the nature of opinion in Ollman v. Evans and Novak (a case involving a defamation claim against two journalists, where the defense was that their published statement was constitutionally protected opinion):

At one end of the continuum are statements that may appropriately be called “pure” opinion. These are expressions which are commonly regarded as incapable of being adjudged true or false in any objective sense of those terms.

... Perhaps far more common ... are statements that reflect the author’s deductions or evaluations but are “laden with factual content”. The apparent proportions of opinion and fact in these “hybrid” statements varies considerably.

Hybrid statements differ from pure opinion in that most people would regard them as capable of denomination as true or false, depending upon what the background facts are revealed to be. At the same time, they generally are not propositions that a scientist or logician would regard as provable facts. The hard question is whether these kinds of statements, which both express the author’s judgment and indicate the existence of specific facts warranting that judgment are within the absolute privilege for opinion.5

In light of the Ollman analysis, a statement by an expert about the authenticity of a painting, even if preceded by the phrase “I think,” “I believe,” or “in my opinion,” is, not “pure opinion,” but is at least, “hybrid” opinion, in that it implicitly suggests the existence of specific underlying facts and conveys the author’s judgment upon, or interpretation of, those facts. Of course, there often is also an intimation of personal aesthetic taste with respect to the art, but there can be no question that the judgment is based, in large part, on express or implied facts which can be proven true or false (and being so provable, the stated judgment could be actionable as negligence, defamation, product disparagement, etc.).

Analytical Similarity in Evaluations of Bond Creditworthiness and Art Authenticity

The frequent garden variety evaluation by financial analysts of the credit-worthiness of bonds seems analytically similar in process to an examination of authenticity of art. Financial analysts evaluating the credit-worthiness of a company’s bonds are deciding upon the relevance of “facts” about the company’s business, market share, strength of competition, etc., and the company’s financial structure, and the relative weight to be given these “facts.” (Although the analysis of residential mortgage-backed bonds presumably took the form of an examination of the underlying security for the bond, numerous, perhaps thousands, of residential property mortgages.)

Of course, in evaluating the authenticity of art, the “facts” deemed relevant by an art expert and their relative importance are quite different from those examined by a credit analyst. Thus, most of the important “facts” which the art expert identifies and weighs are his visual perceptions, that is, his verbal articulation or description of what the trained connoisseur’s eye “sees”. Other facts include the provenance, that is, the chain of title and possession and public exhibition history of the work from the artist to the current owner. Both the credit analyst and the art expert are analyzing facts and, after applying their historical experience, arriving at conclusions or judgments, which they both choose to call opinion.

Fear of Legal Claims Causing Connoisseurs To Cease Authentication Activities

As is well known, many art authentication boards and committees are ceasing their authentication activities over concerns about legal liability for their decisions, the most well-known example being the cessation of activities in 2011 of the Andy Warhol Art Authentication Board. Of course individual art scholars are concerned about
liability as well. Theodore Stebbins, Jr., Curator of American Art at the Harvard University Art Museums, quotes Dr. Abigail Gerdts, director of the Winslow Homer catalogue raisonné, pointing out the financial and personal risk to today’s art expert. “The stakes are just too high. I believe we should all get out of the opinion giving business.” And, as Rachel Cohen recently wrote in The New Yorker,

When a painting could be worth $100 million, what happens to the experts who have to say whether the work is authentic? Lately, they get sued. ... The threat of these suits has begun to affect the state of available scholarship. ... Prices could not have risen so high ... without confident, creditable attribution. Now these astronomical sums are driving away the specialists who made them possible in the first place.

Fear of legal claims is likely the reason that recent catalogues raisonnés no longer have extremely useful sections dealing with “False Attributions” (as found in Volume 4 of the 1978 Jackson Pollock catalogue raisonné) or even an innocuous, “Problems for Study” section (as found in the 1995 Pollock Supplement) which contained a subsection, “Unresolved Attributions”, for which there was “not sufficient evidence” to attribute works to Pollock. (A work listed in the “False Attributions” section of Volume 4 was the subject of a 1994 lawsuit against the Pollock-Krasner Authentication Board.)

The Experts’ Fear of Legal Claims Is Not of Recent Vintage: It Goes Back at Least to 1929.

In the famous case of Hahn v. Duveen9 Sir Joseph Duveen looked at a photograph of a supposed Leonardo da Vinci painting owned by Mrs. Andrée Hahn, and told a newspaper reporter that it was only a copy, the “real one” being in the Louvre.10 Mrs. Hahn sued Duveen, saying that as a result of Duveen’s disparagement, she could no longer sell the painting for its real value. After a trial, and before the jury rendered its decision, Duveen settled out of court, paying Mrs. Hahn $60,000, “forever establishing in the minds of many people that opinions are dangerous things to give”.11

Legislation, Unlikely to Protect Scholars and Other Experts

This author has often been asked by art scholars, museum curators, authors of catalogues raisonnés and art dealers whether protection for their opinions might be somehow possible through some clever new federal or state legislation. But the prospects for such legislation seem remote, at least because many other professionals, such as doctors, lawyers, accountants and, civil engineers, among many others, render important opinions upon which people rely, and would demand this same legislative protection sought by art experts.

The Courts Are the Sole Likely Source of Protection for Connoisseurship

In default of protective legislation, it is usual for art experts to obtain a written “no-sue” agreement from an owner/applicant. These agreements have been held legally enforceable since, at least, the year 2000, when the New York Supreme Court, decided Lariviere v. Thaw.12 (An owner who sues the expert in breach of the no-sue agreement would be liable for damages for breach of contract. The damages would be the expert’s legal fees and costs in defending the owner’s claim.) Some confusion and consternation, at least among non-lawyers, arose in 2009 when a federal district court in the case of Joe Simon v. Andy Warhol Foundation for the Visual Arts et al., allowed a lawsuit to proceed despite a no-sue agreement. In the Simon case (on a motion to dismiss, which procedurally, had to assume that everything the plaintiff alleged was true), the court merely held that the Warhol Foundation’s no-sue agreement signed by plaintiff Simon might not be enforceable if the (otherwise legal and enforceable) agreement had facilitated an illegal plan (as Simon alleged, but never proved) to manipulate prices in the market for Warhol paintings.13 The plaintiff later withdrew all his claims.

Thus, protection for expert opinion is unquestionably available by agreement (not to sue) with an art owner/applicant. Second, the credit rating agency cases (see below) suggest there is also federal constitutional protection available for expert opinion about the authenticity of art. And third, another line of court decisions strongly suggest there is also constitutional protection available for such expert opinion if the expert is able and willing to set forth the factual information on which the expert relies for his opinion (see below).
Rating Agency Cases (Moody’s Investors, Standard & Poor’s, et al.): Matters of “Public Concern” and the “Actual Malice Standard”

The Fall 2011, Volume 2, No. 2, issue of this *Art Law Journal* contains an essay entitled, *Opinions About the Authenticity of Art*, dealing with investor claims against bond rating agencies for their ratings (depending upon the pool or “tranche” of mortgage loans being rated, often times AAA, the same rating as U.S. Treasury debt) of bonds backed by residential real estate mortgage loans. The rating agencies’ defense (which has been accepted by the federal courts, as we will see below) was that their statements about the creditworthiness of the rated bonds were protected, as opinion about a “matter of public concern”, by the First Amendment to the U.S. Constitution guaranteeing freedom of speech. “Congress shall make no law ... abridging the freedom of speech, ...” 14 

Essentially, the rating agencies’ defense is that their judgments about creditworthiness (in the form of the credit rating itself) are akin to unprovable predictions about future events.

As the *Compumere* Court said in 2007:

>[A] viable defamation claim exists only where a reasonable fact finder could conclude that the challenged statement connotes actual objectively verifiable facts. A Moody's credit rating is a predictive opinion dependent on a subjective and discretionary weighing of complex factors.

The *Compumere* decision regarding “the credit rating itself” relied on First Amendment protection of opinions, defined by the Supreme Court as opinions that are not provably false (in *Ollman* terms, pure opinion). 16

But, where a statement is probably false, such as the factual assertions within the *Compumere* ratings report accompanying the credit rating itself, First Amendment protection for a statement about a matter of public concern means that a plaintiff must prove (something very difficult to prove, namely) that the defendant made the statement (that is, rendered the opinion) with actual knowledge of its falsity or with reckless disregard of its truth, to wit, the so-called (constitutional) “actual malice” standard. And reckless disregard is “not measured by whether a reasonably prudent man would have published [ ] or would have investigated before publishing” but by whether “the defendant in fact entertained serious doubts as to the truth of its publication”. 17

The protection afforded by the actual malice standard for matters of public concern is difficult to overstate. If a statement is of public concern it can be unreasonable, false or dead wrong (as the bond ratings in the years 2000–2007 were, in fact), and even negligent, but the agency rating opinion is not legally actionable.

Application of the Actual Malice Standard to Both the Credit Rating Itself and Its Factual Basis

A 2012 decision, *Abu Dhabi Commercial Bank et al v. Morgan Stanley & Co. et al* 18 in the federal court for the Southern District of New York again took up the question of whether credit ratings are opinions and, if so, what kind. The agencies again argued that their ratings are subjective opinions about creditworthiness (of the mortgage-backed bonds) just like, for example, an opinion in a newspaper editorial about bonds or any other subject of public importance addressed by the editorial.

However, *Abu Dhabi/2012* does not treat credit ratings as predictions of future events or as “pure statements of either fact or opinion, but as a hybrid of the two (in *Ollman* terms, a hybrid opinion), that is, a “fact-based opinion”. Credit ratings are understood to be “statements of creditworthiness based on an analysis of underlying facts ...”. 19

While ratings are not objectively measurable statements of fact, neither are they mere puffery or unsupported statements of belief akin to the opinion that one type of cuisine is preferable to another. Ratings should best be understood as fact-based opinions. When a rating agency issues a rating, it is not merely a statement of the agency’s unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment and reached a fact-based conclusion as to creditworthiness. 19

Thus, *Abu Dhabi/2012* analyzes hybrid opinion in the rating agency context by categorizing ratings as “fact-based” conclusions, which are not afforded the absolute protection provided to statements which are not provably false, i.e., “pure” opinions.
Abu Dhabi/2012 requires that a credit rating opinion be (a) supported by reasoned analysis and (b) have a factual foundation or a basis in fact in order to receive First Amendment protection as nonactionable hybrid opinion. Without expressly stating so, Abu Dhabi/2012 decided that a credit rating opinion which is not supported by reasoned analysis and a factual foundation could not be defensible under the actual malice standard, i.e. the rating agency could not have believed its own opinion.20

Private Opinion Which Is Not a Matter of Public Concern

But where the rating agency sent its report only to a select group of investors, and did not publicly disseminate its ratings report, the actual malice standard would not be a good defense for the rating agency, that is, the plaintiff would not have to prove actual malice in order to prevail on its claim of actionable misrepresentation.

It is well established that under typical circumstances, the First Amendment protects rating agencies, subject to an “actual malice” exception, from liability arising out of their issuance of ratings and reports because their ratings are considered matters of public concern. However, where a rating agency has disseminated their ratings to a select group of investors rather than the public at large, the rating agency is not afforded the same protection.21

But such a private opinion is precisely what most art experts render to owners and buyers. (Although, a catalogue raisonné or an essay published in a scholarly journal and disseminated to the public would presumably be a matter of public concern, and therefore constitutionally protected.)

Guidance Derived from the Credit Rating Agency Cases

The rating agency cases leave us with the following rules about legal protection for opinion: a credit-worthiness rating is an opinion, but a certain kind of opinion — a fact-based opinion (in Ollman terms, a hybrid opinion which could be proved true or false). As such, in order to receive the “actual malice” protection as hybrid opinion accorded by the First Amendment, it must be supported by reasoned analysis and based on a factual foundation. However, even when so supported and so based, where the statement is disseminated to a “select group of investors” rather than the public at large, this hybrid opinion is not considered “a matter of public concern” and does not receive First Amendment “actual malice” protection.

These court decisions from 1999 onward about credit ratings suggest that, for example, a catalogue raisonné published, as it always is, for a public audience would receive “actual malice” protection as hybrid opinion under the First Amendment as a matter of “public concern”, but an opinion on authenticity delivered to single or a limited number of owners or buyers would not be so protected (even if supported by analysis and based on a factual foundation).

If we wish to find constitutional protection for expert opinion, given privately to a single owner/buyer or limited number of persons, we will need to examine a second line of court decisions.

A Second Line of Cases More Broadly Protects Opinion (That Is, Even When Not a Matter of Public Concern Because the Opinion Is Given Privately)

As the New York Court of Appeals said in Steinhalber v. Alphonse:

It is settled rule that expressions of an opinion “false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.”22

This constitutional protection for opinion was established by the U.S. Supreme Court in 1974 in Gertz v. Robert Welch, Inc.23 and later clarified in Milkovich v. Lorain Journal.24 Under Gertz and Milkovich, if the statements are held to be expressions of opinion that cannot be proved true or false, they are entitled to absolute protection of the First Amendment to the U.S. Constitution by virtue of the Supreme Court’s categorical statement that:

Under First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.25
The *Steinhilber* court went on to say:

The rule to be applied may be simply stated. An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be. ... A “pure opinion” is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless be “pure opinion” if it does not imply that it is based upon undisclosed facts. ... When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a “mixed opinion” and is actionable.26

An opinion accompanied by a recitation of the facts upon which it is based is not actionable because, as noted in Justice Brennan’s dissenting opinion in *Milkovich v. Lorain Journal Co.*,27 a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.28

**Advice to Experts Giving Opinions**

Where the expert is giving a *private* opinion, that is, one not published for the public (and, by definition, not a matter of constitutional “public concern”) these New York cases strongly suggest that, in order to receive First Amendment protection for their opinions, experts should make a reasonably full recitation of the facts upon which their opinion is based.

It should not be necessary for the expert to write a detailed essay on why the work is, or is not, authentic. All that should be necessary is a simple recitation of the major facts relied upon by the connoisseur, following the usual three lines of inquiry: provenance, application of connoisseurship to the work’s visual aspects and the work’s physical properties (that is, any available forensic analysis).29 (Even if certain of those major facts should turn out to be inaccurate or wrong, it seems unlikely that the courts would involve themselves in weighing up wrong against right facts — so long as there is some reasonable basis in fact for the expert opinion). Since many committees and boards of experts do not want to provide “roadmaps” for would-be forgers, providing “reasons” or facts to back-up their private opinions is not the usual practice in art scholarship involving private opinions for owners. But, it appears that giving some “reasons” for their opinion is the procedure that will provide experts with a First Amendment defense. In that circumstance, an unhappy owner would have to prove (again, something very difficult to prove) that the expert acted with actual malice, that is, did not believe his opinion or had no factual basis, at all, for his opinion.

It will be objected (and fairly so) that these constitutional defenses will still not keep experts who have rendered opinions in good faith from being sued. But, quite obviously, the more difficult it becomes for a plaintiff to succeed, the fewer plaintiff claims will be made.

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STEMMING THE TIDE OF FEDERAL LITIGATION AGAINST ART EXPERTS AND AUTHENTICATION BOARDS FOR OPINIONS ABOUT THE AUTHENTICITY OF ART

Judith Wallace

This essay examines recent court decisions precluding lawsuits under the federal Lanham Act about whether or not a named artist created a work of visual art. --- RDS

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There has recently been much attention devoted to the potential liability of art experts who are asked for opinions about the authenticity of artwork, and the resulting impact on the market if experts refuse to express their views openly. Experts have been sued for expressing negative opinions that make artwork unmarketable, for expressing positive opinions that are relied on by purchasers but later called into question, for omitting a work from a catalogue raisonné, and even for declining to express an opinion or finding that it cannot determine whether a work is authentic or not. In addition, a number of artist-established foundations have closed down their authentication boards, citing fear of litigation.

The Lanham Act Is Limited

The claims against experts have been varied—product disparagement, negligence, negligent misrepresentation, breach of contract, fraud, and more recently under the federal Lanham Act.

However, there may be one less weapon for disappointed owners who would sue those experts, based on the recent application of the U.S. Supreme Court’s decision in Dastar Corp. v. Twentieth Century Fox Film Corp. to disputes relating to authorship of art by a federal court in New York.

Earlier this year, in the case of Gilbert v. Indiana, Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York found that the federal Lanham Act should not be regarded as authorizing a federal cause of action for a statement of whether a work of visual art is or is not by a named artist. This is significant because the federal Lanham Act allows the prevailing party to recover up to three times its actual damages and its attorneys’ fees, and therefore posed a particularly intimidating threat when asserted by angry owners of art. In the U.S. system, parties can usually recover only their actual damages but typically cannot recover attorneys’ fees. In addition, lawsuits asserting violations of federal law are sometimes viewed by the public and the media as more substantial, more legitimate and more worrisome than lawsuits asserting common-law claims filed in state court.

Gilbert v. Indiana involved a statement by the artist Robert Indiana about his own work, in a dispute with someone who claimed a contractual right to pass off his own art as Indiana’s. The significance of the decision in Gilbert v. Indiana—and the U.S. Supreme Court case that it applies—is important for scholars concerned about expressing opinions about art.

The federal Lanham Act is the primary federal trademark statute, and authorizes claims based on misrepresentations about the “origin” of goods. The term “origin” had been previously read broadly, as had similar provisions concerning misrepresentations about the nature, characteristics, or qualities of an artwork, and there have been a number of cases in which art experts have been sued under the Lanham Act for statements about
the authenticity of art. This was problematic because it allowed owners of physical artwork to use U.S.
intellectual property laws to sue, even though they did not own any copyright in the art at issue.3

However, in 2003, the U.S. Supreme Court held that “origin” does not mean “authorship,” and seems to eliminate
such claims. In Dastar, the Supreme Court held that the Lanham Act provision applicable to claims made outside
the context of commercial advertising4 applies only to claims relating to the producer or physical source of goods
and not to claims concerning authorship.

Dastar concerned a television series that adapted, without attribution, portions of an original television series for
which the copyright had expired. The series was based on a book by Dwight D. Eisenhower. The plaintiff owned
the television rights to General Eisenhower’s book, as well as the exclusive right to distribute the television series
on video and to sublicense others to do so.5 The Supreme Court held:

[A]s used in the Lanham Act, the phrase “origin of goods” is in our view incapable of connoting
the person or entity that originated the ideas or communications that “goods” embody or contain.
Such an extension would not only stretch the text, but it would be out of accord with the history
and purpose of the Lanham Act and inconsistent with precedent.6

The court rejected the argument that “origin” denotes something like authorship for “communicative” products in
which the purchaser would be primarily interested in “the creator of the content that the physical item conveys,”
because construing the Lanham Act in that way would “cause the Lanham Act to conflict with the law of
copyright, which addresses that subject specifically.”7 The Lanham Act “does not have boundless application as a
remedy for unfair trade practices.”8

Dastar’s Limitation of Lanham Act to Be Read Broadly

Other cases decided since Dastar confirm that the Supreme Court’s decision should be read broadly to state a
basic principle that the Lanham Act does not apply to claims regarding authorship of a creative work, and is not
limited to the narrow factual circumstances of the Dastar decision, which involved a work that was in the public
domain.9 In 2004, in Zyla v. Wadsworth, the First Circuit Court of Appeals affirmed the dismissal of a claim that
a publisher falsely credited another author, confirming that under Dastar, “[c]laims of false authorship … should
be pursued under the copyright law instead.”10 In a 2006 case involving the misrepresentation of purported author
J.T. Leroy as an actual person,11 and again in a 2010 dispute between Gary Friedrich and Marvel regarding the
“Ghost Rider” characters, courts in the Southern District of New York held that even though Dastar analyzed
meaning of the word “origin,” which occurs in subsection (A) of the Lanham Act, which concerned statements
outside of advertising, Dastar also applies to section (B), which concerns commercial advertising, and bars any
Lanham Act claim concerning authorship.12

Finally, the decision in Gilbert v. Indiana confirms that Dastar should result in dismissal of a Lanham Act lawsuit
regarding the accuracy of a statement about the creator of works of visual art. Because Gilbert v. Indiana involved
an artist who disclaimed authorship and was sued for it, the decision confirms that Dastar does more than
eliminate lawsuits that attempt to do an end run around the limitations of copyright law by raising a claim under
the Lanham Act. Dastar forecloses any claim under the Lanham Act regarding the authorship of art.

It is important to anyone who cares about accuracy in art historical scholarship, and the security of art market
transactions, to ensure that experts—including both scholars and artist-established foundations—are not inhibited
from expressing opinions about authorship of art. While historical practice may have been different, present-day
scholars, to avoid the appearance of impropriety, generally accept at most a modest fee for reviewing artwork
(some accept no fee at all), and their fees are not typically based on either the value of the artwork as they value it
or a percentage of the ultimate sale price.

Legal Defenses Available for Expert Expressions of Opinion

Experts also have the benefit of legal defenses. Under the New York state constitution, there is a qualified
privilege for statements made where one has a legal or moral duty to speak, or in a communication from one
person to another upon a subject in which both have an interest.13 For example, an artist and the author of the
artist’s catalogue raisonné would have a shared interest in having the catalogue raisonné accurately describe the artist’s work. Moreover, even when a statement about a work of art is regarded as a contractual warranty, New York state and federal courts have applied a forgiving standard set forth in a federal district court opinion, *Dawson v. Malina*, which found that the standard for evaluating a breach of warranty is whether there was a *reasonable basis in fact* for an attribution of a work of art at the time the warranty was made, not whether the attribution can be proven to be true or false based on information that came to light after the sale.

Nevertheless, despite some strong legal defenses, experts have little interest in litigating these issues at their own expense, and sellers, auction houses and dealers that benefit financially from art sales have thus far been unwilling to make it a general practice to fully indemnify experts they consult against any claims. Therefore, although experts may care passionately about the accuracy of the record regarding an artist, and their reputations as experts on particular artists, they are reluctant to opine openly and on the record if they stand to gain little and risk litigation from deep-pocketed owners seeking damages or a humiliating retraction of the expert’s opinion. Another unfortunate side-effect of the fear of litigation is the potential that some experts will speak only off the record or in coded comments to the effect that they “like” or “don’t like” a picture—a situation that is rife with potential for ambiguity and misunderstanding. Thus, while there is still a long way to go toward resolving these issues, the elimination of Lanham Act claims is a step in the right direction toward protecting independent scholarship’s role in the art world.

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NOTES

1 539 U.S. 23 (2003).


3 Under U.S. law, the copyright in a work of art does not belong to the owner of the physical artwork unless copyright has been explicitly transferred by the holder of the copyright in a signed writing. See 17 U.S.C. § 204.

4 Section 43(a)(1)(A). This provision governs statements made outside the context of commercial advertising.

5 See *Dastar*, 539 U.S. at 26.

6 *Dastar*, 539 U.S. at 32.

7 *Dastar*, 539 U.S. at 33.

8 *Dastar*, 539 U.S. at 29 (quoting *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974)).


10 *Zyla v. Wadsworth*, 360 F.3d 243, 252 (1st Cir. 2004).


13 See, e.g., Chandok v. Kleissig, 632 F.3d 803 (2d Cir. 2011). A living artist also has the right of attribution and right of integrity under the federal Visual Artists Rights Act, 17 U.S.C. 106A, which allow the artist to prevent the use of his or her name with a work the artist did not create or that is a distortion or modification of the artist’s work that is prejudicial to the artist’s reputation.

A SELLER SHOULD HAVE REASONABLE GROUNDS FOR HIS UNQUALIFIED AUTHENTICITY OPINION. BUT HOW TO WEIGH NEGATIVE FACTS? AND MUST THESE NEGATIVE FACTS BE DISCLOSED IF THEY ARE UNKNOWN TO BUYER?

Ronald D. Spencer

This essay examines whether a seller has reasonable grounds for his authenticity opinion — given that relevant factual grounds do not always point in one direction and, indeed, some may be strongly negative. Of course, in arriving at his opinion, the seller must balance these positive and negative facts while lending more or less weight to each. But does an opinion based on such “mixed” facts need to be formally qualified as “probably” or “likely”. And, having reasonably arrived at an unqualified opinion, must the seller disclose the negative facts he considered (and, on balance, presumably found unconvincing). — RDS

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An English Court Decides That A Seller Had Reasonable Grounds For Its Authenticity Opinion

In 2005 an English Court of Appeal decided Taylor Lynne Thomson v. Christie’s, involving a 1994 London auction sale to Thomson, for almost £2 million, of a pair of Louis XV porphyry and gilt-bronze two handled vases. In 1998 some art dealers suggested to her that the vases might not be Louis XV, but high quality imitations (not forgeries) made in the mid-19th century worth no more than £25,000. Thomson brought an action against Christie’s on the ground that the vases were made in the 19th century, claiming that Christie’s owed her a duty of care which they had broken in not warning her of a risk that Christie’s judgment that the vases were made in the 18th century might be questionable or wrong.

Thomson said that Christie’s should have qualified their sale catalogue for the vases to describe them as “probably Louis XV” or a similar qualification because, at the 1994 sale date, there were facts known to Christie’s which should have led Christie’s to be cautious about their dating of the vases. Thus, in addition to the existence of the 19th century imitations, (Thomson testified that she would not have bought the vases had Christie’s told her of the existence of the 19th imitations) there was an absence of any provenance prior to a 1921 purchase by the grandmother of the seller, Lord Cholmondeley. As well, Christie’s had relied for its opinion that the vases were made in the 18th century upon the exercise of their judgment, based on only a visual inspection, that is, without any physical analysis of the materials utilized in the vases.

The Court of Appeal noted:

... Christie’s do[es] accept that, if there is material doubt as to the description or dating of a work of art offered for sale at auction, good auctioneering practice requires the auctioneer to articulate the doubt in suitable terms, for example, “probably Louis XV”.  

... It is difficult to define the degree of certainty which an auctioneer should have before he ascribes a date without qualification, and it is probably unnecessary for me to try to do so. It may be whether, having reviewed all factors, he finds he has sufficient positive basis for the view he has formed combined with the absence of matters which raise real rather than fanciful doubt by pointing the other way.
The trial judge had found "on the strong balance of probability" that the vases (sometimes referred to as the Houghton urns) were made in the 18th century, and the Court of Appeal upheld the trial judge's decision.

The Court of Appeal seemed to accept Christie's submissions that:

1. The existence of a 19th century revivalist fashion was a reason for caution, but not a reason for doubt.
2. It is obvious to any buyer, whether expert or not, that attributions as to date are matters of opinion and judgment.
3. Christie's could only have a duty to disclose matters which Christie's knew or should have known and which would have materially affected their confidence in their own opinion.

The Thomson trial court judge was quoted with approval in a subsequent case, Avrora Fine Arts v. Christie's, which neatly summed up the Thomson core issue:

The representation is not simply that the urns were Louis XV because that is a matter of opinion. The representation is that was Christie's opinion and that Christie's had reasonable grounds for that opinion.

The Court of Appeal thus decided that Christie's had reasonable grounds for its opinion that the vases were made in the 18th century (about 1765) and therefore Christie's was correct to describe them in its sale catalogue without any qualification such as "probably 18th century".

I cannot be certain that the Houghton urns were made around 1760 to 1765, but I think it likely. The evidence establishes the position somewhere between certainty and more likely than not. If a figure must be placed on it, I would put it in the region of 70%.5

And further, said the Court of Appeal:

... Christie's at the time of the sale ... were reasonably entitled to hold, the certain and definite opinion that the Houghton vases were 18th century and correctly described without qualification as "Louis XV"; that there were no real rather than fanciful doubts pointing the other way, and that Ms. Thomson's eleven reasons did not raise any real doubts.6

Degree Of Certainty Required For An Unqualified Authenticity Opinion

Thomson is one of the few court decisions to examine in depth the degree of certainty required of experts before they render an unqualified opinion on authenticity. Thomson expressed this in terms lack of "material doubt" concerning the description of a work of art, reviewing "all factors" and finding a "sufficient positive basis... combined with the absence of matters which raise real rather than fanciful doubt by pointing the other way." Of course, this is rather a common sense and familiar way of arriving at opinions on most issues. And, in Thomson, a 70% to 80% likelihood allowed Christie's to avoid the qualifier, "probably". But, of course, a 20% to 30% chance of being wrong is a significant risk for a buyer, and, in effect, allows for the existence of a fair number and weight of factors which would not support or, indeed, be contrary to, a positive expert opinion.

These kinds of odds of being wrong (say, one chance in four or five) bring to mind the New York case, Dawson v. Malina, in which a federal district court in New York considered the standard to be applied in determining whether a seller's warranty of Chinese ceramics as being from a certain historical period had been breached by the seller. The buyer plaintiff argued for a standard that would require the seller to establish by a preponderance of the evidence (the usual evidentiary rule in civil matters) the art was unqualifiedly of the period to which they were attributed by the seller. The seller argued for a standard that would require the buyer to conclusively establish, by a preponderance of the evidence, the art was not of the period. The Dawson court thought it would be "unjust for the Court to adopt the strict standard proposed by the buyer. Instead, the court adopted a "middle ground", to wit,

Whether plaintiff Dawson has established by a fair preponderance of the evidence that the representations made by [seller] Malina were without a reasonable basis in fact at the time the representations were made.
This Dawson formulation of the standard required to prove a breach of warranty of authenticity is similar to the Thomson analysis because both formulations allow for an unqualified opinion about, or representation of, authenticity even though all of the factual elements upon which the opinion is based do not necessarily support the expert’s opinion/representation, and, indeed, some might be contrary to the opinion.

Duty To Disclose Doubts Or Negative Information

An additional, and quite interesting, aspect of Thomson is Christie’s duty to disclose facts which it knew or should have known and which would materially affect Christie’s confidence in their own opinion. Thomson’s main argument advanced at trial was that the vases were 19th century, although “it shaded off on occasions towards a case that there were material doubts whether the vases were truly 18th century”8 so that even if Thomson could not establish that the vases were made in the 19th century, there were numerous features about the vases which raised doubts about their true origin, history and age, such that Christie’s had a duty to disclose these doubts. In effect, even though Christie’s was not obliged to qualify its sales catalogue description by the use of the word, “probably”, Christie’s nevertheless had a legal duty to disclose facts that did not support its opinion or raised doubts about the grounds for its opinion.

These doubts, as noted above, were chiefly the following three:

1. There existed no provenance prior to the 1921 purchase in France by the grandmother of Christie’s auction seller, Lord Cholmondeley,

2. Christie’s was relying very largely upon the exercise of its judgment following (only a) visual inspection, and

3. The existence of 19th century imitations.

With respect to provenance, the Court of Appeal noted that the Getty Museum had a similar pair of urns with little or no provenance information, but a Getty Curator of Decorative Arts with an excellent reputation had described the Getty urns as circa 1765-1770. The Court of Appeal stated:

Absence of provenance before 1921 was a reason for caution. It was surprising that there was no secure earlier record of any of the 6 [similar] vases in either the 18th or 19th century, if they were indeed 18th century. But there was evidence of securely dated 18th century pieces which had no real provenance — it applied to 117 of the 214 French decorative objects in the Getty Summary Catalogue of 1993.9

With respect the “doubt” arising about the visual inspection by Christie’s, that is, without any material analysis such as metallurgical evidence of the bronze lion-head mounts and their gilding, or the porphyry stone, the Court stated that Christie’s reliance upon visual inspection “was well understood and there was “no evidence or probability that Ms. Thomson was so naive that she needed to have this commonplace point made to her.”10 And, finally, the Court states:

The [trial] judge’s findings as to the date when the vases were made took account of extensive metallurgical and other scientific evidence put together for the purpose of these proceedings. Ms. Thomson does not suggest that Christie’s should have acquired information of this kind before the auction. It is not relevant to any question whether Christie’s were in breach of duty.11

With respect to the existence of 19th century copies or imitations as a result of a 19th century revivalist fashion, the Court agreed with Christie’s that:

the possible existence of 19th century imitations was a reason for care, but did not in the case of the Houghton vases raise a real, rather than fanciful doubt. Christie’s was not obliged to express fanciful doubts to Ms. Thomson.12

The Thomson Court standard for (negative) factual information that the seller had a duty to disclose was that “real”, as opposed to “fanciful” doubts had to be disclosed. Fanciful doubts suggested only a need for “caution”
on Christie’s part in describing the urns, but did not require Christie’s to disclose such fanciful doubts. The above-noted three items of (negative) factual information (imitations, visual inspection and provenance) contributing to “doubt” are information which reasonable due diligence by the buyer could or should have discovered and therefore, did not have to be disclosed by Christie’s.

Thus, Thomson stands for the somewhat surprising proposition that, even if a seller’s authenticity representation is properly made, any material negative information known to seller, which buyer’s due diligence could not reasonably have discovered, must be disclosed as well.

Can The Seller Remain Silent? That Is, Must All Relevant Negative Facts Be Disclosed?

Many court decisions and tort treatises state that there is “no affirmative duty of disclosure between parties dealing at arm’s length.” Silence, as such, i.e., mere nondisclosure, does not constitute a breach of duty. The harshness of this rule has been mitigated by limitations and exceptions that have gone a long way toward swallowing up the rule – but not yet all the way. One important exception (the so-called “special facts” doctrine) to this rule is where the seller has superior information, not reasonably available to the buyer.

It may be helpful in this regard not to generalize about the vendor-purchaser relation. There would seem to be a distinction between the relationship, on the one hand, of two experienced business men, consummating a sale and purchase and the relationship, on the other, of salesman and customer in a large retail store. To the former, the description “arm’s length” seems to be appropriate, and there is little ground for reliance, except to the extent of warranties and of unequivocal representations of fact. But in the latter, it may be doubted whether it is ever possible for the parties to achieve equality of knowledge. And while the customer may be held to act at his peril in relying on statements which he should recognize to be customary “sales talk,” it can be argued that he relies, and justifiably so, on the sales person not to remain silent as to material facts of which he knows the purchaser is ignorant.

An important point is the degree of “difficulty,” shading sometimes toward impossibility, of the buyer’s discovering the negative information for himself. That is to say, should the duty of discovery be placed on the buyer who could presumably learn of the defect or negative information if he were more diligent or commissioned a thorough expert investigation. An art dealer (an “art merchant” in Uniform Commercial Code terms) selling to a non-dealer collector will usually, but not always, have more general art-related knowledge than the collector and almost always more knowledge about the specific piece being sold. On the other hand, collectors contemplating the purchase of high end art often retain expert art advisors to assist in purchasing from the art merchant in an effort to narrow this dealer-collector knowledge gap.

Another important point concerning the rule of non-liability for “mere nondisclosure” is the nature and importance of the undisclosed negative information.

The second Restatement of Torts has tried to formulate a rule embodying this trend [mandating more disclosure] by requiring one party to a business transaction to disclose to the other, before the transaction is consummated, “facts basic to the transaction” if the former knows that the other is about to act under a mistake as to such facts “and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.” Facts “basic to the transaction” are those that go to its essence (for example, the character of the thing sold), and the concept is narrower than materiality, which covers also facts that are important only as “inducements to enter into” the transaction.

In the context of the sale of a painting or sculpture, one might well doubt, for example, that seller’s failure to disclose a lack of a listing in a catalogue raisonné or a lack of a complete and accurate provenance of the piece would qualify as “basic to the transaction”, as opposed to being material facts, important only as “inducements to enter into” the transaction.
A Dealer Meeting His Contractual Warranty Standard – Having A Reasonable Basis In Fact – Should Not Have A Duty To Meet A Higher Tort Standard – Disclosing All Material Negative Facts

The *Dawson* decision described above establishes the standard an art buyer must meet in order to rescind his purchase based on the claimed breach of the dealer warranty of authenticity – that is, at the time of sale, the dealer did not have a reasonable basis in fact, for the dealer’s representation. By way of example, a “reasonable basis in fact” might consist of ten factual elements, eight of which support authenticity more or less strongly, while two factual elements are negative. *Dawson* suggests that, so long as seller has been reasonable in taking into account the nature and weight of the two negative elements, the seller has not breached his representation of authenticity.

By contrast with this contractual obligation under a warranty, if the dealer also has a tort law duty to disclose the two negative elements and does not do so, the dealer’s mere non-disclosure or silence would be a tort, and entitle the buyer to rescission or damages for misrepresentation. But to hold the dealer liable in tort would undermine the *Dawson* contractual warranty standard the dealer was able to meet. In short, requiring disclosure of negative material facts which are not “basic to the transaction” would allow rescission of the sale where the dealer had met his burden under his contractual warranty. This does not appear to be a sensible result.

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NOTES

1 2005 EWCA Civ. 555; Case no. A2/2004/146 & 1470.
2 Court of Appeal, para. 73.
3 Court of Appeal, para. 74.
4 2012 WL 2923015 at page 22.
5 Court of Appeal, para. 71, quoting the trial judge approvingly.
6 Para. 78 Court of Appeal.
8 Para. 93 Court of Appeal.
9 Court of Appeal, para. 46.
10 Court of Appeal, para. 16.
11 Court of Appeal, para. 8.
12 Court of Appeal, para. 85.
14 *Harper, James & Gray*, page 556.
15 Under the “special facts” doctrine, a duty to disclose arises ‘where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair’. *Beneficial Commercial Corp. v. Glick Datsun*, 601 F. Supp. 773
(S.D.N.Y. 1985); But see Chiarella v. U.S., 445 U.S. 222, 248 (1980) (stating “This Court has never so held.”). It is curious that, while some courts have applied the special facts doctrine to impose a duty of disclosure on the seller, no corresponding duty is usually placed on the buyer where the buyer has knowledge of facts, not reasonably discoverable by the seller, which render the property much more valuable than the price being asked.

16 Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, 8 W. Res. L. Rev. 5, 43-44 (1956).

17 Goldfarb, page 19.

18 Restatement (Second) of Torts §551, Comment j (1977). The Reporter stated that the advisers were unanimous in wishing to limit [§551(2)(e)] to (facts ‘basic to the transaction’) and concluded, [t]he law may be moving in the direction of requiring disclosure of (‘material’ facts) but it is not yet sufficiently clear to justify more than ‘basic.’ Restatement (Second) of Torts §551, at 166-167 (Tent. Draft No. 10, 1964).

PROVENANCE: IMPORTANT, YES, BUT OFTEN INCOMPLETE AND OFTEN ENOUGH, WRONG. WHAT CONSEQUENCE FOR A SALE?

Gary D. Sesser

This essay addresses provenance issues in the context of a sale. Of course the provenance of a piece is an important factor in determining its authenticity, but how important to the seller and buyer is knowing that, for example, there were three private owners between the artist and the current owner. If one of those owners was Paul Mellon or a major museum, it might be very important. And, have the buyer and seller made that importance clear in their sale agreement? — RDS

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Ask anyone at the next gallery opening or museum exhibition and you will find nearly universal agreement that the provenance (lit. "origin") of a work of art is important. In fact, a New York federal judge recently observed that “[i]t is a basic duty of any purchaser of an object d'art to examine the provenance for that piece . . .”

Less clear is whether the standards that exist in the art world about what should be included in the provenance are followed with any regularity or even can be followed as a practical matter. While theoretically intended to be a “chain of title” that should include every owner of the work since its creation, provenance typically tends to be a non-exclusive listing of interesting facts concerning the background of the work, such as notable former owners (at least those who are willing to have their identities disclosed) and the exhibition of the work at prestigious venues. Should galleries which held the work on consignment be listed? Does a seller have potential liability if the provenance provided to the buyer turns out to be inaccurate in any material respect? What if it is merely incomplete?

Before addressing those questions, it is useful to consider how provenance is relevant to sales of art. Art litigation generally falls within one of three categories: disputes concerning ownership, disputes concerning authenticity, and, to a lesser extent, disputes concerning value. The provenance of a work may bear on each of those potential areas of dispute. Obviously, to the extent provenance represents a chain of title, it may bear quite directly on a dispute concerning ownership. (If “H.W. Göring, Berlin” is listed in the provenance, that is probably a red flag).

More typically, provenance will be scrutinized where questions of authenticity arise. A few years back an issue arose concerning the authenticity of a century-old sculpture attributed to a twentieth century artist of iconic stature. The work was sold to a prominent collector through an auction house with a certificate of authenticity from a qualified and appropriately-credentialed scholar of the artist’s work. According to the provenance provided at the time of sale, the work had been acquired in Paris after World War II by an art history professor from an Ivy League university. When questions of authenticity arose several years later, an internet search and a few telephone calls to the university revealed that no such art history professor ever existed. Also left off the provenance was the fact that just months prior to the multi-million dollar sale to the prominent collector, the work had been purchased from an obscure antique store owned and operated by someone who had served jail time for art insurance fraud. Had
these “errors and omissions” in the provenance been discovered at the time of the sale, the sale itself and several years of costly litigation would have been avoided.

Many works of art acknowledged to be authentic carry some risk that in the future questions of authenticity may arise. After all, experts sometimes change their minds, new experts may disagree with the old consensus, and new facts or technologies may emerge. An impeccable provenance that can be verified serves to mitigate that investment risk. On the other hand, we have seen that a dubious provenance may itself be used as circumstantial evidence that the work is a fake. Thus, even where authenticity is not currently an issue, an inaccurate or incomplete provenance still could give rise to a claim in the future.

Recently an art dealer faced a claim that the provenance he provided with a painting was incomplete because it did not include all of the owners going back to the artist. According to the disgruntled buyer, this omission was material because the provenance included a gallery involved in a well-publicized forgery scandal and, therefore, the painting would be hard to re-sell at an appropriate price without a verifiable provenance going back to the artist. Significantly, the painting had been sold at auction a decade earlier and the dealer had provided the current buyer with exactly the same pre-auction provenance as the prominent auction house had provided at the time of the auction sale. The dealer did not think to second-guess or investigate the completeness of the provenance provided by the auction house and did not have the resources to do so. Previous owners of the work did not want their identities disclosed due to privacy concerns (which is not uncommon), so a more complete provenance was not even feasible. Nevertheless, the buyer claimed that he had been promised a “verifiable provenance” and sought to revoke the sale. The buyer did not contend that the work was not an authentic painting by the famous artist, but merely that it would be hard to re-sell without a complete and verifiable provenance going back to the artist. Although the dispute ultimately was resolved without litigation, this episode starkly highlights the potential risks a seller may be assuming by providing -- without qualification -- a provenance that he or she has no real reason to doubt.

In seeking to revoke the sale based on an “incomplete” provenance, the buyer claimed that the provenance constituted a warranty under the Uniform Commercial Code (“UCC”) because it was part of the “basis of the bargain.” Under UCC § 2-313(1)(a), “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” Section 2-313(1)(b) provides that “[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” It is hard to argue that these sections are not worded broadly enough to encompass the provenance of art work, assuming that provenance was considered part of “the basis of the bargain” when the artwork was sold. The bad news for the seller is that determining whether the provenance was part of “the basis of the bargain” in a given transaction will likely be a question of fact for a jury to decide. That means that, absent precautionary measures such as an express disclaimer as to completeness and accuracy, the question of whether the provenance provided by the seller in an art sale constitutes a warranty will not be decided until after a good deal of expensive litigation. And it is certain that if the provenance is arguably misrepresented or incomplete, the buyer will be able to produce an “expert” to testify about the importance of provenance in the art world, all in support of the buyer’s argument that the given provenance was part of the basis of the bargain.

Adding to the seller’s risk is the fact that a claim for breach of warranty does not depend on proof of seller’s negligence or other culpability. Under UCC § 2-714 (2) “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted
and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” If the provenance is deemed to be a warranty, and the artwork is less valuable because of an inaccuracy or omission in the provenance, the seller may be liable for that difference in value, regardless of his or her good faith or lack of knowledge of the error in question.

An example of this risk without fault arose out of an art dealer’s acquisition of a painting by another distinguished twentieth century artist. Again, there was no question concerning the authenticity of the work. The information provided by the seller at the time of the sale noted that the work had been part of a celebrated 1960s exhibition of the artist’s work at a well-known New York museum. The inclusion of the work in this exhibition was acknowledgment of the work’s value and its importance to the artist’s oeuvre (not to mention further corroboration of its authenticity). Unfortunately, the exhibition history was not correct. The work was not included in the exhibition; the work was supposed to be included, but due to various circumstances another work was selected instead. There were even documents indicating that the work was in the show and it took some investigation to determine that it was not. Even though the seller had not intended to deceive or mislead the buyer/dealer, that did not change the fact that the work was measurably less valuable than the dealer thought at the time of the purchase, based on the information provided. Because the case settled before any lawsuit was filed, no court had the opportunity to address whether the erroneous exhibition history gave rise to a valid breach of warranty claim.

In fact, we are not aware of any judicial decisions addressing whether an error or omission in the listed provenance or exhibition history, standing alone, gives rise to a breach of warranty claim under the Uniform Commercial Code. This absence of reported cases has likely given rise to a certain complacency in the art world concerning the legal significance of provenance in connection with art sales. Nevertheless, the art world is not getting less litigious as art values escalate, and it may not be long before the courts are called upon to address this issue.

It plainly makes sense for sellers and buyers to get ahead of the curve and finally reach a clear understanding about what is at stake when provenance or related information such as exhibition history is provided. Is the provenance really intended to be a complete chain of title and possession, given that there is no title registry for personal property such as works of art? Is that even possible, given the penchant for anonymity among many wealthy collectors, not to mention the confidentiality of private sales? Further complicating research into ownership is the fact that many art transactions are documented with simple invoices, rather than detailed contracts; often it is unclear from the face of the documents, particularly in multi-party back to back transactions, whether a dealer is acting as a principal or as agent for one of the parties.

Fraudulent misrepresentations are one thing, but do sellers who proudly “stand behind the works they sell” really intend to be strictly liable (i.e. without fault) for any error or omission in the provenance or exhibition history? Do sellers undertake to do independent investigations of the provenance, or do they just pass along the same information they received when the work was acquired? In practice, more sophisticated art market participants, such as the major auction houses, include disclaimers (in fine print) in their terms and conditions of sale, but when smaller galleries and dealers sell art they rarely incorporate such protections against liability for faulty or inaccurate information.

Whether the seller agrees to take full legal responsibility for the accuracy of the provenance is crucial information for buyers in terms of their own due diligence obligations and their ability to rely on information provided by sellers. Making all of this clear in the sales contract is unquestionably in
everyone’s interest, even if – much like a prenuptial agreement – it spoils some of the romance associated with the purchase of fine art.

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3 Sotheby’s was recently sued in San Francisco for failing to disclose that a painting Sotheby’s had sold in 2004 had been owned by Hermann Wilhelm Göring, rendering it unmarketable based on the refusal of reputable auction houses or dealers to accept its questionable title. Brooks v. Sotheby’s, 2013 WL 1156067 (Cal. Super. 2013).
4 Exhibition history is often conflated with provenance, although they are distinct concepts.