

ARTICLES

ARTIFICIAL AUTHENTICITY

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Why buy something for vast sums of money that other people can seemingly have for free? This is one of the puzzles confronting people new to both the art market and the market in Non-Fungible Tokens (“NFTs”). Both soaring markets depend on a stark division between real and fake, original and copy. Yet in a world of increasingly cheap and limitless copying, why do people still pay so much for authentic originals when you can download or 3D-print identical copies? What is the mysterious mechanism that creates value in a world of unfettered mechanical and digital reproduction?

For years, the mechanism was copyright law, which was created to solve the problem of how to monetize works that could be copied. But the art market, pre-empting the NFT market, long ago cast aside copyright as the mechanism to create value in a world of copies. Both markets instead depend on a non-legal market mechanism—what I call the “norm of authenticity.”

Yet, in this Article I show, through a deep exploration of the art market, that the norm of authenticity, the bedrock of that market, is artificial: protean, often arbitrary, and ultimately a mutually agreed upon fiction. And the importance of understanding artificial authenticity is urgent because it now has migrated from art to govern the market for NFTs.

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This Article explores the contours of the norm of authenticity, explains why it is fake, and then shows why it is essential to understanding both the art market and the NFT phenomenon. Ultimately the Article points to the spreading importance of artificial authenticity in an age of limitless copying.

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INTRODUCTION

*“The single most important thing you can say
about a work of art is that it is real.”*

—Richard Dorment, 2009¹



Glenn Ligon, *Untitled* (2006)²

The Whitney Museum of American Art was preparing to mount “Glenn Ligon: America,”³ a one-man show of artist Glenn Ligon’s work scheduled to open in spring 2011. One of the signal works was to be the sculpture *Untitled* (2006), a neon work that spells out the word “America” in large capital letters. The sculpture contains visible electric wires that drop to the floor and connect to a power supply. Although there are four variations of this sculpture, the 2006 work is the earliest in the series,⁴ and, therefore, arguably the most important. But there were problems with getting the piece for the Whitney. The Tate Modern in London owns the work, which was configured for

¹ Richard Dorment, *What Is an Andy Warhol?*, N.Y. REV. BOOKS (Oct. 22, 2009), <https://www.nybooks.com/articles/2009/10/22/what-is-an-andy-warhol> [<https://perma.cc/QQX5-QEG4>].

² SCOTT ROTHKOPF, *GLENN LIGON: AMERICA* 235 (2011).

³ *Glenn Ligon: America, Mar 10–June 5, 2011*, WHITNEY MUSEUM OF ART, <https://whitney.org/exhibitions/glenn-ligon> [<https://perma.cc/HB9E-K94R>].

⁴ ROTHKOPF, *supra* note 2, at 46–47 (discussing the America works).

British voltage rather than American voltage. And there were the typical issues that arise on art loans—insurance, shipping costs, customs duties, and so forth.

The curators spoke to Ligon, seeking his input about how to convert his sculpture to U.S. voltage without damage. Together they found a solution that, in all its simplicity, reveals a startling instability at the heart of contemporary art and the notion of authenticity on which it depends. Ligon noted that the neon company that fabricated the original piece for him was in Brooklyn.⁵ Why not just get them to make an exact copy for the Whitney show and save all the troubles associated with the Tate loan?

So when “Glenn Ligon: America” opened at the Whitney later that year, the sculpture, *Untitled*, on display was not the “real” 2006 one. Instead, a signature piece in the show was a copy, manufactured for the exhibition. The Whitney displayed the work under its original title and date and described it as “on loan” from the Tate Modern. The only way a viewer would have known the peculiar story behind the sculpture’s origins were the words “exhibition copy” tucked into the wall text. For the duration of the Whitney exhibition, the Tate took down its “original” (or perhaps I should say “original copy”) of *Untitled*. After all, the sculpture was “on loan” to the Whitney, so how could it be in the Tate? When “Glenn Ligon: America” closed, the sculpture—at which so many museumgoers had come to marvel—was presumably destroyed.⁶

The use of the exhibition copy is a common if little remarked upon aspect of the museum world.⁷ Typically, exhibition copies are flagged so discreetly as to pass unnoticed by many viewers. Sometimes the press calls attention to the practice, as was the case with the staggering display by Chinese art star Cai Guo-Qiang of nine cars shot through with lighted tubes and dangling from the ceiling of the

⁵ *Id.* at 237.

⁶ *Id.* at 240.

⁷ See Carol Mancusi-Ungaro, *Authority and Ethics*, TATE PAPERS (Autumn 2007), https://www.tate.org.uk/documents/405/tate_papers_8_carol_mancusi_ungaro_authority_and_ethics.pdf [<https://perma.cc/5ZDQ-LXCA>] (considering changing assumptions about authenticity as “museums become ‘factories’ of works of art – producing exhibition copies for installations and even making replicas”); Matthew Gale, *Afterthoughts: Introduction*, TATE PAPERS (Autumn 2007), <https://www.tate.org.uk/research/tate-papers/08/afterthoughts-introduction> [<https://perma.cc/RBK6-XZBG>] (collecting thoughts of curators and other arts professionals on the complex practices of museum replication); ADINA KAMIEN-KAZHDAN, *REMAKING THE READYMADE: DUCHAMP, MAN RAY, AND THE CONUNDRUM OF THE REPLICA* 25–43 (2018) (exploring great works of art that are replicas).

Guggenheim.⁸ (That piece was “on loan” to the Guggenheim while still on display in Seattle.)⁹ But often the practice is so subtle that even sophisticated viewers walk out of an exhibition unaware that they have seen copies. Should it matter?

What is an original and what is a copy? What is real and what is fake? In an era of perfect reproductions, why seek out the original when identical copies are readily available? These questions are relevant not just to art like Ligon’s that is manufactured rather than produced by the artist’s hand. Increasingly it is a fundamental question for all art, as 3D printing eliminates the visual distinction between copies and even virtuoso works.¹⁰ The Van Gogh Museum now sells limited-edition 3D copies of some of its paintings which are so convincing that each is marked with an unbreakable seal to prevent the replicas from being mistaken for originals in the market.¹¹ And, of course, these questions are paramount in digital art, which is infinitely reproducible.¹² As we shall see, the NFT attempts to resolve these precise questions, manufacturing authenticity in a world of limitless copies.¹³

⁸ See, e.g., Jen Graves, *Copycars*, STRANGER (Apr. 24, 2008, 4:00 AM) [hereinafter Graves, *Copycars*], <https://www.thestranger.com/seattle/in-art-news/Content?oid=562678> [<https://perma.cc/JH32-SRH3>]; Jen Graves, *With Modern Art, a Question of What’s ‘Original.’* NEWSWEEK (June 4, 2008, 8:00 PM), <https://www.newsweek.com/modern-art-question-whats-original-90645> [<https://perma.cc/6KBV-WL7X>].

⁹ Graves, *Copycars*, *supra* note 8; see also Jen Graves, *What Became of the Guggenheim Centerpiece Cars?*, STRANGER (Nov. 23, 2015, 1:38 PM), <https://www.thestranger.com/blogs/slog/2015/11/23/23180592/what-became-of-the-guggenheim-centerpiece-cars> [<https://perma.cc/H6BA-BTF4>] (observing that the copy was allegedly destroyed at the end of the exhibition).

¹⁰ See, e.g., Franz Lidz, *The Robot Guerrilla Campaign to Recreate the Elgin Marbles*, N.Y. TIMES (July 8, 2022), <https://www.nytimes.com/2022/07/08/science/elgin-marbles-3d-print.html> [<https://perma.cc/ZFR8-XFHD>] (discussing the use of 3D machining to recreate the hotly disputed Elgin Marbles); Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1145–48 (2017) (discussing the role of 3D printing in museums). The problem of the perfect copy is far from new even as it has become increasingly common. There are many examples of historical copies that are virtually indistinguishable from the originals, even to the eye of a connoisseur. See ALEXANDER NAGEL & CHRISTOPHER S. WOOD, *ANACHRONIC RENAISSANCE* 275 (2010) (describing an exact copy made in the 15th century of an earlier work by Rogier van der Weyden and now owned by the Metropolitan Museum of Art which is “so similar, stroke for stroke, that no scholar, unaided by technology, was ever able to say for sure which was the original and which was the copy”). For a philosophical exploration of the perfect copy and a discussion of the aesthetic difference between an original work and a “perfect fake,” see NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 99–112 (2d ed. 1976).

¹¹ Dalya Alberge, *Van Gogh in 3D? A Replica Could Be Yours for £22,000*, GUARDIAN (Aug. 24, 2013, 7:28 AM), <https://www.theguardian.com/artanddesign/2013/aug/24/3d-replicas-van-gogh> [<https://perma.cc/4LH7-96JT>].

¹² See *infra* Part III (discussing the proliferation of NFTs).

¹³ *Id.*

Yet even as the distinction between real and copy is being erased, the soaring art market depends on that distinction. For example, a “real” Glenn Ligon sold at Sotheby’s for \$3,973,000.¹⁴ While you could go to the neon manufacturer’s workshop in Brooklyn and get a perfect copy of “Ligon’s” *Untitled*, it would be worth only what a neon sign is worth.¹⁵ And the stakes are even higher with the big market stars. A recent lawsuit involved the authenticity of a supposed Warhol.¹⁶ While a fake Warhol is unmarketable, a real Warhol is worth a fortune: Warhol’s *Silver Car Crash (Double Disaster)* (1963) sold for \$105 million in 2013;¹⁷ one of his 1964 Marilyn Monroe portraits sold for \$195 million in May 2022, the highest auction price ever paid for a work by an American artist.¹⁸

As we will see, however, the difference between a real and a fake Warhol can be far from clear-cut. Determining the authenticity of a Warhol sometimes requires not only an objective inquiry but also a philosophical meditation on the nature of art. The answer can fluctuate, and, with it, the value of a work can swing from millions of dollars to zero and back again depending on whose definition of “real” or “fake” rules.¹⁹

Once we recognize that the concept of authenticity is unstable, vexing questions arise: Why do we attach so much value to the “real” thing? Is the relationship between the copy and the original parasitic or synergistic? The basic premise of copyright law is that unauthorized copies threaten to usurp demand for the original. Walter Benjamin hoped copies would “wither” what he called “the aura” associated

¹⁴ Victoria L. Valentine, *At Sotheby’s, \$3.9M White Text Painting Sets Glenn Ligon Record*, CULTURE TYPE (Nov. 12, 2014, 6:55 AM), <https://www.culturetype.com/2014/11/12/at-sothebys-3-9m-white-text-painting-sets-glenn-ligon-record> [https://perma.cc/4S5H-KGAU].

¹⁵ I put aside the possibility that the copy could be passed off as real, resulting in a much higher (if false) valuation. See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 344–46 (2018) (analyzing forgery in the context of both copyright law and art market valuations).

¹⁶ Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423, 2009 WL 1457177 (S.D.N.Y. May 26, 2009) (considering claims of conspiracy and fraud by an authenticating body), *complaint dismissed per stipulation* (S.D.N.Y. Nov. 30, 2010). For further discussion, see *infra* Part II.C.

¹⁷ Carol Vogel, *Grisly Warhol Painting Fetches \$104.5 Million, Auction High for Artist*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/14/arts/design/grisly-warhol-painting-fetches-104-5-million-auction-high-for-artist.html> [https://perma.cc/P6YX-TADW].

¹⁸ *Warhol’s Marilyn Shatters Auction Record for American Artist at \$195 Million*, ARTFORUM (May 10, 2022, 12:19 PM), <https://www.artforum.com/news/warhol-s-marilyn-shatters-auction-record-for-american-artist-at-195-million-88547> [https://perma.cc/2YUV-SYHM].

¹⁹ See generally *infra* Part II (discussing artworks whose values have fluctuated based on the market’s understanding of their authenticity).

with unique works.²⁰ But today, copies often reinforce our desire for the real thing, just as a uniquely prized original that is beyond our reach drives us to yearn for a copy.²¹

Soon we will all be able to have a perfect replica of the Mona Lisa on our walls, 3D-printed to capture every nuance of Leonardo's brushstrokes.²² Will we no longer go on pilgrimages to the Louvre to see the real work? Or will our desire to be in its presence intensify as its clones proliferate, luring us to worship at the altar of the real?

A similar question consumed iconophiles and iconoclasts over the centuries: Would the existence of idols depicting God lead us astray, tempting us to choose the representation over the real? Would we worship the idol/copy rather than God? Or would the image heighten our faith, enflaming our desire for an encounter with the holiness it depicts?²³

We have long assumed that copyright law would resolve some of these questions. After all, copyright law is designed to sort copies from originals, and to create value for works that could easily be replicated.²⁴ According to the utilitarian theory of copyright, the dominant

²⁰ WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 220–23 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955) (exploring the concept of the “aura”).

²¹ See *infra* Part III (explaining how in both the art market and the market for NFTs, copies often drive desire for originals, a phenomenon which directly defies the basic premises of copyright law and theory); see also Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 506 (2022) (exploring a similar phenomenon in memes).

²² See Charles Towers-Clark, *Recreating Paintings with AI and 3D Printing*, FORBES (Nov. 30, 2018, 11:01 AM), <https://www.forbes.com/sites/charlestowersclark/2018/11/30/recreating-paintings-with-ai-and-3d-printing/?sh=4846e0634a50> [<https://perma.cc/T6BH-4AG2>] (describing how MIT's RePaint project uses 3D printing to overcome the shortcomings of 2D reproductions); Liang Shi, Vahid Babaei, Changil Kim, Michael Foshey, Yuanming Hu, Pitchaya Sitthi-amorn, Szymon Rusinkiewicz & Wojciech Matusik, *Deep Multispectral Painting Reproduction via Multi-Layer, Custom-Ink Printing*, 37 ACM TRANSACTIONS ON GRAPHICS, Nov. 2018, article 271 (describing the MIT project's findings).

²³ See Amy Adler, *The First Amendment, and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41, 43–45 (2012) (exploring how the history of iconoclasm and idol worship both exemplify the extraordinary power we attribute to visual images as opposed to text).

²⁴ Copyright law protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). A copyright holder has several rights, including the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works based on it. *Id.* § 106. According to the predominant utilitarian account of copyright law, copyright prevents free riders from making cheap copies that would deprive the original author of the ability to profit from her work and would ultimately leave her no economic incentive to create. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (positing that without copyright, copies

account in U.S. law and scholarship, copyright is necessary to incentivize authors to produce works.²⁵ Without copyright, artists would be undercut in the market by others who create copies and sell them for cheaper than the original creator, thus reducing the incentive of the original artist to create.

That's the theory, anyway. But in reality, copyright is nearly irrelevant in the world of visual art. In my previous work, I showed that legal scholars had made a fundamental mistake in their analysis of the role of copyright law in the art market: Copyright provides no incentives to visual artists because they work in a field where copies have almost no value.²⁶ Since artists derive the vast majority of their income from originals, unauthorized copying simply does not impact an artist's market in the way that copyright law envisions.²⁷ In short, "[t]he basic premise of copyright law—that the copy poses a threat to creativity—does not apply to art."²⁸ Instead, I showed that the most important value for participants in the art market is something I called "the norm of authenticity."²⁹ This norm steps in where copyright law falters, tying a work's value to the identity of the artist and policing the market by separating the real from the fake.³⁰ But my previous work left open a substantial question: What are the contours of the norm of authenticity and how does it function?

Given that the norm of authenticity is the bedrock of the art market, this Article sets out to define its basic principles. Can the norm be codified and reduced to predictable factors? The multibillion-dollar market demands that. And courts assume it; litiga-

would be made and sold until the "market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work").

²⁵ See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009) (stating that "copyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms"); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

²⁶ Adler, *supra* note 15, at 330–34; see also *id.* at 335 ("[F]or those few lucky artists who do have a market for copies or derivative uses of their work, the value of that market is almost always trivial compared to the value of even one unique work.").

²⁷ The exception is with undetected forgeries. See *id.* at 344–46 (describing how once a work is revealed as a forgery, it loses all value).

²⁸ *Id.* at 342. Indeed, copyright law can *disincentivize* creativity by exposing artists to costly infringement litigation. See *id.* at 351–61 (discussing costs imposed by copyright law on artists).

²⁹ *Id.* at 342.

³⁰ See *id.* at 346 ("[A]n art-world declaration that a work is inauthentic is the equivalent of an economic death sentence, rendering a work unsalable . . .").

tion about art authenticity has skyrocketed, and courts frequently approach authenticity disputes as if they turned on clear-cut principles. But as I will show here, the norm of authenticity, the foundation of the art market, is protean, contested, often arbitrary, and ultimately a mutually agreed upon deception. Authenticity is artificial.

The importance of what I call artificial authenticity is spreading beyond art. As I show, it now forms the foundation of the NFT market. Many consider NFTs to be a revolutionary and unprecedented way to create value in our age of unfettered mechanical and digital reproduction.³¹ But once we view NFTs as an extension of the art world norm of artificial authenticity, we will see that this phenomenon is not revolutionary and is not even new. It is no accident that NFTs first captured public attention in an art sale and that the most expensive NFT sold to date was for a work of art.³² The NFT phenomenon represents the culmination of a century-long conversation in the art world around copying and authenticity that I chronicle here. Just as the art market cast aside copyright law for a norm of authenticity that is arbitrary and artificial, the market for NFTs followed suit.

This Article explores the contours of the norm of authenticity, explains why it is fake, and establishes that understanding “artificial authenticity” is essential to making sense of both the art market and the NFT phenomenon. Part I sets forth the traditional account (and promise) of authenticity in art. Part II uses case studies to paint a portrait of authenticity as artificial, a quality that is invented rather than discovered. This is particularly true for contemporary art, as artists create art that addresses our contemporary world of limitless copying and replication. Part III turns to the rise of the NFT, painting it as the culmination of the conversation around authenticity and copying I present here.

I

TRADITIONAL ASSUMPTIONS ABOUT AUTHENTICITY

This Part sets forth initial assumptions about authenticity. It also chronicles the recent explosion of authenticity lawsuits and shows how the art market and courts have traditionally understood the term.

³¹ Steve Kaczynski & Scott Duke Kominers, *How NFTs Create Value*, HARV. BUS. REV. (Nov. 10, 2021), <https://hbr.org/2021/11/how-nfts-create-value> [<https://perma.cc/UNE6-XJRF>].

³² See *infra* note 269.

A. *What We Talk About When We Talk About Authenticity*

The term “authenticity” signals two complex, overlapping concepts in art. First, it signals originality, usually but not exclusively in the sense of uniqueness.³³ Second, authenticity signals authorship—an authentic work is “by” an artist and can be attributed to her.³⁴

The problem is that both dimensions of authenticity—originality and authorship—are concepts artists have frequently challenged in their work. Contemporary artists, especially during the postmodern period, have attacked the possibility of originality by using copying and appropriation as building blocks of creativity.³⁵ Furthermore, while authenticity depends on a stable concept of authorship, contemporary art often revels in the erasure of the artist, flaunting its authorlessness (a trend that is now booming in meme culture).³⁶

B. *The Rise of Authenticity Disputes*

Authenticity has never been a hotter topic in art. The contemporary art market is soaring, and authenticity is essential to give a work value. Given all the money to be made, the culture of secrecy that surrounds so much of the art world,³⁷ and experts’ fear of liability for

³³ As Benjamin wrote, the “unique existence of the work of art determined the history to which it was subject through the time of its existence” so that “[t]he presence of the original is the prerequisite to the concept of authenticity.” BENJAMIN, *supra* note 20, at 220. Nelson Goodman’s work on authenticity explains the relevance of authenticity to the realm of visual art as opposed to other art forms by distinguishing between “autographic” and “allographic” works. See GOODMAN, *supra* note 10, at 113 (stating that a work is autographic “if and only if even the most exact duplication of it does not thereby count as genuine”). Goodman placed painting, sculpture, and prints into the former category, and gave music and poetry as examples of the latter. *Id.* at 112–19. For important criticism of Goodman, see Jerrold Levinson, *Autographic and Allographic Art Revisited*, 38 PHIL. STUD. 367 (1980).

³⁴ Note that this concept roughly maps on to the moral right of attribution governed by the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(1).

³⁵ Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 570–72 (2016). As I argue there, although postmodern artists took copying and the impossibility of originality as their subject matter, many contemporary artists simply use copying as a basic technique rather than a subject matter. *Id.* For a discussion of authenticity and originality in postmodernism that argues that “[n]otions of originality, authenticity, and presence . . . are undermined,” see Douglas Crimp, *On the Museum’s Ruins*, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 43, 53 (Hal Foster ed., 1983).

³⁶ See Adler & Fromer, *supra* note 21, at 534–35 (“[M]emes might lack authorship due to the author’s decentralization. . . . [A]s a meme spreads, the creator’s conceptions can frequently dissipate into nothingness as a meme is absorbed into culture.”); *id.* at 553 (describing how contemporary art more generally relies on a diffuse, “meme-like participatory model”).

³⁷ The culture of the art world is highly peculiar; sales of art can rely on storytelling, handshakes, and even smoke and mirrors. As Judge Shorter wrote in 1978, “[i]n an industry whose transactions cry out for verification of both title to and authenticity of subject matter, it is deemed poor practice to probe into either.” *Porter v. Wertz*, 1978 WL

identifying fakes,³⁸ forgeries are on the rise—as are lawsuits. On June 24th, 2022, the FBI raided the Orlando Museum of Art, seizing twenty-five works on view in a blockbuster exhibit.³⁹ The museum initially claimed they were newly-discovered paintings by celebrated graffiti artist Jean Michel Basquiat.⁴⁰ Basquiat is a popular sensation as well as an art market star; a painting of his recently sold for \$85 million at auction.⁴¹ If authentic, the works in Orlando would have been worth about \$100 million.⁴² But the FBI believes the paintings are worthless forgeries, and many art world experts agree.⁴³

The saga in Orlando is just the latest headline in over a decade of high-profile controversies. A recent authenticity lawsuit led most prominent U.S. art foundations to shut down their authentication boards,⁴⁴ leaving the roughly \$65 billion art market “stunned” and

23505, at *614 (N.Y. Sup. Mar. 13, 1978), *rev'd*, 416 N.Y.S.2d 254, 259 (App. Div. 1979), *aff'd*, 421 N.E.2d 500, 500 (N.Y. 1981). As a critic lamented, the art market is “utterly unregulated.” William D. Cohan, *A Bull Market in Sketchy Art*, N.Y. TIMES: OPINIONATOR (Aug. 19, 2010, 8:02 PM), <https://opinionator.blogs.nytimes.com/2010/08/19/a-bull-market-in-sketchy-art> [https://perma.cc/Y3CJ-KMHA].

³⁸ For more on the fear of liability that has silenced experts from speaking out when they spot a fake, see Ronald D. Spencer, *Protection from Legal Claims for Opinions About the Authenticity of Art*, SPENCER’S ART L.J., Winter 2012/13, at 2, 3–4, <https://www.clm.com/wp-content/uploads/2020/11/Protection-from-Legal-Claims-for-Opinions-about-the-Authenticity-of-Art.pdf> [https://perma.cc/KU6W-XEK7].

³⁹ Brett Sokol, *Orlando Museum Director Loses Job After Disputed Basquiat Show*, N.Y. TIMES (June 28, 2022), <https://www.nytimes.com/2022/06/28/arts/design/orlando-museum-art-basquiat-director-fired.html> [https://perma.cc/8N6X-SRSU].

⁴⁰ Brett Sokol, *F.B.I. Investigates Basquiat Paintings Shown at Orlando Museum of Art*, N.Y. TIMES (May 29, 2022), <https://www.nytimes.com/2022/05/29/arts/design/fbi-basquiat-paintings-orlando-museum.html> [https://perma.cc/UZY4-STP8].

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.* (reporting that the F.B.I. questioned experts and subpoenaed the museum’s communications regarding the works as part of an investigation into their authenticity); Ryan Waddoups, “*Stay in Your Limited Lane*”—*Basquiat Drama Erupts in Orlando*, SURFACE (June 30, 2022), <https://www.surface.com/articles/fbi-raids-basquiat-exhibition-orlando-museum-art> [https://perma.cc/KU3G-5C77] (citing art world experts’ doubts about the paintings).

⁴⁴ The boards operate to privately determine authenticity for individual artists. In response to the Warhol lawsuit, described *infra* Part II.C, closures include authentication committees for the Andy Warhol Art Authentication Board, the Roy Lichtenstein Foundation, the Basquiat Authentication Committee, and the Calder Foundation. Jane Kallir, *Art Authentication is Not an Exact Science*, ART NEWSPAPER (Nov. 23, 2018), <https://www.theartnewspaper.com/2018/11/23/art-authentication-is-not-an-exact-science> [https://perma.cc/DR6C-TWWG]; see *Warhol Board Stops Authenticating: Issues and Fallout*, IFAR J., Vol. 13, no. 23, at 20 (2012) (“Several other artist-endowed foundations said that they, too, would stop authenticating or would change their procedures.”). The Pollock-Krasner Authentication Board shut down in 1996 after having been sued repeatedly. Randy Kennedy, *Is This a Real Jackson Pollock?*, N.Y. TIMES (May 29, 2005), <https://www.nytimes.com/2005/05/29/arts/design/is-this-a-real-jackson-pollock.html?searchResultPosition=1> [https://perma.cc/TDG4-3AWC] (“The board was frequently sued

unmoored during the rising art boom.⁴⁵ Multiple legal cases concerning authenticity are pending.⁴⁶ The rise in authenticity litigation is so steep that the New York State Senate has twice passed legislation to try to combat the onslaught,⁴⁷ but both efforts died in the State Assembly.⁴⁸ The discovery of an enormous forgery ring involving

by would-be Pollock owners, whose cases sometimes verged on the ridiculous. . . . The board disbanded in 1996 for reasons that remain unclear” See, e.g., *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 253 (S.D.N.Y. 1995) (alleging antitrust violations); *Vitale v. Marlborough Gallery*, No. 93-cv-6276, 1994 WL 654494 (S.D.N.Y. July 5, 1994) (dismissed on statute of limitations grounds); *Lariviere v. Thaw*, No. 0100627/99, 2000 WL 33965732, at *1 (N.Y. Sup. Ct. June 26, 2000) (alleging breach of contract by the authentication board); see also *McCloud v. Lawrence Gallery, Ltd.*, No. 90-cv-30, 1991 WL 136027 (S.D.N.Y. July 12, 1991) (granting summary judgment in a case involving the Comité Picasso).

⁴⁵ See Eileen Kinsella, *A Matter of Opinion*, ARTNEWS (Feb. 28, 2012, 8:00 AM), <https://www.artnews.com/2012/02/28/a-matter-of-opinion> [<https://perma.cc/UB8C-DG4V>] (describing how the market was nearing peak levels and the shock caused by the Warhol board’s dissolution); CLARE McANDREW, *A SURVEY OF GLOBAL COLLECTING IN 2022*, at 16 (2022), <https://www.artbasel.com/about/initiatives/the-art-market> [<https://perma.cc/9TDS-AL9J>] (valuing aggregate sales of art and antiques by dealers and auction houses at an estimated \$65.1 billion).

⁴⁶ See, e.g., *Greenway II, LLC v. Wildenstein & Co.*, No. 19-cv-4093, 2022 WL 1451474, at *1 (S.D.N.Y. May 9, 2022), *appeal filed*, No. 22-cv-1201 (2d Cir. June 2, 2022) (granting defendant art dealership’s motion for summary judgment in fraud case involving alleged inauthentic Pierre Bonnard painting); *Morgan Art Found. Ltd. v. McKenzie*, No. 18-cv-4438, 2021 WL 5919133, at *1 (S.D.N.Y. Dec. 15, 2021) (order compelling witness testimony in ongoing litigation about allegedly unauthorized Robert Indiana works). Several recent high-profile criminal cases are pending. See, e.g., *Man Charged with Selling Multiple Forged Paintings by Contemporary Artist Raymond Pettibon*, U.S. ATT’Y’S OFF. S. DIST. OF N.Y. (Oct. 13, 2021), <https://www.justice.gov/usao-sdny/pr/man-charged-selling-multiple-forged-paintings-contemporary-artist-raymond-pettibon> [<https://perma.cc/R8JV-VC2A>]; Maximiliano Durón, *Three Men Indicted for Selling Faked Works by American Modernists*, ARTNEWS. (Apr. 28, 2022, 11:50 AM), <https://www.artnews.com/art-news/news/indictment-faked-artworks-ralston-crawford-george-ault-gertrude-abercrombie-1234626795> [<https://perma.cc/YNN7-Y6J7>].

⁴⁷ See S.B. 1229A, 237th Leg., Reg. Sess. (N.Y. 2015); S.B. 1974, 239th Leg., Reg. Sess. (N.Y. 2017). The bill was first proposed in 2014 to amend the New York Arts and Cultural Affairs Law to provide protections for experts opining on authenticity. It passed the Senate in 2015 and again in 2016. Versions of the bill were re-introduced to the Senate and Assembly in 2017, 2020, and 2021. *Senate Bill S1229A*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/S1229> [<https://perma.cc/3G2C-PP5N>] (describing the bill’s history).

⁴⁸ See Scott Reyburn, *Art Market Grew 29% in 2021, Says Key Report (Though Some Doubt It)*, N.Y. TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/arts/design/art-basel-ubs-report-2022.html> [<https://perma.cc/F5A4-9JN4>]. S.B. 9016A, 238th Leg. Reg. Sess. (N.Y. 2014) (sponsor memo) (“In recent years, the work of authenticators has come under pressure from meritless lawsuits against those who render opinions in good faith. Such defense of expensive and frivolous lawsuits have left many in the industry reluctant to lend their expertise in authenticating art works.”); see also Press Release, N.Y. State Senate, *Senate Passes Bill to Protect Art Authenticators* (June 15, 2015), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-bill-protect-art-authenticators> [<https://perma.cc/JVN4-9NE8>] (“[V]ery expensive lawsuits have deterred these experts from rendering their opinions to the point of disrupting commerce. The point of this

modern masters brought down New York's oldest gallery, leaving multiple criminal and civil cases involving tens of millions of dollars of art in its wake.⁴⁹

Disputes about the authenticity of art arise in numerous areas of legal doctrine. Claims arise in copyright law,⁵⁰ moral rights,⁵¹ contract law,⁵² fraud,⁵³ defamation,⁵⁴ product disparagement,⁵⁵ tax,⁵⁶ negligent

legislation is to establish protections under the law to ensure that only valid, verifiable claims against authenticators are allowed to proceed in civil court.”).

⁴⁹ See, e.g., Second Amended Complaint & Demand for Jury Trial at 2, *De Sole v. Knoedler Gallery*, No. 12 Civ. 2313, 2013 WL 592666 (S.D.N.Y. Feb. 14, 2013) (involving a forged Rothko); Patricia Cohen, *Note to Forgers: Don't Forget the Spell Check*, N.Y. TIMES (Jun. 11, 2014), <https://www.nytimes.com/2014/06/12/arts/design/note-to-forgers-dont-forget-the-spell-check.html> [<https://perma.cc/234F-QAGT>] (reporting on a case involving a forged Pollock). The case led to one criminal conviction against Glafira Rosales. See Patricia Cohen, *Selling a Fake Painting Takes More Than a Good Artist*, N.Y. TIMES (May 2, 2014), <https://www.nytimes.com/2014/05/03/arts/design/selling-a-fake-painting-takes-more-than-a-good-artist.html> [<https://perma.cc/2ZJJ-326N>]. Two other dealers charged were arrested in Spain and released on bail; the U.S. government's extradition requests were denied. The forger—facing criminal charges—fled to China. See Nate Raymond, *New York Art Dealer Avoids Prison for \$80 Million Counterfeit Scheme*, REUTERS (Jan. 31, 2017, 6:36 PM), <https://www.reuters.com/article/us-new-york-crime-art-idUSKBN15F2VJ> [<https://perma.cc/QTA8-BS29>].

⁵⁰ *Morgan Art Found. Ltd.*, 2021 WL 5919133, at *1.

⁵¹ See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 275–79 (2009) (setting forth and contesting the central assumption in moral rights law that artists, unlike other authors, have especially profound bonds to their creations); *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. Nov. 13, 2012), *aff'd* 967 N.Y.S.2d 649 (App. Div. 2013) (adjudicating contract claim brought by collector against auction house after artist had asserted that she had a moral right to disavow her work); see also Pierre Sirinelli, *Intellectual Property Law* (providing an overview of droit moral), in INTRODUCTION TO FRENCH LAW 171–204, 180–82 (George A. Bermann & Etienne Picard eds., 2008).

⁵² See, e.g., *De Sole v. Knoedler Gallery, LLC*, 139 F. Supp. 3d 618, 659–64 (S.D.N.Y. 2015) (adjudicating claims for breach of warranty and mistake relating to the sale of a forged Rothko); *Martin Hilti Fam. Tr. v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 430, 441, 465–73 (S.D.N.Y. 2015) (dismissing breach of warranty and mistake claims on statute of limitations grounds); *Fertitta v. Knoedler Gallery, LLC*, No. 14-CV-2259, 2015 WL 374968, at *8–10 (S.D.N.Y. Jan. 29, 2015) (dismissing breach of warranty and mistake claims on statute of limitations grounds); *Pivar v. Van Gogh Museum*, 21 Civ. 09362, 2022 WL 889837, at *2 (S.D.N.Y. Mar. 25, 2022) (alleging museum breached contractual term requiring “good care” in its determination that a work was inauthentic).

⁵³ See, e.g., *Brady v. Lynes*, No. 05 Civ. 6540, 2008 WL 2276518, at *4 (S.D.N.Y. June 2, 2008) (alleging numerous theories, including fraud). Most of the Knoedler claims, discussed above, *supra* note 49 and accompanying text, and *supra* note 52, alleged fraud as well as other theories of liability.

⁵⁴ See, e.g., *S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, 820 F. Supp. 2d 477, 483 (S.D.N.Y. 2011), *vacated*, 10 Cv. 7547, 2012 WL 13210272, at *10 (S.D.N.Y. 2012) (alleging statements “understood among participants in the high-end art market to deny the authenticity” of works were defamatory); *Bilinski v. Keith Haring Found., Inc.*, 632 F. App'x 637, 639–41 (2d Cir. 2015) (adjudicating claims of defamation by implication and defamation through ownership based on a characterization of works as fakes).

misrepresentation,⁵⁷ antitrust,⁵⁸ and criminal law.⁵⁹ Yet regardless of the legal doctrine at stake, every court that adjudicates an authenticity dispute encounters a recurring problem: These lawsuits take place against a backdrop of the surprisingly shifting and elusive art world norm of authenticity. While courts may assume that the word “authenticity” has a stable meaning, this Article shows why that is wrong. Authenticity is not a unified concept; instead, it is artificial, contested, and mutable.

Questions about authenticity are central not only to the art market and the burgeoning litigation that surrounds it, but also to contemporary art itself. In the last sixty years or so, issues involving copying and authenticity have become a frequent subject of art.⁶⁰ This is striking given the anxiety around authenticity that haunts the art market. At the same time that the specter of fakes has left the art world “shaken to its foundations,” an inquiry into what it means to be fake has also penetrated the foundation of art.⁶¹

⁵⁵ See *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1113–18 (S.D.N.Y. 1992) (evaluating a claim for product disparagement brought by a painting’s owner against an expert who raised questions about the authenticity of the painting).

⁵⁶ See *Ferrari v. Comm’r*, No. 90-2042, 1991 WL 60478, at *1–3. (4th Cir. Apr. 23, 1991) (evaluating a claim that the authenticity of pre-Columbian artworks should be considered in their valuation and holding that they “fell outside the definition of pre-Columbian art” due to significant restorations).

⁵⁷ See *Ravenna v. Christie’s Inc.*, No. 121367-00, 2001 WL 36385308 (N.Y. Sup. Ct. Mar. 22, 2001), *aff’d*, 734 N.Y.S.2d 21, 22 (App. Div. 2001) (dismissing claim of negligent misrepresentation brought by painting’s owner against an auction house for failing to recognize the work’s value and authenticity).

⁵⁸ See *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177, at *1 (S.D.N.Y. May 26, 2009); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 253 (S.D.N.Y. 1995).

⁵⁹ See, e.g., *United States v. Amiel*, 95 F.3d 135, 137 (2d Cir. 1996) (affirming jury conviction for numerous counts of mail fraud resulting from the sale of fraudulent artworks attributed to Chagall, Dali, Miro, and Picasso); see also M.H. Miller, *The Big Fake: Behind the Scenes of Knoedler Gallery’s Downfall*, ARTNEWS (Apr. 25, 2016, 9:30 AM), <https://www.artnews.com/art-news/artists/the-big-fake-behind-the-scenes-of-knoedler-gallery-s-downfall-6179> [<https://perma.cc/L68V-Q78D>] (detailing the legal troubles of the gallery prior to its closing in 2011); Julia Preston, *Art Gallery Owner Pleads Guilty in Forgery Found by Coincidence*, N.Y. TIMES (Dec. 14, 2004), <https://www.nytimes.com/2004/12/14/nyregion/art-gallery-owner-pleads-guilty-in-forgery-found-by-coincidence.html> [<https://perma.cc/9SV7-ENN8>] (reporting on an art dealer’s guilty plea to criminal charges of fraud for selling forgeries).

⁶⁰ See Adler, *supra* note 35, at 567–75 (exploring how artistic explorations of authenticity and copying became central to contemporary art).

⁶¹ THIERRY LENAIN, *ART FORGERY: THE HISTORY OF A MODERN OBSESSION* 16 (2011) (quoting PAUL B. COREMANS, *VAN MEEGEREN’S FAKED VERMEERS AND DE HOOGHS: A SCIENTIFIC EXAMINATION* vii (1949)). The forgery is a threat to the art market and to the history of art, leaving both vulnerable to falsification. It also threatens the notion of originality itself. See SÁNDOR RADNÓTI, *THE FAKE: FORGERY AND ITS PLACE IN*

C. *The Conventional Wisdom: Authenticity as a Stable Concept*

“Just as a woman can’t be a little bit pregnant, a work of art can’t be a little bit real.”

—Patricia Cohen, 2012⁶²

What does it mean for a work to be “inauthentic”? The category includes far more than forgeries. It also includes misattributions—works created with no intent to deceive, which are then mistakenly (or deceitfully) attributed to an artist. Since copying, allusion, and emulation have been central to art since time immemorial,⁶³ this is a significant problem. “Fakes” can also be unauthorized reproductions of works that are easily mechanically copied, such as prints and photographs. For all these reasons, art market participants and art scholars studiously avoid the words “fake” or “forgery” and instead refer to inauthentic works as “wrong” or “not right.”⁶⁴

Traditional authenticity disputes are thought to pose a yes-or-no question: Did the artist to whom the work is attributed create it? That simple question conceals numerous complexities. Consider even the most basic threshold problem—what do we mean when we ask if an artist “created” the work? For most traditional works, the right question is whether the artist created the work by his own hand—did Picasso paint that painting? Yet even this seemingly straightforward inquiry raises problems. The search for the artist’s hand makes sense as long as we envision the romantic notion of the artist painting alone in his garret. Yet the question becomes more complex for the many traditional artists who worked with multiple assistants in studio systems, such as Rembrandt or Rubens. A work may be attributed to an artist yet betray the presence of more than one hand.⁶⁵ And as we

ART 26 (Ervin Dunai trans., 1999) (“The figure of the forger . . . serves to undermine the notion of originality.”).

⁶² Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. The Law*, N.Y. TIMES (Aug. 5, 2012), <https://www.nytimes.com/2012/08/06/arts/design/when-judging-arts-authenticity-the-law-vs-the-market.html> [<https://perma.cc/P3Y5-WWMW>].

⁶³ See, e.g., Adler, *supra* note 35, at 559, 568 (describing techniques of allusion, copying, and emulation as characterizing the history of art).

⁶⁴ Michael Findlay, *Authenticity, Connoisseurship and the Art Market*, Address at the International Seminar on the Authentication of Artworks and the Prevention of Forgery, ART DEALERS ASS’N AM. (June 20, 2011), <https://web.archive.org/web/20130125034640/http://www.artdealers.org/findlayessay> [<https://perma.cc/P525-ZJ2Z>]; see also Tony Shafrazi Gallery, Inc. v. Christie’s Inc., No. 112192/07, slip op. at 1–2 (N.Y. Sup. Ct. Nov. 22, 2011) (recounting Jean-Michel Basquiat’s father’s statement that a painting attributed to his son was “not right” in a fraud case against Christie’s auction house), *aff’d*, 955 N.Y.S.2d 875 (App. Div. 2012).

⁶⁵ Works can span a “sliding scale” of attribution—such as “studio of,” “circle of,” or even “style of.” Samantha Subramanian, *How to Spot a Perfect Fake: The World’s Top Art Forgery Detective*, GUARDIAN (June 15, 2018), <https://www.theguardian.com/news/2018/>

shall see, a contemporary artwork can be authentic but produced by assistants without ever being touched by the artist's hand. In fact, an artwork can be authentic and made without the hand of any artist, as with a "readymade" work that an artist selects rather than makes, or a work of conceptual art that has no physical embodiment.⁶⁶

While it is assumed that there is a "true" answer to the yes-or-no question of authenticity, it is also well known how hard it is to get that answer right. A team of revered scholars in this area admitted that "absolute certainty . . . can only rarely be reached."⁶⁷ Authentication relies on multiple methodologies. Volumes of art scholarship repeat the common wisdom that the process of authenticating a work depends on what is commonly referred to as the "three-legged stool": connoisseurship, provenance, and scientific analysis.⁶⁸

Yet uncertainty plagues each of these three avenues of inquiry. Take connoisseurship. To art historians and the art market, connoisseurship is the most important part of the analysis.⁶⁹ Because a connoisseur's skill comes from a lifetime of looking at the work of a particular artist or period, almost no one else has the expertise to definitively confirm or deny what they see.⁷⁰ Yet to art world out-

jun/15/how-to-spot-a-perfect-fake-the-worlds-top-art-forgery-detective [https://perma.cc/DZ5C-X335]. For discussion of Rembrandt's studio process, see *infra* note 79 and accompanying text. Adding to the complexity is the issue of posthumous works; a work may be perfectly authentic in the market's view yet produced posthumously using casts made from original sculptures by the artist. Some posthumously cast works by Modigliani, Gauguin, and Brancusi are treated as authentic, cast under supervision of the artist's estate. See John Tancock, *Issues of Authenticity in the Auction House*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 45, 52 (Ronald D. Spencer ed., 2004) [hereinafter *THE EXPERT VERSUS THE OBJECT*]. Yet the validity of posthumous work is also subject to fluctuation. For example, the market has revised its view of certain Maillol casts that were considered authentic sixty years ago and are no longer salable. *Id.* The posthumous production of Rodin's sculpture was addressed in Rosalind Krauss, *The Originality of the Avant-Garde: A Postmodernist Repetition*, *OCTOBER*, Fall 1981, at 47.

⁶⁶ See discussions *infra* notes 172, 173 (citing Andy Warhol's use of assistants to create his works) and *infra* note 218 (describing the conceptual and textual nature of Sol LeWitt's Wall Drawings).

⁶⁷ Peter C. Sutton, *Rembrandt and a Brief History of Connoisseurship*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at 29, 37.

⁶⁸ See Leila A. Amineddoleh, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 *CARDOZO ARTS & ENT. L.J.* 59, 72–73 (2016) ("Authentication has been likened to a three-legged stool, which relies on three prongs: (1) forensics; (2) provenance; and (3) connoisseurship.").

⁶⁹ See, e.g., *Panel 1: The Process of Authentication*, 35 *COLUM. J.L. & ARTS* 369, 379 (2012) (quoting James Martin, founder of Orion Analytical); Ronald D. Spencer, *Introduction* to *THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at xi (noting "the emphasis on the importance of connoisseurship" in the field).

⁷⁰ See, e.g., *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 23 (App. Div. 2009) (quoting *THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at xi ("[T]he process of authentication of visual art depends chiefly on the scholarship of art experts.")). See

siders—including judges—the connoisseur may seem like a madman or a charlatan.⁷¹ And connoisseurs are often notoriously unable to explain how they “know,” often in an instant, whether a work is authentic.⁷² An expert in abstract expressionism told me he feels a strange sensation on the tip of his tongue when he first sees a picture that is “not right.” An old story holds that James McNeil Whistler was shown a painting attributed to Velázquez but dismissed it with a glance. When pressed on why he could be sure it wasn’t by Velázquez if he had barely looked at it, Whistler replied, “I always swoon when I see a Velázquez.”⁷³ No wonder that almost a hundred years ago, in one of the most famous authenticity cases, *Hahn v. Duveen*, the court expressed suspicion of connoisseurs “who claim to have a sixth sense which enables some of them after they have seen a picture even for five minutes to definitely determine whether it is genuine or not.”⁷⁴

A further problem is that even the finest connoisseur is fallible. Experts make mistakes;⁷⁵ they change their minds;⁷⁶ new generations

generally JONATHAN BROWN, *KINGS & CONNOISSEURS: COLLECTING ART IN SEVENTEENTH-CENTURY EUROPE* 232–53 (1995) (describing the rise of connoisseurship in the seventeenth century); MICHAEL HATT & CHARLOTTE KLONK, *ART HISTORY: A CRITICAL INTRODUCTION TO ITS METHODS* 40–64 (2006) (providing a historical account of the role of the connoisseur). The relevant connoisseur is either an individual scholar or a committee of experts. Certificates of authenticity by experts may also play a role (more so in Europe) but are less persuasive. See Francis V. O’Connor, *Authenticating the Attribution of Art: Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attributions*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at 3, 21.

⁷¹ See *Panel I: The Process of Authentication*, *supra* note 69, at 371 (describing “suspicion, disapproval, and even scorn for connoisseurship,” including among academics); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 449 (S.D.N.Y. 2012) (quoting David Grann) (describing the connoisseur’s skill as “rare, mysterious, and often bitterly contested”).

⁷² When a handful of art experts were invited to view the famous Getty kouros—a (supposedly) sixth-century B.C. classical nude sculpture the Getty had triumphantly purchased in 1999 for \$10 million, but is now considered fake—some of them had visceral, instantaneous reactions. One connoisseur “blanched” upon seeing the Kouros; another felt “a wave ‘of intuitive repulsion.’” MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 5–8 (2005); see also Michael Kimmelman, *Absolutely Real? Absolutely Fake?*, *N.Y. TIMES* (Aug. 4, 1991), <https://www.nytimes.com/1991/08/04/arts/art-absolutely-real-absolutely-fake.html> [<https://perma.cc/6ZEP-9CSS>] (detailing the conflicting scientific and artistic opinions on the authenticity of the Getty kouros).

⁷³ Ronald Spencer recounts the story in *THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at xv.

⁷⁴ 234 N.Y.S. 185, 192 (Sup. Ct. 1929).

⁷⁵ An example comes from the Knoedler trial, in which a Rothko expert admitted his former mistaken belief that a fake Rothko was real while under cross-examination. Isaac Kaplan & Abigail Cain, *A Settlement Has Been Reached in the Knoedler Gallery Lawsuit—Here’s What You Need to Know*, *ARTSY* (Feb. 8, 2016, 7:27 PM), <https://www.artsy.net/article/artsy-editorial-a-settlement-has-been-reached-in-a-25-million-dollar-case-over-a-fake-rothko-here-s-what-you-need-to-know> [<https://perma.cc/HX67-4ECZ>].

⁷⁶ *Id.*

reverse the verdicts of those who came before.⁷⁷ For many artists, there is not just one connoisseur, but a handful who can disagree with one another, thereby casting a work into a kind of market “purgatory.”⁷⁸ Consider the dramatic swings in expert opinions about Rembrandt, an artist notoriously hard to authenticate. In the 1920s there were over 700 known Rembrandt paintings; now the corpus has shrunk to fewer than 300 as a new generation of experts has deauthenticated more than half of the works canonized by previous scholars.⁷⁹ Indeed, the profound uncertainty of Rembrandt attribution has become a kind of art form unto itself.⁸⁰ In a similar vein, The Metropolitan has changed its mind twice in the last fifty years about the great Velázquez portrait of Philip IV in its collection.⁸¹ (It was real, last time I checked.) Compounding the problem is the fact that connoisseurs are often reluctant to speak out, even when they see works they are certain are fakes or misattributions, because they can be sued for calling out a work.⁸² This fear of liability often leads connoisseurs to remain silent.⁸³ In short, connoisseurship is flawed, sub-

⁷⁷ *Id.*

⁷⁸ David Grann, *The Mark of a Masterpiece*, *NEW YORKER* (July 12, 2010), <https://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece> [<https://perma.cc/VRA5-Y7CS>]; see also Steven M. Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 *Wis. L. Rev.* 595, 596 (1991) (“Art historians are constantly reevaluating the world’s inventory of art.”).

⁷⁹ Arthur K. Wheelock, Jr., *Issues of Attribution in the Rembrandt Workshop*, in *DUTCH PAINTINGS OF THE SEVENTEENTH CENTURY* (2014), <https://www.nga.gov/content/ngaweb/research/online-editions/17th-century-dutch-paintings/essay-issues-attribution-rembrandt.html> [<https://perma.cc/6PX8-J4GG>] (describing fluctuations in attribution of Rembrandt’s work over time and special issues presented by Rembrandt’s use of apprentices). Many Renaissance artists used apprentices in their studios. See, e.g., CARMEN C. BAMBACH, *DRAWING AND PAINTING IN THE ITALIAN RENAISSANCE WORKSHOP: THEORY AND PRACTICE, 1300–600* (1999) (exploring the workshop system and the use of apprentices in Renaissance art).

⁸⁰ It was the subject of an exhibition at The Metropolitan Museum of Art. See generally HUBERT VON SONNENBURG, *REMBRANDT/NOT REMBRANDT IN THE METROPOLITAN MUSEUM OF ART: ASPECTS OF CONNOISSEURSHIP* (1995). Note that the primary problem in authenticating Rembrandt is misattribution, not forgery. See generally *id.*

⁸¹ See Carol Vogel, *Reconsidered, a Met Velázquez Is Vindicated*, *N.Y. TIMES* (Dec. 20, 2010), <https://www.nytimes.com/2010/12/21/arts/design/21velazquez.html?smid=url-share> [<https://perma.cc/JZH4-KZT7>].

⁸² Lawsuits against experts proceed under various theories of liability including defamation, product disparagement, and fraud. See, e.g., *McNally v. Yarnall*, 764 F. Supp. 838, 840 (S.D.N.Y. 1991) (defamation); *Hahn v. Duveen*, 234 N.Y.S. 185, 187–88 (Sup. Ct. 1929) (disparagement); *Goldman v. Barnett*, 793 F. Supp. 28, 29 (D. Mass. 1992) (fraud).

⁸³ See Patricia Cohen, *In Art, Freedom of Expression Doesn’t Extend to ‘Is it Real?’*, *N.Y. TIMES* (June 19, 2012), <https://www.nytimes.com/2012/06/20/arts/design/art-scholars-fear-lawsuits-in-declaring-works-real-or-fake.html> [<https://perma.cc/U2UF-DS8E>] (describing a “perceived crisis” in the art world in which experts no longer point out forgeries for fear of getting sued); N.Y.C. BAR ASS’N, *REPORT BY THE ART LAW COMMITTEE RECOMMENDING AMENDMENTS TO NEW YORK’S ARTS AND CULTURAL*

jective, opaque, and esoteric. Yet it remains by far the most important aspect of authentication in the art world.⁸⁴

It is not surprising that courts are skeptical of “tingling tongues” or that they desire a more objective method to determine authenticity. Both provenance and scientific evidence, the other two legs of the three-legged stool, appear to promise relief, but these seemingly objective inquiries are also flawed. Take provenance, an inquiry into documentary evidence to trace a work’s history of ownership; provenance researchers consider documents such as sales receipts, auction or museum catalogues, records from museums or from the artist’s studio, historic photographs of the work, and the like.⁸⁵ A work with impeccable provenance has an unbroken chain from the present owner back to the studio of the artist who created it.⁸⁶

There are two significant problems with provenance. First, it can be faked, just as art can be. One notorious art forger, Wolfgang Beltracchi, deftly forged documents establishing the provenance of his forged paintings. To demonstrate his wife’s family’s supposedly long history of ownership of these fakes, he created fake photographs depicting the works hanging in his wife’s grandmother’s home.⁸⁷ His wife dressed up as her grandmother in period clothes to pose with the forgeries.⁸⁸ Beltracchi even aged the photographs and printed them on pre-war developing paper to make them more convincing.⁸⁹ Other

AFFAIRS LAW RELATED TO OPINIONS CONCERNING AUTHENTICITY, ATTRIBUTION AND AUTHORSHIP OF WORKS OF FINE ART 3–4, 6 (2012), <https://www2.nycbar.org/pdf/report/uploads/ArtAuthenticatorProposalArtLawReportFINAL12.19.13.pdf> [<https://perma.cc/TXA2-GHEZ>] (proposing protections to insulate experts from baseless legal liability); Ameneddoleh, *supra* note 68, at 82–85 (discussing the effects of fear of litigation on experts and authentication boards).

⁸⁴ See Riah Pryor, *The Rocky Authority of the Artist in Authentication Disputes: Who Gets the Final Say?*, ART NEWSPAPER (Feb. 14, 2022), <https://www.theartnewspaper.com/2022/02/14/the-rocky-authority-of-the-artist-in-authentication-disputes-who-gets-the-final-say> [<https://perma.cc/2CCE-C9A9>] (quoting an art market expert who asserts that “[c]onnoisseurship is more subjective and difficult for courts to weigh; but, for the market, it remains the most valuable leg”).

⁸⁵ See generally *Davis v. Carroll*, 937 F. Supp. 2d 390, 429 (S.D.N.Y. 2013) (“It is a basic duty of any purchaser of an object d’art to examine the provenance for that piece.”).

⁸⁶ See, e.g., *Greenwood v. Koven*, 880 F. Supp. 186, 189 n.1 (S.D.N.Y. 1995) (adjudicating the rescission of a contract for a work found to be inauthentic in spite of its “impeccable” provenance).

⁸⁷ See Saskia Hufnagel & Duncan Chappell, *The Beltracchi Affair: A Comment and Further Reflections on the “Most Spectacular” German Art Forgery Case in Recent Times*, in ART CRIME: TERRORISTS, TOMB RAIDERS, FORGERS AND THIEVES 9, 12 (Noah Charney ed., 2016).

⁸⁸ *Id.*

⁸⁹ *Id.*; see also LANEY SALISBURY & ALY SUJO, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* 78–81 (2009) (describing another widespread forgery scheme that included fake provenance documents).

forgers have been similarly enterprising, going so far as to alter existing archives and catalogues to insert fake provenance for their works into the historical record.⁹⁰

The second problem with provenance is that it is often spotty, even for authentic works, because works of art sometimes change hands without documentation.⁹¹ The art world is notorious for doing deals with nothing more than a handshake.⁹² Artists don't always keep perfect records; collectors and dealers frequently wish to keep their holdings or their sales a secret.⁹³ And as researchers of Holocaust looting know all too well, major gaps in provenance can signal problems other than inauthenticity; these gaps can often suggest a history of exploitation and plunder.⁹⁴

Scientific evidence, the third leg of the “stool,” would seem like the sturdiest and most objective component of authenticating art. Yet it is surprisingly limited in what it can accomplish. Scientific evidence can be drawn from relatively straightforward methods, such as close examination of a work's surface and materials under good light, or from more technically complex methods such as scanning electron microscopy,⁹⁵ which can identify pigments.⁹⁶ Further methods, such as

⁹⁰ E.g., Peter Landesman, *A 20th-Century Master Scam*, N.Y. TIMES MAG. (Jul. 18, 1999), <https://www.nytimes.com/library/magazine/archive/19990718mag-art-forgers.html> [<https://perma.cc/STT9-UE5T>] (describing another forgery scheme in which forgers tampered with catalogues and archival records to create fake provenances for the works); Patty Gerstenblith, *Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 322–23 (2012) (detailing several schemes of faking provenance).

⁹¹ See Gerstenblith, *supra* note 90, at 339 (“The ideal provenance would trace the work back to the hand of the artist, although this is generally unrealistic, even in the case of many contemporary artists, and certainly so for older works.”).

⁹² E.g., Nate Freeman, *The Art Market Grew to \$63.7 Billion in 2017, and Other Key Takeaways from Art Basel Report*, ARTSY (Mar. 13, 2018, 8:19 PM), <https://www.artsy.net/article/artsy-editorial-art-market-hit-637-billion-2017-key-takeaways-art-basel-report> [<https://perma.cc/999P-UL3L>] (describing the “handshake-deal norms of the art world”).

⁹³ See, e.g., *Foxley v. Sotheby's Inc.*, 893 F. Supp. 1224 (S.D.N.Y. 1995) (summary judgment claim involving an auction catalogue which omitted the consignor's name from the provenance). Unscrupulous gallerists can exploit the air of secrecy that surrounds art ownership. For example, in the Knoedler cases, the gallery presented buyers with shifting accounts of the forged paintings' supposedly secret and glamorous provenance. *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 290 (S.D.N.Y. 2013); see also *id.* at 304 (describing the shift from one false provenance story for the forged works to a “new provenance story when aspects of the initial tale were called into question”).

⁹⁴ See COMM'N FOR LOOTED ART IN EUR., WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (Dec. 3, 1998), <https://www.lootedartcommission.com/Washington-principles> [<https://perma.cc/229B-HUF7>] (establishing multi-national restitution principles surrounding Holocaust looted art and describing “unavoidable gaps or ambiguities in the provenance [of looted works] in light of the passage of time and the circumstances of the Holocaust era”).

⁹⁵ See Rustin S. Levenson, *Examining the Techniques and Materials of Paintings, in THE EXPERT VERSUS THE OBJECT*, *supra* note 65, at 111, 117–21.

radiocarbon dating or dendrochronology, analyze the age of the materials.⁹⁷ Thus scientific techniques can show, for example, that a work purported to be from the eighteenth century was not created until later. Of course, wily forgers may anticipate this analysis and use frames, canvasses, and other materials from the appropriate period in an attempt to withstand scientific scrutiny.⁹⁸ Still, scientific analysis may reveal conclusively that some works are fakes. Yet it cannot reveal with certainty whether a work is “real,”⁹⁹ and it cannot detect if a work is a misattribution or a forgery created during an artist’s lifetime.¹⁰⁰

There is also an emerging interest in using artificial intelligence and machine learning techniques to authenticate works by training a neural network to recognize an artist’s style based on building a database of the artist’s previously authenticated works and then comparing the work in question against that database. While this technique holds great promise, it also has obvious flaws. For example, a finding on authenticity is only as good as the authenticity and selection of the underlying works included in the database against which the work in question is compared; selection bias and the inclusion of previously incorrectly attributed works or works that have undergone extensive restoration can skew results.¹⁰¹

Although the traditional account of authenticity addresses the extraordinary difficulties and uncertainties that surround the process, one thing is never in doubt: While it may be hard—if not impossible—to ascertain whether a work is real, the notion that there is a correct

⁹⁶ See *id.* at 112, 121.

⁹⁷ See *id.* at 113, 122.

⁹⁸ See Subramanian, *supra* note 65.

⁹⁹ Often all that can be revealed is that “there is no reason why the work could not be by the hand of the artist.” Levenson, *supra* note 95, at 122.

¹⁰⁰ Despite these significant limitations, scientific evidence remains an important part of the authentication process. This significance was indicated by Sotheby’s 2016 acquisition of Orion Analytical, a scientific research firm with expertise in “technical imaging, magnified visual inspection, elemental analysis, and molecular analysis.” Sarah Cascone, *Expert Forgery-Spotter James Martin to Head Sotheby’s Scientific Research Department*, ARTNET NEWS (Dec. 5, 2016), <https://news.artnet.com/market/james-martin-sothebys-scientific-research-771905> [<https://perma.cc/N593-C5E9>].

¹⁰¹ See, e.g., Dorian Batycka, *‘We Were Blown Away’: How New A.I. Research Is Changing the Way Conservators and Collectors Think About Attribution*, ARTNET NEWS (Jan. 10, 2022), <https://news.artnet.com/art-world/ai-research-changing-attributions-2057023> [<https://perma.cc/7SY9-LTNA>] (advocating two levels of authentication); Linda Geddes, *Computer Says There Is a 80.58% Probability Painting Is a Real Renoir*, GUARDIAN (Nov. 19, 2022), <https://www.theguardian.com/artanddesign/2022/nov/19/computer-says-there-is-a-8058-probability-painting-is-a-real-renoir> [<https://perma.cc/QH5N-SZV5>] (exploring the promise of these techniques but also stating that “art connoisseurs have warned that the AI is only as good as the paintings it is trained on”).

answer to the question—even if hard to determine—is a bedrock assumption. Part II will show that this assumption is wrong. Art can be a little bit real and a little bit fake, even if the market and the most venerated experts insist otherwise. Contrary to the assertion quoted at the beginning of this Section, works of art can be a little bit pregnant.

II

ARTIFICIAL AUTHENTICITY

In this Part, I look at several high-profile lawsuits in which courts have confronted authenticity problems to show the problematic status of “authenticity” and its protean meanings in the art world. What we see is the persistent divide between legal assumptions about authenticity and art world norms.

The cases raise a series of problems: how to determine authenticity in work where one point of the art is to dismantle notions of authorship and originality; how to determine authenticity in a medium built on mechanical reproduction, where there is no possibility of uniqueness; how to determine authenticity when it no longer resides in the art object or has any connection to aesthetics; and how to conceive of authenticity when it can fluctuate based on factors divorced from the work itself. As we shall see, a work can remain unchanged, and yet its status as “real” can vanish based on the loss of a piece of paper, the word of an artist who changes his mind about a long-ago creation, or a battle about the meaning of “art.”

A. *Cady Noland: Fake by Fiat*



Cowboys Milking (1990) (Formerly Attributed to Cady Noland)

A 2012 lawsuit involving the artist Cady Noland illustrates how a living artist's disclaimer of a work, even when everyone knows it is "real," can transform it into a fake, reducing its value from potential millions to zero.¹⁰² Cady Noland is the bestselling living American woman artist at auction.¹⁰³ Her silkscreen on aluminum, *Bluewald*, sold in 2015 for \$9.8 million.¹⁰⁴ (We can talk another day about women's low valuation in the art market compared to men.)¹⁰⁵ But Noland is also known to be a bit prickly.¹⁰⁶ In 2011, she saw a work of

¹⁰² Marc Jancou Fine Art Ltd. v. Sotheby's, Inc., No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. Nov. 13, 2012), *aff'd* 967 N.Y.S.2d 649 (App. Div. 2013).

¹⁰³ *The 10 Most Expensive Living Artists*, BARNEBYS MAG. (Feb. 9, 2022), <https://www.barnebys.com/blog/the-most-expensive-living-artists> [<https://perma.cc/PHJ3-ZRNB>] (listing Cady Noland as second in the world only to British artist Jenny Saville among living female artists).

¹⁰⁴ Cady Noland, *Bluewald*, CHRISTIE'S, <https://www.christies.com/lotfinder/Lot/cady-noland-b-1956-bluewald-5895975-details.aspx> [<https://perma.cc/XLG6-JHE2>]; *see also* Felix Salmon, *Why Art Isn't a Commodity, Cady Noland Edition*, REUTERS (Feb. 13, 2012), <https://web.archive.org/web/20120217040027/http://blogs.reuters.com/felix-salmon/2012/02/13/why-art-isnt-a-commodity-cady-noland-edition> [<https://perma.cc/QQQ7-P8BK>]; Tracy Zwick, *Sotheby's and Jancou Battle in Appeals Court over Cady Noland Artwork*, ART IN AM. (June 13, 2013), <https://www.artinamericamagazine.com/news-features/news/sothebys-and-jancou-battle-in-appeals-court-over-cady-noland-artwork> [<https://perma.cc/BQ6Z-6P4W>].

¹⁰⁵ In 2015, Noland's *Bluewald* sold for \$9.8 million, still the record for a living female American artist at auction. Lauren Palmer, *Artnet News's Top 10 Most Expensive Living American Artists 2015*, ARTNET NEWS (Aug. 13, 2015), <https://news.artnet.com/market/artnet-newss-top-10-expensive-living-american-artists-2015-323871> [<https://perma.cc/3LKU-HP6S>]; Noland, *supra* note 104. The ten most expensive artworks by living artists have all been created by men. Caroline Galambosova & Nicole Ganbold, *Top 10 Most Expensive Artworks by Living Artists*, DAILYART MAG. (Nov. 25, 2022), <https://www.dailyartmagazine.com/10-most-expensive-artworks-by-living-artists> [<https://perma.cc/5KMB-3EDP>]. The twelve highest-selling living artists were all men as of 2016. *See Who Are the Top 100 Most Collectible Living Artists?*, ARTNET NEWS (May 26, 2016), <https://news.artnet.com/market/top-100-collectible-living-artists-504059> [<https://perma.cc/GL4T-VPCL>]. The highest prices achieved for works by living male American artists include Jeff Koons's *Rabbit* which sold at auction in 2019 for \$91.1 million, and a Jasper Johns "Flag" painting, which reportedly changed hands privately in 2010 for \$110 million. Scott Reyburn, *Jeff Koons 'Rabbit' Sets Auction Record for Most Expensive Work by Living Artist*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/arts/jeff-koons-rabbit-auction.html> [<https://perma.cc/JS7Q-GPK5>]; Carol Vogel, *Planting a Johns 'Flag' in a Private Collection*, N.Y. TIMES (Mar. 18, 2010), <https://www.nytimes.com/2010/03/19/arts/design/19vogel.html> [<https://perma.cc/VLE8-QQZC>].

¹⁰⁶ *See, e.g., Cady Noland Approximately: Sculptures & Editions, 1984 - 1999*, TRIPLE CANDIE, <http://www.triplecandie.org/Archive%202006%20Cady%20Noland.html> [<https://perma.cc/23N5-54TM>]. Noland largely disappeared from the art world over twenty years ago and has replaced creating art with a practice of policing the presentation of her existing work, a job she calls a "full-time thing." SARAH THORNTON, 33 ARTISTS IN 3 ACTS 325–28 (2014). Noland staunchly resists inclusion of her work in exhibitions that she has not authorized. Many exhibitors have agreed to display disclaimers alongside such "unauthorized" displays or offerings of Noland's work. *See, e.g., Gabriella Angeleti & Pac Pobric, Lots to Think About: What Flew, What Flopped*, ART NEWSPAPER (Nov. 30, 2015), <https://www.theartnewspaper.com/2015/12/01/lots-to-think-about-what-flew-what-flopped>

hers, *Cowboys Milking*, shortly before it was to be offered for sale at Sotheby's. Noland had created the silkscreen on aluminum work in 1990.¹⁰⁷ The owner, collector Marc Jancou, had consigned it to Sotheby's, which estimated it would fetch \$250,000 to \$350,000.¹⁰⁸ But given that *Oozewald*, another silkscreen on aluminum work by Noland from the same period, sold earlier in the same auction week for \$4.4 million above its low estimate, Jancou had reason to hope *Cowboys Milking* would sell for much more.¹⁰⁹

When Noland went to see *Cowboys Milking* at Sotheby's a few days before it was to be auctioned, she didn't like what she saw. The corners of the work were bent.¹¹⁰ Although a respected conservator had pronounced the piece to be "in very good condition,"¹¹¹ Noland decided to disavow authorship of the work and demanded it be withdrawn from auction. Sotheby's complied, and Jancou, the collector who had consigned it, sued Noland and Sotheby's for \$26 million.¹¹²

Noland argued that she was entitled to disavow the work as a matter of moral rights under the Visual Artists Rights Act (VARA), an amendment to the Copyright Act.¹¹³ If the work were indeed not hers—a forgery for example—Noland would have had a legitimate claim to disown it under the statute. But it is not at all clear that VARA affords her the right to disclaim authorship of a work and to

[<https://perma.cc/TZ5A-TDGL>] (describing a disclaimer in the Sotheby's catalogue); BRANT FOUND. ART STUDY CTR., <https://brantfoundation.org/exhibitions/deliverance> [<https://perma.cc/36MP-4S9B>] (posting a disclaimer per the artist's request). For an archive of Cady Noland's disclaimers, see *An Anthology of Cady Noland Disclaimers*, GREG.ORG, <https://greg.org/archive/2015/06/13/an-anthology-of-cady-noland-disclaimers.html> [<https://perma.cc/Z7BP-YH38>]. Nonetheless, Noland sometimes participates in exhibitions of her work. She was highly involved in a survey of her work at the Museum für Moderne Kunst in Frankfurt, Germany. See Martha Buskirk, *Cady Noland's Pathological America*, HYPERALLERGIC (Dec. 11, 2018), <https://hyperallergic.com/474241/cady-noland-survey-museum-for-moderne-kunst> [<https://perma.cc/5DXF-FSK9>]. And curators have noted the gendered nature of the dialogue surrounding the artist—one remarking that Noland "was specific and exacting, precise and brilliant in the choice and placement of her work," and that when similar terms are employed to describe male artists, "they are seemingly never labeled 'difficult.'" *Id.*

¹⁰⁷ Exhibit 2 to the Affirmation of Charles G. Moerdler at 5, *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. May 11, 2012).

¹⁰⁸ Amended Complaint at 5, *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. Apr. 9, 2012).

¹⁰⁹ See Zwick, *supra* note 104 (describing how another work, *Oozewald*, sold for \$4 million over estimates).

¹¹⁰ Noland asserted that the piece had been damaged and undergone restoration. See *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316-2012, 2012 WL 7964120 at *5 (N.Y. Sup. Ct. Nov. 13, 2012), *aff'd* 967 N.Y.S.2d 649 (App. Div. 2013).

¹¹¹ *Id.* at *8.

¹¹² Complaint at 4, *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316-2012, 2012 WL 299946 (N.Y. Sup. Ct. Feb. 1, 2012).

¹¹³ Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.

render it inauthentic merely because she doesn't like its condition.¹¹⁴ And yet, regardless of whether VARA technically allows this kind of disclaimer, the legal niceties are moot. In the art market, the artist has the last word about authenticity. Noland's view of the piece, even if it was capricious or irrational, is all that matters. Her disavowal rendered the work immediately inauthentic and unmarketable.

Sotheby's—no naïf when it comes to these kinds of things—had already contracted out of this kind of risk in its standard consignment agreement. The contract allowed Sotheby's to withdraw a work if in its "sole judgment there is doubt as to its authenticity or attribution," a purely subjective standard that protected the auction house from the vagaries of authenticity I address here.¹¹⁵ With language like this, Jancou did not stand a chance. He lost his lawsuit against Sotheby's for breach of contract and breach of fiduciary duty.¹¹⁶

The Cady Noland case shows how art market participants like auction houses manage the uncertainties swirling around authenticity, but it also raises deeper questions: Why is authenticity so subjective? Why should an artist's word, especially if it may be unreasonable, be enough to transform an authentic work into an inauthentic one? The work was damaged, but was it fair to say that it was no longer a Cady Noland? Plenty of artworks circulate in less than perfect condition, including Noland's. Prices can reflect this. Why should the artist have the power to disavow a work she clearly made, reducing its value to zero? And why should her power persist twenty-two years after she made the piece, long after she sold it and was no longer in privity of contract with its owner, and when the work had been recognized for all those years as an authentic Cady Noland?

Part of the answer lies with custom and the art world's deference to the artist.¹¹⁷ For example, in a case involving the painter Balthus,

¹¹⁴ VARA's attribution provisions allow an artist to disclaim a work "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation." *Id.* § 106A(a)(2). While catastrophic, intentional mutilation or grossly negligent mutilation through conservation would certainly trigger this provision, it is unclear if it was properly invoked here, or if it would have been more accurate to say that the work was still a Cady Noland, only damaged and thus reduced in value. It is plausible that a work can be so seriously damaged or so badly restored as to render it inauthentic. *See, e.g.,* Ferrari v. Comm'r, 58 T.C.M. 221, 222 (1989) ("Moreover, at some point, excessive restoration takes a piece of this art out of the category of an original and turns it into a reproduction.").

¹¹⁵ Marc Jancou Fine Art Ltd., No. 650316-2012, 2012 WL 7964120, at *11.

¹¹⁶ *Id.*

¹¹⁷ Peter Doig, who successfully defended himself against a bizarre \$10 million lawsuit over the authorship of a work, said, "I feel a living artist should be the one who gets to say yea or nay and not be taken to task and forced to go back 40 years in time." Graham Bowley & Lori Rotenberk, *The Artist Peter Doig Wins a Case Involving a Painting's Attribution*, N.Y. TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/24/us/the-artist->

the artist gave what the court considered potentially false statements, including a signed affidavit disclaiming a work, presumably to spite his ex-wife.¹¹⁸ The court held that even though the artist had unequivocally disavowed the work three times, there was nonetheless a triable issue of fact as to its authenticity; the court noted significant evidence pointing to the work's authenticity and also observed that there is a history of authors falsely repudiating their own works. But while the court raised doubts about Balthus's disavowal, the art market considered the artist's word to be the end of the story. Andre Emmerich, then president of the Art Dealers Association of America, explained the art world rules to the court, which promptly ignored them. He stated that it was "self-evident [that] the artist is the definitive expert on what is his/her own work. When a living artist repudiates a work as forgery or a fake, the work becomes unmerchantable and unsalable."¹¹⁹

Yet part of the answer to why an artist like Cady Noland has the power to disavow a work she clearly created reflects not only art world custom but also the unstable nature of contemporary art. Ever since Duchamp transformed a ready-made urinal into a work of art merely by designating it as such, art was no longer something that was intrinsic to an object or that could be evaluated aesthetically.¹²⁰ It was

peter-doig-wins-case-involving-a-paintings-attribution.html [https://perma.cc/5YHG-NQPF]. The court nonetheless ignored this art market reality and found that whether the work was authentic was a triable issue of fact. *Id.* It was only after an expensive trial that the court, in an oral verdict, found Doig had successfully shown he was not the author. *Fletcher v. Doig*, No. 13-C-3270, 2022 LEXIS 233651, at *2 and *18 (N.D. Ill. Dec. 30, 2022).

¹¹⁸ *Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc.*, 626 N.Y.S.2d 74, 75 (App. Div. 1995).

¹¹⁹ *Id.* While an artist's repudiation typically renders the work unsalable, there may be exceptions to the rule. In protest of President Trump's inauguration, Richard Prince took to Twitter to disavow a portrait of Ivanka Trump. Richard Prince (@RichardPrince4), TWITTER (Jan. 11, 2017, 3:36 PM), <https://twitter.com/RichardPrince4/status/819281967225180160> [https://perma.cc/8DCF-95HT] ("This is not my work. I did not make it. I deny. I denounce. This [sic] fake art."). In my view, the longstanding theme in Prince's work of playing with truth and lies suggests that his disavowal made the work more quintessentially Prince and thus had the perverse, unintended effect of increasing its market value. Adler, *supra* note 35, at 588–89 (exploring this theme in Prince's work); see also Benjamin Sutton, *Richard Prince Disowns His Ivanka Trump Portrait, Possibly Increasing Its Value*, HYPERALLERGIC (Jan. 13, 2017), <https://hyperallergic.com/351403/richard-prince-disowns-his-ivanka-trump-portrait-possibly-increasing-its-value> [https://perma.cc/DQC5-SWTH] (questioning whether Prince's typical ironic style would blunt the effect of his disavowal on the portrait's value); Randy Kennedy, *Richard Prince, Protesting Trump, Returns Art Payment*, N.Y. TIMES (Jan. 12, 2017) https://www.nytimes.com/2017/01/12/arts/design/richard-prince-protesting-trump-returns-art-payment.html?_r=1 [https://perma.cc/3NYK-XJ4G].

¹²⁰ For a discussion of Duchamp's dismay when people evaluated his art aesthetically, and for my general argument about why the legal attempts to evaluate art aesthetically are

art by fiat. But if an artist has the power to transform a lowly object into art by sheer choice, then by sheer choice she can transform a work of art back into a lowly object. The power to confer arthood is the power to take it away. A urinal went from being a quotidian thing to (arguably) the master artwork of the twentieth century. Cady Noland's power to strip an object of its art status is the vexing corollary to this.

Note that authenticity in both cases—Duchamp's and Noland's—bears no relationship to the visual quality of the piece or to whether it was touched by the hand of the artist. These have been the hallmarks of authenticity for centuries. But traditional methods of authentication can no longer help us. No connoisseur, no researcher of provenance, and no scientific analyst could find a trace of what makes *Fountain* an authentic Duchamp or *Cowboys Milking* an inauthentic Noland. Authenticity no longer inheres in the object, just as art no longer does.

Noland was back at it in 2017, when she disavowed another work, *Log Cabin Façade*, after it was “restored” by being refabricated. The sculpture was a façade of a log cabin adorned with American flags. It had begun to rot, so a conservator discarded the rotted logs and replaced them with new ones bought from the same Montana manufacturer as the original logs, using the artist's original specifications.¹²¹ As extreme as it seems, utter refabrication is not unheard of when restoring a work.¹²² This is particularly so with works like Noland's, which was produced by outside fabricators.

When Noland discovered that the work had been “restored” and was for sale, she sued a collector and two German galleries for violations of copyright and moral rights.¹²³ In her view, the restored sculp-

misguided and focused on an attribute that contemporary art has long left behind, see Adler, *Fair Use*, *supra* note 35, at 599–609.

¹²¹ Noland v. Janssen, No. 17-CV-5452, 2020 WL 2836464, at *1 (S.D.N.Y. June 1, 2020).

¹²² See *infra* notes 228–37 (describing varied cultural and theoretical attitudes toward restoration); see also Ben Lerner, *The Custodians*, NEW YORKER (Jan. 3, 2016), <https://www.newyorker.com/magazine/2016/01/11/the-custodians-onward-and-upward-with-the-arts-ben-lerner> [<https://perma.cc/2P3V-GF66>] (describing the Whitney Museum's extensive restoration of Claes Oldenburg's sculpture “Ice Bag Scale C,” which included replacing the entire fabric exterior). It violates art world customs, however, not to consult a living artist, if available, on restoration of her work. Cf. Carol Mancusi-Ungaro, *supra* note 7 (discussing restoration, stating “I might go so far as to say that it is only artists who validate art”).

¹²³ Noland alleged violations of her moral rights under VARA with respect to the deterioration, destruction, and refabrication of the original Log Cabin, and of her reproduction and exhibition rights under the Copyright Act. Complaint at 7–9, Noland v. Janssen, No. 17-CV-05452 (S.D.N.Y. July 18, 2017). Noland also sought complete destruction of the refabricated work. *Id.* at 13–14. One of the defendants Noland sued then sued another collector over a “buy-back” provision in their contract, inserted to protect

ture was now no longer the real work, but a copy. Her lawsuit faced multiple hurdles, including the pesky problem that the Copyright Office had deemed the work uncopyrightable.¹²⁴ (Noland’s lawyer responded by saying: “Clearly, the copyright office does not understand contemporary art,”¹²⁵ although I think the Copyright Office understood it very well. Its value has nothing to do with whether it’s copyrightable.)¹²⁶ Noland faced another significant hurdle: the sculpture was in Germany, and copyright laws generally do not have extra-territorial application.¹²⁷ She ultimately lost on the extraterritorial issue in 2020, when Judge Oetken in the Southern District granted defendants’ motion to dismiss Noland’s third amended complaint.¹²⁸

Noland lost in a court of law, but she still won in the court of art. The art world norm of authenticity allowed Noland to transform her multimillion-dollar work of art into a plain old log cabin in an instant. When Noland first learned of the refabrication, she faxed a handwritten letter to the collector who owned it, stating “THIS IS NOT AN ARTWORK.”¹²⁹ And from that moment on, regardless of its legal or physical status, *Log Cabin* was just a pile of sticks.

B. Authenticity by Oracle: The Calder Cases and the Irrelevance of Law

Given the indeterminacy of authenticity, one way the art world manages it is to anoint experts, whether individuals or committees, who become the arbiters of a work’s status. As we shall see, the anointed experts can have complete market power—regardless of whether they are right or wrong and certainly regardless of whether courts believe them.

against the artist’s possible disavowal. *Mueller v. Michael Janssen Gallery PTE. Ltd.*, 225 F. Supp. 3d 201, 205 (S.D.N.Y. 2016). The case was dismissed. *Id.* at 209.

¹²⁴ See Third Amended Complaint and Demand for Trial by Jury at 3–4, *Noland*, No. 17-CV-5452, 2019 WL 5857998 (S.D.N.Y. Apr. 2, 2019) (describing Noland’s efforts to secure copyright registration). The Copyright Office’s affirmation of its refusal explained: “The Work is a simple representation of a standard log cabin façade with joinery; thus any authorship is *de minimis* and does not support registration.” Letter from U.S. Copyright Off. Rev. Bd. to Andrew Epstein 4 (May 25, 2018) (on file with author).

¹²⁵ Julia Halperin, *Art Dealers Strike Back at Artist Cady Noland in an Increasingly Philosophical Legal Dispute About a Restored Sculpture*, ARTNET NEWS (Apr. 5, 2018), <https://news.artnet.com/art-world/noland-log-cabin-lawsuit-1259900> [<https://perma.cc/WM4H-SVE8>].

¹²⁶ Adler, *supra* note 15, at 348 (arguing that copyrightability is irrelevant to the value of art, which depends instead on the norm of authenticity).

¹²⁷ See *Noland*, No. 17-CV-5452, 2020 WL 2836464, at *3–4 (S.D.N.Y. June 1, 2020).

¹²⁸ See *id.* at *4.

¹²⁹ See Memorandum of Plaintiff, Cady Noland in Opposition to Defendants’ Motion to Dismiss, Exhibit D, *Noland*, No. 17-CV-5452, 2019 WL 1099805.

Consider a 1993 case that roiled the art world, *Greenberg Gallery v. Bauman*.¹³⁰ At issue was a Calder mobile, bought by a quartet of sophisticated art dealers. When the dealers bought the mobile, they said it was “fabulous” and “beautiful.”¹³¹ But soon they began to suspect it was a fake. They went to Klaus Perls, the anointed expert on Calder. He declared the mobile “an exact copy of the original” and a worthless forgery.¹³²

The dealers sued the seller of the mobile for fraud, breach of warranty, and mutual mistake. The bench trial pitted Perls, the designated art world authority, against a studious and careful younger expert, Linda Silverman, who claimed the work was authentic but damaged. Perls had “vastly superior”¹³³ art market cred compared to her; the art world could not have cared less about this bookish young upstart, even though she spent an hour and a half meticulously examining the sculpture, while Klaus Perls, the great man, dismissed it as fake in a “couple of minutes.”¹³⁴ But the judge sided with Silverman, finding that the sculpture was real and suggesting instead that Perls was not credible: sloppy, cursory, and confused. Perls was eighty-one at the time of the decision and the court’s opinion seemed to hint that his memory was declining. It recited a litany of things Perls had forgotten, including phone calls, conversations, and letters. It noted the contrast between his certainty about the appearance of the mobile and his inability to recognize the handwriting of his long-time gallery partner.¹³⁵ (And to make matters worse, the Calder estate later claimed that Perls was a fraud and thief who swindled Calder for thirty years and even dealt in fakes.)¹³⁶

But none of this mattered to the art world. It seems that even if Perls had never even seen the work, his assessment of the sculpture

¹³⁰ *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993), *aff’d*, 36 F.3d 127 (D.C. Cir. 1994).

¹³¹ *Id.* at 168.

¹³² *See id.* at 171.

¹³³ *Id.* at 174.

¹³⁴ *Id.* at 170. Note that Perls’s quickness should not in my view undermine the validity of his judgment. Connoisseurs, deeply immersed in an artist’s body of work, often know in an instant if a work is not right. *See supra* notes 72–73.

¹³⁵ *Id.* at 172.

¹³⁶ *Davidson v. Perls*, No. 651760/2010, 2013 WL 6797665 (N.Y. Sup. Ct. Dec. 23, 2013) (dismissing complaint on statute of limitations grounds). The Calder estate stands by its accusations. Erik Larson & Christ Dolmetsch, *Calder Heirs Lose Fraud Suit Against Art Dealer’s Estate*, BLOOMBERG NEWS (Dec. 26, 2013), <https://www.bloomberg.com/news/articles/2013-12-26/calder-s-heirs-suit-against-confidant-perls-is-dismissed> [<https://perma.cc/Y873-HBZZ>] (quoting the lawyer for Calder’s heirs saying “the defendants should not go to bed easily at night”); *see also* Patricia Cohen, *Calder’s Heirs Accuse Trusted Dealer of Fraud*, N.Y. TIMES (Oct. 29, 2013), <https://www.nytimes.com/2013/10/30/arts/design/alexander-calder-estate-sues-heirs-of-klaus-g-perls.html> [<https://perma.cc/HE39-WDW9>].

would have been binding. A respected dealer explained the way it worked in his deposition: “[I]f Klaus Perls says a work is a forgery, it is a forgery in terms of the market. The work is then, ipso facto, unsalable and should not be touched by any honorable person.”¹³⁷ Thus, because of Perls’s word, and despite the judge’s finding that the work was authentic, the mobile remains unmarketable. It sits, untouched and untouchable, in the basement of one of the New York City dealers who bought it.

Note the irrelevance of law or even reason in this story. Regardless of whether Perls was right or wrong, he functioned like an oracle. In a few brief minutes, he pronounced the work to be fake or real; he produced rather than discovered its status.

And just as his decision about authenticity seems vested in a realm more akin to magic than reason, so too does the market valuation that attends that decision. The case reveals the divorce between authenticity and value on the one hand and aesthetics on the other.¹³⁸ The work was “an exact copy.”¹³⁹ It looked “fabulous” and “beautiful” to the sophisticated dealers who bought it.¹⁴⁰ But because it was, as Perls pronounced, “an exact copy” and not real, it went from being an expensive artwork (worth about \$750,000 at the time and certainly much more today), worthy of display and study, to being unsellable refuse.¹⁴¹

If two objects look the same, why are they valued and treated so differently? The paradox of the “perfect fake” has consumed philosophers of art.¹⁴² The Calder case suggests to me that the value of an authentic work, like the process of authentication itself, is based as much on myth as on anything tangible. It seems tied to our fantasy that we can somehow be in the presence of the artist by being in the presence of his work, as if his touch has imbued the object with his spirit, much like a talisman, totem, or icon is said to bear some magical trace of its origins.¹⁴³ Thus, to the extent the process of authenti-

¹³⁷ *Greenberg Gallery*, 817 F. Supp. at 174 n.8.

¹³⁸ See Adler, *supra* note 35, at 599–607 (discussing divorce in art between aesthetics on the one hand, and both meaning and value on the other).

¹³⁹ *Greenberg Gallery*, 817 F. Supp. at 168.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See GOODMAN, *supra* note 10, at 99–112 (discussing the aesthetic difference between an original work and a “perfect fake”).

¹⁴³ I draw here on my previous work exploring the traditional religious view of visual images as infused with the spirit of their origins, a view that I argue has shaped the First Amendment approach to the visual. See Adler, *supra* note 23; see also DAVID FREEDBERG, *THE POWER OF IMAGES* 402 (1989) (describing images as having “an effectiveness that proceeds as if the original body were present”).

cation is based on oracular divination rather than reason, it seems, in all its peculiarity, perfectly suited to the concept of authenticity.

The judge in the 1993 Calder mobile case forged ahead with his finding even though he acknowledged that the art world would disregard his view. But in a later case from 2009, involving the authenticity of yet another Calder, a New York court in *Thome v. Alexander & Louisa Calder Foundation* took the opposite approach.¹⁴⁴ Noting its irrelevance to the art market, the court chose to absent itself from a determination of authenticity. By the time of the case, Perls was dead, and the market had come to vest authenticity judgments in the Calder Foundation, which was preparing the official Calder catalogue raisonné. The 2009 court marveled at the peculiarity of this mechanism. In its view, the art market had once again surrendered authority to a designated arbiter that seemed uninterested in “proof” and “facts.”¹⁴⁵ Explaining its refusal to weigh in, the court wrote:

[T]he problem lies in the art world’s voluntary surrender of . . . ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof [the work is authentic] . . . then it will be immaterial to the art world that a court has pronounced the work ‘authentic.’ Plaintiff’s problem can be solved only when buyers are willing to make their decisions based upon the Work and the unascertainable facts about its creation, rather than allowing the Foundation’s decisions [to guide it].¹⁴⁶

Taken together, the Calder cases suggest that authenticity is a realm beyond law, facts, and proof—invented rather than discovered.¹⁴⁷

¹⁴⁴ *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16 (N.Y. App. Div. 2009).

¹⁴⁵ *Id.* at 26.

¹⁴⁶ *Id.* This is not the first time a court has expressed surprise at the art market’s peculiar authenticity procedures. In *Greenwood v. Koven*, the court wrote: “[W]hile Koven asks the Court to make bold determinations about how the auction market should work, and how expert determinations about authenticity should properly be made, it is not the Court’s role to impose upon an industry its own view of how common transactions should be structured.” 880 F. Supp. 186, 204 (S.D.N.Y. 1995).

¹⁴⁷ In 2012, the Picasso estate chose a similar path. See George Stolz, *Authenticating Picasso*, ARTNEWS (Jan. 1, 2013, 7:00 AM), <https://www.artnews.com/art-news/news/authenticating-picasso-2146> [<https://perma.cc/CAF3-T3NV>]. In France, the right to authenticate and to issue certificates of authenticity descends to an artist’s heirs by the *droit moral*. *Id.* (Although we have limited moral rights in the United States under VARA, they last only for the life of the artist.) Four of Picasso’s five surviving heirs announced that they had designated one of them—Claude Picasso—to be the sole authenticator of the work, replacing a process in which more of them had been involved. *Id.* The goal was to centralize and streamline the authentication process for Picasso. *Id.*

C. The Oxymoron of the “Authentic Warhol”



Andy Warhol, *Red Self-Portrait* (1965) (Inauthentic)

In a 2007 case that sent shock waves through the art world, Joe Simon sued the Andy Warhol Foundation after its Authentication Board denied the authenticity of a Warhol self-portrait he had submitted to them.¹⁴⁸ In its usual practice when rejecting a work, the Board had stamped the back of Simon’s painting with the word “DENIED” in indelible red ink, rendering it valueless.¹⁴⁹ A real Warhol would have been worth millions. (The artist’s record at auction is \$195 million.)¹⁵⁰ The Warhol Foundation spent \$7 million defending the lawsuit. Simon ultimately gave up; he settled in 2010 without getting a dime.¹⁵¹ And even though the Foundation prevailed, the cost of defending the lawsuit was so great that it shut down its Authentication Board, leaving Warhol market participants in a

¹⁴⁸ *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177 (S.D.N.Y. May 26, 2009), *complaint dismissed per stipulation* (Nov. 30, 2010).

¹⁴⁹ Amended Class Action Complaint at 22–23, *Simon-Whelan*, No. 07 Civ. 6423, 2009 WL 1457177 (S.D.N.Y. Nov. 7, 2007); *see also* Dorment, *supra* note 1, at 1.

¹⁵⁰ Robin Pogrebin, *Warhol’s ‘Marilyn,’ at \$195 Million, Shatters Auction Record for an American Artist*, N.Y. TIMES (May 9, 2022), <https://www.nytimes.com/2022/05/09/arts/design/warhol-auction-marilyn-monroe.html> [<https://perma.cc/3P23-J3DH>].

¹⁵¹ Linda Sandler, *Warhol Foundation’s \$7 Million Defense Beats Lawsuit*, BLOOMBERG (Nov. 16, 2010), <https://www.bloomberg.com/news/articles/2010-11-16/warhol-foundation-for-the-visual-arts-wins-lawsuit-with-7-million-defense?leadSource=UVerify%20wall> [<https://perma.cc/YC8A-PUG7>].

“panic.”¹⁵² In the wake of the lawsuit, other authentication boards also shut down.¹⁵³

The Warhol Board’s power had been immense. Warhols are some of the hottest commodities on the art market, but they are easily faked. The Board was the most important market arbiter of Warhol authenticity. It operated in secrecy and initially gave no reasons for its decisions; presumably, to have done otherwise would have drawn a road map for forgers.¹⁵⁴ Prior to the Simon lawsuit, the Board had been thought to have airtight insulation from legal liability. Anyone who submitted a work to the Board signed a legal waiver contracting away the right to sue in the event of a disappointing verdict.¹⁵⁵ Its decisions were unreviewable.¹⁵⁶ But Simon’s lawsuit exposed a weak point in the perfect armor the Board had constructed to protect its private tribunal from courts of law. He got around the contract by bringing an antitrust lawsuit, alleging that the Foundation had conspired with the Board to monopolize and restrain trade in the Warhol market.¹⁵⁷ Two of his claims survived a motion to dismiss.¹⁵⁸ It was the

¹⁵² Rachel Corbett, *Warhol Foundation to Quit Authenticating Works*, ARTNET NEWS (Oct. 19, 2011), <https://www.artnet.com/magazineus/news/corbett/warhol-foundation-stops-authenticating-works-10-20-11.asp> [<https://perma.cc/Q95B-4ZBE>].

¹⁵³ See Jennifer Maloney, *The Deep Freeze in Art Authentication*, WASH. POST (Apr. 24, 2014, 8:26 PM), <https://www.wsj.com/articles/the-deep-freeze-in-art-authentication-1398385417> [<https://perma.cc/G5EF-GQSM>].

¹⁵⁴ See Jason Edward Kaufman, *Art Historians Appointed to the Warhol Authentication Board to Help Judge Attributions*, ART NEWSPAPER (Nov. 30, 2005), <https://www.theartnewspaper.com/2005/12/01/art-historians-appointed-to-the-warhol-authentication-board-to-help-judge-attributions> [<https://perma.cc/QB8Z-7RPG>] (noting that the Warhol Authentication Board stated that disclosing their reasoning for rejecting works would provide a road map for forgers). The Board later changed its policy and responded to Simon.

¹⁵⁵ *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177, at *2 (S.D.N.Y. May 26, 2009) (setting forth the terms of the “submission agreement” required to be signed by persons submitting a work to the Board), *complaint dismissed per stipulation* (Nov. 30, 2010).

¹⁵⁶ The Board was always willing to revisit its decisions in light of new information or new scholarship and would sometimes reverse itself. Sometimes that meant denying the authenticity of a Warhol it had previously endorsed. See, e.g., Michael Shnayerson, *Judging Andy*, VANITY FAIR (Nov. 2003), <https://www.vanityfair.com/culture/features/2003/11/authentic-andy-warhol-michael-shnayerson> [<https://perma.cc/ARQ5-VWVF>] (“[T]he authentication board had faxed both Christie’s and Sotheby’s to say the painting was a fake . . . less than a year after they gave it an A rating.”).

¹⁵⁷ *Simon-Whelan*, 2009 WL 1457177, at *10 (S.D.N.Y. May 26, 2009).

¹⁵⁸ *Id.* (denying in part defendant’s motion to dismiss); see generally Gareth S. Lacy, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J.L. TECH & ARTS 185 (2011) (analyzing Simon-Whelan case and its implications for art authentication boards).

only antitrust case against an art authentication board to get that far.¹⁵⁹

Simon's purported Warhol was part of a series of silkscreens on cotton canvas printed in 1965 from an acetate image. The series was similar to a 1964 series that the Board considers authentic, printed from the exact same acetate, but on linen.¹⁶⁰

But the 1965 series was not printed at Warhol's Factory, which was the artist's usual method at the time. Instead, it was printed without Warhol's supervision at an outside printer, using Warhol's acetate and according to his instructions.¹⁶¹ There are other differences between the two series: The 1964 paintings contain backgrounds of various colors, while the 1965 works are uniformly red. And the earlier series contains hand-painted details, whereas the later series does not.¹⁶² Based on its evaluation of these factors and others, the Board denied the authenticity of Simon's painting and of the whole 1965 series. Yet Simon insisted his work was real: After all, his 1965 painting had been previously authenticated by the chairman of the Andy Warhol Foundation, before the formation of the Board.¹⁶³ And another painting from the same 1965 series was not only signed by Warhol but had been selected as the cover image of the catalogue raisonné of his work, which was produced with his cooperation while he was alive.¹⁶⁴ (The lack of a signature on a Warhol is not definitive, and conversely, the Board viewed the presence of a signature as

¹⁵⁹ Swift Edgar, *Standing by Your Man Ray: Troubles with Antitrust Standing in Art Authentication Cases*, 37 COLUM. J.L. & ARTS 247, 249 (2014); cf. *Kramer v. Pollock-Krasner Found.*, 850 F. Supp. 250 (S.D.N.Y. 1995) (granting motion to dismiss in lawsuit against the Pollock-Krasner authentication board).

¹⁶⁰ Richard Dorment, *How to Tell a Warhol from a Fake*, AUSTL. FIN. REV. (Nov. 6, 2009, 11:00 AM), <https://www.afr.com/life-and-luxury/arts-and-culture/how-to-tell-a-warhol-from-a-fake-20091106-iwi03> [<https://perma.cc/HN7V-KN9Y>].

¹⁶¹ Dorment, *supra* note 1.

¹⁶² Reva Wolf, *'What Andy Warhol Did': An Exchange*, N.Y. REV. BOOKS (June 6, 2011), <https://www.nybooks.com/articles/2011/06/09/what-andy-warhol-did-an-exchange> [<https://perma.cc/SD3B-4FQY>].

¹⁶³ Lindsay Pollock, *Case Against Warhol Foundation Withdrawn*, ART NEWSPAPER (Nov. 30, 2010), <https://www.theartnewspaper.com/2010/12/01/case-against-warhol-foundation-withdrawn> [<https://perma.cc/8NUZ-36MG>].

¹⁶⁴ A later incarnation of the catalogue raisonné excluded the picture. *See id.* It is not uncommon for opinions about the authenticity of a work to be revised and for catalogues raisonnés to reflect this. Catalogues raisonnés are known to be fallible (some more than others), *see, e.g.*, Patricia Cohen, *A Modigliani? Who Says So?*, N.Y. TIMES (Feb. 2, 2014), <https://www.nytimes.com/2014/02/03/arts/design/a-modigliani-who-says-so.html> [<https://perma.cc/FR3G-7YU8>], yet they are often the *sine qua non* of authenticity. *See, e.g.*, Cohen, *In Art, Freedom of Expression Doesn't Extend to 'Is it Real?'*, *supra* note 83.

equally insignificant.¹⁶⁵ Warhol could have signed the work the way he might have signed an autograph.)¹⁶⁶

For most artists, it would make perfect sense to deny the authenticity of a painting run off multiple times in a print shop without the artist even being in the room. But Warhol wasn't like most other artists. He made art by assembly line, copying celebrity photographs, Brillo boxes, and cans of soup in the studio he called "The Factory."¹⁶⁷ His subject matter and his technique were depersonalized and commercial. He said he wanted to become "a machine."¹⁶⁸ And by the 1970s, Warhol was becoming increasingly removed from the production of his work.¹⁶⁹ Warhol's printer, Rupert Smith, told a biographer: "He had so much work that even Augusto [the security guard] was doing the painting. We were so busy, Andy and I did everything over the phone. We called it 'Art by Telephone.'"¹⁷⁰ Still, one must consider that Warhol's self-narrative was itself a form of artwork; we should not naively map his statements onto his actual artistic process.

I take no side in the bitter fight over whether Simon's painting was a fake.¹⁷¹ My point is that the very question of whether the painting was real or fake is one that Warhol's narrative of his life and work renders complicated, interesting, and ultimately absurd. Indeed, the disagreement between Simon and the Board (like the art market) turned on resolving the question that Warhol famously and gleefully destabilized. He attacked both overlapping dimensions of authenticity I previously identified: (1) authorship; and (2) originality. Constantly

¹⁶⁵ See *id.* The Board pointed to other factors supporting its decision regarding Simon's painting, including the uniformity of the series, the border, and the atypical paint application for the time. Amended Class Action Complaint at ¶ 169, *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177 (filed Nov. 7, 2007) (reproducing May 18, 2004 letter from the Board to Simon-Whelan).

¹⁶⁶ Shnayerson, *supra* note 156 (quoting Ronald Spencer, former lawyer for the Warhol Authentication Board).

¹⁶⁷ See Adler, *supra* note 51, at 296 (discussing the Factory).

¹⁶⁸ Ben Davis, *The Whitney's Warhol Show Strives to Spotlight His Human Side. But It's His Cynicism That Remains Most Surprising*, ARTNET NEWS (Nov. 26, 2018), <https://news.artnet.com/art-world/andy-warhol-whitney-review-1400113> [<https://perma.cc/ZTW3-MGDV>].

¹⁶⁹ See Dorment, *supra* note 1 (asserting that by "the 1970s Warhol no longer had any sustained involvement in the production of his paintings").

¹⁷⁰ See BOB COLACELLO, *HOLY TERROR: ANDY WARHOL CLOSE UP* 478 (1990) (alteration in original). Simon's supporters argue that the 1965 works are particularly important because, in their view, those works anticipated the mechanical means Warhol would later come to use. See Dorment, *supra* note 160.

¹⁷¹ For an account of the Board's view and sharp denunciations of Dorment's account, see Joel Wachs, Richard Ekstract, Richard Polsky & David Mearns with Richard Dorment, *'What Is an Andy Warhol?': An Exchange*, N.Y. REV. BOOKS (Nov. 19, 2009), <https://www.nybooks.com/articles/2009/11/19/what-is-an-andy-warhol-an-exchange> [<https://perma.cc/3KDD-JZNF>].

disclaiming his participation in his work, reveling in its factory-made, assistant-produced origins,¹⁷² Warhol made the erasure of his authorship the signature of his work. Boasting of his lack of connection with his objects to a group of admiring interviewers who wanted the great artist to speak about the meaning of his work, Warhol replied: “Why don’t you ask my assistant Gerry (Gerard) Malanga some questions? He did a lot of my paintings.”¹⁷³ And Warhol flagrantly repudiated originality and uniqueness, the hallmarks of the authentic. Instead, Warhol celebrated “the simulacrum, the copy, the second-generation image,”¹⁷⁴ and the promise of endless repetition. “I like things to be exactly the same over and over again,” he said.¹⁷⁵ Perhaps the very notion of an “authentic Warhol” is an oxymoron.

In asking whether Simon’s work was a real work of art or a valueless copy, the dispute between Simon and the Warhol Board repeated the question that philosopher Arthur Danto identifies as being the central breakthrough that makes Warhol arguably the most important artist of our era.¹⁷⁶ Danto speaks of Warhol’s Brillo boxes, which looked “exactly like the real cartons one could see in the stockroom of any supermarket in the land.”¹⁷⁷ As Danto famously writes,

The question What is art? had been part of philosophy since the time of Plato. But Andy forced us to rethink the question in an entirely new way. The new form of the ancient question was this: given two objects that look exactly alike, how is it possible for one of them to be a work of art and the other just an ordinary object?¹⁷⁸

The Warhol Board’s decision took Simon’s painting, which looked like other “real” Warhols, and transformed it from a “work of art” into “just an ordinary object.” As Danto might have asked, how was that possible? The disagreement between Simon and the Warhol

¹⁷² See ARTHUR C. DANTO, *ANDY WARHOL* 55 (2009) (“[T]he effect of being machine-made . . . [was] central to Warhol’s aesthetic.”).

¹⁷³ See CAROLINE A. JONES, *MACHINE IN THE STUDIO: CONSTRUCTING THE POSTWAR AMERICAN ARTIST 199–200*, 422 n.35 (1996).

¹⁷⁴ See TONY SCHERMAN & DAVID DALTON, *POP: THE GENIUS OF ANDY WARHOL* 17 (2009).

¹⁷⁵ HAL FOSTER, *THE RETURN OF THE REAL: THE AVANT-GARDE AT THE END OF THE CENTURY* 131 (1996). When Warhol heard that the *Mona Lisa* was traveling to New York in 1963, he said, “Why don’t they have someone copy it and send the copy, no one would know the difference.” Jerry Saltz, *Christie’s Is Selling This Painting for \$100 Million. They Say It’s by Leonardo. I Have Doubts. Big Doubts.*, *VULTURE* (Nov. 14, 2017), <https://www.vulture.com/2017/11/christies-says-this-painting-is-by-leonardo-i-doubt-it.html> [<https://perma.cc/FRS6-5MNF>]. No doubt he would have loved the rise of exhibition copies.

¹⁷⁶ Danto wrote that the present will be dubbed the “Age of Warhol.” See ARTHUR C. DANTO, *ENCOUNTERS & REFLECTIONS: ART IN THE HISTORICAL PRESENT* 293 (1990).

¹⁷⁷ See DANTO, *supra* note 172, at 61.

¹⁷⁸ See *id.* at 62. Danto continued, asking, “What is the difference between two things, exactly alike, one of which is art and one of which is not?” See *id.* at 23.

Board “forced us to rethink” the key question posed by Andy’s work. I therefore submit we should read the dispute itself as a “real,” posthumous work of art created by Andy Warhol.

D. *Photography and the Invention of Authenticity*

“[A]uthenticity is not reproducible[.]”

—Walter Benjamin¹⁷⁹

Can a photograph ever be authentic? *Sobel v. Eggleston*,¹⁸⁰ a 2013 case in the Southern District of New York, exposed a question that has haunted the genre of photography since its inception: Is the concept of authenticity even applicable to this medium?

The *Sobel* court confronted the peculiar convention of “limited editions” in the photography market. Sobel was one of the largest collectors of acclaimed photographer William Eggleston. As is the custom in the photography market, Sobel bought Eggleston photographs from “limited editions,” numbered (usually as fractions) by the artist to indicate the restricted number of prints.¹⁸¹ But in 2012 Eggleston reprinted several old images to be auctioned at Christie’s. The Christie’s sale aimed to establish a new market for Eggleston’s photography, appealing not to traditional photography collectors, but to deep-pocketed collectors in the booming contemporary art world.¹⁸² (The gambit worked; thirty-six reprints sold for \$5.9 million, setting a record for Eggleston’s work.)¹⁸³ Eight Christie’s reprints copied the exact same images that Sobel owned.¹⁸⁴ Still, the new prints differed from Sobel’s in size and format. Sobel owned 16 x 20 dye transfer prints produced from negatives or slides.¹⁸⁵ In contrast, Christie’s sold digital inkjet prints that were 44 x 60¹⁸⁶ (big, the way the contemporary market likes its art).¹⁸⁷

¹⁷⁹ BENJAMIN, *supra* note 20, at 243 n.2.

¹⁸⁰ No. 12 Civ. 2551, 2013 WL 1344712 (S.D.N.Y. Mar. 28, 2013). For a superb student-written article on the case, see Ava McAlpin, *Limiting Limited Edition Laws* (2013) (unpublished manuscript) (on file with author).

¹⁸¹ See *Sobel*, 2013 WL 1344712, at *1 (“[Sobel’s] belief that the works were limited editions was a principal factor in his decision to purchase them.”).

¹⁸² See Conor Risch, *Eggleston’s First-Ever Large Pigment Prints Earn 5.9 Million at Auction*, PHOTO DIST. NEWS (Mar. 13, 2012), <https://www.pdnonline.com/news/egglestons-first-ever-large-pigment-prints-earn-5-9-million-at-auction> [<https://perma.cc/G7AS-HXB4>].

¹⁸³ See *id.* (describing the sales amounts of multiple works that surpassed previous Eggleston auction records).

¹⁸⁴ *Sobel*, 2013 WL 1344712, at *1.

¹⁸⁵ Dye transfer allows for deep color saturation, a hallmark of Eggleston’s work. See *id.* (explaining that Eggleston previously faced size limitations imposed by the dye-transfer process).

¹⁸⁶ *Id.*; see also Risch, *supra* note 182.

¹⁸⁷ See Risch, *supra* note 182.

Sobel sued Eggleston. How could a “limited edition” be reprinted? To him, the reprints “diminished the monetary value and uniqueness of the Limited Edition works.”¹⁸⁸ But Sobel lost on both his statutory and fraud claims.¹⁸⁹ At issue were provisions of New York’s Arts and Cultural Affairs Law that, like twelve other state laws, regulate limited editions in art.¹⁹⁰ According to the court, New York law “contemplate[s] and permit[s]” the creation of subsequent limited editions from previous ones.¹⁹¹ Eggleston was free to keep reprinting to his heart’s content, a practice that is common in the art market.¹⁹²

The case laid bare a conundrum inherent in the medium of photography and its market. What distinguishes an authentic photograph from a copy? The seeming authorlessness of the medium has been a source of anxiety since its invention (and a topic that even troubled the Supreme Court in one of its first encounters with photography).¹⁹³ Equally troublesome is photography’s built-in capacity for endless reproduction. As Walter Benjamin wrote, “From a photographic negative . . . one can make any number of prints; to ask for the ‘authentic’ print makes no sense.”¹⁹⁴ Why would anyone spend hundreds of thousands of dollars to buy a “real” Eggleston when we could so easily make an identical one ourselves with the help of a talented (albeit unscrupulous) printer? The medium by its nature permits limitless reproduction, copies with no originals. The convention of the limited edition creates artificial scarcity, but even that is a ruse, as the Eggleston case shows. Photography, more than any medium, seems fundamentally discordant with the concept of authenticity.

¹⁸⁸ *Sobel*, 2013 WL 1344712, at *1.

¹⁸⁹ *Id.* at *4–5.

¹⁹⁰ *See id.* at *3–4 (analyzing Sobel’s statutory claim and granting Eggleston’s motion to dismiss); *see also* McAlpin, *supra* note 180 (examining other state provisions). *See generally* N.Y. ARTS & CULTURE AFF. LAW § 15.01 (McKinney 2012).

¹⁹¹ *Sobel*, 2013 WL 1344712, at *3.

¹⁹² *See* Mike C. Johnston, *Sobel vs. Eggleston: The Decision*, THE ONLINE PHOTOGRAPHER (Mar. 30, 2013), https://theonlinephotographer.typepad.com/the_online_photographer/2013/03/sobel-vs-eggleston-the-decision.html [<https://perma.cc/6CVT-BTKJ>] (describing the decision as following “standard practice”).

¹⁹³ In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Court considered and rejected (albeit not across the board) the argument that a photograph is “the mere mechanical reproduction . . . of some object . . . and involves no originality of thought or any novelty in the intellectual operation” *See id.* at 59–60 (determining that the plaintiff’s photograph is an original work of art worthy of copyright protection).

¹⁹⁴ BENJAMIN, *supra* note 20, at 224. This quality of photography explains Benjamin’s hopes that photography could destroy the aura. In a similar vein, Sontag wrote, “The traditional fine arts rely on the distinction between authentic and fake, between original and copy, between good taste and bad taste; the media blur, if they do not abolish outright these distinctions.” SUSAN SONTAG, *ON PHOTOGRAPHY* 149 (1977).

Yet the art market still clings to the concept. And lots of money rides on this. An Andreas Gursky digital photograph, *Rhine II*,¹⁹⁵ sold for \$4.3 million in 2011.¹⁹⁶ (Even though it was part of an edition of six, the seller pointed to its rarity to explain the price, comparing it to a “one-off painting.”)¹⁹⁷ One of Richard Prince’s prints of *Spiritual America*, from an edition of ten, sold for \$3.9 million.¹⁹⁸ Nowhere is this passion for originality more evident than in the market’s obsession with the “vintage print” (made close to the time that the image was first captured), which scholar Rosalind Krauss has described as evidence of our “clinging to a culture of originals which has no place among the reproductive mediums.”¹⁹⁹

It is no accident that photography has become an obsession, a subject, and a prototype for contemporary artists, for whom the critique of authorship, uniqueness, and originality has become an abiding theme. Ironically, the art world can’t get enough of them. For example, the contemporary painter Wade Guyton makes works that address their machine-made, easily replicated condition—large canvases printed on inkjet printers and photocopiers.²⁰⁰ In 2014, as the spring auctions rolled around, Guyton was reportedly disgusted by the high estimate (\$2.5–3.5 million) Christie’s gave for his 2005 flame painting “Untitled (Fire, Red/Black U).”²⁰¹ Using his Instagram account, Guyton tried to torpedo the sale. He took the original file for “Untitled” and began to print multiple copies of the formerly unique painting, posting pictures on Instagram as his printer spewed out more and more versions of the painting, strewn across his studio floor. The images of the \$3.5 million painting being produced at the click of the button were accompanied by hashtags like #harddayatthestudio and

¹⁹⁵ Maev Kennedy, *Andreas Gursky’s Rhine II Photograph Sells for \$4.3m*, *GUARDIAN* (Nov. 11, 2011), <https://www.theguardian.com/artanddesign/2011/nov/11/andreas-gursky-rhine-ii-photograph> [<https://perma.cc/3Q6B-DJC6>].

¹⁹⁶ See Jakob Schiller, *Really? \$4.3 Million for That Photo?*, *WIRED* (Nov. 11, 2011, 2:34 PM), <https://www.wired.com/2011/11/really-4-3-million-for-that-photo> [<https://perma.cc/DRS7-FETJ>]. Given Gursky’s embrace of massive size and complex technique, his work can (controversially) be identified as something between a photograph and a contemporary painting. See *id.*

¹⁹⁷ *Id.*

¹⁹⁸ Richard Prince, *Spiritual America*, *CHRISTIE’S*, <https://www.christies.com/en/lot/lot-5792590> [<https://perma.cc/9YR2-4ZRD>].

¹⁹⁹ See KRAUSS, *supra* note 65, at 52 (discussing the price differential between lifetime and posthumous or vintage prints).

²⁰⁰ Note however that Guyton’s work depends on printer errors and other mistakes in the printing process. No two are exactly alike. Jerry Saltz, *Saltz: Wade Guyton May Be Trying to Torpedo His Own Sales*, *VULTURE* (May 12, 2014), <https://www.vulture.com/2014/05/wade-guyton-may-be-torpedoing-his-own-sales.html> [<https://perma.cc/H7JS-B4TZ>].

²⁰¹ See *id.*

#deflationarypolicy.²⁰² Guyton showed his potential to flood the market in an instant with real-fake paintings.²⁰³



Wade Guyton's Instagram Photo Showing His Printer Spewing Copies of His Formerly Unique Inkjet-Printed Painting Untitled (Fire, Red/Black U)

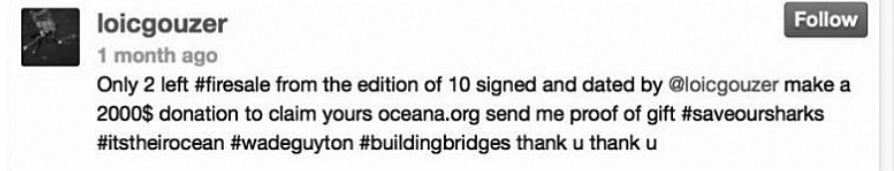
But oddly, the market didn't mind. The "original" painting sold for \$3.525 million, exceeding its high estimate.²⁰⁴ The copies seem to have enhanced the price. Christie's thought they would; the auction house appropriated Guyton's anti-Christie's images and used them on its website to promote the sale. After the auction, Loic Gouzer from Christie's, who had organized the sale, taunted Guyton by posting his own appropriated images of Guyton's work on Instagram, spelling out

²⁰² See *id.*; Wade Guyton (@burningbridges38), INSTAGRAM (May 7, 2014), <https://www.instagram.com/p/nts0LN8IJ> [<https://perma.cc/WH8N-N6GN>].

²⁰³ See Saltz, *supra* note 200.

²⁰⁴ Wade Guyton, *Untitled* (painting), CHRISTIE'S, <https://www.christies.com/lot/lot-5792587> [<https://perma.cc/Y4KD-RRM7>].

“Thank U” and tagging Guyton.²⁰⁵ And on the heels of the incident, a new record was set for a Guyton work in a sale at Art Basel.²⁰⁶



Christie’s Loic Gouzer’s Instagram, Showing His Unauthorized Copies of Guyton’s Painting, Altered to Say “THANK U”

The Guyton story, like the Eggleston case, provides more evidence that we should reconsider the traditional instinct that copies dilute the value of the original.²⁰⁷ Sobel’s lawsuit against Eggleston

²⁰⁵ See Jenni Avins, *Two of the Art World’s Hottest Names Are Fighting on Instagram*, QUARTZ (May 23, 2014), <https://qz.com/213161/art-christies-loic-gouzer-wade-guyton-are-fighting-on-instagram> [<https://perma.cc/8J3F-T6S5>] (detailing Gouzer’s response to Guyton’s actions).

²⁰⁶ See Carol Vogel, *At Art Basel, Works with a Museum Presence*, N.Y. TIMES (June 19, 2014), <https://www.nytimes.com/2014/06/20/arts/design/at-art-basel-works-with-a-museum-presence.html> [<https://perma.cc/J84N-GYQB>] (noting that the prices for Guyton’s artworks were “stronger than ever”).

²⁰⁷ This instinct underlay the plaintiffs’ theories in the antitrust cases brought against the Warhol and Pollock-Krasner foundations. See *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423, 2009 WL 1457177, at *2–3 (S.D.N.Y. May 26, 2009) (claiming the defendant “routinely denies the authenticity of a certain percentage of

was based on this traditional instinct (as is the very concept of the limited edition). But market watchers suggest Sobel was wrong: The copies increased the value of his “originals.” As my previous work has argued, in art (and in other realms),²⁰⁸ unauthorized copies can sometimes help the market for an original work, or even create a market that did not exist before the copy.²⁰⁹ But this dynamic directly defies a central premise of copyright law: that unauthorized copying harms the market for original works and must be prohibited in order to incentivize creativity.

E. *Authenticity by Certificate*

Renowned sculptor Dan Flavin made works out of ordinary hardware store fluorescent light bulbs, shown in their original state without alteration. Some of his most famous works consist of one tube leaning against a wall; others involve more extensive arrangements.²¹⁰ Flavin represented a pivotal moment in art history (the rise of Minimalism and arguably the end of Modernism), and you have probably seen his works glowing in museums. The record at auction for a Flavin sculpture is a bit over \$3 million (paid for one version of an editioned work

Warhols, particularly when several from the same series are submitted”); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 253 (S.D.N.Y. 1995) (accusing the defendant of “exclud[ing] certain authentic Pollock pieces from the accepted canon of his works, and thereby from the market, in an attempt to increase the value of Pollock paintings owned by the Foundation”).

²⁰⁸ See generally Adler & Fromer, *supra* note 21, at 477 (arguing that memes owe their very existence to unauthorized copying).

²⁰⁹ See, e.g., Adler, *supra* note 15, at 351 (“[C]opying in art often seems to help the market for the original, or even to create a market that did not exist before the copy.”); Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1469–70 (2019) (describing the successful sales of original images after they had been appropriated); see also Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 616 (2015) (arguing for the assessment of market benefits as well as harms in fair use law).

²¹⁰ See, e.g., *Dan Flavin: The Architecture of Light*, GUGGENHEIM MUSEUM, <https://www.guggenheim.org/exhibition/dan-flavin-the-architecture-of-light> [<https://perma.cc/GAT7-5TBR>] (describing the one-man retrospective at Guggenheim). For an authoritative account of Flavin, see JAMES MEYER, *MINIMALISM: ART AND POLEMICS IN THE SIXTIES* (2001) (exploring the practices of Flavin and other key minimalist artists). See also Tiffany Bell, *Fluorescent Light as Art*, in *DAN FLAVIN: A RETROSPECTIVE* 109 (Michael Govan & Tiffany Bell eds., 2004) (catalogue essay about a Flavin retrospective); James Meyer, *The Minimal Unconscious*, *OCTOBER*, Fall 2009, at 141 (analyzing struggles over the interpretation and installation of Flavin’s works).

that exists in several permutations).²¹¹ His works typically come in editions of three or five.²¹²

Because the works are made up of everyday materials, you and I could make our own fake “Flavins” by buying vintage fluorescent lights and arranging them according to the specifications of his sculptures.²¹³ But unlike our copies, a “real” Flavin is accompanied by an artist’s certificate of authenticity, which differentiates it from copies.

Let’s say you own a Dan Flavin and you’re driving down the highway, windows open, with your sculpture in the back seat and its certificate of authenticity in the front. If your sculpture flies out the window, but the certificate stays in the car, you’ve still got your million-dollar artwork.²¹⁴ You can always remake it by getting more fluorescent tubes. After all, a real Flavin will eventually burn out, and you’ll have to get more bulbs. But if your certificate flies out the window and the sculpture is still in the back, now all you’ve got is . . . some light bulbs.²¹⁵ Still intact, still beautiful (or not), the sculpture is now destroyed. The certificate transforms fungible hardware store lightbulbs into ground-breaking art.

This seems preposterous to some. In 1992, lawyer Stephen Susman and his wife bought a Flavin sculpture, *Untitled*, from 1964. But at some point, Susman lost the certificate, even though he still had the “sculpture”: three horizontal bulbs. When he attempted to consign the sculpture to Christie’s in 2006, the auction house refused it, telling him it was worthless without a certificate.²¹⁶

²¹¹ Flavin’s *Alternate Diagonals of March 2, 1964 (To Don Judd)* sold in 2014 at Sotheby’s New York for \$3,077,000 USD. *Dan Flavin*, MUTUALART, <https://www.mutualart.com/Artist/Dan-Flavin/DF7056B7CAB7F691> [<https://perma.cc/2ALU-VK49>]. See also Nord Wennerstrom, *\$30.1 Warhol Leads Sotheby’s May 14, 2014 Contemporary Art Sale*, NORD ON ART (May 14, 2014), <https://nordonart.wordpress.com/2014/05/14/28-7-million-richter-leads-sothebys-may-14-2014-contemporary-art-sale> [<https://perma.cc/5KHU-HVA3>].

²¹² See Nick Paumgarten, *Dealer’s Hand*, NEW YORKER (Nov. 24, 2013), <https://www.newyorker.com/magazine/2013/12/02/dealers-hand> [<https://perma.cc/WZM9-2VA2>].

²¹³ It is important to note that changes in the lighting industry mean that contemporary fluorescents don’t look like Flavins. To make a Flavin today, you don’t need the original bulbs, but you do need the original technology; the Flavin estate has a supplier. This raises a tension between the need to have the works look like Flavins while remaining true to his concept of relying on commonly available materials. See *id.* (discussing how Flavin’s estate funnels all bulb orders through art dealer David Zwirner).

²¹⁴ See *id.* (“If you have a Flavin and no certificate, it is no longer a Flavin. It is a fluorescent light.”).

²¹⁵ Legacy Russell, *Amy Adler*, BOMB (Mar. 12, 2013), <https://bombmagazine.org/articles/amy-adler> [<https://perma.cc/DQ5N-C2QP>].

²¹⁶ Complaint at 2, *Susman v. Dan Flavin, Ltd.*, No. 603180/2007 (N.Y. Sup. Ct. Sep. 25, 2007).

Susman approached the Dan Flavin estate and asked them to issue a replacement certificate of authenticity. When they refused, he sued them, arguing breach of the purchase agreement as well as promissory estoppel.²¹⁷ In the Flavin estate's view, Susman's request for a new certificate made no sense; it was as if an owner who lost a painting asked the artist to paint him a new one. The dispute between Susman and Flavin exemplifies a dilemma in contemporary art.²¹⁸ When the work bears no trace of the artist's hand and is fabricated with industrial materials so commercial and mass-produced that they can be pulled from the shelf of a local hardware store, what determines a work's authenticity? Many artists use certificates of authenticity to answer this question, but the practices around certificates vary significantly from artist to artist.²¹⁹

Ultimately the parties settled the lawsuit on undisclosed terms.²²⁰ Over the years, I often wondered what had become of Susman's "sculpture," now inauthentic, that had once been a real Dan Flavin? And after searching, I'm pretty sure that I found out. I believe it now hangs in the Yale University Art Gallery, where it has magically come back to life as real again. I discovered that in the same year the case was settled, Susman donated a 1964 Flavin to the Yale Art Gallery.²²¹

²¹⁷ *Id.*; see also Greg Allen, *The Dark Side of Success*, N.Y. TIMES (Jan. 2, 2005), <https://www.nytimes.com/2005/01/02/arts/design/the-dark-side-of-success.html> [<https://perma.cc/3VQA-HTZ7>] ("Christie's won't even consider a Flavin sculpture unless it's accompanied by an original document.").

²¹⁸ Collector Roderic Steinkamp filed a lawsuit against Rhona Hoffman over a certificate for a work by Sol LeWitt, one of Flavin's contemporaries. See Daniel Grant, *Collector Files Lawsuit Over Lost LeWitt Paperwork*, ARTNEWS (June 5, 2012, 11:30 AM), <https://www.artnews.com/art-news/news/collector-files-lawsuit-over-lost-lewitt-paperwork-578> [<https://perma.cc/4L3H-68K9>]. The Complaint alleged that the gallery lost the work's accompanying certificate of authenticity, describing the certificate as "a unique and irreplaceable document that cannot be generated anew or replaced" and that is "required for the sale of the Wall Drawing." See Complaint at 3–4, *Steinkamp v. Hoffman*, No. 651770/2012, 2012 WL 1941149 (N.Y. Sup. Ct. May 22, 2012). The parties settled on undisclosed terms. Stipulation of Discontinuance, *Steinkamp v. Hoffman*, No. 651770/2012, 2012 WL 1941149 (N.Y. Sup. Ct. July 16, 2012). LeWitt's Wall Drawings are textual works: a set of instructions contained in the certificate of authenticity provides guidance to the workers installing the piece. See Henry Lydiate, *Authenticating Sol LeWitt*, ART MONTHLY, July–Aug. 2012, at 41 (describing the typical LeWitt certificate).

²¹⁹ See generally Martha Buskirk, *Certifiable*, in IN DEED: CERTIFICATES OF AUTHENTICITY IN ART 98 (Susan Hapgood & Cornelia Lauf eds., 2011) (discussing the use of certificates by various artists). For discussions of LeWitt's use of certificates, see Kirk Pillow, *Did Goodman's Distinction Survive LeWitt?*, 61 J. AESTHETICS & ART CRITICISM 365 (2003). And for a description of the approach of Félix González-Torres, see Joan Kee, *Félix González-Torres on Contracts*, 26 CORNELL J.L. & PUB. POL'Y 517 (2017).

²²⁰ See Appearance Detail, *Susman v. Dan Flavin, Ltd.*, No. 603180/2007 (N.Y. Sup. Ct. Dec. 3, 2008).

²²¹ *Dan Flavin, American 1933–1996: Untitled*, YALE UNIV. ART GALLERY, <https://artgallery.yale.edu/collections/objects/133544> [<https://perma.cc/4Y33-FHBQ>].

It matches the exact description of the work at issue in the lawsuit. Below is a copy of the certificate that Susman lost and below that is an entry in the Yale Art Gallery catalogue showing Susman's gift to Yale. Assuming I'm right, this settlement suggests another facet of the unstable nature of authenticity: A work can be inauthentic in one setting and authentic in another.

03/18/2003 00:44 FAX

1964.032

02

THE PACE GALLERY

untitled

1964

blue, yellow and red fluorescent light

8 1/4 x 48 x 3 3/4 inches

edition number 4 of 5

Pace #22581.04



This is a certificate only

Dan Flavin

Please keep this certificate in a safe place. The sculpture cannot be sold without it and replacement certificates cannot be made. A photocopy cannot serve as a valid certificate.

32 EAST 57TH STREET NEW YORK CITY 10022
PHONE: (212) 421-5292 FAX: (212) 421-5883

03/14/03 12:38 TX/RX NO.3477 P.802

Copy of Susman's Lost Flavin Certificate for *Untitled* (1964)

MODERN AND CONTEMPORARY ART



< > 1 of 2

Photo credit: Yale University Art Gallery

© Dan Flavin / Artists Rights Society (ARS), New York

Full-size image not available for download. Please contact Rights and Reproductions.

Artist: Dan Flavin, American, 1933–1996

Untitled

1964

Blue, yellow and red fluorescent light

20.955 x 121.92 x 9.525 cm (8 1/4 x 48 x 3 3/4 in.)

Gift of Ellen and Stephen Susman, B.A. 1962

2008.153.1

Culture: American

Period: 20th century

Classification: Sculpture

Status: Not on view

Bibliography:

"Acquisitions 2009," *Yale University Art Gallery Bulletin* (2009): 168, ill.

Note: This electronic record was created from historic documentation that does not necessarily reflect the Yale University Art Gallery's complete or current knowledge about the object. Review and updating of such records is ongoing.

Yale University Catalogue Entry for Dan Flavin, *Untitled* (1964), Donated by Steven Susman After Settling His Lawsuit

Recent issues regarding the authenticity of Flavins reveal another unstable aspect of the concept. Not only can a work go from inauthentic to real based on its institutional setting, but some authentic works may be more “real” than others. A few years ago, the Flavin estate decided after the artist’s death to “complete” sculptures from editions that Flavin had already started during his lifetime but had not fully realized.²²² For example, if a work was part of an edition of five and he had sold three of the five during his lifetime, the estate will produce and sell the remaining two. Is there a difference between a Flavin produced during his life and one completed after his death? The estate’s position is that they are the same; the logic of automation that informs Flavin’s work would seem to support this view. Yet two of Flavin’s earlier dealers criticized the practice, viewing it as violating an understanding that unrealized editions would not be completed after the artist’s death.²²³ In any event, there is a sense from some market participants that prices for the works with an estate-signed certificate would be higher if they were accompanied by an artist-signed certificate.²²⁴ Zwirner Gallery, however, states that this is

²²² See Paumgarten, *supra* note 212 (explaining the estate’s reversal from its previous position that there would be no posthumous work).

²²³ See *id.* (expressing Paula Cooper’s annoyance and also quoting Douglas Baxter, the president of Pace Gallery, stating that it was the gallery’s understanding that there would be no posthumous works).

²²⁴ Michael Govan, the director of LACMA, stated ten years ago that he believed such a split would emerge, predicting that “if you own a 1960s mercury Flavin fixture, which is an

untrue, and that there is no price differential.²²⁵ As a general art market matter for other artists, posthumous editions tend to sell for thirty percent less than lifetime produced works, but the price differential between lifetime and posthumous works varies from artist to artist.²²⁶ The fact that there is a market for Flavin's with estate-signed certificates demonstrates that such works are considered authentic. But, if two works in similar condition have potentially different values, it suggests that authenticity is less of a black or white question and more like a spectrum, and that works with certificates signed by the artist are considered "more" authentic by the market than works with certificates signed by the estate. If so, the market would appear to be fetishizing the very destabilization of authenticity that characterized Flavin's art.

As the case studies so far have shown, the norm of authenticity has no stable and universal principles. Instead, the cases suggest that we can disaggregate the norm into a set of discrete, unrelated, and frequently conflicting practices.²²⁷ These practices vary radically based

artifact of the time with a perfect certificate, the market is going to decide it is more valuable." *Lift on Ban for Posthumous Dan Flavin Sculptures Raises Questions as to Artist's True Wishes and the Effect on the Present Market for His Works*, CENTER FOR ART LAW (June 17, 2013), <https://itsartlaw.org/2013/06/17/lift-on-ban-for-posthumous-dan-flavin-sculptures-raises-questions-as-to-the-artists-true-wishes-and-the-effect-on-the-present-market-for-his-works> [<https://perma.cc/WD8A-6H6G>].

²²⁵ Anna Louie Sussman, *How Dead Artists Continue Producing Work*, ARTSY (June 7, 2018, 6:39 PM), <https://www.artsy.net/article/artsy-editorial-dead-artists-continue-producing-work> [<https://perma.cc/DWS2-PPAJ>] (quoting Kristine Bell, noted Flavin scholar and senior partner at David Zwirner Gallery, that "there is no price difference for Flavin's work from before and after his death").

²²⁶ *Id.*; see also Krauss, *supra* note 65 (discussing debates that vary artist to artist about whether posthumous works are considered authentic). Typically, the market for "authentic" posthumously produced works is less vibrant than that for lifetime casts or prints. This is clearly true in the market for vintage photographs. For example, the auction record for a single print by photographer Diane Arbus was achieved in 2015 for a lifetime-produced print of *Child with a toy hand grenade in Central Park, N.Y.C.*, 1962 for \$785,000. See Diane Arbus, *Child with a toy hand grenade in Central Park, N.Y.C.*, CHRISTIE'S (May 11, 2015), <https://www.christies.com/lot/lot-diane-arbus-1923-1971-child-with-a-toy-5895980> [<https://perma.cc/52Y2-MPBQ>]. By contrast, the highest price for a posthumously produced version of the same image—printed by the only person authorized to produce posthumous Arbus prints, Neil Selkirk—sold for \$229,000. See Diane Arbus, *Child with a toy hand grenade in Central Park, N.Y.C.*, CHRISTIE'S (Oct. 8, 2007), <https://www.christies.com/en/lot/lot-4972089> [<https://perma.cc/NWK2-WGZL>].

²²⁷ In a rich and fascinating article, Professor Laura Heymann explores the meaning of the term "authenticity," viewing it as bearing multiple meanings depending on context and intended audience. See Laura A. Heymann, *Dialogues of Authenticity*, 67 *STUD. L. POL. & SOC'Y* 25, 28–33 (2015) (arguing that the definition of the term "authentic" hinges on context and community). Writing about authenticity across multiple fields, including art, Heymann views authenticity as "inherently community-based or dialogical." See *id.* at 41. In my view, dialogue and designation, while important, are just two of multiple discrete and unrelated practices that inform the meaning of the term authenticity in the art market.

on which artist, genre, and period is at issue, the materials used, the institutional setting of the work (museum or market), whether the artist is living or dead, the artist's potentially shifting views about authenticity, and on changing views about the nature of art itself. And, as we will see below, the norm of authenticity is subject to even further volatility.

F. *The Meaning of "Preservation": Authenticity over Time*

There is a deeper instability inherent in the concept of authenticity. The meaning of the term fluctuates not only artist by artist and in various artistic contexts, but also across cultures and over time. This instability is relevant not merely to artworks but to all cultural artifacts. There is no uniform agreement about how an authentic object should be preserved.

For a glimpse of how our notion of authenticity is culturally determined, consider the seeming peculiarity (to Western eyes) of the Japanese approach to preserving the great Shinto Shrine at Ise, originally built in 690 A.D.²²⁸ Every twenty years, the Shrine is ritually dismantled and rebuilt, using the same type of wood, on an adjacent plot of land.²²⁹ It has now been completely reconstructed sixty-two times since 690 A.D.²³⁰ This approach presents a radically different vision of authenticity. Rather than preserve the building as Westerners might, by repairing and maintaining the original materials, the Shinto view is that the best way to approximate and experience the "real" shrine is to make it new, "preserving" it in its original state by destroying and recreating it.²³¹

²²⁸ While completely rebuilding a shrine was once the common practice, "Ise is the only shrine to carry the tradition forward." HOWARD MANSFIELD, *THE SAME AX, TWICE: RESTORATION AND RENEWAL IN A THROWAWAY AGE 4* (2000).

²²⁹ See Marilena Vecco, *A Definition of Cultural Heritage: From the Tangible to the Intangible*, 11 J. CULTURAL HERITAGE 321, 324 (2010); Estelle A. Maré, *Creation and Re-Creation: The Origins and Preservation of the Shinto Shrines at Ise, Japan, and the Abbey Church of St. Michael at Hildesheim, Germany*, 11 RELIGION & THEOLOGY 161, 172–73 (2004) (discussing the historical memory that is continuously rekindled by the regular reconstruction of the Ise Shrine).

²³⁰ See Rachel Nuwer, *This Japanese Shrine Has Been Torn Down and Rebuilt Every 20 Years for the Past Millennium*, SMITHSONIAN MAG. (Oct. 4, 2013), <https://www.smithsonianmag.com/smart-news/this-japanese-shrine-has-been-torn-down-and-rebuilt-every-20-years-for-the-past-millennium-575558> [<https://perma.cc/7RP2-ENAF>] (highlighting the cultural importance of the reconstruction); *Rituals and Ceremonies*, ISE JINGU, <https://www.isejingu.or.jp/en/ritual/index.html#sengu> [<https://perma.cc/HWS4-93EM>] ("The first Shikinen Sengu of Naiku was conducted in 690, in the era of the 41st emperor Jito. The latest Shikinen Sengu conducted in 2013 was sixty-second.").

²³¹ See Daniel Ganninger, *The Japanese Shrine That Is Rebuilt Every 20 Years*, MEDIUM (July 2, 2020), <https://medium.com/knowledge-stew/the-japanese-shrine-that-is-rebuilt->

These competing visions of authenticity are ancient in origin. They date back to Plutarch who proposed the famous paradox of the Ship of Theseus in 75 A.D. Plutarch wrote,

The ship wherein Theseus and the youth of Athens returned had thirty oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question as to things that grow; one side holding that the ship remained the same, and the other contending that it was not the same.²³²

Which is the authentic ship of Theseus? Is it the “original,” now lost as each of the planks has been replaced, or the one rebuilt from new wood, like the Shrine at Ise?

Cady Noland’s rotted log cabin presents a modern-day version of the Ship of Theseus puzzle.²³³ The log cabin was “restored” by replacing the old wood with new—or, to use Plutarch’s terms, by “t[aking] away the old planks” and “putting in new and stronger timber in their place.”²³⁴ To continue with Plutarch’s language, we could say the lawsuit was between “one side [the defendants] holding that the [log cabin] remained the same, and the other [Cady Noland] contending that it was not the same.”²³⁵

In the seventeenth century, Thomas Hobbes took up Plutarch’s puzzle and added a variation: What if all the original planks of the ship of Theseus were kept after they were replaced, and then a second ship was built out of all the original parts? Now would there be two ships of Theseus? Which ship, if either, is the original, the authentic one?²³⁶

Present-day art conservators and curators repeatedly confront similar dilemmas. Controversies swirl around restoration and preservation. For example, conservators fought bitterly over the 1990 “conservation”—some say “defacement”—of Michelangelo’s Sistine

every-20-years-4882ce9a1b0f [https://perma.cc/HY2C-HCV8] (describing temple rebuilding as representing “the Shinto belief of death and renewal of nature”).

²³² PLUTARCH, *Theseus*, in PLUTARCH’S LIVES 1, 21 (A.H. Clough, ed., John Dryden, trans., Boston, Little, Brown & Co. 1864).

²³³ See *supra* Part II.A for a discussion of Cady Noland’s *Log Cabin Façade* and the surrounding lawsuit.

²³⁴ PLUTARCH, *supra* note 232, at 21.

²³⁵ *Id.*

²³⁶ Thomas Hobbes, ELEMENTS OF PHILOSOPHY pt. 2, ch. 11, § 7 (1656), reprinted in THE COLLECTED WORKS OF THOMAS HOBBS 136–37 (Sir William Molesworth ed., Routledge 1992).

Ceiling.²³⁷ The ceiling had been covered with dirt and soot that had built up over the centuries.²³⁸ The conservators claimed to reveal the work the way Michelangelo had intended it; the surprisingly bright color of the ceiling that they unearthed presented a new way of thinking about the artist, suggesting that he was far more interested in color than we had previously known.²³⁹ Critics charged that the restorers had destroyed the ceiling; they stripped it too far, removing layers of dark shading that Michelangelo had intended to modulate the forms and deepen the sculptural quality of the work.²⁴⁰

A series of problems arises from this example: Which vision of restoration was the truer approximation of the artist's intent? And should the artist's intent be the guide of what is authentic? Even if that were the case, we must acknowledge that the artist's intent is often unstable or unknown.²⁴¹ I have previously argued for the unpopular position that instead of focusing on the artist's intent, we should consider focusing on making the artwork the best it can now be.²⁴²

After all, some of our most cherished works of art depend on a fiction of authenticity; modern-day preferences shape our attitudes toward restoration in ways that might be said to distort rather than preserve the past. Consider Greek sculpture. We display it as white, the color we associate with statues of classical antiquity, but we know that in ancient Greece these sculptures were vibrantly painted.²⁴³ We would be shocked if we were to "restore" a sculpture's painted surface to the way the Greeks intended it. It would look "fake" to our modern eyes. As art historian Rosalind Krauss observes: "[O]ne is irritated by

²³⁷ For a vehement critique of the restoration, see JAMES BECK & MICHAEL DALEY, *ART RESTORATION: THE CULTURE, THE BUSINESS AND THE SCANDAL* (1993).

²³⁸ Penelope Greene, *Gianluigi Colalucci, Who Showed Michelangelo's True Colors, Dies at 91*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/04/05/obituaries/gianluigi-colalucci-dead.html> [<https://perma.cc/5F7Z-7H8A>].

²³⁹ *Id.* (describing the lead conservator of the Sistine Chapel as having revealed "a new Michelangelo" interested in vivid color to the world).

²⁴⁰ Michael Kimmelman, *Finding God in a Double Foldout*, N.Y. TIMES, Dec. 8, 1991 (§ 7), at A11 (describing "critics who fueled public doubts about whether the transformation of the frescoes on the ceiling from their famously darkened state into paintings of brilliant color betrayed Michelangelo's intentions").

²⁴¹ See Adler, *supra* note 35, at 584–99 (arguing that intent is neither knowable nor relevant to the meaning of contemporary art).

²⁴² Adler, *supra* note 51, at 271, 275. But see Richard Serra, *Art and Censorship*, 17 CRITICAL INQUIRY 574, 576–77 (1991) (arguing that protecting moral rights, and thus the artist's intent, is essential to maintaining the integrity of artworks).

²⁴³ Rosalind Krauss, *Changing the Work of David Smith*, ART AM., Sept.–Oct. 1974, at 30, 31; Gisela M.A. Richter & Lindsley F. Hall, *Polychromy in Greek Sculpture*, 2 METROPOLITAN MUSEUM ART BULL. 233, 233–35 (1944) (addressing Greek sculpture specifically). See also Adler, *supra* note 51, at 276 (arguing that the concept of a solo, authoritative artist stems from a romantic fantasy about creativity).

this reminder that Greek sculpture was, after all, originally painted, that what one has come to love is a kind of fiction produced by the erasures of time and expurgative criticism of later cultures. . . . [W]e like those statues white.”²⁴⁴

Issues like this recur around the preservation of ancient or classical works. But these problems also crop up repeatedly around contemporary art, which often relies on fragile or new materials that do not lend themselves to traditional conservation techniques. We know (or think we know) how to restore oil paintings, but it is not at all obvious how to restore works like Janine Antoni’s sculptures, made from cubes of chocolate or lard—work that changes, disintegrates, melts, and collapses.²⁴⁵ Antoni has instructed that her lard cubes be recreated—recast from their original molds each time they are shown—and then be allowed to degrade over the course of each exhibition.²⁴⁶ Many artists monitor work that they’ve already sold, offering and sometimes demanding to recreate it based on its condition.²⁴⁷

And while curators and conservators frequently rely on living artists to document their intentions regarding their work, what to do when these intentions are unclear or when the artist is dead? Sculptor Eva Hesse did pioneering work in the 1960s in fragile, new materials such as resin, latex, and fiber.²⁴⁸ Some of these sculptures are disintegrating; they may not last. Hesse died young, in 1970.²⁴⁹ Was it part of her art that the pieces would inevitably degrade? Or was it her intent

²⁴⁴ Krauss, *supra* note 243, at 31.

²⁴⁵ MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 7–8 (2003).

²⁴⁶ *Id.*

²⁴⁷ For example, artist Jeff Koons has stated that “[b]eing a collector is a responsibility” and that his studio “[tr]ies] to educate people about their ongoing obligations” to their purchases. Rhonda Lieberman, “*T*” and *Sympathy: Rhonda Lieberman at a TimesTalk with Jeff Koons*, ARTFORUM (Jan. 10, 2008), <https://www.artforum.com/diary/rhonda-lieberman-at-a-timestalk-with-jeff-koons-19262> [<https://perma.cc/BEM6-49HM>]. Artist Damien Hirst’s studio offers to replace “any animal that is older than ten years” in his formaldehyde vitrine works. Petra Lange-Berndt, *Replication and Decay in Damien Hirst’s Natural History*, TATE, <https://www.tate.org.uk/research/publications/tate-papers/08/replication-and-decay-in-damien-hirst-natural-history> [<https://perma.cc/5XQD-WU6Q>]. Hirst monitors the appearance of other works that involve degradable materials. See Carol Vogel, *Swimming with Famous Dead Sharks*, N.Y. TIMES (Oct. 1, 2006), <https://www.nytimes.com/2006/10/01/arts/design/01voege.html> [<https://perma.cc/A5WX-W6RU>] (reporting that Hirst “recently called a collector who owns a fly painting because [he] didn’t like the way it looked, so [he] changed it slightly”).

²⁴⁸ See generally LUCY R. LIPPARD, *EVA HESSE* 5 (1976) (offering a classic analysis of Hesse’s work).

²⁴⁹ See, e.g., *id.*; see also, e.g., Alexandra Tilden, *Something Gained: The Art of Translation in Conservation*, GUGGENHEIM: CHECKLIST (Oct. 14, 2022), <https://www.guggenheim.org/blogs/checklist/something-gained-the-art-of-translation-in-conservation> [<https://perma.cc/Z9BB-KF5R>] (describing a challenging restoration of a monumental Eva

to have the pieces somehow “preserved”? Would we destroy her sculptures by “preserving” them? Do we do a better job of “preserving” them by letting them fall apart? Perhaps we should make exhibition copies.

The issues are particularly vexed around Conceptual and Minimalist art from the 1960s. A recent contest over the preservation or destruction of a piece from this era provides another modern twist on the Ship of Theseus paradox. In 1964, Robert Morris created *Untitled (Corner Piece)* out of plywood and exhibited it at the Green Gallery in Manhattan.²⁵⁰ Morris had the “original” piece thrown out after the show.²⁵¹ At the time, he believed that his objects should be remade; their essence was conceptual, not physical.²⁵² Yet Morris’s views changed. Later in his career he became more interested in the material works themselves. And so, after the original 1964 piece was destroyed, Morris made or authorized various copies of it, sometimes in fiberglass.²⁵³ One of Morris’s fiberglass recreations belongs to the Guggenheim, but it is badly damaged.²⁵⁴ Is this fiberglass version the “real” work? And how it should be shown? Adding to the complexity is that the curator of the collection and the artist sometimes disagreed about the answers to these questions; a curator’s obligation of stewardship over the work can compete with an artist’s views.²⁵⁵ The complexity with Morris’s work only deepened because the artist’s views varied during his lifetime.²⁵⁶ Ultimately, the museum decided that the truest way to show *Untitled (Corner Piece)* was to recreate a version of the destroyed plywood work from 1964.²⁵⁷ The damaged fiberglass copy, the one that was later created by the artist and is now owned by the museum, has been consigned to storage as an object of study but not as a work of art.²⁵⁸

Hesse work made of deteriorating cheesecloth, fiberglass, resin, and latex); LIPPARD, *supra* note 248, at 5.

²⁵⁰ Jeffrey Weiss, *Overview*, in OBJECT LESSONS: CASE STUDIES IN MINIMAL ART—THE GUGGENHEIM PANZA COLLECTION INITIATIVE 165 (Francesca Esmay, Tedd Mann & Jeffrey Weiss eds., 2021).

²⁵¹ *Id.* at 162, 165.

²⁵² *Id.* at 163, 165.

²⁵³ *Id.* at 165.

²⁵⁴ *Id.* at 167.

²⁵⁵ *See id.* at 168–70 (discussing the Guggenheim Museum’s dispute with Robert Morris over the preservation of his work, which was still unresolved at Morris’s death).

²⁵⁶ *See id.* at 163–64 (describing Morris’s interest in different materials in light of his changing interests, such as preservation, surface finish, stability of construction, convenience, and personal considerations).

²⁵⁷ *Id.* at 167.

²⁵⁸ Tedd Mann, *Chronology*, in OBJECT LESSONS: CASE STUDIES IN MINIMAL ART, *supra* note 250, at 141, 154; *see also* Randy Kennedy, *Tricky Business: Defining Authenticity*, N.Y. TIMES (Dec. 20, 2013), <https://www.nytimes.com/2013/12/22/arts/design/>

The conundrum of the Morris sculpture(s) presents a modern riff on the Ship of Theseus puzzle. As in Hobbes's example, there are two rival ships or sculptures—the one fabricated by the artist in fiberglass, now damaged, and the one remade by the museum in plywood for exhibition purposes. But there is also a third sculpture or ship, a ghost ship, haunting the scene: the first one that was thrown away, whose authenticity depended on its immateriality and transience. What does it mean to immortalize through preservation a work that was once meant to die? Are we wrong to resurrect it from the dead?²⁵⁹ I submit that the most authentic sculpture might be merely a description of what happened, a photograph, or some other vestige of loss.²⁶⁰

G. *Authenticity, Longing, and Loss*

In my view, our desire for authenticity is often bound up in loss.²⁶¹ Sometimes we want the authentic artwork because we want contact with the great genius who authored it, as if by being in the work's presence, we can be in his presence, as if the artwork, like a totem or an idol, keeps his spirit alive. Indeed, we crave contact not only with the artist but also with the past, as if being in the presence of the object will bring the past back.²⁶²

After the Mona Lisa was stolen from the Louvre in 1911, thousands of people lined up to stare at the blank spot on the wall where it had hung.²⁶³ Some even brought flowers to lay before the empty space.²⁶⁴ This poignant story suggests to me that our desire for authenticity may be a hopeless quest for something we've lost. Sometimes when we look at works of art, we are looking at a marker of absence. We are yearning for what is gone.

guggenheim-project-confronts-conceptual-arts-nature.html [https://perma.cc/2AYD-GKPG] (describing issues of authenticity and artistic intent that the Guggenheim Museum faced while attempting to conserve other Minimalist and Conceptualist art).

²⁵⁹ By using the word "wrong," I have left open the important question of who is wronged: Whose interests should preservation and authenticity serve? Is our duty to the artist, the owner, or the public?

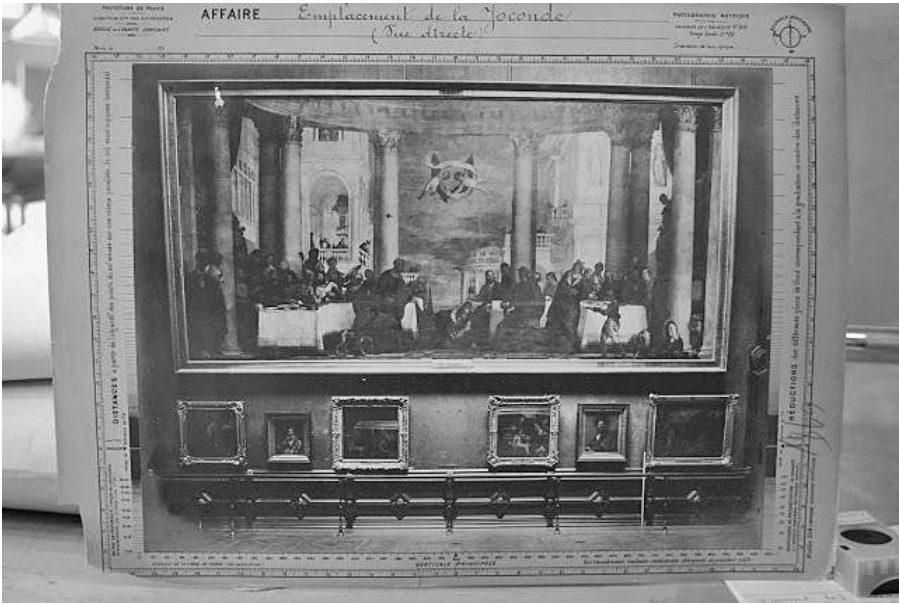
²⁶⁰ See SUSAN SONTAG, *REGARDING THE PAIN OF OTHERS* 24 (Picador 1st ed. 2004) (2003) (describing the close connection between photography, loss, and death in the context of photographs of atrocities). To Sontag, photographs convey "the vulnerability of lives heading toward their own destruction, and this link between photography and death haunts all photographs of people." SONTAG, *supra* note 194, at 70.

²⁶¹ *But see infra* notes 296–97 and accompanying text (exploring status and money as other obvious rationales for why people collect authentic objects).

²⁶² This explains our attitude towards not only artwork, which implicates genius, but also towards other sentimental objects like family heirlooms.

²⁶³ HANS BELTING, *THE INVISIBLE MASTERPIECE* 273–74 (Helen Atkins trans., 2001).

²⁶⁴ Dorothy Hoobler & Thomas Hoobler, *Stealing Mona Lisa*, VANITY FAIR (Apr. 16, 2009), <https://www.vanityfair.com/culture/2009/05/mona-lisa-excerpt200905> [https://perma.cc/YC2G-ZJ53].



1911 Police Photo of the Wall in the Louvre Showing the Blank Space (Bottom Middle) Where the *Mona Lisa* Had Hung²⁶⁵

And on a deeper level, perhaps our continued desire for the authentic thing is a symptom of a broader, cultural loss. We live in a culture of perfect, cheap, endless copies. Against that backdrop, our quixotic, even mysterious, desire to own “the real thing” strikes me as a symptom that we have lost something even greater.²⁶⁶ Surrounded by simulacra, we yearn for what is disappearing—the “real.” Enter the NFT.

III THE NFT

In March 2021, the non-fungible token (NFT) revolution burst onto the art market. Christie’s sold an NFT of a work by the digital artist Beeple for \$69 million.²⁶⁷ It was the third most expensive work by a living artist sold at auction, placing Beeple directly behind Jeff

²⁶⁵ Photography of the blank space where the *Mona Lisa* had hung, in *The Missing Piece – A Blank Spot on the Wall of the Louvre*, MONA LISA IS MISSING (Nov. 11, 2012), <https://monalisadocumentary.blogspot.com/2012/11/the-missing-piece-blank-spot-on-wall-of.html> [https://perma.cc/A8AL-BBN8].

²⁶⁶ My reading here is influenced by Sigmund Freud, *Mourning and Melancholia* (1917), reprinted in *THE FREUD READER* 584 (Peter Gay ed., Norton paperback ed. 1995).

²⁶⁷ Beeple, *The First 5000 Days*, CHRISTIE’S, <https://onlineonly.christies.com/s/first-open-beeple/beeple-b-1981-1/112924> [https://perma.cc/6ACH-PBG9].

Koons and David Hockney.²⁶⁸ (The Beeple work is also the most expensive single NFT sold to date in any market, not just the art market.)²⁶⁹ There was nothing about Beeple's work that the traditional art market would have taken seriously. The underlying work is painfully bad according to conventional art standards; the buyers for it were "crypto bros," not the usual art crowd.²⁷⁰ But, taking a page from Duchamp, Christie's took a non-art object and transformed it into "art" by placing it in perhaps the consummate art context of our era: the auction house, where appreciation of the art market has perhaps overtaken appreciation of art itself.²⁷¹ I argue that the NFT fits into the history of art and its market in another significant way: The rise of the NFT can be seen as the culmination of the struggles over authenticity that I have chronicled.

To vastly oversimplify: NFTs are unique non-fungible cryptographic tokens, existing on the blockchain, that identify or "point to" things. While NFTs can point to anything, one of the first applications of NFT technology was in the realm of digital art,²⁷² and even now, as their uses continue to expand, NFTs most frequently point to digital images or clips that are publicly available and capable of endless repetition.²⁷³ When you buy an NFT of a digital image or clip, you typi-

²⁶⁸ *The 10 Most Expensive Living Artists*, BARNEBYS (Feb. 9, 2022), <https://www.barnebys.com/blog/the-most-expensive-living-artists> [<https://perma.cc/6GQ6-ENH8>] (listing the sale of Beeple's *EVERYDAYS: THE FIRST 5000 DAYS* for \$69.3 million as the third highest price paid for a work by a living artist, trailing behind only Koons's *Rabbit* (\$91 million) and Hockney's *Portrait of an Artist* (\$90.3 million)).

²⁶⁹ Stephen Graves, Daniel Phillips & Andrew Hayward, *The 15 Most Expensive NFTs Ever Sold*, DECRYPT (Feb. 21, 2022), <https://decrypt.co/62898/most-expensive-nfts-ever-sold> [<https://perma.cc/N352-Y5QD>]. Another artist, Pak, sold a project called *Merge* for \$91.8 million in 2021, a price that surpassed Beeple's *The First 5000 Days*, but it is not considered a single work. *Id.*

²⁷⁰ See, e.g., Jason Farago, *Beeple Has Won. Here's What We've Lost*, N.Y. TIMES: CRITIC'S NOTEBOOK (Mar. 14, 2021), <https://www.nytimes.com/2021/03/12/arts/design/beeple-nonfungible-nft-review.html> [<https://perma.cc/8ECL-YUZY>] (lampooning Beeple's work as "puerile," shallow, cheaply contrarian, and "rote regurgitation of the day's memes"); Ben Davis, *I Looked Through All 5,000 Images in Beeple's \$69 Million Magnum Opus. What I Found Isn't So Pretty*, ARTNET NEWS (Mar. 17, 2021), <https://news.artnet.com/opinion/beeple-everydays-review-1951656> [<https://perma.cc/G8CZ-LX7U>] (describing the individual images in Beeple's *The First 5000 Days* as "ghoulish," garish, and directionless).

²⁷¹ See Adler, *supra* note 51, at 294–99 (discussing the contemporary merging of art and money); David Joselit, *NFTs, or the Readymade Reversed*, 175 OCTOBER 3, 3–4 (2021) (arguing that the NFT "deploys the category of art to extract private property from freely available information").

²⁷² Joshua A.T. Fairfield, *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, 97 IND. L.J. 1261, 1274 (2022) (connecting the emergence of digital art NFTs with virtual social displays like video game skins and social media likes).

²⁷³ Mitchell Clark, *NFTs, Explained*, VERGE (June 6, 2022, 5:30 AM), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq> [<https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq>]

cally don't buy the image, which remains freely available.²⁷⁴ Everyone has access to the same image and can “right-click” and save it. Typically, you don't even buy copyright in the image.²⁷⁵ There is nothing stopping you from doing so if the copyright is for sale, but digital authors and NFT owners usually desire the circulation of the image, not control of it.²⁷⁶ As with so much of the contemporary art world, copies confer rather than usurp value.²⁷⁷

Note the similarities to the history of art and its market that we have explored. When you buy a Dan Flavin, you don't buy the right to exclude others from buying fluorescent light bulbs and leaning them against the wall.²⁷⁸ Anyone can. The value is not located in the everyday object—the bulbs that flew out of the back of the car in my

perma.cc/ZM93-A6X6] (“You can copy a digital file as many times as you want, including the art that's included with an NFT.”). Legal scholarship on NFTs is just emerging. See generally Carol R. Goforth, *How Nifty! But Are NFTs Securities, Commodities, or Something Else?*, 90 *UMKC L. REV.* 775 (2022) (evaluating potential regulatory frameworks for NFTs); Fairfield, *supra* note 272 (arguing that NFTs should be treated as personal property rather than as contractual obligations); Brian L. Frye, *The Art of the Token*, 5 *STAN. J. BLOCKCHAIN L. & POL'Y* 238 (2022) (compiling writings about securities regulation, copyright, and authenticity questions posed by NFTs); Brian L. Frye, *How to Sell NFTs Without Really Trying*, 13 *HARV. J. SPORTS & ENT. L.* 113 (2022) [hereinafter Frye, *How to Sell NFTs Without Really Trying*] (exploring the legal conundrums associated with NFTs through the author's own works of conceptual art and NFTs).

²⁷⁴ It is common parlance in the NFT market to state that the NFT owner also “owns” the image, even though the owner typically does not own the image in any conventional use of the term. See Alfred Steiner, *The Paper It's Printed On: NFTs, Ownership and Conceptual Art* 6–16 (Dec. 30, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3997352> [<https://perma.cc/7VU9-GGP6>] (offering an extended analysis of the copyright issues surrounding NFTs, including whether courts may find implied limited licenses for the underlying images).

²⁷⁵ Note that there are different practices regarding rights granted by the transfer of NFTs. See *id.* at 8–11 (comparing different approaches to the rights an NFT owner has in an NFT, including those of the auction house Christie's, NFT marketplaces like OpenSea, and NFT sellers). Note that some NFTs famously include a transfer of copyright or a license in the underlying image. See *infra* note 292 (discussing the various policies around the transfer of copyright for an NFT purchase). The wildly popular Bored Ape Yacht Club project promises such a license. See Steiner, *supra* note 274, at 11.

²⁷⁶ Frye, *How to Sell NFTs Without Really Trying*, *supra* note 273, at 118 (“If anything, the reproduction and distribution of the work they ‘own’ only increases the value of their NFT, by increasing the prestige of ownership.”). Cf. Adler, *supra* note 15, at 330–34, 349, 351 (arguing that copying confers value in the art market, defying the basic premise of copyright law that unauthorized copying threatens value).

²⁷⁷ See Adler, *supra* note 15, at 330–34, 349, 351 (arguing that copying does not threaten value in the art market and may even confer value); *supra* notes 26–27 and accompanying text (arguing that copyright law fails to understand the role of copies in art).

²⁷⁸ See *supra* Part II.E.

earlier hypothetical—but in the unique certificate, or should I say the “non-fungible token” of authenticity. There is no original object.²⁷⁹

A simpler example comes from Maurizio Cattelan’s *Comedian*, a 2019 work of art consisting of a banana duct-taped to a wall. A certificate of authenticity accompanies each of the three editions of the work, one of which is owned by the Guggenheim.²⁸⁰ (A performance artist ate one incarnation of the work when it was first displayed at Art Basel.)²⁸¹ Clearly the Guggenheim doesn’t own the artist’s “original” banana, nor does it keep a banana at the ready when the work is in storage.²⁸² And it does not own intellectual property in the work: It has no right to keep others from duct-taping bananas to their walls.²⁸³ As we have seen, a great deal of contemporary art is not copyrightable, and that doesn’t matter to its value.²⁸⁴ There is nothing to differentiate the banana that the Guggenheim would buy when it wants to exhibit the work from the banana I would buy when I want to eat one.

²⁷⁹ Note again that the aesthetic need for bulbs produced by an earlier technology complicates this story. See *supra* note 213 (discussing aesthetic differences between lightbulbs used during Flavin’s time and contemporary ones).

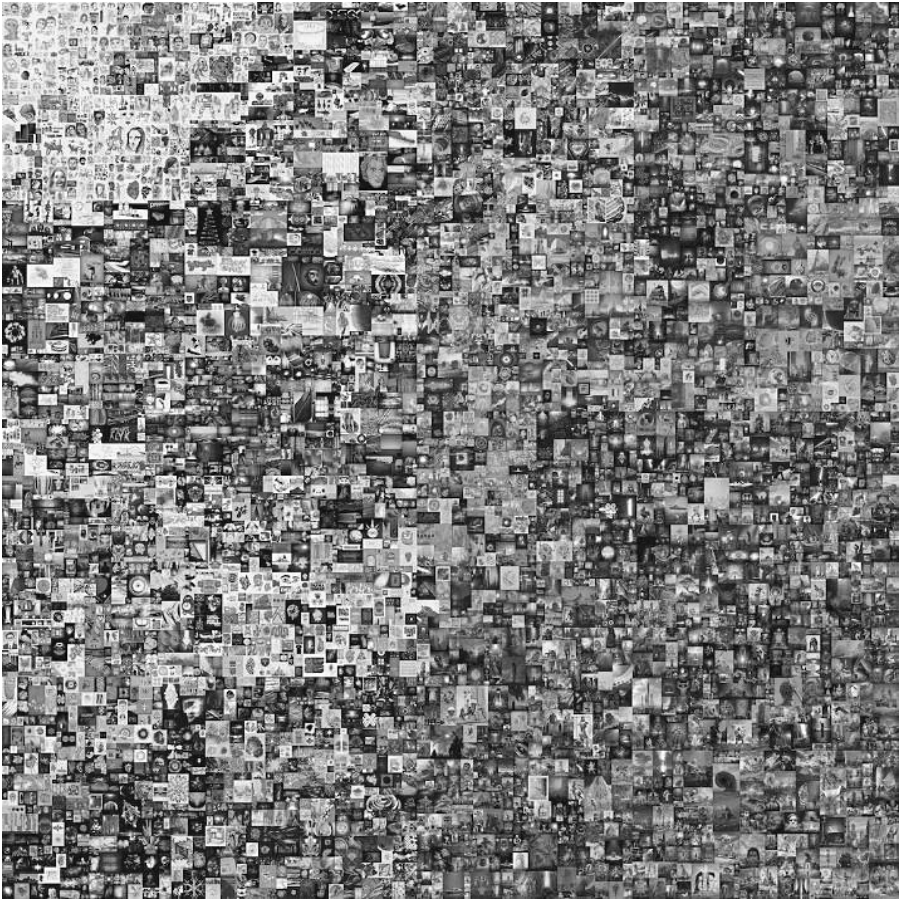
²⁸⁰ Graham Bowley, *It’s a Banana. It’s Art. And Now It’s the Guggenheim’s Problem*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/18/arts/design/banana-art-guggenheim.html> [<https://perma.cc/SZ3G-U6DU>].

²⁸¹ Graham Russell, *Banana Artwork that Fetched \$120,000 Is Eaten by ‘Hungry’ Artist*, GUARDIAN (Dec. 7, 2019, 9:30 AM), <https://www.theguardian.com/artanddesign/2019/dec/08/banana-artwork-that-fetched-120000-is-eaten-by-hungry-artist> [<https://perma.cc/J49P-A7KW>].

²⁸² See Bowley, *supra* note 280 (discussing the Guggenheim’s conservation strategy for *Comedian*, which is to buy a new banana and tape whenever the work is to be displayed).

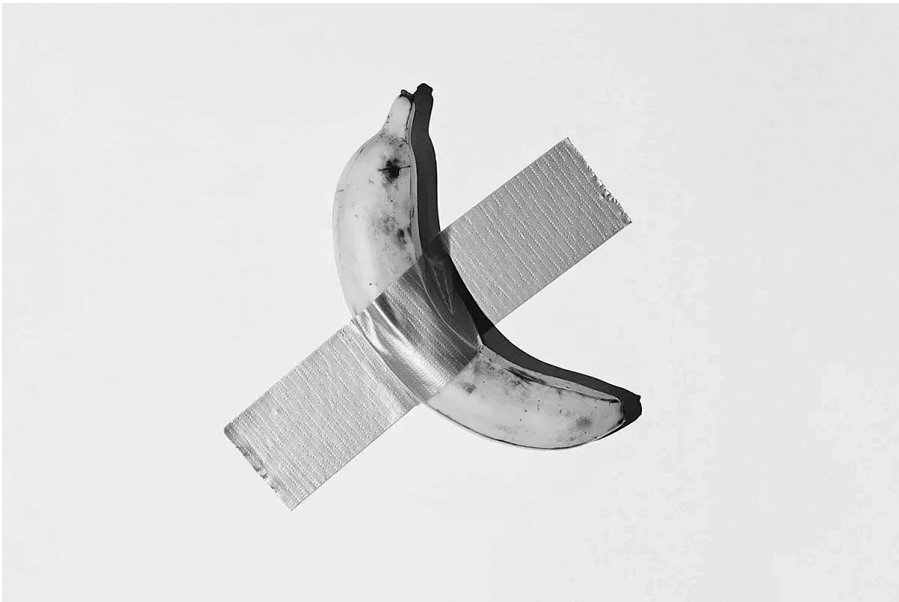
²⁸³ See Shane Burke, *Copyright and Conceptual Art*, in NON-CONVENTIONAL COPYRIGHT 44 (Enrico Bonadio & Nicola Lucchi eds., 2018). But see *Morford v. Cattelan*, No. 21-20039-Civ-Scola, 2022 WL 2466775, at *7 (S.D. Fla. July 6, 2022) (denying a motion to dismiss a pro se copyright infringement claim against Cattelan based on an earlier duct-taped banana work).

²⁸⁴ See Adler, *supra* note 15, at 330–34, 349, 351 (arguing that the lack of copyrightability does not diminish the value of artwork in the contemporary art market). In contrast to my view that copyrightability is irrelevant to contemporary art’s value, other scholars have lamented the lack of copyrightability for some contemporary art as a threat to artistic creativity. See, e.g., Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2228–33 (2014) (arguing that copyright’s fixation requirement excludes contemporary art forms such as natural sculpture and performance art).



Beeple, *Everydays: The First 5,000 Days*²⁸⁵

²⁸⁵ See Beeple, *supra* note 267.



Maurizio Cattelan, *Comedian* (2019) (Collection of Guggenheim Museum)

In my view, the NFT represents the culmination of a conversation about authenticity and copying that has been going on in art for the last 100 years. Starting with Duchamp, artists began to address concepts of authorship, uniqueness, materiality, and authenticity as the subjects of their work. Flavin made works of art out of fungible, manufactured, store-bought objects—work that interrogated, among other things, the distinction between original and copy. Warhol showed the difference, or lack thereof, between a fungible, mass-produced Brillo box and his “Factory”-made copies. Wade Guyton plays with the difference between his unique artworks, made by printing a digital file on an inkjet printer, and the potentially limitless versions and variations of the same digital image that his printer could spew out. And while artists have explored questions of authenticity in a world of replication, the market has too, not for the sake of intellectual inquiry, but instead to figure out how to commodify works capable of limitless reproduction. For example, the market convention of limited-edition photographs (as seen in the Eggleston case)²⁸⁶ is a mechanism to create artificial scarcity in a medium capable of endless replication. To go back to Benjamin: “From a photographic negative . . . one can make any number of prints; to ask for the ‘authentic’ print makes no sense.”²⁸⁷

²⁸⁶ See *supra* Part II.D for a discussion of the authenticity issues posed by limited-edition photographs.

²⁸⁷ BENJAMIN, *supra* note 20, at 224.

So too with NFTs. The NFT creates artificial scarcity in a medium where the very concept of an authentic original “makes no sense.” As Jeanne Fromer and I wrote in our recent article on memes, “NFTs represent an attempt to cling to the concepts of uniqueness, originality, and authenticity in a world in which those concepts no longer make sense.”²⁸⁸ The NFT responds to a world of limitless reproduction by artificially creating and monetizing authenticity.

Thus, there are at least four key features of the market for NFTs that have longstanding precedent in the art market as I have explored it. First, both markets depend on finding a method to limit and monetize works that are capable of unlimited reproduction. The NFT market creates and sells artificial scarcity in a world of abundance; everyone can access and right-click on a digital image, but the NFT pointing to that reproducible digital image is unique. In the same way, the convention of the limited edition in photography can confer scarcity and therefore great value on images that could otherwise be continually reproduced. Furthermore, some artists in the pre-digital era had already grappled with the deep conceptual questions ushered in by the reproducibility of their works. As we saw with “minimal” artists such as Dan Flavin and Robert Morris,²⁸⁹ the capacity for replication was intrinsic to their art objects, which were constructed from everyday materials or, in Morris’s case, premised on the idea that the work could be remade. These artists therefore confronted philosophical questions raised by the reproducible quality of their work, in which one iteration seemed interchangeable with another. As the curator Jeffrey Weiss has written of this period, “since one ‘copy’ is presumably as good as another, the very notion of an original is often moot.”²⁹⁰ Now digital work has a similar inherent condition: One copy is as good as another, and again, the notion of an original is moot. The NFT is a market mechanism that solves this problem: Whereas there is no original digital work, and all copies of it are fungible, the NFT creates a unique, non-fungible device that points to the work and that can be sold.

Second, as we have seen, both the art and NFT markets accomplish the need to limit and monetize infinitely reproducible works by turning to a norm of authenticity. And, third, the norm of authenticity in both cases is artificial. A work is not intrinsically authentic but becomes so based on an extrinsic convention or practice. In art, that might be any of the varied practices of authentication I have explored

²⁸⁸ Adler & Fromer, *supra* note 21, at 562.

²⁸⁹ For a discussion of Morris’s work, see *supra* Part II.F.

²⁹⁰ Jeffrey Weiss, *Introduction*, in *OBJECT LESSONS: CASE STUDIES IN MINIMAL ART*, *supra* note 250, at 18, 20.

up to now. For example, with Flavins, the “authenticity” of the work is located in the certificate, not the object. Similarly, with NFTs of digital works, the locus of value is not found in the underlying reproducible work, but in the token itself, an arbitrary marker extrinsic to the work. Finally, in both markets, as I have explored,²⁹¹ copyright is not the driver of value.²⁹² The norm of authenticity has completely displaced it.

The soaring market for art, particularly contemporary art, which has reached record-breaking prices in the past decade, depends for its value on the existence of a clear distinction between real and fake.²⁹³ The NFT gold rush, as it has waxed and now waned,²⁹⁴ is the latest

²⁹¹ Adler, *supra* note 15, at 330–34, 349, 351.

²⁹² See Brian L. Frye, *After Copyright: Pwning NFTs in a Clout Economy*, 45 COLUM. J.L. & ARTS 341, 341–42 (2022) (arguing that NFTs recognize ownership of a work through clout, rather than copyright). Even though copyright law is not the mechanism that confers value on NFTs, copyright issues still arise around questions such as who has the right to mint NFTs pointing to underlying copyrighted works. See Complaint at 1, 16–17, *Miramax, L.L.C. v. Tarantino*, No. 21-cv-8979, 2021 WL 5359414 (C.D. Cal. filed Nov. 16, 2021) (claiming copyright infringement over who owned the right to create NFTs based on the film *Pulp Fiction*); cf. *Roc-A-Fella Records, Inc. v. Dash*, No. 1:21-cv-05411-JPC, 2022 U.S. Dist. LEXIS 114591, at *2, *4 (S.D.N.Y. June 27, 2022) (settling dispute that arose when defendant allegedly tried to sell his copyright ownership stake in an album via an NFT). Some NFTs famously include copyrights or licenses in the underlying image; the latter is the policy connected with the wildly popular Bored Ape Yacht Club project. Steiner, *supra* note 274, at 11. In cases involving copyright licenses or transfers, copyright lawsuits will of course arise. See, e.g., *Whitley v. Maguire*, No. 2:22-cv-01837-ODW, 2022 WL 117418624, at *4–5 (C.D. Cal. Dec. 5, 2022) (dismissing with leave to amend a copyright infringement claim for the use of digital designs for “Caked Ape” NFTs); Complaint at 14, *Nygaard v. Whitley*, No. 8:22-cv-00425 (C.D. Cal. filed Mar. 20, 2022) (alleging DMCA violations for filing misleading DMCA takedown notices); see also Edward Lee, *The Two CryptoPunks, V1 and V2* 5–8 (Feb. 11, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4032777> [<https://perma.cc/DX5J-F474>] (exploring copyright dispute between owners of two versions of CryptoPunks NFTs). I leave aside the issue of trademark litigation surrounding NFTs, which raises questions of who has the right to use marks in NFTs but does not go to the structure of what gives “authentic” NFTs value to begin with. See, e.g., *Yuga Labs, Inc. v. Ripps*, No. CV 22-4355-JFW, 2022 WL 18024480, at *3–6 (C.D. Cal. Dec. 16, 2022) (denying motion to dismiss a trademark infringement claim involving copycat NFTs); *Hermès International v. Rothschild*, No. 22-cv-384 (JSR), 2022 WL 1564597, at *1 (S.D.N.Y. May 18, 2022) (denying a motion to dismiss in a trademark infringement claim).

²⁹³ See Adler, *supra* note 51, at 292–93; Scott Reyburn, *Ultrarich Keep Contemporary Art Market Bustling*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/20/arts/international/ultrarich-keep-contemporary-art-market-bustling.html> [<https://perma.cc/62GT-LQDE>].

²⁹⁴ See Dan Milmo, *NFT Sales Hit 12-Month Low After Cryptocurrency Crash*, GUARDIAN (July 2, 2022, 2:00 PM), <https://www.theguardian.com/technology/2022/jul/02/nft-sales-hit-12-month-low-after-cryptocurrency-crash> [<https://perma.cc/3PVB-MB8Z>] (documenting a twelve-month low in NFT sales in June 2022); Corrie Driebusch & Paul Vigna, *The Crypto Party Is Over*, WALL ST. J. (June 18, 2022, 12:00 AM), <https://www.wsj.com/articles/the-crypto-party-is-over-11655524807> [<https://perma.cc/ZJ4L-5RU9>] (detailing the 2022 cryptocurrency market crash); David Yaffe-Bellany, Erin Griffith &

example of the art market's exploiting this distinction for profit. The NFT enables the commodification of images that have become so easy to reproduce as to have become free. It creates a market only by conjuring authenticity from thin air. From this perspective, the NFT market might seem like the ultimate horror story of late market capitalism.

Well before the advent of NFTs, Barton Beebe showed how intellectual property law was deployed to create artificial rarity in our post-rarity world; he explored the use of what he called "sumptuary intellectual property law" as a means "to re-enchant copies, to render them as somehow unique or authentic" in a culture of copying.²⁹⁵ But unlike Beebe's vision, in which intellectual property law created false rarity, with NFTs, as with contemporary art more generally, we see that intellectual property law is not the relevant mechanism for limiting the limitless. Once again, the norm of authenticity—without any operation of law—creates authenticity, even though it's fake.

CONCLUSION

Why would someone pay vast sums for something that other people can seemingly have cheaply or even for free? This is one of the paradoxes that befuddle people new to both NFTs and the art market. Why pay \$120,000 for a banana, rather than grabbing a banana from your counter and taping it to your wall? Why buy a multimillion-dollar Andy Warhol work when, with care, you can create a near-identical one? Similarly, why buy an expensive NFT of a digital image when, in the typical case, you don't own the image or even the copy-

Ephrat Livni, *Cryptocurrencies Melt Down in a 'Perfect Storm' of Fear and Panic*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/technology/cryptocurrencies-crash-bitcoin.html> [<https://perma.cc/8RSG-UPQB>] (citing analysts' and industry insiders' opinions on the magnitude of the cryptocurrency collapse). Despite the recent crash in value of NFTs and the underlying cryptocurrency market to which they are tied, some brands and artists are doubling down on NFTs, citing optimism in the long-term market outlook. See, e.g., Paul Vigna, *NFT Sales Are Flatlining*, WALL ST. J. (May 3, 2022 7:15 AM), <https://www.wsj.com/articles/nft-sales-are-flatlining-11651552616> [<https://perma.cc/FCT7-WTMG>] (describing artist Jeff Koons's plans to continue a project selling NFTs tied to physical sculptures); Riley de León, *How 99-Year-Old Publisher Time Is Leading Legacy Media into the NFT Future*, CNBC (July 18, 2022, 9:34 AM), <https://www.cnbc.com/2022/07/17/99-year-old-publisher-time-is-leading-legacy-media-into-the-nft-future.html> [<https://perma.cc/7E5G-LB4U>] (detailing media brand Time's investment in building an NFT asset library); Kevin Collier, *Despite Crypto Crash, NFT Enthusiasts Keep the Party Going*, NBC NEWS (June 22, 2022, 3:11 PM), <https://www.nbcnews.com/tech/crypto/cryptocrash-nft-enthusiasts-keep-party-going-rcna34498> [<https://perma.cc/2CN3-GF3J>] (describing hope about the long-term prospects of NFTs despite the recent market turbulence).

²⁹⁵ Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 844 (2010).

right to the image? All you own is a token on the blockchain that points to the image, which is available to everyone else who wants to right-click on it. Why is that valuable? What is the mysterious mechanism that creates value in a world of cheap, flawless, and limitless copies?

We might have assumed that that mechanism was copyright law, which was created to solve the problem of how to sort originals, or valuable copies, from valueless, infringing ones. But as this Article has shown, the NFT market, like the art market before it, creates value in a world of copies without any recourse to copyright law. Both markets instead depend on a non-legal market mechanism, a norm I call “artificial authenticity,” the contours of which I have explored at length in this Article.

Many consider the NFT market to be revolutionary—an unprecedented way to create value in our age of unfettered mechanical and digital reproduction. But as I have shown, this phenomenon is not revolutionary and is not even new. The NFT phenomenon makes perfect sense when viewed from the perspective of the art world, which is the realm in which NFTs first captured public attention and the realm which claims the most expensive NFT sale to date. For the past 100 years, contemporary artists and art market professionals have been exploring both philosophical and market questions about what authenticity, originality, and uniqueness mean in a world of copies. And just as the art market came to accept a norm of authenticity that is arbitrary and artificial, the market for NFTs followed suit.

Once we see that the norm of authenticity, though artificial, still creates value, we may be tempted to end our inquiry into why people buy a “real” Andy Warhol rather than a copy or a unique NFT of an image rather than just downloading the image online. One reason people buy the fake-real thing is because there is so much money to be made,²⁹⁶ and because owning authentic works such as NFTs and art are powerful ways to signal status.²⁹⁷ That is true of course. But I

²⁹⁶ See, e.g., Adler, *supra* note 51, at 298 (exploring how billionaires display authentic artwork as trophies); Calvin Tomkins, *A Fool for Art*, *NEW YORKER*, (Nov. 4, 2007), <https://www.newyorker.com/magazine/2007/11/12/a-fool-for-art> [<https://perma.cc/RC27-JY6R>] (exploring the ability of art to signal wealth for rich buyers and investors); James Tarmy, *New York's November Auctions Mark a Return to Billionaire-Level Art Prices*, *BLOOMBERG* (Nov. 1, 2021), <https://www.bloomberg.com/news/articles/2021-11-01/new-york-s-november-auctions-mark-a-return-to-billionaire-level-art-prices> [<https://perma.cc/774U-TPLU>] (noting billionaires' continued investment in art market trophies).

²⁹⁷ See, e.g., Caroline Goldstein, *Which Celebrities Have NFTs as Profile Pics?*, *ARTNET NEWS*, (Jan. 27, 2022), <https://news.artnet.com/market/nft-celebrity-profile-pics-2064502> [<https://perma.cc/MG3Y-C25W>] (listing celebrities that use NFT avatars on social media).

believe there are also deeper reasons we crave authentic works, even if their authenticity is artificial.

In my view, our yearning for authenticity has been paradoxically amplified by our current culture of copying and the disorientation that it produces. We're drowning in images; we're drowning in information; we're living on Zoom and in virtual space; we're moving into the metaverse. Nothing is real. At times it seems as if we're grasping for something to hold on to and touch. We see this quest for authenticity across culture, not just in art. The passion for vinyl records has come back into vogue in our age of streaming.²⁹⁸ Suddenly the coolest media outlet for Gen Z is a printed newspaper, available not online but in a box on a corner in the hipster neighborhood called "Dimes Square" in New York City.²⁹⁹ Part of the appeal is that it runs out of copies each day and then it's gone.³⁰⁰ Why does everyone in Brooklyn seem to be butchering their own pigs³⁰¹ or making artisanal goods or craving locavore farm-to-table food? All these trends signal a yearning for connection with the material world, with touch, with individuality—the very things we are losing. As the digital takes us over and Mark Zuckerberg pushes us out of real life and into the metaverse, no wonder we artificially manufacture authenticity. It's so scarce.

²⁹⁸ See Zachary Crockett, *The Insane Resurgence of Vinyl Records*, THE HUSTLE (Dec. 4, 2021), <https://thehustle.co/the-insane-resurgence-of-vinyl-records> [<https://perma.cc/5Q3F-FZ3K>] (reporting that, in the first half of 2021, sales of new vinyl were up eighty-six percent from 2020).

²⁹⁹ See Ben Smith, *They Had a Fun Pandemic. You Can Read About It in Print*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/2021/03/07/business/media/the-drunken-canal-media-nyc.html> [<https://perma.cc/UH3U-8LNG>] (describing *The Drunken Canal*, one of several new small-scale New York City media projects).

³⁰⁰ See *id.* (noting that a hundred copies of *The Drunken Canal* distributed in one street corner were gone by noon that day).

³⁰¹ See Kim Severson, *Young Idols with Cleavers Rule the Stage*, N.Y. TIMES (July 7, 2009), <https://www.nytimes.com/2009/07/08/dining/08butch.html> [<https://perma.cc/8YPU-DEJW>] (describing a rise in interest in small-scale butchered meat and butchering classes).