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## UNIFORM COMMERCIAL CODE WARRANTY SOLUTIONS TO ART FRAUD AND FORGERY

The sale of fine art annually accounts for an estimated 300 to 400 million dollars of commercial transactions. An estimated one to 10 percent of that total is the subject of fraud.<sup>1</sup> Although the exact degree of fraud in the fine art market may never be known,<sup>2</sup> it is clear that consumers of art are in need of protection.<sup>3</sup>

Schemes to reduce the incidence of forgery have been advanced by art dealers, legislators, and members of the legal profession. But measures to prevent art forgery can give only partial protection. The law must provide an effective civil remedy to redress the defrauded purchaser when preventive measures have failed.

This Note will examine the practical and theoretical impediments to successful civil redress<sup>4</sup> and will suggest means by which the warranty provisions of the Uniform Commercial Code may be applied to tainted art transactions.

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1. L. JEPSON, *THE FABULOUS FRAUDS* 290 (1970) [hereinafter cited as L. JEPSON] supports a one percent figure; R. ARIES, *FAKERY IN PAINTING AND SCIENTIFIC EXPERTISE* (1965) estimates 10 percent. See also Colin & Easby, *Legal Aspects of Forgery and Protection of the Expert*, 26 *BULLETIN OF THE METROPOLITAN MUSEUM OF ART* 258 (1968) [hereinafter cited as Colin & Easby].

2. The inexactitude arises from the difficulty in the detection and proof of art forgery and from the reluctance of the defrauded purchaser to report or prosecute a fraud for fear of labelling himself a dupe and advertising his purchase as worthless for resale or donative tax deduction.

3. Thomas Wurtenberger, Director of the Institute of Criminology and Penology of the University of Freiburg, Germany, believes that far too many purchasers enter the market ill-equipped to cope with its complexities, and that their desire to reflect social and financial accomplishments often supersedes any cautious aesthetic appraisal of their prospective purchase. See Wurtenberger, *Criminal Damage to Art—A Criminological Study*, 14 *DEPAUL L. REV.* 83 (1964).

Those who seek a profitable financial investment frequently are deceived by their opinion of what will be in vogue, without giving full consideration to the vagaries and inconsistencies of the public's view as formulated by fashionable critics and galleries. In an interview with Ralph Colin and Gilbert Edelson, April 19, 1972, the author was told that the percentage of works which actually realize a significant investment return is minimal. Hence, the public is being informed inaccurately by the numerous articles in the media which inflate investment potential. Due to changing tastes and interests, the art market is so prone to fluctuation that only knowledgeable market observers are qualified to think in terms of investment.

4. Criminal prosecution of a forger or fraudulent seller also raises serious difficulties. To be successful, the work's lack of authenticity must be proved beyond a reasonable doubt, and it must also be shown that the dealer knew of the defect but made no indication of it in his representations to the purchaser. Even where the dealer returns the

## CHARACTERISTICS OF ART FORGERY

An attorney who represents the purchaser of art must have an understanding of the methods and materials of the art forger.<sup>5</sup> There are five<sup>6</sup> basic methods of art forgery: forging signatures and supporting documentation;<sup>7</sup> forging specific original works; utilizing the style of a known artist without copying an existing work, completing unfinished works; and, pastiche, or combining diverse compositional elements from original paintings to produce "new" compositions which are attributed to the artist.<sup>8</sup> It is readily apparent that artistic compe-

purchase price to an unwary purchaser of a forgery, the dealer cannot be prosecuted successfully without a showing of scienter. The difficulty involved in proving scienter is obvious. One noted authority has observed that proof of fraud is particularly difficult where the forgery is unusually deceptive; in such a case, the dealer probably could assert a successful defense by claiming that he, also, was deceived. G. SAVAGE, *FORGERIES, FAKES, AND REPRODUCTIONS* 20 (1969) [hereinafter cited as G. SAVAGE].

Florence Shuentag notes: "Because of the high stakes, traffickers in art frauds are willing to assume the risk of detection, and unfortunately, successful prosecutions [are] rare." Shuentag, *Some Legal Aspects of Art and Fake Art*, 54 *WOMEN LAWYERS J.* 23, 25 (1968). In the United States criminal sanctions seldom are imposed. Neither state criminal codes nor federal statutes recognize art forgery as a distinct offense. *Id.*

5. For purposes of this Note, focus will be limited to painting, the media most frequently exploited by art forgers.

6. This list is not intended to be conclusive. There is authority for acceptance of other categories of art forgery, including duplicates done by the master himself. One author has noted:

Questions of authenticity are sometimes raised by the frequent phenomenon of duplicates from the same hand, which are of course distinct from copies by another person. In former times, artists did not hesitate to produce replicas of their work. But today such repetitions are regarded as unacceptable. Hans Gross, Professor of Criminal Law at the University of Czernowitz, designates all duplicates of works of art as, "from a juristic standpoint" forgeries.

Such duplicates are in general repudiated by connoisseurs and described as a variety of forgery. It is usually maintained that there can be only one original work by an artist and that all subsequent productions of a similar character are imitations.

S. SCHULLER, *FORGERS, DEALERS, AND EXPERTS*, 156-57 (1960)

7. Signatures may be forged with relative ease. In a letter to the *New Statesman*, August 20, 1938, Lucien Pissaro stated that he saw one of his paintings that was signed with a forgery of his father's signature offered for sale. Legal intervention failed and the painting was sold as the work of Camille Pissaro. *See also* O. KURZ, *FAKES: A HANDBOOK FOR COLLECTORS AND STUDENTS*, 46 (1948).

8. Prior to the middle half of the nineteenth century, masters often employed apprentices in their studios. The question occasionally arose whether the finished product was wholly the work of the master or was executed in part by an employee. Backgrounds and draperies were often the products of these assistants. "The buyer at the time was under no illusion as to the nature of the artist's purpose, and did not demand that he should carry out every operation with his own hand. [T]he signature was not the hallmark of genius; it was the trademark of the studio." G. SAVAGE, *supra* note 4, at 2.

tence and technical proficiency are necessities in the forgery of works of art. Likewise, successful prosecution of an art forger requires a commensurate degree of artistic expertise.

*Authentication Procedures: Detection and Proof of Forgery*

Distressing evidentiary problems are presented in civil actions for the wrongful sale of fake art because of the difficulty in detecting and proving art fraud. Authentication generally is accomplished by scientific analysis, stylistic inquiry, and documentation. Scientific verification may be the most important method of challenging authenticity and attribution, and technological analysis is usually the only means of elucidating the problems relating to compositional materials and the effects of time upon them. Thus, to insure any degree of success, the forger not only must master the style of his predecessor, but also must make every attempt to duplicate the original materials and processes.<sup>9</sup>

A painting is a layering of many materials. A material such as canvas tacked to a wooden stretcher provides the support for subsequent layers of the primer, pigments, and sealant. Any variation from the original materials will facilitate detection. A forgery can be revealed if the stretcher is not made of a wood used in the original artist's locale or if its age is not contemporaneous with the date of the imitated work. Though not an absolute test, wormholes are a frequent incident of age. The kind of canvas used and the method in which it was woven also can provide indicia of forgery.

The layers of pigment are particularly important in determining forgery through scientific processes. X-rays reveal otherwise invisible layers of pigment, exposing structural coatings and supplementary color. Luminescent photographs taken in ultraviolet light from quartz-tube lamps reveal retouching and restorations in almost every type of material. Infrared paints isolate various stages of construction, and spectroscopy provides a chemical analysis of pigments. Historically, pigments were made from minerals and earth bases ground into a fine powder and suspended in an oil or resin vehicle. Often, the dates of discovery of various pigments have been recorded and, on occasion, have aided in the authentication of disputed works.<sup>10</sup>

Evidence of age also may be found in craquelure, the web-like network of small cracks which results from shrinkage and movement be-

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9. See generally A. BURROUGHS, *ART CRITICISM FROM A LABORATORY* (1938).

10. See generally A. DEWILD, *THE SCIENTIFIC EXAMINATION OF PICTURES* (1929).

tween the paint layers and sealant. The cracks may be the result of temperature, handling, or faulty technique, as in over-painting before the bottom layer has dried sufficiently. But the presence of craquelure is not an absolute test. As stated by Dr. Max Friedlander: "There exist many genuine paintings which show no cracks; they are never absent in forgeries."<sup>11</sup> In addition to scientific methods, detection of art fraud also is possible through the stylistic analysis of experts. An authentic painting is marked by the harmonious portrayal of all aspects of the painting's subject. The trained eye would search for anachronisms in costume, jewelry, and architecture.<sup>12</sup>

Furthermore, the forger possesses his own instinctive artistic vocabulary and is a product of his time. This point was articulated well in Friedlander's *On Art and Connoisseurship*: "Since every epoch acquires fresh eyes, Donatello in 1930 looks different from what he did in 1870. That which is worthy of imitation appears different to each generation. Hence, whoever in 1870 successfully produced works 'by' Donatello will find his performance no longer passing muster with the experts in 1930."<sup>13</sup>

An analysis of artistic style is less precise than objective scientific data and is subject to the usual distrust of expert opinion, but because even the most talented and precise imitator cannot repress his own personality during the execution of a forgery, stylistic analysis remains a viable test.

Another method of authentication utilizes documentation of the history of ownership and public exposure. This test is frequently unavailable because such documentation itself is often the subject of forgery or is missing entirely. Whatever method is used—scientific examination, stylistic analysis, or documentation—it must be remembered that the tests are no better than those who interpret them.<sup>14</sup>

### *Prevention of Art Forgery*

Attempts to alleviate the problem of art forgery have arisen from a variety of sources. One author<sup>15</sup> has proposed that state art specialists

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11. G. SAVAGE, *supra* note 4, at 209.

12. The importance of accessories and interior decoration cannot be over-estimated. In a genuine work, all accessories and decoration must belong to a period not later than the year of execution. *Id.*

13. M. FRIEDLANDER, *ON ART AND CONNOISSEURSHIP* 259 (1942).

14. See generally L. JEPSON, *supra* note 1, at 292.

15. Hodes, *Fake Art and the Law*, 27 *FED. B.J.* 73, 77 (1967) [hereinafter cited as Hodes].

be licensed and granted a qualified immunity from prosecution for defamation. Under this proposal, properly accredited experts could advise prospective buyers that a certain piece is not an original without fear of liability for defamation of the seller.<sup>16</sup>

A bill introduced by a New York congressman envisaged a federal art archive supervised and administered by the Smithsonian Institute Committee.<sup>17</sup> The functions of the archive would include recordation of certificates of authenticity filed by living artists, photographs of their work, and an owner's index.<sup>18</sup>

A three-year project was initiated in 1968 by the Mellon Institute to study and perfect the process of atomic fingerprinting of Old Masters.<sup>19</sup> The project was made possible by \$25,000 contributions from both the National Gallery of Art and the Atomic Energy Commission.

Volunteer Lawyers for the Arts, an organization initiated in New York, provides advice covering the entire scope of art-related legal problems. The intricacies of copyright law have been examined in an attempt to protect the artists' reproduction rights and to ascertain the scope and effect of a publication of a work of art.<sup>20</sup>

In the late 1960's, New York Attorney General Louis Lefkowitz persuaded the New York Legislature to enact legislation<sup>21</sup> designed to define and regulate the relationships among artists, dealers, art experts, and purchasers of fine art.<sup>22</sup> The law provides that, absent a clear and conspicuous disclaimer, any written bill of sale that identifies the work as the product of a specific artist is deemed to be an express warranty of genuineness.<sup>23</sup> Illinois attempted to pattern art legislation after the New York law, but the bill failed in the Illinois Senate.<sup>24</sup>

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16. Fear of possible litigation is one reason for the reluctance of museums to have their staffs give expert opinions. Ethical considerations also are important. Paid expertise is frowned upon and considered highly unethical. Staff members, being academic people primarily, do not wish to be seen as helping make a sale or give the appearance of offering investment counselling services. Also, such opinions generally are not based on extended academic research. See Colin & Easby, *supra* note 1, at 260.

17. See Hodes, *supra* note 15, at 78.

18. *Id.*

19. L. JEPSON, *supra* note 1, at 298.

20. See Jonakait, *Do Art Exhibitions Destroy Common Law Copyright in Works of Art?*, 19 COPYRIGHT LAW SYMPOSIUM 81 (1971).

21. N.Y. GEN. BUS. art 12, §§ 219 *et seq.* (1968).

22. Shientag, *Some Legal Aspects of Art and Fake Art*, 54 WOMEN LAWYERS J. 23, 25 (1968).

23. See Hodes, *supra* note 15, at 77.

24. Hodes, *Wanted: Art Legislation for Illinois*, 51 ILL. B.J. 218, 219 (1968) [hereinafter cited as *Art Legislation*].

Preventive measures such as those suggested above will do much to encumber and discourage the forger, but they provide no solace to the victim of an iniquitous sale;<sup>25</sup> it is submitted that the Uniform Commercial Code will supply the necessary civil remedy to compensate the buyer of forged art.<sup>26</sup> The following analysis will demonstrate that the warranty provisions<sup>27</sup> of the Code protect consumers of art both from the seller who intentionally misrepresents a forged piece as an original, and from the art dealer who innocently sells what he believes to be an authentic work of art.

### UCC § 2-313· EXPRESS WARRANTIES

The codification of express warranties in Code section 2-313 provides a purchaser of fine art with a remedy that may be found to be dispositive of almost every sale of fake art.<sup>28</sup> A Florida court has defined express warranty as "a statement or representation made by the seller of goods, contemporaneously with, and as a part of the contract of sale, though collateral to the express object of it, having reference to the character,

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25. It is interesting to note that the legislation enacted in New York has been criticized as a mere duplication of the protection provided by the Uniform Commercial Code. *Art Legislation, supra* note 24, at 219. See also Colin, *Reply*, 65 ART NEWS 6 (1966).

26. The applicability of Article 2 to the sale of works of art is clear. Section 2-102 defines the scope of Article 2 as applying to "transactions in goods." The term "goods" is clarified in section 2-105 as "all things movable at the time of identification to the contract."

27. Sections 2-313, 2-314, and 2-315 will be the subject of this Note. The warranty of title provided by section 2-312 will not be considered; this warranty would not be breached in the sale of art forgeries.

28. Section 2-313 provides that:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

quality, or title of the goods, and by which the seller promises or undertakes to insure that certain facts are or shall be as he then represents them.”<sup>29</sup>

The foundation of the express warranty provision is the core description.<sup>30</sup> “A 1965 Chevrolet,” “a pair of scissors,” or “a Picasso,” are examples of core descriptions. Essentially, the core description is that quality of the subject matter of the sale to which the seller’s performance must necessarily conform. Because it must be assumed that the subject of every sales transaction is something describable, the core description is so basic to the contract for sale that it never may be disclaimed.<sup>31</sup> In addition, the extent of the express warranty is dependent upon the basis of the bargain. The drafters of the Code expressed a belief that “all of the statements of the seller [become part of the basis of the bargain] unless good reason is shown to the contrary.”<sup>32</sup>

Express warranties may arise regardless of the intention of the seller.<sup>33</sup> It is no defense that the seller made an assertion in good faith and without knowledge of the falsehood or deceit.<sup>34</sup> This protection is particularly important for one who purchases from a museum or art dealer.

Another aspect of the right to recovery under section 2-313 also is significant for the art trade. Recovery is not limited to the express representations in the contract for sale.<sup>35</sup> For example, an express warranty may arise by way of advertising<sup>36</sup> or use of catalogues.<sup>37</sup> To create

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29. *Weimar v. Yacht Club Point Estates*, 223 So. 2d 100, 104 (Fla. 1969).

30. See UNIFORM COMMERCIAL CODE § 2-313, Comments 1 & 4. See also Ganz, *Limitation of Liability Under the Sales Provision of the Uniform Commercial Code*, 14 DEPAUL L.J. 73, 76 (1964); Note, *Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code*, 38 IND. L.J. 648, 652 (1963).

31. See *Moss v. Gardner*, 228 Ark. 828, 310 S.W. 491 (1958).

32. UNIFORM COMMERCIAL CODE § 2-313, Comment 8.

33. UNIFORM COMMERCIAL CODE § 2-313 (2).

34. *City Mach. & Mfg. Co. v. A. & A. Mach. Corp.*, 4 UCC REP. SERV. 461, 464 (E.D. N.Y. 1967).

35. It is not unusual for the transfer of a work of art to be evidenced merely by a sales receipt. Such receipts frequently include nothing more than a general description of the piece, the consideration paid, and the date of sale. The instrument would reflect none of the language of either party, including oral representations that might have given rise to warranties.

36. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

37. *Weisz v. Parke-Bernet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. City Civ. Ct. 1971).



such a warranty, the purchaser need only have knowledge of the affirmation or description contained therein and act accordingly. A recent decision<sup>38</sup> held that it is not essential that the advertisement set forth the exact warranty asserted by the plaintiff purchaser; it is necessary only that such material convey the "essential idea" underlying the claimed warranty.

Moreover, since the express warranty is not limited to the terms of the contract, the precise time when representations are made is immaterial.<sup>39</sup> This is significant in two respects. First, an advertisement setting forth affirmations of fact or description may be viewed far in advance of actual negotiations with the seller. Though removed in time and space from the transfer of the goods, the advertisement may well have been the motivating influence that induced the purchase; thus, the advertisement has become part of the basis of the bargain. Secondly, language used after the closing of a sale may become a modification of the contract and need not be supported by additional consideration. Subsequent assurance could arise through an exhibition of prior advertising or catalogue documentation if such facts were made known to a purchaser after a sale.<sup>40</sup>

In addition to the warranty arising from such extrinsic materials, oral representations by the seller may give rise to an express warranty. The fact that a contract is within the Statute of Frauds does not prevent the proof of an oral warranty,<sup>41</sup> because the Code does not require that a written contract include all the material terms of the agreement.<sup>42</sup> Thus, the warranties made by the seller may be proven by oral evidence, and it is immaterial that the writing or memo does not contain them. Prior to the adoption of the Code, the parol evidence rule made it extremely difficult to prove agreements or representations not included in the written contract. Under the Code, even though the parties have intended the writing to be a final expression of their agreement with respect to the terms included therein, evidence of consistent additional terms from prior or contemporaneous oral agreements is admissible to explain or supplement the contract unless the writing is found to have been intended as a complete and exclusive statement of the terms of

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38. *Sylvester v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968).

39. UNIFORM COMMERCIAL CODE § 2-313, Comment 7.

40. *Id.*

41. 1 R. ANDERSON UNIFORM COMMERCIAL CODE § 2-313:22 (2d ed. 1970) [hereinafter cited as ANDERSON].

42. UNIFORM COMMERCIAL CODE § 2-201.

the agreement; evidence of a course of dealing, usage of trade, or course of performance is always admissible.<sup>43</sup> An analysis of the creation of an express warranty will further evidence the vitality of section 2-313 in transactions involving art objects.

*Affirmation of Fact or Promise: UCC § 2-313(1)(a)*

Subsection (1)(a) of section 2-313 provides for the creation of an express warranty upon "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." If, in fact, the goods do not conform to the affirmation or promise, the warranty is breached. In the situation where a seller makes an unequivocal assertion that a painting is "a Corot of the finest quality supported by unimpeachable documentation," and, in truth, the painting is a forgery that has escaped detection for a century, the buyer's remedy is preserved by the section 2-313(1)(a) express warranty arising by way of affirmation of fact or promise.<sup>44</sup>

Expert opinion as to authenticity, although not absolute, also should be regarded as an affirmation of fact within the meaning of section 2-313. The seller of art, which possesses an established longevity exceeding the life of its creator, is confronted with the evidentiary burden of establishing a correct attribution. Attribution probably cannot be reduced to an absolute because of the problem inherent in expert opinions. However, it is an accepted custom in the trade to value art on the basis of expert opinion. It would seem only logical and equitable that if the seller is supported by the benefits of something less than absolute, he also should bear the burdens of something less than absolute. A statement of authorship or authenticity should be viewed as an affirmation of fact under section 2-313. This is not to say, however, that when it is the seller who relies on expert opinion to effect a sale, he is without any protection. He has recourse to the network of disclaimers embodied in the Code.

One valuable benefit which would result from treating expert opinion as an express warranty would be the measure of predictability which would be injected into the commercial transaction; either the seller warrants the experts' opinion as his own or he disclaims the experts' subjective analysis. Regardless of the seller's decision, a new perspective would enhance the transaction by eliminating some of the uncertainty. The reasonable effect would be to protect the pecuniary value of art and

43. UNIFORM COMMERCIAL CODE § 2-202(b).

44. Cf. *Jacobs Pharmacy Co. v. Gipson*, 116 Ga. App. 760, 159 S.E.2d 171 (1967).

to encourage the public to purchase more art with greater certainty of receiving what was bargained for in addition to providing a readily available remedy if the piece is anything less than authentic.

In considering another aspect of the express warranty, it would seem logical to find a breach of the section 2-313(1)(a) affirmation or promise when the documentation alone has been forged. Such a breach would render questionable the authorship of the painting,<sup>45</sup> and the seller should be required to reimburse the purchaser for any diminution in value caused by the lack of certification or to compensate the purchaser for expenses incurred in reasonably resolving the question of attribution through scientific analysis or expert opinion. Punitive damages should be allowed if the seller acted in bad faith.<sup>46</sup>

### *UCC § 2-313 (1)(b) Warranty by Description*

A superficial reading would suggest that the warranty of description merely duplicates the warranty by affirmation of fact. The additional strength of the section 2-313 (1)(b) warranty, however, becomes apparent when read in light of the language of comment 5, there is no limit on what may be considered a description. Technical specifications and blueprints are included as examples of methods of establishing a description which may be made part of the basis of the bargain.<sup>47</sup> Similarly, the results of a scientific analysis or an expert examination of stylistic evidence would be within the scope of subsection (1)(b) and comment 5

Warranties by description and by affirmation of fact are both subject to the limitation of subsection (2) of section 2-313 which exempts a seller's statement purporting to be his opinion or commendation of the goods. Such "puffing" statements do not necessarily create an express warranty. The distinction between statements which are deemed nothing more than the seller's opinion or judgment of the subject matter, and those which are considered affirmations of the quality and condition

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45. There is a major problem with documentation in the art sales process which may be attributed to two factors: Since no procedure has been adopted for licensing art experts, no clear criteria exist for establishing the credentials of such persons; moreover, the quality of the documentation is not readily interpreted without recourse to another "expert."

46. *Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66 (Mo. Ct. App. 1968).

47. *See, e.g., Fox Pools, Inc. v. Villarose*, 77 York Leg. Rec. 165 (Pa. 1963), where a purchaser specified the exact dimensions he desired for the construction of a swimming pool. Upon a showing of non-conforming dimensions, the court ruled that the builder had breached an express warranty.

of the thing sold, is exemplified by two early English cases involving the sale of fine art which were cited by a New Jersey court in *Wolcott v. Mount*.<sup>48</sup>

The first case, *Jendwme v. Slade*,<sup>49</sup> involved a sale of two pictures; the catalogue of the auction described one as a sea piece by Claude Lorraine and the other a painting by Teniers. It was held that no warranty was made that the pictures were the genuine works of Lorraine and Teniers. The court concluded that: "there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore." <sup>50</sup>

*Power v. Barham*<sup>51</sup> involved a sale of four paintings described as "four pictures, Views in Venice, Canaletto." <sup>52</sup> Distinguishing the *Jendwme* case, the court found that since Canaletto was a comparatively modern painter, the authenticity of his works was ascertainable. With respect to the productions of very old masters, an assertion as to their genuineness was necessarily a matter of opinion. Miriam Cederbaum<sup>53</sup> suggests that the distinction formulated in these early cases is still a viable standard. It is interesting to note that "because of the nature of the art it collects, the Museum of Modern Art does not normally encounter problems of fraud and forgery. This Museum usually acquires the works of living artists. Such works are easy to authenticate through collaboration with the artist himself." <sup>54</sup>

#### EXCLUSION OF EXPRESS WARRANTY

##### *Examination of the Goods*

Under "good faith" circumstances, an independent inspection of the goods will not negate the section 2-313 express warranties. Furthermore, absent suspicious circumstances, there is no requirement that the purchaser initiate an examination to verify the accuracy of the seller's representation;<sup>55</sup> it is sufficient that the purchaser believed it was true.<sup>56</sup>

48. 38 N.J.L. 496, 20 Am. R. 425 (Ct. Err. & App. 1875).

49. 170 Eng. Rep. 459 (Nisi Prius 1797).

50. *Id.* at 459.

51. 111 Eng. Rep. 865 (K.B. 1836).

52. *Id.* at 865.

53. Miriam Cederbaum is associate counsel for the Museum of Modern Art, New York.

54. Letter from Miriam Cederbaum to Richard DeYoung, March 27, 1972.

55. *Union Pipe & Mach. Ltd. v. Luria Steel & Trading Corp.*, 225 F.2d 829, 835 (6th Cir. 1955); *City Mach. & Mfg. Co. v. A. & A. Mach. Corp.*, 4 UCC REP. SERV. 461, 464-65 (E.D.N.Y. 1967); *Schwartz v. Gross*, 93 Ohio App. 445, 114 N.E.2d 103 (1952).

56. *City Mach. & Mfg. Co. v. A. & A. Mach. Corp.*, 4 UCC REP. SERV. 461, 464-65 (E.D.N.Y. 1967).

Where the purchaser knows that an express warranty extended by the seller is false, however, the representation could not be considered part of the basis of the bargain, and no warranty is created.<sup>57</sup>

To tempt the uncautious buyer, forgeries usually are offered at prices below market value, but not so low that they are marked as spurious. The mere fact that a sale is consummated for a price below market value does not alone constitute notice sufficient to deny the buyer relief for a claimed breach of warranty.<sup>58</sup> However, equality in bargaining positions evidenced by a sophisticated purchaser, or the absence of documented pedigree, could be sufficient, when coupled with a low price, to present a factual determination for a jury.<sup>59</sup>

### *Disclaimer*

General disclaimers of express warranty usually will be found to be inoperative. Where general language of disclaimer conflicts with specific express warranties, for example, Code section 2-316 (1) gives effect to the express warranty. Thus, when language used in a disclaimer seeks to exclude "all warranties, express or implied," it will be effective only if the seller can prove that no express warranty existed initially. This task is a difficult one because of the variety of representations which give rise to express warranties. In addition, as noted earlier, the Code's version of the parol evidence rule should, in most cases, permit introduction of evidence of an oral or other extrinsic warranty.<sup>60</sup> The courts have demonstrated a dislike for general language of disclaimer. By refusing to give effect to disclaimers, the courts can protect the art market from the sophisticated but disreputable dealer who is armed with fake and poor quality works of art and attempts to shield his despicable practice with contracts resplendent with disclaimers.

The recent decision in *Weisz v. Parke-Bernet Galleries*<sup>61</sup> illustrates

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57. *Id.* at 465. See also *General Electric Co. v. United States Dynamics, Inc.*, 403 F.2d 933 (1st Cir. 1968).

58. "To charge one with notice, 'the facts must be such as ordinarily to excite inquiry with reference to the particular fact which inquiry is designed to elicit.'" *People v. One 1933 Buick Sedan*, 43 Cal. App. 2d 482, —, 111 P.2d 378, 380 (1941), *quoting from* *Zeller v. Milligan*, 71 Cal. App. 617, 624, 236 P. 349, 352 (1925). By analogy, inadequacy of price alone rarely is sufficient to constitute notice of defect in title unless the price paid is merely nominal or absurdly low. *Zweig v. Schwartz*, 31 A.2d 857, 861 (D.C. Mun. App. 1943) (purchase of \$400 diamond ring for \$75 did not constitute notice).

59. UNIFORM COMMERCIAL CODE § 2-316, Comment 8.

60. See notes 41-43 *supra*, and accompanying text.

61. 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. City Civ. Ct. 1971).

the aversion to disclaimers generally held by courts. The defendant, Parke-Bernet Galleries, had sold at auction two paintings which were attributed to Raoul Dufy, but which were later discovered to be fakes. Parke-Bernet had represented in its catalogue that the works were genuine and that documentation was available. Parke-Bernet argued, however, that all sales were "as is" and subject to the "Conditions of Sale" contained in the catalogue. The mentioned "Conditions of Sale" included a disclaimer of any warranty and a statement that purchasers were bound by its terms. Two issues were presented: first, whether the plaintiffs had knowledge of the disclaimer, and, if they did not, whether they were legally chargeable with such knowledge. The second issue was whether the disclaimer was effective to immunize Parke-Bernet from the legal consequences that would normally follow where a sale results from a representation of genuineness that subsequently is found to have been totally inaccurate.<sup>62</sup>

In addressing the first question, the court noted that the provisions of the "Conditions of Sale" were in small print. Though the disclaimer was unequivocal in its terms, a "List of Artists" was included in the catalogue with appropriate reference numbers to works offered for sale. Descriptive material about the artists and works appeared throughout the catalogue, including specific reference to the two paintings in question. The court also noted that the auction procedure merely was to announce at the beginning of the auction that all sales were subject to the "Conditions of Sale," without making any direct statement about the disclaimer.

The court decided the knowledge question by invoking a test which inquires whether "the person . . . should as a reasonable man understand that it contains terms of the contract that must be read at his peril."<sup>63</sup> In holding that much more than the auctioneer's statement was required to draw attention to the "Conditions of Sale," the court indicated that the auction attracted people on the basis of their interest in owning art, not on the basis of their legal experience or business sophistication. Moreover, the court considered it unreasonable to expect a prospective purchaser to appreciate a disclaimer of "basic information presented throughout the catalogue in unqualified form with every appearance of certainty and reliability."<sup>64</sup>

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62. 325 N.Y.S.2d at 579.

63. *Id.* at 580.

64. *Id.*

In deciding the effect of the disclaimer, the court also focused on the defendant's expectation that bidders would rely upon the reputation of Parke-Bernet and the accuracy of its representations: "The wording of the catalogue was clearly designed to emphasize the genuineness of the works to be offered."<sup>65</sup> Significantly, in addressing itself to the "highly technical and legalistic words of disclaimer," the court found that "[w]here one party in a contractual relationship occupies a position of superior knowledge and experience, and where that superior knowledge is relied upon and intended to be relied upon by the other, surely more is required for an effective disclaimer than appears here."<sup>66</sup> In denying the legal effect of the disclaimer, the court acted "consistently with a whole body of law that reflects an increasing sensitivity to the requirements of fair dealing where there is a relationship between parties in which there is a basic inequality of knowledge, expertness or economic power."<sup>67</sup>

Were this case decided under the Code, it would fall directly within the provisions of section 2-316(1). To the extent an attempt to construe the express warranty and disclaimer consistently is unreasonable, the attempted disclaimer is inoperative.

#### UCC § 2-314 WARRANTY OF MERCHANTABILITY

The codification of the implied warranty of merchantability in section 2-314 has given consumers a highly flexible remedy to redress the infliction of personal injury.<sup>68</sup> Particularly important for the protection

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65. *Id.* at 581.

66. *Id.*

67. *Id.* at 582.

68. Section 2-314 provides:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

of art consumers is the question whether section 2-314 will be interpreted to include redress for loss of bargain resulting from the sale of defective goods.

Section 2-314 (1) establishes that, unless disclaimed, a warranty that goods shall be merchantable is implied in a contract for their sale by a "merchant dealer." The scope of the warranty limits liability to a "merchant with respect to goods of that kind;" it is arguable that this coverage includes commercial galleries and dealers, and museums which indulge in the controversial practice of de-accessioning.

Although developmental case law surrounding section 2-314 primarily involves personal injury or property damage caused by defective goods, cases such as *Santor v. A. & M. Karagheusian, Inc.*<sup>69</sup> evidence at least sporadic judicial willingness to extend implied warranty liability to commercial loss situations. Considering the far-reaching impact that past art scandals such as the Van Meegeran<sup>70</sup> and de Hory<sup>71</sup> forgeries and the discovery of the fake Etruscan Horse in the collection of the Metropolitan Museum of Art<sup>72</sup> have had on the commercial art world, the application of implied warranty liability to the sale of art would be an effective means of eradicating the specter of art fakes whether their transfer is innocent or intentional.

The thrust of section 2-314 is demonstrated by comparing that remedy with the more traditional action for fraudulent representations inducing the sale of goods. In an action for fraud, it generally is necessary to prove that the seller knew his representation was false. However, in an action for breach of the implied warranty of merchantability, the seller's knowledge of the existence of a defect is not an essential element of liability. Covering all defects within its scope, whether known to the seller or not, the 2-314 warranty is a form of strict liability which is

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(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

69. 44 N.J. 52, 207 A.2d 305 (1965). See also *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), which extends the breach of *express* warranties to commercial loss.

70. See L. JEPSON, *supra* note 1, at 149.

71. See generally C. IRVING, *FAKE* (1969).

72. A collection of articles on art forgery appears in 26 BULLETIN OF THE METROPOLITAN MUSEUM OF ART, February, 1968. Most of the articles were prompted by the then-recent discovery of the fake Etruscan horse.



applicable even in situations where the seller would be unable<sup>73</sup> to discover the defect in the work of art.<sup>74</sup> If the goods do not conform to the contract, the seller's utmost care will not relieve him of liability<sup>75</sup>

### *Criteria for Establishing Merchantability*

The standards for establishing merchantability are enumerated in section 2-314 (2). Of foremost importance in applying the warranty of merchantability to art sales is the criterion of section (2) (a), which states that "goods to be merchantable must be at least such as pass without objection in the trade under the contract description." Comment 2 to this section suggests that in the field of art this interpretation would be made by reference to recognition, categorization, and evaluation of specific artists, periods of art, and specific works relating to those artists and periods.

Obviously, an original, documented work of art would pass without objection in the trade. But it is less clear what result would follow from a fake Corot which has passed unnoticed for 100 years.<sup>76</sup> Literally, there has been no objection by the trade in such a situation; nevertheless, it is a spurious piece which, when discovered, will work to the financial detriment of its purchaser. On discovery of the defect, the work would be rendered unmerchantable for the purposes of that particular contract of sale, and section 2-314(2) (a) should provide a remedy.

The art industry has attempted to alleviate the possibility of this situation by standardizing the classification of the degrees of certainty in attribution.<sup>77</sup> In reality, the classification scheme is an attempt to estab-

73. The word "unable" has more practical meaning when defined in terms of the extreme expense and time required to authenticate most works of art. Coupled with the reality that expert opinion is rarely unanimous, "unable" need not be an absolute in this context.

74. See, e.g., *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 849 (1967) (disease in chickens was non-detectable by seller, but such fact did not relieve him of the consequences of section 2-314).

75. *Id.* See also *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1965), *rehearing denied* July 11, 1966, *application for leave to file second petition for rehearing denied*, Oct. 18, 1966.

76. George Savage declares: "The specious argument is often advanced that if a forgery deceives the critics and experts it is as valid as the original work. A proper refutation is that the life of any forgery is rarely more than a generation. Left alone, it will expose itself merely by existing. A case in which a forgery has been universally accepted is virtually unknown. Even the best of forgeries can hardly be said to exist on the same plane as a genuine work of art." G. Savage, *supra* note 4, at 10.

77. If the artist's surname alone is mentioned in a catalogue, the merchant implicitly is saying that the question of attribution is far from resolved, and in his opinion the work

lish a built-in disclaimer system for the protection of the art merchant; the classification purportedly operates as a vehicle of notice to prospective purchasers. This method of imbuing the transaction with integrity does not provide for all contingencies which may arise. Section 2-314 (2) (a) could provide an effective remedy; when the defect is discovered, it still can be shown to have been unmerchantable.

Another test for determining merchantability which may afford an alternate means of protecting the disappointed purchaser from the loss of his bargain is found in section 2-314(2) (c), which states: "Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used." Comment 8 elaborates: "[M]erchantable goods must therefore be 'honestly' resalable in the normal course of business because they are what they purport to be." A forgery certainly would defeat the purpose of buying an original and assuredly would not be "honestly resalable" as an original. Whether the purchase was motivated by an aesthetic sense or by the ever-increasing desire to obtain a financial investment, the provisions of section 2-314 (2) (c) and comment 8 make it apparent that there is a breach of the implied warranty of merchantability in the sale of a forged piece.

Section 2-314 (2) (f) provides another standard for defining merchantability. The goods must be such as "conform to the promises or affirmations of fact made on the container or label if any." Paintings often are sold in frames displaying brass or wooden plaques which recite the title of the work and to whom it is attributed. If such a plaque is regarded as a label, and if the painting and the plaque are inconsistent, a breach of the implied warranty of merchantability would arise.

Viewing the artist's signature as a label within the purview of subsection (2) (f) is even more significant. A forged signature would breach the warranty of merchantability; and where the painting was, in fact, an original, but the signature had been added fraudulently to improve salability or artistic importance, the purchaser should recover for any difference in value between an unsigned and a signed original.

### *Privity*

The UCC makes no provision with respect to the seller's liability to

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is "of the artist's school," "by one of his apprentices," or "in his manner or style." The addition of the artist's initials to the surname indicates that the work is "of the period" of the artist, which may be in whole or in part the efforts of the artist. When the work is listed with the first name or names in addition to the surname, it is considered that the work is "by the artist."

a subpurchaser. Comment 3 to section 2-318 declares that the Code position is "neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." The modern trend is away from privity and toward foreseeability as the criterion for liability. In Virginia, for example, legislation has dispensed with both horizontal and vertical privity and has extended liability beyond personal injury to property damage and loss of bargain.<sup>78</sup> The Oregon courts have indicated an alternative method of dispensing with privity. In *State ex rel. Western Seed Production Corp. v. Campbell*,<sup>79</sup> for example, an implied warranty was not considered a bargained-for provision; liability under such a warranty thus is imposed by law and is essentially tortious rather than contractual. It would be immaterial, therefore, whether the defendant is a remote or immediate seller. Moreover, if advertising is involved, an additional argument for dispensing with privity arises. In a personal injury action in *Lonzrick v. Republic Steel Corp.*,<sup>80</sup> the court stated that, although advertising by the manufacturer is a reason for not requiring privity when the consumer sues the manufacturer, the absence of advertising by the manufacturer does not bar such action by the purchaser. Likewise, in an action for transfer of fake art the remote purchaser should be able to dispense with privity on the basis of advertisements;<sup>81</sup> even in the absence of advertising, it is submitted that lack of privity should not preclude recovery. In any case where it is reasonably foreseeable that the breach of the warranty of merchantability will cause an economic loss to the ultimate consumer, the remote seller should be held liable for such loss.<sup>82</sup>

### Disclaimer

The warranty of merchantability may be disclaimed, but such disclaimer requires special precaution.<sup>83</sup> A disclaimer of this warranty may

78. VA. CODE ANN. §§ 8.2-318 (Added Vol. 1965); 8-654.4 (Cum. Supp. 1972). See Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

79. 250 Or. 262, 442 P.2d 215 (1968).

80. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

81. Judge Fuld in *Randy Knitwear* stated: "Today, the significant warranty is frequently that given by the manufacturer through mass advertising to consumers with whom he has no direct contractual relationship." 11 N.Y.2d 5, 12, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363, 367 (1962).

82. ANDERSON, *supra* note 41, § 2-314:141.

83. UNIFORM COMMERCIAL CODE § 2-314, Comment 11.

be oral or in writing; if written, it must be conspicuous and must expressly mention merchantability.<sup>84</sup> The implied warranty of merchantability also may be excluded by general language which informs the buyer that he assumes the entire risk of the quality of the goods; this may be accomplished by such statements as "with all faults," or "as is."<sup>85</sup> Courts are reluctant to give effect to any language of disclaimer, particularly in the case of the implied warranty of merchantability. Buyers frequently are relieved of the onerous burdens of a disclaimer by a finding of unconscionability<sup>86</sup> or a determination that the disclaimer was not sufficiently conspicuous.<sup>87</sup>

The warranty of section 2-314 also may be precluded by the purchaser's inspection or failure to inspect.<sup>88</sup> However, this rule applies only to defects which could be revealed by reasonable inspection. What constitutes a reasonable inspection is determined by the skill of the buyer and the time and facilities available to him.<sup>89</sup> The purchaser of a forged painting should not be precluded by his inspection from asserting a forgery that he could not have discovered without using the tools of advanced technology or extensive research.

#### UCC 2-315 WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

A cause of action of special importance both to the novice art consumer and to the educated purchaser can be found in section 2-315,<sup>90</sup> which establishes an implied warranty of fitness for a particular purpose. Although the usual fact situation involves a merchant seller, comment 4 to 2-315 indicates that the warranty can arise as to nonmerchant sellers when it is justified by the circumstances. As in the cases of the warranty of merchantability and express warranty, the seller's intention to create a warranty is immaterial, and good faith is no defense.<sup>91</sup> Likewise, the

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84. UNIFORM COMMERCIAL CODE § 2-316 (2).

85. UNIFORM COMMERCIAL CODE § 2-316 (3) (a).

86. UNIFORM COMMERCIAL CODE § 2-302.

87. UNIFORM COMMERCIAL CODE §§ 2-316 (2), 1-201 (10).

88. *Intrastate Credit Serv., Inc. v. Pervo Paint Co.*, 236 Cal. App. 2d 547, 46 Cal. Rptr. 182 (1965).

89. *Id.*

90. Section 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

91. ANDERSON, *supra* note 41, § 2-315:9.

fact that the defect is difficult to discover does not eliminate the warranty of fitness for a particular purpose if the warranty otherwise is created.<sup>92</sup>

Warranty liability under section 2-315 arises "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." <sup>93</sup> To constitute a breach of this warranty, three requirements must be met. Initially, the seller must know of the buyer's particular purpose. An explicit statement of purpose by the buyer is unnecessary if the circumstances are such that the seller should realize the purpose. Secondly, the seller must have actual or constructive knowledge that the purchaser is relying on his skill. Finally, the buyer must actually rely on the seller.

Care must be taken to insure that the purchaser's claim is based on a particular purpose apart from the purpose contemplated by the warranty of merchantability. Comment 3 to section 2-315 distinguishes between "particular" and "ordinary" purposes. Basically, a particular purpose within the meaning of section 2-315 "envisages a special use by the buyer which is peculiar to the nature of his business," whereas an ordinary purpose envisages a use "customarily made of the goods in question." A purchaser who is motivated generally by investment potential will not invoke the 2-315 warranty; nor would a purchaser whose primary purpose was merely to own a work by a given artist. If, however, the purchase is undertaken to secure a particular investment or gift or to complete a specific collection, the particular purpose required by section 2-315 may be present.

It is possible to envisage the operation of these concepts in the context of art forgery. If, for example, a prospective purchaser wishes to acquire a specific painting or a painting by a particular artist for the purpose of completing a collection, or for a certain gift or investment based on public demand for work by that artist or period, and if the seller is aware of that purpose, and in addition is cognizant of the purchaser's reliance on his professional skill to provide a quality of goods commensurate with the purchaser's need, the transfer of a forgery, or anything other than that which was bargained for, would constitute a breach of the warranty for a particular purpose.

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92. *Id.*

93. UNIFORM COMMERCIAL CODE § 2-315.

## CONCLUSION

Art forgery has been called the "indispensable concomitant of art collecting."<sup>94</sup> It is a self-contradictory exercise in ultimate devotion, "resulting as it does in the complete effacement of the maker."<sup>95</sup> Efforts to prevent forgery probably never can be totally successful; as a result, there is a need to provide a means to compensate the victims of the inevitable art fraud. The Uniform Commercial Code can afford an effective remedy for art fraud. The warranty provisions of sections 2-313, 2-314, and 2-315 are existing remedies which, if applied creatively, can provide the broad-based shield necessary for continued scientific, scholarly, and legislative advancement in the eradication of art forgery. Some of the proposals set forth herein are innovative in theory and application and may or may not enjoy judicial support. What is important, however, is recognition by the legal and commercial art communities of the urgent need for the emergence of a metamorphosed concept of Code warranties—an expanded concept more realistic in light of modern commercial art transactions. Only when the specter of art fraud and forgery is challenged and contained will the commercial art industry dwell in a relatively clean market, and only then will purchasers of art, whether *avant garde* or Antique, be able to rejoice unencumbered in the aesthetic fulfillment and pride in ownership of those works.

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94. H. TIETZE, *GENUINE AND FALSE* 74 (1948).

95. *Id.*