

VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW

VOLUME 16

SPRING 2014

NUMBER 3

Explaining the Art Market's Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem to Care)

*Gregory Day**

ABSTRACT

Based upon a series of interviews with art market experts, this Article identifies and answers a significant, yet previously unexplored economics puzzle affecting the art market. Economics suggests that markets typically produce efficiency and social wealth, but when they fail, most actors should prefer remedial measures over an inefficient status quo. The art market currently is, and has been, plagued with frauds, thefts, forgeries, and market failure—a state of affairs that the governing legal framework has made worse. Despite this, the art market seems to adamantly, and puzzlingly, defend its business culture, rejecting attempts to remedy inefficiencies. In other words, why has the art industry remained stable, yet fraught with market failure?

The research herein finds that reliable product information is the lifeblood of efficient markets, yet the nature of art encourages many participants to withhold or conceal important market information. This often prevents prospective buyers from accurately determining a work's value, leading to inefficient behavior. Few actors have sought change, however, because the economics of art produces a special conflict of interest: buyers expect art to appreciate in value and thus

* Associate, Morris Nichols Arsht & Tunnell LLP; Instructor, University of Mississippi (2008–2010); J.D., University of North Carolina School of Law; Ph.D., M.A., University of Mississippi; B.A., Antioch College. The views expressed in this Article are the Author's and not those of Morris Nichols Arsht & Tunnell LLP.

assume they will resell the work at a higher price, causing them to prefer a market favoring the sellers. This observation suggests that efficient markets require buyers and sellers to be sufficiently adverse or else incur stark inefficiencies.

TABLE OF CONTENTS

I.	INTRODUCTION	458
II.	ART AND THE ECONOMICS OF THE MARKET	462
III.	THE PERPLEXING TRADE OF ART.....	465
	<i>A. Evaluating the Deal</i>	465
	<i>B. The Art Market, Information, and Thievery</i>	470
	<i>C. Information and the Risks Found in Attribution</i>	478
IV.	THE INEFFICIENCIES OF THE ART MARKET.....	484
V.	EXPLAINING THE ECONOMICS OF PERSISTENT MARKET FAILURE	486
VI.	PROPOSALS FOR REFORM	489
	<i>A. The Experts</i>	489
	<i>B. The Duty of the Dealer</i>	492
	<i>C. Insurance</i>	492
	<i>D. Art-Theft Databases</i>	493
VII.	CONCLUSION	494

I. INTRODUCTION

Economic principles inform the laws of property and commerce.¹ The overarching theory is that unregulated markets generally maximize collective wealth and social benefits.² This does

1. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 369–71 (8th ed. 2011) (discussing how cartels and price fixing produce undesirable economic, and thus societal, externalities, and how the Sherman Act sought to regulate these inefficient market behaviors, including monopolies, price-fixing, cartels, and collusion, with criminal and civil penalties).

2. See ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* 27 (2004) (“[T]he standard economic assumption [is] that in competitive markets, marginal private benefits equal marginal social benefits, and marginal private costs equal marginal social costs. This means that self-interest equals the public interest, and that there are no negative or positive externalities from market exchange. . . . The same idea dates back all the way back to Adam Smith and his notion of the invisible hand. Smith argued, for instance, that when individuals pursue their own self-interest, they end up promoting the public interest even though it is not part of their original intention.”) (internal footnotes omitted).

not happen in every instance,³ as sometimes markets create harmful externalities⁴ or poorly distribute resources.⁵ Incidents of “market failure”⁶ should not last long though, considering that a number of actors—including buyers, sellers, voters, and local officials—have incentives to remedy inefficiency.⁷ Indeed, most market participants should prefer remedial laws and economic regulations over a suboptimal status quo.⁸ A corollary is that markets existing without disruption have most likely produced a desirable sum of wealth and efficiency⁹ or otherwise, those negatively affected would have sought change. In that case, why has the art market remained stable yet fraught with stunning inefficiency?

This Article finds that in contrast to efficient markets, the art industry actively suppresses reliable information about its

3. “Pareto efficiency” or “Pareto optimality” is an economic theory defining optimal market efficiency, occurring when “no one can be made better off without making someone else worse off.” David Ellerman, *Numeaire Illusion: The Final Demise of the Kaldor-Hicks Principle*, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 96, 96 (Mark D. White ed., 2009). This means that the status quo of all parties achieves maximum benefits and any changes to the relationship would then begin to harm one party. *Id.*

4. An example of a negative economic externality is pollution when the buyer and seller do not have to pay for the pollution that their transaction has created and thus have an incentive to engage in behavior where the end result is negative if the cost of pollution exceeds the public benefit created by their deal. See Michael J. Podolsky, Note, *The Use of Discount Rate in EPA Enforcement Actions*, 52 CASE. W. RES. L. REV. 1009, 1012 (2002) (“Regulations are imposed to correct for market failures such as negative externalities. In the context of pollution, negative externalities exist as firms fail to internalize the external cost of pollution as a result of their production process. Consequently, the quantity of goods and services consumed exceeds the optimal level. The optimal level is where the marginal social benefits equal marginal social costs.”).

5. See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 39–41 (2000) (explaining that market inefficiencies in developing nations has produced “\$9.3 trillion of dead capital,” meaning that these assets cannot achieve optimal value).

6. There is not necessarily one agreed upon definition of “market failure,” though one can view it as a collective problem whereby the system fails “to overcome problems of collective action—that is, situations in which individual incentives lead to inefficient collective outcomes.” BRUCE BUENO DE MESQUITA, PRINCIPLES OF INTERNATIONAL POLITICS: PEOPLE’S POWER, PREFERENCES, AND PERCEPTIONS 136–37 (3d ed. 2006).

7. Buyers, sellers, voters and local officials all have an incentive to remedy these inefficiencies. Economists have said that legislation exists in a market whereby a law is most likely to be enacted by a legislature when a significant demand for it exists. This demand should naturally occur when a majority of affected parties feel harmed by the status quo. See POSNER, *supra* note 1, at 716 (mentioning that the electoral process “creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money or votes”).

8. See *id.*

9. See Sandra Marco Colino, *On the Road to Perdition? The Future of the European Car Industry and Its Implications for EC Competition Policy*, 28 NW. J. INT’L L. & BUS. 35, 76 (2007) (explaining that if markets are acting efficiently, then any subsequent regulation can then upset the market, or another market, creating market failure).

products—a behavior that the governing legal regime reinforces.¹⁰ For instance, art dealers and sellers often withhold most product and sales data in order to drive up prices artificially.¹¹ This becomes even more troublesome when taking into account the legal pitfalls facing an uninformed buyer.¹² A purported Matisse could have been forged¹³ or stolen,¹⁴ either of which condition threatening the buyer's investment.¹⁵ Victims of forgeries also have little legal recourse against the seller¹⁶ or anyone else,¹⁷ and those who have purchased a stolen painting must usually return it without compensation

10. A primary function of efficient markets is providing adequate information to buyers and sellers. This consideration informs many economic regulatory laws. See Robert A. Brown, *Financial Reform and the Subsidization of Sophisticated Investors' Ignorance in Securitization Markets*, 7 N.Y.U. J.L. & BUS. 105, 146–47 (2010) (“The Dodd-Frank Bill (and a lot of legal commentary) has as its core the idea that the lack of information between investors and issuers of securities was a primary contributing factor to the Market Meltdown. . . . The dominant theory about market failure is Nobel Prize winner George Akerlof’s seminal work, which describes the problem of information asymmetries as a ‘Lemons Problem.’ Akerlof concludes that market failure can occur where sellers cannot communicate costlessly to buyers the value of their products.”) (footnotes omitted).

11. See Interview with Franklin Feldman, Former Chairman, International Foundation of Art Research’s Law Advisory Council, in N.Y.C., N.Y. (Mar. 13, 2013) (explaining that when little information exists about the typical value of an contemporary artist’s work, dealers seek to avoid public sales, such as auctions, because if the work is sold at a lower price, the dealer will be unable to sell the works again for the higher price; thus, dealers prefer to repress information to keep prices high).

12. See *infra* Part III (explaining the three predominant problems facing perspective buyers).

13. See, e.g., *Wilson v. Hammer Holdings, Inc.*, 671 F. Supp. 94, 95–98 (D. Mass. 1987) (finding that the buyer of a painting that later turned out to be a forgery did not have a cause of action against the seller, despite the fact that the painting is now worth a fraction of its purchase price of \$11,250, because it was barred by the statute of limitations).

14. See, e.g., *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 302–11 (D.R.I. 2007) (finding that owners of a painting which later turned out to be stolen must give the painting back to original owners, who had it stolen from them during World War II).

15. See *id.* at 311 (granting the original owners motion of replevin, divesting the current holders of art of both legal and possessory rights to the painting).

16. See, e.g., *Hope v. Klabal*, 457 F.3d 784, 791–92 (8th Cir. 2006) (finding that no fiduciary duty typically exists between buyers and dealers wherein a buyer purchased a painting, later found out that it was a forgery, and sued the dealer claiming that the dealer had breached a fiduciary duty to him).

17. Many who suspect that their works are forged determine for a number of reasons that it makes little sense to bring an action against any culpable party that caused the buyer to purchase the forged art. For instance, the costs of investigating the art’s authenticity can exceed its value; the culpable party may be judgment proof so that determining that the work is a forgery will serve only to diminish the value of the buyer’s painting; some countries destroy forgeries and because of that, buyers may prefer to keep the forged painting than have it be destroyed; or even that one discovers that their painting is a forgery long after the perpetrator has been found liable in a civil and/or criminal trial. See Riah Pryor, *Victims of Forgery are ‘Left in Limbo,’* ART NEWSPAPER, Sept. 6, 2012, <http://www.theartnewspaper.com/articles/Victims-of-forgery-are-left-in-limbo/27146>.

regardless of the generations passed since the theft occurred.¹⁸ Even the most diligent art consumer cannot typically access enough reliable information to determine with confidence whether a proposed art deal is a wise investment.¹⁹

The dangers belying a buyer were recently illustrated by one of New York's most well known and storied private galleries, Knoedler & Company, which, as it turns out, had sold forged paintings for over a decade.²⁰ A local man had authored the forgeries in a nearby Queens garage, selling them to Knoedler as authentic Rothkos and Jackson Pollocks,²¹ producing as much as \$40 million in gallery profits.²² Even if Knoedler was duped,²³ the fact that such a scandal could surface at Knoedler suggests that no transaction can ever rise above scrutiny.²⁴ Notwithstanding the Knoedler debacle and other prior scandals, few in the art industry have seriously attempted to add transparency to the art market.²⁵

But despite these flaws, consumers continue to invest substantial sums of money in art.²⁶ While some think of the art market as a niche industry for the rich, it actually entails a significant

18. See, e.g., *Porter v. Wertz*, 421 N.E.2d 500 (N.Y. 1981) (finding that a merchant's defective title would not be protected even if he was duped because he did not make his purchase in good faith); *Menzel v. List*, 267 N.Y.S.2d 804, 820 (1966).

19. See *infra* Part II (explaining the crucial role of information in effective markets and the related problems posed by the art market).

20. For a more detailed discussion of events, see Michael Shnayerson, *A Question of Provenance*, VANITY FAIR, May 2012, <http://www.vanityfair.com/culture/2012/05/knoedler-gallery-forgery-scandal-investigation>.

21. See Patricia Cohen & William K. Rashbaum, *One Queens Painter Created Forgeries that Sold for Millions*, U.S. SAYS, N.Y. TIMES, Aug. 15, 2013, <http://www.nytimes.com/2013/08/16/nyregion/one-queens-painter-created-forgeries-that-sold-for-millions-us-says.html>.

22. Patricia Cohen, *Lawsuits Claim Knoedler Made Huge Profits on Fakes*, N.Y. TIMES, Oct. 21, 2012, <http://www.nytimes.com/2012/10/22/arts/design/knoedler-made-huge-profits-on-fake-rothko-lawsuit-claims.html>.

23. See Michael Shnayerson, *What Does Glafira Rosales's Guilty Plea in the Knoedler-Gallery Forgery Case Mean for Ann Freedman and the Rest of the Players?*, VANITY FAIR (Oct. 1, 2013, 12:52 PM), <http://www.vanityfair.com/online/daily/2013/10/glafira-rosales-guilty-plea-knoedler>.

24. See *id.*

25. See generally Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 53 (1999) ("Furthermore, as the present system lacks transparency, controversies arise and parties must engage in costly litigation."); Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 350 (2012) ("The information problem can be traced to the 'wall of silence' that surrounds the art market. As this Part shows, secrecy norms dominates both private sales and public auctions, making information about art transactions difficult, if not impossible, to come by.").

26. See David D'Arcy, *Big Money Still Being Spent on Works of Art Despite World's Traumas*, NATIONAL (Mar. 24, 2011), <http://www.thenational.ae/arts-culture/art/big-money-still-being-spent-on-works-of-art-despite-worlds-traumas>.

portion of the value of goods bought and sold in the United States.²⁷ The auction house Sotheby's, for example, estimates that it facilitated sales of art worth approximately \$5.4 billion in 2012.²⁸ Even during the heart of the recession in 2009, the sale of fine art in the United States rose to about \$1.3 billion.²⁹ Buyers of art, it seems, have not been dismayed.

This Article explores why market failure persists in the art world even though sophisticated parties appear to have both the motivation and ability to demand efficiency. Part II argues that a market will remain perpetually riddled with inefficiency when buyers and sellers harbor similar preferences, undermining arm's length dealing. Part III traces current theories of markets and regulation in order to create a framework explaining how the law should ideally intersect with trade. Part IV explains in greater detail the historical and current state of the art market, as well as the laws governing it. Part V proposes reforms to remedy the art market's failure and inefficiency.

II. ART AND THE ECONOMICS OF THE MARKET

The art trade and the laws regulating it behave very differently from efficient markets. Economists define market efficiency as a condition in which goods sell at a price incorporating all available information.³⁰ This process occurs through an interaction between buyers and sellers whereby sellers price a good and then survey the market in hopes of finding consumers willing to spend that much.³¹ If no buyer agrees to that price, then the sellers must reduce its cost; the

27. See *id.*

28. Souren Melikian, *Art Market Goes Hot and Cold*, N.Y. TIMES, Mar. 29, 2013, <http://www.nytimes.com/2013/03/30/arts/30iht-melikian30.html>.

29. ART MARKET INFORMATION, <http://www.artmarket.com> (last visited Apr. 17, 2013).

30. See Michelle N. Comeau, Comment, *The Hidden Contradiction within Insider Trading Regulation*, 53 UCLA L. REV. 1275, 1295 (2006) ("In its purest form, market efficiency is simply a positive description of how a capital market may adapt to information. If a capital market is efficient, stock prices should fully reflect all available information. Furthermore, the price of shares should immediately adjust to new information that is relevant to a stock's value. The value of maintaining an efficient market lies in the market's ability to properly allocate investment resources.")

31. See Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV. 235, 262–63 (2010) (noting that firms are willing to spend more producing a good as its value increases and firms will produce the good as long they can receive more for the goods than it costs to make it).

point at which buyers and sellers agree establishes the good's market value.³²

The role of knowledge assumes a crucial function in the market.³³ Just because a buyer and a seller reach an agreement does not mean that the market has functioned efficiently since either actor could have labored under a serious misconception or lacked information that would have shed light on a bad deal. Accordingly "market failure" refers to a process by which information asymmetries cause buyers and sellers to misallocate resources, resulting in systemic inefficiencies.³⁴ Consumers who continuously spend too much on a good, for instance, will have fewer resources to purchase other products and services, harming both themselves and alternative vendors.³⁵

Another important aspect of a good's price is the transaction cost required to obtain reliable information about it.³⁶ Transaction costs entail all of the resources one must expend beyond the good's

32. See POSNER, *supra* note 1, at 15 ("The economic value of a good or service is how much someone is willing to pay for it or, if he has it already, how much money he demands for parting with it."); Marshall, *supra* note 31, at 263 ("Since each price reflects the value of each product to the marginal buyer, and since each price equals the cost of the marginal unit of output, consumer welfare is maximized . . .").

33. See Roger J. Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 WM. & MARY L. REV. 373, 374-75 (1984) (discussing the efficient market hypothesis with respect to Capital formation). Dennis notes that a market that absorbs and reflects plentiful information is more efficient and thus desirable:

The model posits that the price of a security reflects all publicly available information about a firm, and that prices react almost instantaneously and in an unbiased manner to any new information. These two notions are obviously interrelated. If share prices always reflect all publicly available information, then prices must adjust promptly to any new data. As a normative matter, a market that operates in the manner described by the model is economically desirable because investment will be channeled into the most profitable areas and capital will be allocated efficiently.

Id.

34. See POSNER, *supra* note 1, at 13 ("When resources are being used where their value is highest, or, equivalently, when no reallocation would increase their value, we say they are being employed efficiently."); Thomas L. Greaney, *Competitive Reform in Health Care: The Vulnerable Revolution*, 5 YALE J. ON REG. 179, 205 (1988) (arguing that market inefficiency can actually result out of free market competition when significant information asymmetries exist, and that this type of inefficiency is especially ripe in health care).

35. See POSNER, *supra* note 1, at 13. The health industry is notorious for market failure because most consumers lack the knowledge to make wise medical decisions independently. See Greaney, *supra* note 34, at 204-05. Without strict market regulations, charlatan doctors could convince patients that they require unnecessary procedures, redirecting a disproportionate sum of societal resources to an undeserving location. See Greaney, *supra* note 34, at 205.

36. See POSNER, *supra* note 1, at 4 ("Information is costly, and often the costs are prohibitive, especially when the information one would like to have concerns the future.")

sticker price to complete a deal.³⁷ For example, two vendors could both sell a television set for one-hundred dollars, but if the first vendor charges a ten-dollar delivery fee while the other delivers for free, then the latter television set is actually ten dollars cheaper. To some degree all transactions bear a cost considering that consumers must spend time, money, or other resources to research, purchase, retrieve, and install the good.³⁸ The cost of obtaining such information can sometimes be so great that buyers will either avoid the deal in the first place or pay much more than necessary.³⁹

Accordingly, the foundation of an efficient market lies in its ability to provide reliable information at a reasonable cost so that buyers and sellers can dedicate resources to their wisest, most efficient uses.⁴⁰ Consider again the market for televisions: The ease with which consumers (and sellers) can acquire information needed to appraise a television's value promotes the industry's performance. Indeed, consumers are able to comparison shop amongst vendors, consult reference magazines like *Consumer Reports*,⁴¹ consider online user reviews, and in some instances acquire wholesale prices and dealer invoices—any of these sources potentially providing enough information to determine a television's fair market value.⁴²

Most developed legal systems thus encourage efficiency by either requiring those with reliable information to disseminate it or forbidding them from concealing it.⁴³ The laws governing corporate

37. Posner defines a transaction cost as “the costs involved in organizing economic activity through voluntary exchange.” *Id.* at 529.

38. See, e.g., *id.* at 4; John F. Barry III, *The Economics of Outside Information and Rule 10B-5*, 129 U. PA. L. REV. 1307, 1335–36 (1981) (explaining that a system to trade stocks generally performed better than average, however, the number of transactions required to make the system effective incurred such transaction costs to eliminate its benefits).

39. Posner uses the example of a farmer contemplating raising a hog on his land versus other possible uses of the land. POSNER, *supra* note 1, at 42. Depending upon transaction costs involved, such as property rights and incomplete information regarding whether the hog will reach maturity, rational actors will choose options or avoid others depending upon those costs. *Id.*

40. See *id.* at 8 (“Economics is primarily concerned with how resources are allocated.”).

41. See, e.g., CONSUMER REPORTS MAGAZINE, <http://www.consumerreports.org/cro/magazine/index.htm> (last visited Apr. 16, 2013).

42. See, e.g., *Consumer Reviews*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=12177361> (last visited Apr. 16, 2013) (explaining how their user reviews are meant to help consumers assess whether to purchase a good).

43. Professor Romano presents a good example of vehicular “lemons.” Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 1002 (1984). Here, if consumers cannot (at a reasonable cost) discern a well-functioning car from a lemon, then dealers may try to sell lemons under the auspices of a good car. *Id.* Buyers may expect this then, and thus, only pay the price of the lemon (or refuse to buy a car). *Id.* Accordingly, the value of automobiles would plummet, especially considering that sellers would then stop selling higher value cars. *Id.*; see also POSNER, *supra* note 1, at 141 (stating that laws that require disclosure often occur when consumers cannot readily or cheaply acquire information themselves).

fiduciary duties, for instance, require that when a board of directors asks its shareholders to vote on a proposed merger, the board must disclose all material information on the deal, as opposed to compelling individual shareholders to ferret out the terms of the deal.⁴⁴ The policy rationale is that corporate-disclosure laws help shareholders maximize the value of their ownership and thus promote societal wealth and market performance.⁴⁵ Efficient legal systems thus encourage the proper distribution of resources, usually by increasing the volume and quality of market information.⁴⁶

III. THE PERPLEXING TRADE OF ART

Upon this canvas, the laws governing the art market make little sense. When purchasing art, consumers must be concerned with three questions: (1) whether the work's value equals at least what the seller is asking, (2) whether the work is authentic, and (3) whether anyone else can claim title to the work.⁴⁷ The art industry refuses, however, to provide reliable information about these issues due in part to the nature of art as a commodity, the culture and history of the market, and the laws governing its trade. In fact, these same conditions create incentives to actively conceal these qualities, thereby driving the art market into a state of market failure.

A. *Evaluating the Deal*

The nature of art as a tangible commodity makes it difficult for consumers to accurately assess a particular work's value, leading to several inefficient consequences. Traditional commodities like a television, for example, are utilitarian and thus have an inherent value influenced by its component parts and labor.⁴⁸ Most consumers also buy televisions on the primary market (i.e., new) from established dealers who sell in bulk through a vast number of dealers, creating intra-industry competition. All of these characteristics allow consumers to compare television prices, disseminating reliable

44. See Romano, *supra* note 43, at 1001–02 (explaining that the disclosure requirements also help the market by providing relevant information to potential buyers outside the corporation).

45. See Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 616 (1988).

46. For example, a lively debate is ongoing with respect to whether insider trading should remain illegal considering it allows stocks to better incorporate reliable information about their value. See, e.g., Comeau, *supra* note 30, at 1300.

47. See *infra* Part III.

48. See Marshall, *supra* note 31, at 262–63 (explaining that producers will only sell a good above the marginal cost to create it).

consumer information.⁴⁹ While perfect information almost never exists, most markets provide enough information to effectuate wise decision-making.⁵⁰

In contrast, artists have not historically produced works of art in bulk as fungible commodities; original paintings, drawings, and sculptures have traditionally existed as unique, individually produced works (although this concept has begun to erode with the advent of “Pop Art” in the second half of the twentieth century).⁵¹ Even prints, lithographs, and other works produced serially or in multiples generally decrease in value and marketability if they are not produced as part of a limited edition of finite number.⁵² Thus, a consumer who seeks a specific original painting or limited print must buy that piece.⁵³ The primary market for original works produced by living artists is relatively small.⁵⁴ The secondary resale market for art is much larger.⁵⁵ This is true even for rare masterworks.⁵⁶ Although some dealers operate public galleries, most conduct their business privately and confidentially.⁵⁷ Indeed, dealers typically serve only as middlemen in that they work for the seller, instructed to quietly find a buyer who agrees to keep the deal out of the public’s eye.⁵⁸

The result of this business culture is a difficult process that consumers must navigate to appraise art. Several qualities influence a painting’s price—including its authorship, aesthetic value, and

49. See Leigh Richards, *What are the Characteristics of a Competitive Market’s Structure?*, HOUSTON CHRON., <http://smallbusiness.chron.com/characteristics-competitive-markets-structure-23832.html> (explaining that many buyers and sellers and homogenous products constitute a competitive market) (last visited Feb. 4, 2014).

50. See POSNER, *supra* note 1, at 4 (noting that the act of “absorbing and using” information is costly and thus, maximum information is not necessarily optimal).

51. See Interview with William G. Pearlstein, Partner, Golenbock Eiseman Assor Bell & Peskoe, LLP, N.Y.C., N.Y. (Mar. 13, 2013) (explaining that—considering the art market as a whole—only a relatively small number of original works are sold directly by a living artist (or the artist’s estate) through a primary dealer while the vast majority of art market transactions relate to resales in the secondary market mainly through and by private dealers and auction houses).

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See Katya Kazakina, *Bargain Warhols, Secrecy Bring Collectors to Private Art Sales*, BLOOMBERG (July 27, 2009, 12:01 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=apWH1zpp1laM> (“Private sales compose the most opaque segment of the largely unregulated art market. The secrecy that makes these deals appealing to clients also precludes most participants from revealing any specifics about the transactions. Such deals also allow collectors to have control over prices ‘at the time when price points are very difficult to determine,’ Dolman said. ‘People are happy to negotiate and walk away from a transaction’ if the agreement isn’t reached, he added.” (quoting Edward Dolman, CEO, Christie’s International)).

significance—yet none of these attributes possesses an inherent value that can help a common buyer estimate a piece's worth.⁵⁹ Buyers cannot reference a painting's component parts to approximate its value and, because most works of art are unique, singular commodities, buyers cannot rely upon the aggregation of a thousand sales to inform the transaction.⁶⁰ Instead they must depend upon an expert's subjective determination of a work's beauty, influenced by the reputation of the artist who created it, to determine its value.⁶¹ Franklin Feldman, the Chairman of the International Foundation for Art Research (IFAR), explained that in some instances people have paid nearly \$30,000 for what appears to be a watercolor sketch because it was likely painted by Jackson Pollock, yet many more aesthetically pleasing works have sold for significantly less. A work's estimated value is really a black box,⁶² wherein the process used by experts to appraise a painting's value is largely unavailable to the common consumer.⁶³

Problematically, many in the art market have chosen to exploit this informational asymmetry, rendering appraisal information even harder to uncover. For example, most modern artists and dealers dislike using auction houses because their public nature provides reliable information about the value of art or a specific piece.⁶⁴ Instead some artists prefer private dealers so as to not set an undesirable price range.⁶⁵ In situations where an auction is necessary, some sellers have resorted to hiring agents to bid up prices.⁶⁶

It is also commonplace for dealers to create serious conflicts of interest under the dual agency problem.⁶⁷ Few in the art industry consider it inappropriate for a dealer to represent both the buyer and seller during the same transaction, even if the dealer has opted not to

59. See Interview with Franklin Feldman, *supra* note 11.

60. The fact that a work rarely sells more than once over a period of twenty years frustrates attempts by buyers to estimate a work's value. See JOHN BUTLER, *ART AS INVESTMENT* 9 (1984).

61. See WILLIAM D. GRAMPP, *PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS* 37–38 (1989).

62. See Interview with Franklin Feldman, *supra* note 11.

63. See *id.*; see also John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 *DENV. U. L. REV.* 335, 362 (1994) (“Determining fair market value often requires an expert's appraisal.”).

64. See Interview with Franklin Feldman, *supra* note 11.

65. See *id.*

66. See *id.*

67. See, e.g., Patricia Cohen, *The New Blow in Art Clash of Titans*, *N.Y. TIMES*, Jan. 18, 2013, <http://www.nytimes.com/2013/01/19/arts/design/larry-gagosian-and-ronald-perelman-in-a-new-legal-clash.html>.

inform either party about her dual interest.⁶⁸ The problem is that the preferences of the buyer and seller often diverge—buyers would like to pay the lowest possible price while the seller seeks the opposite.⁶⁹ In turn, a dealer who represents the seller will have few incentives to discover and disclose defects in a work's title or challenges to its authenticity.⁷⁰ This dynamic gained notoriety in a lawsuit against the powerful art dealer, Larry Gagosian, where Gagosian was alleged to have played both sides—inflating prices when he had a greater stake in selling but undervaluing works when he could make more from purchasing.⁷¹ Much of the art market's efficiencies thus stems from the manner in which dealers have access to some of the best

68. See, e.g., Randy Kennedy, *Gagosian Suit Offers Rare Look at Art Dealing*, N.Y. TIMES ARTS BEAT (Nov. 7, 2012, 5:50 PM), <http://artsbeat.blogs.nytimes.com/2012/11/07/gagosian-suit-offers-rare-look-at-art-dealing>. A recent lawsuit brought against the powerful art dealer Larry Gagosian, accused him of striking deals with both the buyer and seller. See *id.* Gagosian replied by admitting his role as intermediary with dual interests, yet defended his claim in part by stating that this is common practice and nothing that he had ever considered inappropriate. See *id.* Coverage of a deposition in the case noted that

Mr. Gagosian said that he frequently represented both the seller and buyer in a deal without disclosing that fact to either party. "To be honest with you, the question hardly ever gets asked," he said. "I never get asked the question, [a]re you representing both sides." When asked whether, in a consignment agreement, Mr. Gagosian felt "any duty of loyalty whatsoever to the seller," he replied: "I just don't think about it in terms of – in those terms. I think about, 'It's a financial transaction, and the seller wants to get paid.' My objective is to pay the seller and to make a profit for the gallery." [Furthermore,] [o]n Wednesday the gallery called the claims baseless and said its "practices are fully consistent with both the law and the standards in the art world."

Id.

69. See Aaron Cahall, *Real Estate Double Agents Represent Buyer and Seller*, COLUM. NEWS SERVICE (May 8, 2007), <http://jscms.jrn.columbia.edu/cns/2007-05-08/cahall-doubleagents.html> (explaining that representing both buyer and seller—a practice known as dual agency—can create an impermissible conflict of interest, whereby at least one party can suffer harm).

70. For a discussion of the problems posed by dual agency, Rosenbaum presents a discussion of its problem in the horse market. R. Kelley Rosenbaum, Note, *Mucking Out the Stalls: How Krs S 230.357 Promises to Change Custom and Facilitate Economic Efficiency in the Horse Industry*, 95 KY. L.J. 997, 1004 (2007) ("In the court's opinion, since the object of each agent on either side of the transaction was to obtain the best bargain for their principal the 'temptation to violate [the agent's] duty to one or both is too great.'" (citing *Lloyd v. Colston & Moore*, 68 Ky. (5 Bush) 587, 588 (1869))).

71. See Cohen, *The New Blow in Art Clash of Titans*, *supra* note 67 ("Mr. Perelman had charged in his papers that Mr. Gagosian took advantage of him, 'undervaluing works when purchasing them, overvaluing them when selling them, and pocketing the substantial differential.'"); Priscilla Frank, *Ronald Perelman and Larry Gagosian Sue Each Other, Wage War over Jeff Koons \$4 million 'Popeye'*, HUFFINGTON POST (Sept. 16, 2012, 5:54 PM), http://www.huffingtonpost.com/2012/09/13/billionaire-businessman-r_n_1880728.html.

evaluative information yet put themselves into position to profit from either withholding or obfuscating it.⁷²

Making matters worse, the art market has fostered a culture of secrecy, conducting deals under the strictest confidentiality.⁷³ These norms make it taboo for buyers to ask sellers questions about a work's purchase history, prior owners, and place of origin.⁷⁴ Acceptable buyers must abide by this code, understanding that even million-dollar sales frequently occur informally, structured as an "as is" transaction.⁷⁵ In *Hoffman v. L & M Arts*,⁷⁶ for example, the seller required as a condition of sale that the buyer keep the seller's identity a secret. The buyer then sold the painting to Sotheby's which later divulged the original owner's identity in order to substantiate the painting's provenance.⁷⁷ The original owner sued the first buyer for breaching the agreement and then Sotheby's for tortious interference with a contract.⁷⁸ Consequently these confidentiality agreements further reduce available information regarding the amount paid by previous owners for specific paintings or even comparable works. In turn, buyers must often rely upon the dealer's asking price to form an opinion about the work's value.⁷⁹ Oddly, even substantial art transactions often employ fewer contract documents than other similarly priced goods.⁸⁰ The point is that although efficient markets require plentiful and reliable information, the nature of art, along with the culture of its trade, has made this information particularly hard to obtain. And this analysis has yet to account for further issues in authenticity and thievery.

72. Economists would argue that the dealers are not acting nefariously, as it is an overly normative term. Here they are simply acting rationally by responding to the market's incentives structures and acting accordingly.

73. See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 386 (1995).

74. See *Porter v. Wertz*, 21 N.E.2d 500, 502 (N.Y. 1981) (rejecting a buyer's defense that it is industry custom to avoid asking questions).

75. See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 662 (2000) ("The pervasive secrecy of the art trade is another reason why buyers and collectors need to take independent and informed precautions. One scholar has related that the most striking thing to a lawyer who comes upon the art world is the assumption that transactions should normally be, and are certainly entitled to be, secret.").

76. *Hoffman v. L & M Arts*, 774 F. Supp. 2d 826 (N.D. Tex. 2011).

77. *Id.* at 829.

78. *Id.* at 831.

79. See Interview with Franklin Feldman, *supra* note 11.

80. See Interview with Judith Wallace, Counsel, Carter, Ledyard & Milburn LLP, in N.Y.C., N.Y. (Mar. 12, 2013).

B. The Art Market, Information, and Thievery

Much as the nature of art complicates its valuation and sale, the number of potentially stolen works available on the market also produces significant inefficiencies. Because many buyers fear that publicizing their collections will invite criminals to steal from them⁸¹ and few owners have the wherewithal to protect against sophisticated art thieves or the requisite insurance to guard against losses, many patrons hire intermediaries to conduct art transactions without using names or revealing identities.⁸² This desire for secrecy has influenced behavior to the point where victims of art theft seldom contact the police out of concern that publicizing the crime will signal to other criminals that they possess vulnerable art.⁸³ Reporting the crime also renders retrieving stolen art more difficult by driving it underground.⁸⁴ Even some high-end institutional buyers, such as museums, prefer to operate quietly without insuring valuable paintings from theft.⁸⁵

This fear is not paranoia;⁸⁶ it is often noted that stolen art constitutes the third most commonly traded illicit good after arms and drugs (though Interpol states that exact figures are unavailable).⁸⁷ The FBI has even dedicated a special unit to tracking art theft⁸⁸ and

81. See Interview with Ronald Spencer, Counsel, Carter Ledyard, & Milburn LLP, in N.Y.C., N.Y. (Mar. 12, 2013) (discussing the incentives about secrecy and the fear of theft).

82. See *id.* (noting that even most museums do not have the requisite insurance to protect against theft).

83. Amy Zelcer, *Matthew Taylor, the FBI Art Crime Team, and the Law of Stolen Chattels*, AM. CRIM. L. REV. (Oct. 3, 2011), <http://www.americancriminallawreview.com/Drupal/blogs/blog-entry/matthew-taylor-fbi-art-crime-team-and-law-stolen-chattels-10-03-2011>.

84. See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428 (N.Y. 1991) (“[T]he [museum] did not inform other museums, galleries or artistic organizations of the theft, and additionally, did not notify the New York City Police, the FBI, Interpol or any other law enforcement authorities. The museum asserts that this was a tactical decision based upon its belief that to publicize the theft would succeed only in driving the gouache further underground and greatly diminishing the possibility that it would ever be recovered.”).

85. *Id.* at 431; Les Christie, *Much Money in Munch?*, CNNMONEY.COM (Aug. 23, 2004, 4:51 PM), <http://money.cnn.com/2004/08/23/pf/munchtheft> (“The Munch paintings, the London *Times* reported, were uninsured against theft. That's not unusual in the art-exhibition world -- the Gardner works weren't insured, either. 'Many museums can't afford the exorbitant premiums that insurers would have to charge for coverage of these priceless paintings,' [Katie] Dugdale says.”); see, e.g., Paige Williams, *The Gardner Heist: 20 Years Later*, BOSTON MAG. (Mar. 2010), <http://www.bostonmagazine.com/2010/03/gardner-heist> (discussing a \$200 million theft of work from a Boston Museum, where the museum opted not to purchase theft insurance for the works).

86. See generally Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2439 (1994).

87. See *Frequently Asked Questions*, INTERPOL, <http://www.interpol.int/Crime-areas/Works-of-art/Frequently-asked-questions> (last visited Apr. 12, 2013).

88. See *Art Theft*, FBI.GOV, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft (last visited Apr. 11, 2013).

numerous private services endeavor to catalogue stolen works.⁸⁹ The Art Loss Register, for example, allows victims to publicize their stolen works so that good citizens can report the location of discovered art,⁹⁰ and the IFAR provides a service to help putative buyers uncover possible authenticity and titling issues.⁹¹

World War II—during which time nearly half the works housed in Europe were stolen—was of particular importance to the history of art theft.⁹² Thievery, in fact, preceded the fighting when the Nazi Party formed the *Einsatzstab Reichsleiter Rosenberg für die Besetzten Gebiete* (ERR) to “acquire” or steal art predominantly from Jewish collectors.⁹³ The ERR would offer Jewish art owners nominal sums of money for caches of priceless art, backing the proposition with threats of violence, hollow promises of protection, and other forms of coercion.⁹⁴ Not surprisingly many sold or even abandoned their collections so they could flee to regions outside of Nazi control.⁹⁵ Once the war began, the Nazis ransacked the art of each defeated country.⁹⁶ The Germans were not the only perpetrators; Russian troops took German art back to Eastern Europe⁹⁷ while Americans looted the Axis nations.⁹⁸

89. See *About Us*, ART LOSS REG., <http://www.artloss.com/about-us> (last visited Apr. 20, 2013); Zelcer, *supra* note 93.

90. See The Art Loss Register, <http://www.artloss.com/en> (last accessed April 20, 2013).

91. See The International Foundation for Art Research, <http://www.ifar.org/>, (last accessed April 20, 2013).

92. See, e.g., THOMAS D. BAZLEY, *CRIMES OF THE ART WORLD* 84–85 (2010) (“For example, one report places the losses suffered in France at 60,000 pieces, a figure that accounts for one-third of all art in private hands in that country. A Polish database of artworks stolen or missing incident to World War II contains 59,000 pieces and this number might only represent 10 percent of the artworks destroyed or stolen during that period . . .”); Jeremy Epstein, *The Problems of Litigating WWII Art Restitution Claims*, THE UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY PODCAST (May 6, 2009) (downloaded using iTunes).

93. BAZLEY, *supra* note 92, at 89 (“In September 1940, Hitler established a specialized unit known as the Einsatzstab Reichsleiter Rosenberg (ERR) whose mission was to seize those works that were in concert with the cultural ideals of the Nazi regime and confiscate for sale or destruction degenerate objects. This unit was head by the long-time Nazi loyalist and anti-Semite, Alfred Rosenberg.”).

94. See Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75, 87 (2012) (“Because the Nazis used many tactics to mask involuntary transactions in a cloak of legality, documentation of such transactions should be viewed with a cynical, historically informed eye. . . . From their very first days in power in 1933, the Nazis forced Jews to abandon their property in order to flee. . . . The Jews’ loss of their property as they fled ‘for their lives was no more voluntary than the relinquishment of property during a holdup.’” (citing *Menzel v. List*, 267 N.Y.S.2d 804, 810 (1966))).

95. See *id.* at 87.

96. See BAZLEY, *supra* note 92, at 85 (“To be clear, the Nazis stole art from every country they conquered.”).

97. *Id.* at 92.

98. See, e.g., *Hoffman v. United States*, 53 F. Supp. 2d 483, 485–86 (D.D.C. 1999) (discussing a claim brought by Germans to reclaim photographs stolen by the U.S. Army at the

Because some at that time assumed victorious armies could rightfully plunder conquered lands⁹⁹—a practice that the international community has disavowed for some time¹⁰⁰—stolen works appeared globally in galleries, museums, and private collections.¹⁰¹ Many beneficiaries saw nothing wrong with the process by which they acquired stolen art and the good-faith purchasers thereof thought little of scrutinizing the transaction; indeed, the norms of the art world instructed dealers and buyers to refrain from questioning a work's origin and transactional history.¹⁰² In turn, any buyer of art not dealing with the actual artist could potentially purchase stolen goods; this is especially true of older works that thieves could have stolen and fenced at any point during its existence.

While the law typically disfavors those who knowingly receive stolen property, individual states have adopted various rules regarding a good-faith purchaser for value, who had little way of knowing whether a work was stolen. The common law of the state where the painting lies usually controls the claim, each jurisdiction abiding by the old English rule that one cannot transfer good title to stolen property.¹⁰³ Most state laws concerning contracts for the sale of goods follow the Uniform Commercial Code (UCC), which provides a few exceptions to the common law rule.¹⁰⁴ The first exception imposes

conclusion of World War II, which was transported to the United States), *aff'd in part, rev'd in part* 17 F. App'x 980 (Fed. Cir. 2001).

99. The Russians actually viewed plundered artwork as payment for the losses that they suffered on the battlefield. BAZLEY, *supra* note 92, at 92.

100. See *Menzel v. List*, 267 N.Y.S.2d 804, 811–12 (1966) (explaining that international law allows armies to take “booty,” defined as “property necessary and indispensable for the conduct of war,” while prohibiting plunder and pillage, defined as “the taking of private property not necessary for the immediate prosecution of war”).

101. See Kreder, *supra* note 94, at 75 (“Tales of venerated institutions, such as the Museum of Modern Art (MoMA), acquiring what they knew or should have known was trafficked and laundered art may seem outrageous to those unaware of the infection of the market with art that had been stolen or extorted from Jews between 1933 and 1945.”); Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis during World War II*, 30 RUTGERS L.J. 441 (1999).

102. See Borodkin, *supra* note 73, at 386; see also *Menzel*, 267 N.Y.S.2d at 809–10 (rejecting defendant's argument that a painting's former Jewish owners fled Germany and thus “abandoned” the painting).

103. See Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 50 (1995) (“Anglo-American law is well-settled that neither a thief nor a good faith purchaser from the thief, nor even subsequent good faith purchasers, can pass good title. Indeed, the tort of conversion is unique in that it permits a plaintiff to recover property or money damages from a defendant who is by definition innocent of any wrongdoing . . .”).

104. See, e.g., U.C.C. § 2-403 (2003) (stating that a person with voidable title has power to transfer a good title to a good faith purchaser for value, any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the

a limited warranty of title on all merchants unless the buyer knows that the good is not being sold by its true owner or that the owner claims to have only the ownership rights of a third person, unaware of any prior sales and dealings.¹⁰⁵ The UCC also distinguishes situations in which a good's owner created a scenario where a bona fide purchaser would not suspect a lineage problem.¹⁰⁶ For example, section 2-403 allows title to pass to a good-faith purchaser of value when the original owner has given the "indicia of ownership" to a third party who then sells for value.¹⁰⁷ In that case, the original owner's cause of action would be against the intermediary but not the subsequent purchaser.¹⁰⁸ Title can also pass if the owner entrusts a "merchant who deals in goods of that kind" with a good and that merchant then sells it.¹⁰⁹ The policy rationale is that the law must allow consumers to rely upon reputable dealers, and thus the original owner must accept blame when putting a dealer in position to commit

entruster to a buyer in ordinary course of business, and entrusting includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties); *Uniform Commercial Code Locator*, LEGAL INFO. INST., <http://www.law.cornell.edu/uniform/ucc.html> (last visited Feb. 4, 2014).

105. U.C.C. § 2-312(2) (2003) ("A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.").

106. The UCC specifies:

(1) A person with voidable title has power to transfer a good title to a good faith purchaser for value. . . . (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business. (3) 'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties

U.C.C. § 2-403 (2003).

107. *See id.*

108. *See, e.g.,* *Zendman v. Harry Winston, Inc.*, 111 N.E.2d 871, 872 (N.Y. 1953) (concluding that a diamond merchant who sent a ring without the intention of passing title to a corporation conducting auctions could not recover the ring once it was sold to a bona fide purchaser who had purchased the ring for full value and in entire good faith).

109. *See* U.C.C. § 2-403 (2003); *see also id.* § 1-201(b)(9) ("Buyer in ordinary course of business' means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.").

harm.¹¹⁰ Again, the owner's cause of action would be against the intermediary, not the bona fide purchaser for value.¹¹¹

Although these appear to be simple rules, significant legal questions arise from the culture of art ownership. Most art owners store their works at home or in venues not open to the public, especially if the work has been stolen.¹¹² This has frustrated attempts by victims of theft to locate their stolen works; in fact, it is often the original owner's heir or devisee who learns of the work's subsequent whereabouts decades or generations later.¹¹³ And upon discovery, the new owner is frequently an innocent purchaser, long removed from the art's theft, raising the question of when the law should estop theft victims from asserting ownership over a stolen work.¹¹⁴ This is a classic conflict of two innocents.¹¹⁵

The states have dealt with this question differently. The first approach is strict adherence to the common law rule that a thief cannot pass good title allowing victims of theft to always sue for replevin.¹¹⁶ In the infamous case *Porter v. Wertz*,¹¹⁷ the defendant

110. See Zendman, 111 N.E.2d at 875 ("In resolving this conflict, the courts have evolved certain principles 'akin to estoppel' based on the maxim that 'As between two innocent victims of the fraud, the one who made possible the fraud on the other should suffer.'" (internal citation omitted)).

111. See, e.g., *id.* at 877 (ruling based upon the UCC's common law origin, that the original owner of a diamond ring could not pursue an action against the good-faith purchaser after entrusting the ring to an intermediary). The court observed:

An owner must be fully aware of the potentialities for fraud created when, for purposes of sale, he entrusts merchandise to a retail dealer, regularly engaged in selling such goods, and the dangers are many times multiplied if that dealer happens to be an auctioneer. It ill behoves the owner to complain if he is not permitted to rely upon his private and secret agreement, when he himself has failed to require strict adherence to its terms and has thus become responsible for the dealer's apparent authority to sell.

Id.

112. See William M. Landes & Richard A. Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles* 11 (Chi. Coase-Sandor Inst. For Law & Econ., Working Paper No. 40, 1996), available at <http://www.law.uchicago.edu/files/files/40.posner.pdf> (explaining that those possessing stolen work have an incentive to hide it so the original purchaser cannot bring an act of replevin).

113. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 682 (2004) (stating that after the original owners fled Germany and the Holocaust, their descendants located some of the stolen art over fifty years later and brought suit).

114. For a discussion of this question, see generally Hawkins, Rothman & Goldstein, *supra* note 103.

115. See *id.* at 50.

116. See, e.g., *Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784, 788 (Cal. Ct. App. 1996) ("[N]aftzger is innocent of any wrongdoing and was unaware of the theft when he purchased the coins. Even if Naftzger is an innocent purchaser, however, he did not acquire valid title to the coins, assuming they were stolen, because a thief cannot transfer valid title. On this record, Naftzger's obligation to return the coins will be established if and when the museum proves the coins are its stolen property.").

117. *Porter v. Wertz*, 421 N.E.2d 500 (N.Y. 1981).

purchased a stolen painting and then sought to estop its true owner from retrieving it, arguing that because the art industry's customs forbid inquiring into a painting's history, his own actions were blameless.¹¹⁸ The court found that the defendant purchased the work from a seller who best fit the description of delicatessen employee—not a reputable merchant—and that the law imposes a duty on buyers to act in good faith, which may require an exercise of due diligence.¹¹⁹ Indeed, when the court found that the defendant had not done enough to investigate the painting's title, *Porter* imposed a standard of conduct on the art industry which had not previously existed.¹²⁰

Against this backdrop, the general rules for an art transaction are that reputable dealers sell goods with warranties of both authenticity and title lasting for a set number of years unless they disavow any warranty at the time of its sale.¹²¹ Generally no warranties exist for appraisal errors as this nearly always constitutes a matter of opinion, which the UCC does not protect.¹²² Works sold by private individuals come with no warranties unless expressly given in the sale.¹²³ This framework incentivizes buyers to transact with reputable dealers only; however, the majority of art sales still flow through informal channels, potentially because of the premium one must pay to the reputable dealer for these same warranties.¹²⁴

Others courts, however, have considered arguments based upon statutes of limitations and other equitable defenses.¹²⁵ New York follows the demand-and-refusal rule, which states that the statute of limitations begins only when the theft victim learns of the painting's location.¹²⁶ Thus, a thief or subsequent owner who conceals a painting cannot rely upon a statute of limitations defense against

118. See *id.* at 502.

119. See *id.*

120. See Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 588 (1999) (discussing how *Porter* represented a departure from the method that the art industry had previously used to conduct business).

121. See, e.g., *Balog v. Ctr. Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1573 (D. Haw. 1990).

122. See U.C.C. § 2-313(2) (20); *Balog*, 745 F. Supp. at 1563.

123. See U.C.C. § 2-314 (2003).

124. See Interview with William G. Pearlstein, *supra* note 51.

125. See, e.g., *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 309 (D.R.I. 2007); *Hui Qun Zhao v. Yu Qui Wang*, No. 10-CV-1758(JMA), 2013 WL 269034, at *7 (E.D.N.Y. 2013) (concluding that in an act of replevin under New York law, the three-year statute of limitation is firm and no equitable toiling exists, which in fact gives more leniency to the one who converted the good than to a good-faith purchaser).

126. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991).

the true owner.¹²⁷ In *O’Keeffe v. Snyder*,¹²⁸ a New Jersey court added the requirement that during the time when the owner had not located the stolen painting, the owner must have exercised due diligence,¹²⁹ whereas New York places no such burden on the owner.¹³⁰

Other equitable defenses available to new owners include laches and adverse possession. Laches is a common law claim that allows a defendant to keep a contested work if conduct by or on behalf of the victim prejudiced the new owner.¹³¹ Adverse possession alleges that the new owner possessed the painting openly and explicitly, creating a new title in the owner.¹³² This requires the new owner to display the work publicly, such as in a museum, and assert ownership over it for a specified period time, effectively estopping the original owner from asserting a legal or possessory claim.¹³³

In short, one who purchases a stolen work might have to return it without compensation. This encourages patrons to thoroughly research ownership history, though the art market’s traditional secrecy has limited the availability of such information.¹³⁴ A work’s chain of title is embodied in its provenance, which lists those who owned a work, but not typically the specific years during which it was owned.¹³⁵ Even absent theft, almost all provenances of older works include missing information, preventing possible buyers from determining whether a particular gap is a product of ordinary secrecy or evidence of theft.¹³⁶ If a work lacks a formal enumeration of owners, especially in circumstances when one family continuously owned a work, buyers and sellers must rely upon suggestive evidence, such as wills, letters, pictures, newspaper articles, journal entries, or any other historical document.¹³⁷ A work going unchallenged for a

127. Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 345 (1993).

128. 416 A.2d 862 (1980).

129. *Id.* at 870.

130. *Lubell*, 569 N.E.2d at 431.

131. *See, e.g.*, *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 309 (D.R.I. 2007) (“A court applying the defense of laches applies a two part test: (1) there must be negligence on the part of the plaintiff that leads to a delay in the prosecution of the case, and (2) the delay must prejudice the defendant. What constitutes laches depends on the circumstances of each particular case. The prejudice may come from ‘loss of evidence, change of title, intervention of equities and other causes.’”) (citations omitted).

132. Hayworth, *supra* note 127, at 345.

133. *Id.* at 349 n.59.

134. *See* Turner, *supra* note 25, at 355–56.

135. *See* Interview with Ronald Spencer, *supra* note 81 (discussing the incentives about secrecy and the fear of theft).

136. *See id.*

137. *See* Bruce W. Burton, *In Search of John Constable’s the White Horse: A Case Study in Tortured Provenance and Proposal for a Torrens-Like System of Title Registration for Artwork*,

century possibly indicates that it possesses a clean title, but heirs and descendants can, and have, returned years later to seek the return of a lost work.¹³⁸ Indeed, stolen art often resembles those with clean titles, frustrating attempts by good-faith buyers to guarantee an unchallenged purchase.¹³⁹

Making matters worse, it is easy to bring a lawsuit alleging to be the true owner of a painting, the effect of which creating a cloud over the work's title.¹⁴⁰ A work loses almost all marketability, and thus value, when others potentially assert a claim over it as few buyers wish to litigate a replevin claim or even possibly risk losing the work.¹⁴¹ Because few artworks possess such value worth litigating, these disputes often settle.¹⁴²

In sum, because theft has ravaged the art industry, its response has been to increase secrecy.¹⁴³ A work with a strong provenance comes at a premium; as a provenance becomes cloudier, its

59 FLA. L. REV. 531, 540 (2007) ("As is often the case with older masterpieces, the chain of ownership would necessarily rely upon exploring a wide variety of letters, journals, auction catalogs with their marginal entries, press accounts, diaries, private memoirs, or such probate records as might still exist. Such evidence must be uncovered, its own genuineness established, and assessed in the light of other tested information. In short, a squad of experts including formal and informal archivists, art historians, museum curators, expert connoisseurs, and biographers must be brought into play before a conclusive decision can be formed.") (internal footnotes omitted).

138. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 681–82 (2004) (explaining that the Austrian government confiscated the painting during World War II and that the suit to reclaim it was brought by the origin owner's descendants, eventually arriving at the Supreme Court in 2004).

139. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010) (involving a good faith purchaser who ended up purchasing a stolen painting at a Sotheby's auction).

140. See, e.g., *United States v. Fireman's Fund Ins. Co.*, No. 99 Civ. 2622(BSJ), 2001 WL 88226, at *5 (S.D.N.Y. Jan. 31, 2001) (noting that the claim, alleging possible theft in the painting's chain of title, may have only been brought by the plaintiff to cloud the work's title, and that nothing about the work's history suggests impropriety).

141. See Burton, *supra* note 137, at 573 n.219; Jeffrey Orenstein, Comment, *Show Me the Monet: The Suitability of Product Disparagement to Art Experts*, 13 GEO. MASON L. REV. 905, 914 (2005).

142. See Epstein, *supra* note 92. Several cases suggest that plaintiffs have brought suit with the intent of casting a shadow on a work's title; presumptively to receive a settlement. See, e.g., *Fireman's Fund*, 2001 WL 88226, at *5 ("Sait seeks to discover facts relating to the Dannenberg Galleries' title to the painting, vaguely asserting that the gallery owner had a reputation for being dishonest, presumably in order to cloud Lifton's title to the painting. As discussed above, all of the indicia surrounding the sale of the painting to Lifton demonstrate a bona fide purchase conveying good title."); see also *Solomon v. Cutler*, No. 2:07-cv-645-RLH-PAL, 2010 WL 3909980, at *5 (D. Nev. Apr. 8, 2010) (finding that a former owner has brought claim over a painting with seemingly no merit in his action). IFAR provides excellent research of art litigation. Of particular importance, as noted by IFAR, is that it contains some information on out of court settlements. These type of agreements exist in significant quantities, yet are infrequently accessible to the public. See *Case Law*, IFAR, http://www.ifar.org/case_law.php?ID=1 (last visited Apr. 29, 2013) (subscription required).

143. See Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 496 n.15 (1995).

value diminishes.¹⁴⁴ When a work's provenance suggests that it has been stolen—such as a work that survived World War II with no ownership history—some buyers will still purchase it, but for a steep discount and under the assumption that it can never be displayed publicly.¹⁴⁵ This is true even for works that, while never having actually been stolen, lack sufficient titling due to the desire of prior owners to conduct business secretly.¹⁴⁶ Importantly, all future sales must be done quietly to keep the possibly ill-gotten works out of the public's eye.¹⁴⁷ The sad irony is that the art market's transactional secrecy has become both a cause and effect of art theft, further reducing the sum of information upon which a consumer may rely.

C. Information and the Risks Found in Attribution

Thievery is not the only undesirable behavior affecting the art market, as the lack of warranties or guarantees accompanying many art transactions mandates that any hopeful purchaser guarantee a work's most essential quality, i.e., its authenticity.¹⁴⁸ This takes on several complex forms, all of which involving the process of attribution.¹⁴⁹ Evidence of who originally created a painting, especially when dealing with older works, is often lost.¹⁵⁰ Without compelling evidence, experts must examine a number of characteristics such as brush strokes, color, and content to determine whether a specific master produced the work.¹⁵¹ If Rothko experts find that a painting belongs to, for instance, Rothko, then the group will include the painting in Rothko's *catalogue raisonné*, an authoritative bibliography of an artist's work.¹⁵² While exclusion from

144. See Interview with Franklin Feldman, *supra* note 11.

145. See *id.*

146. See Turner, *supra* note 25, at 351–52.

147. See Interview with Franklin Feldman, *supra* note 11.

148. See Raúl Jáuregui, Comment, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947, 1948–52, 2027 (1997) (explaining that an art's attribution is its most important and valued quality).

149. See *id.* at 1960–65.

150. See *id.*

151. See *id.*

152. As Jeffrey Orenstein notes,

[a] *catalogue raisonné* is an authoritative index of an artist's work, covering either the artist's full oeuvre or a specific category of his works. It is an invaluable reference, often containing detailed descriptions, history, and provenance for each work. Primarily, however it is a list of all known works attributed to the artist. Therefore, when the authors of a catalogue raisonné omit a work, they cast serious doubt on its authenticity and profoundly affect the work's marketability. As the attorney for a leading art dealer put it, "if a work isn't going to be included in the catalogue, from a commercial view it's the death of your painting."

Orenstein, *supra* note 141, at 914 (internal footnotes omitted).

the *catalogue raisonné* does not definitively mean inauthenticity, for the sake of marketability, it does.¹⁵³

Another similar issue occurs when an artist's "school" or, in the case of Andy Warhol, "factory" created the piece.¹⁵⁴ Historically, artists employed pupils, other artists, and mentees to help produce the paintings; sometimes the agents created an entire work under the artist's supervision, while other times the principle and agent combined efforts.¹⁵⁵ In terms of attributing a work, standards and opinions vary about to whom a piece should be credited when more than one hand painted it.¹⁵⁶ Said differently, what is the nature or level of influence that an artist must contribute to constitute a genuine work? Especially when dealing with old masters, evidence detailing the process by which the school created the work is often lost, and standards regarding what constitutes authenticity have changed over generations; what passed as a genuine work centuries ago may no longer qualify.¹⁵⁷

Further, highly skilled artists have created forgeries that mimic preexisting works.¹⁵⁸ Art patrons should not underestimate either the number of forgeries on the market or the probability of purchasing one.¹⁵⁹ Elmyr de Hory alone painted and sold approximately one-thousand forgeries in the styles of Matisse, Van Gogh, and other celebrated masters.¹⁶⁰ Incredibly, the infamy of Hory inspired other forgers, creating a market for fake Horys.¹⁶¹

Determining whether a forger created a painting is actually quite difficult; many replica paintings were created centuries ago, at which time the experts attributed them to a master.¹⁶² Problems arise

153. See Gareth S. Lacy, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J.L. TECH. & ARTS 185, 190 (2011) ("Auction houses face considerable liability regarding the authenticity of artwork sold on secondary markets and will often refuse to sell work excluded from an artist's *catalogue raisonné*. In other words, authentication is as much a product of market consensus as expert or scholarly inquiry.").

154. See Jáuregui, *supra* note 148, at 1956, 1962.

155. See *id.*

156. See *id.*

157. See *id.* at 1957–58.

158. See JONATHON KEATS, FORGED: WHY FAKES ARE THE GREAT ART OF OUR AGE 12–13, 50–66 (2013) (observing that many forgers are actually more technically skilled than the original artists who they have copied).

159. See Liz Weiss & Julie Zeveloff, *Eight of the Biggest Art Forgeries of All Time*, BUS. INSIDER (July 5, 2011, 4:57 PM), <http://www.businessinsider.com/art-forgeries-2011-6> (demonstrating the prevalence of high quality forgeries available on the market).

160. *Id.*

161. See Jesse Hamlin, *Master (Con) Artist / Painting Forger Elmyr de Hory Copies are Like the Real Thing*, S.F. CHRON. (July 29, 1999), <http://www.sfgate.com/entertainment/article/Master-Con-Artist-Painting-forger-Elmyr-de-2917456.php>.

162. See Jáuregui, *supra* note 148, at 1955–58.

when the work comes under scrutiny today, pulling the figurative rug out from under a good-faith purchaser.¹⁶³ Even if a work is legitimate, questions raised by experts about a work's authenticity can still create a cloud over its title.¹⁶⁴ In turn, lawsuits have arisen where art owners allege that experts damaged a work's marketability by rendering a negative finding about its authenticity.¹⁶⁵ While some of these suits seek to remedy genuine harm caused by negligent attribution, others are meritless attempts by frustrated owners to salvage their investment.¹⁶⁶ For example, in *United States v. Fireman's Fund*,¹⁶⁷ the court posited that the only reason the plaintiff brought suit challenging a painting's provenance was to create a cloud over its title to diminish its marketability.¹⁶⁸

The attribution process raises several important legal questions, the first of which arises when a buyer learns that a purchased work is actually a high-quality forgery. While one who knowingly sells a forged good claiming that it is an original has committed fraud,¹⁶⁹ the law is murkier where the seller had no knowledge of a work's lack of authenticity. Confusion mounts when several innocent parties have bought and sold the forged work at the

163. See *id.* at 1957–58, 2017 (“Tragically, every time [amongst the centuries when] the threshold is tightened, the feat of attribution becomes more difficult and the master’s oeuvre diminishes because the art expert—and the law that incorporates the expert’s views—has adopted a standard in contradiction to a fundamental reality of the production process of the studio piece [at the time when it was painted].”).

164. See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 483 (3d ed. 2012); see, e.g., *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ, 2009 WL 6506658, at *1 (D. Mass. 2009) (noting that Museum asked court to declare owner of painting and to bar defendant from continuing to sue over it, so that the court could remove the “cloud” over its title).

165. See, e.g., *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 21 (N.Y. App. Div. 2009) (noting that plaintiff sued after defendant refused to include painting in an author’s *catalogue raisonné* which essentially signaled that the work was not marketable); Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in THE EXPERT VERSUS THE OBJECT 63, 69–71 (Ronald D. Spencer ed., 2004); Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, in THE EXPERT VERSUS THE OBJECT, *supra*, at 143, 169–70.

166. See, e.g., *Thome*, 890 N.Y.S.2d at 21; *United States v. Fireman’s Fund Ins. Co.*, No. 99 Civ. 2622(BSJ), 2001 WL 88226, at *1 (S.D.N.Y. Jan. 31, 2001).

167. *Fireman’s Fund*, 2001 WL 88226, at *5.

168. *Id.*

169. Under New York law, for instance, one who purchases a forgery can press a fraud claim against the dealer if the buyer can satisfy the following elements: “(1) false representation(s) of (2) material fact with (3) intent to defraud thereby [scienter] and (4) reasonable reliance on the representation (5) causing damage to plaintiff.” *Foxley v. Sotheby’s Inc.*, 893 F. Supp. 1224, 1228 (S.D.N.Y. 1995) (denying the plaintiff’s claim for fraud when the plaintiff bought a forgery from an auction house because the auction house appears to have made no misrepresentations about the painting’s authenticity).

price of an authentic.¹⁷⁰ Which party should bear the lost value between its purchase price and its current value: the current owner, the original seller, or some party in between? Furthermore, the discovery of a forgery often occurs years after a work's last purchase, raising the question of when the law should estop a purchaser from bringing suit.¹⁷¹

The primary statutory scheme controlling who assumes the burden of a transaction involving a forgery comes from the UCC, which enumerates when a seller has statutorily provided a warranty. Section 2-313 instructs that a seller who vouches for a work's authenticity by making either an "affirmation of fact or promise" or providing a "description of the goods which is made part of the basis of the bargain" creates a legally recognizable promise to the buyer; no words of art, such as "warrant" or "guarantee," are necessary.¹⁷² Indeed, under certain conditions, words that seemingly establish an express warranty may not actually bind the seller¹⁷³ as some courts require the seller to have made comments about the work's legitimacy unless the buyer relied on the express statements or the seller used them to induce the deal.¹⁷⁴ For instance, in *Rogath v. Sibernmann*,¹⁷⁵ the court examined whether one who mistakenly bought a forged painting could bring suit against the dealer if the buyer had knowledge that an expert had once challenged its authenticity.¹⁷⁶ The court reasoned that a buyer who has made a calculated deal should not be able to hold the dealer liable as an insurer for her misjudgment.¹⁷⁷ Moreover, subsection (2) of UCC section 2-313 limits a seller's liability when her statements constitute "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."¹⁷⁸

170. See, e.g., *id.* at 1227, 1233 (involving a question where a painting bore indicia that it had been forged, though none of the parties had substantial proof).

171. New York puts a six-year statute of limitations on fraud claims, starting two years after the owner discovers that the painting is a forgery, or should have so realized. See *Foxley*, 893 F. Supp. at 1231.

172. U.C.C. § 2-313 (2003).

173. See *Foxley*, 893 F. Supp. at 1233.

174. See, e.g., *id.* at 1228.

175. 129 F.3d 261 (2d Cir. 1997).

176. *Id.* at 265.

177. See *id.* ("In short, where the seller discloses up front the inaccuracy of certain of his warranties, it cannot be said that the buyer-absent the express preservation of his rights-believed he was purchasing the seller's promise as to the truth of the warranties. Accordingly, what the buyer knew and, most importantly, whether he got that knowledge from the seller are the critical questions.")

178. U.C.C. § 2-313(2) (2003).

If a seller refrains from making a claim about a work's authenticity, then section 2-314 imposes an implied warranty of authenticity (or merchantability) if the seller is "a merchant with respect to goods of that kind."¹⁷⁹ Under this section, the goods must be "fit for the ordinary purposes for which such goods are used,"¹⁸⁰ although the seller may strip the works of all warranties expressed and implied¹⁸¹ by selling them "as is" under section 2-316.¹⁸²

The UCC statute of limitations, however, limits the period during which a buyer may file suit to four years from the time of the work's purchase—not from when the buyer learns of its lack of authenticity.¹⁸³ The policy rationale is to encourage buyers to verify paintings' authenticity quickly.¹⁸⁴ For example, in *Krahmer v. Christies*,¹⁸⁵ the Delaware court held that the plaintiffs could not bring a breach of warranty claim because the auction house provided a six-year warranty, putting the buyers on notice that they must investigate the work during that period.¹⁸⁶ Though there are a few situations where the law provides the buyer with extra safeguards, such as when the seller continues to act in a manner causing the buyer to believe that the good is authentic.¹⁸⁷ Such seller action resets the statute of limitations either to when the buyer learned of the

179. *Id.* § 2-314.

180. *Id.* § 2-314(2)(c).

181. *Id.* § 2-316 (1), (3). Section 2-315 also stipulates that an implied warranty of authenticity attaches to a good in which the seller 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 an implied warranty that the goods shall be fit for such purpose. *Balog v. Ctr. Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1563 n.16 (D. Haw. 1990). This section though, infrequently applies to art since there are few special purposes in which art may be "used." *Id.* (explaining why section 2-315 can rarely be used by one who buys a forgery). The court explained:

Comment 2 to § 2-315 states that "a particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." With this comment as a guide, it would appear that neither a museum nor a private collector could invoke § 2-315's implied warranty for its protection, since the use of artwork for display or investment are customary uses for such items, or else are those which would not be particular to the purchaser's business.

Id.

182. U.C.C. § 2-316 (3) (2003).

183. *Id.* § 2-725(1).

184. *See Krahmer v. Christie's Inc.*, 903 A.2d 773, 781 (Del. Ch. 2006).

185. *Id.*

186. *See id.* at 783.

187. *See Balog v. Ctr. Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1572 (D. Haw. 1990) (explaining that future warranties provided by the dealer constituted express warranties and thus, restarted the statute of limitations clock).

forgery or to the date of the seller's last communication.¹⁸⁸ Also, in some situations the seller may have a special fiduciary relationship with the buyer that creates a common law obligation of good dealing beyond what the UCC requires.¹⁸⁹

The problems of attribution and authenticity have further diminished the market efficiency of the art trade. Investigating the authenticity of a work is difficult and costly in part because of the degree to which purchasers must rely upon experts.¹⁹⁰ This process has been made even more difficult by the legal liability threatening those brave enough to offer an expert authenticity opinion.¹⁹¹ Because many buyers sue experts for product disparagement¹⁹² or defamation of title¹⁹³ for diminishing a work's value by asserting inauthenticity, those buyers who need expert advice often cannot obtain it as experts have become fearful of potential litigation.¹⁹⁴ Moreover, art experts occasionally work for the dealer, nearly guaranteeing a finding of authenticity despite evidence suggesting otherwise.¹⁹⁵ Not only does this dupe the buyer, but it floods the market with bad information. Other times, the parties will conduct a secret transaction so that if an

188. *See id.*

189. *See* Hope v. Klabal, 457 F.3d 784, 791–92 (8th Cir. 2006) (finding that no fiduciary relationship existed when an owner of art that turned out to be forged brought suit against dealer, claiming, in part, that the deal violated his fiduciary duty even though the two parties had conducted business previously because a relationship of added trust and “protection” must arise).

190. *See generally* Orenstein, *supra* note 141 (explaining the role, necessity, and intricacies of art experts in many art transactions).

191. *See* Interview with Ronald Spencer, *supra* note 81. *See generally* Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, *supra* note 165, at 143–80 (“This chapter examines the six legal claims most usually made against experts—academic and independent art scholars, art dealers, museum curators, and others—who make decisions about the attribution of visual art.”).

192. *See, e.g.*, Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 27–28 (N.Y. App. Div. 2009) (explaining that product disparagement is descended from slander of title and allowing plaintiff's case to proceed because the expert's public statement of the inauthenticity of a painting had “caused negotiations for the sale of the painting to be suspended and potentially affected future sale possibilities”); *see also* Kirby v. Wildenstein, 784 F. Supp. 1112, 1114 (S.D.N.Y. 1992).

193. *See, e.g.*, Seltzer v. Morton, 154 P.3d 561, 576–77 (Mont. 2007) (involving an art expert who sued a painting owner and a law firm for malicious prosecution and abuse of process after the painting owner sued the expert). The art expert claimed that the painting was by the hand of a different artist and thus the owner claimed that the expert had committed defamation of title. Before bringing suit, the owner asserted that the expert could avoid litigation by renouncing his opinion. *Id.*

194. *See* Interview with Ronald Spencer, *supra* note 81. *See generally* Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, *supra* note 165, at 143–85 (discussing the required elements of legal claims typically asserted against art experts as well as the ways in which art experts may raise defenses or conduct themselves to reduce the risk of liability).

195. *See* Jáuregui, *supra* note 148, at 1966 (noting that France has sought to improve attribution integrity by demanding that experts work independently, and not for the dealer).

expert suspects a lack of authenticity, other buyers will never know of this finding allowing the painting to be resold years later as if it were authentic.¹⁹⁶

An equally pressing problem is the manner in which art experts choose to include a work within an author's *catalogue raisonné*. A man recently found a cache of paintings in his attic resembling Jackson Pollock's work,¹⁹⁷ he even lived near where Pollock once resided, further suggesting that he had lucked into a fortune.¹⁹⁸ A similar event occurred when a woman bought a painting at a thrift store, which some would later observe could be a Pollock.¹⁹⁹ In both situations, those in control of the *catalogue raisonné* disagreed, refusing to include the works in Pollock's official listing.²⁰⁰ Accusations have since surfaced that many of the experts working for the *catalogue raisonné* owned Pollocks and, in turn, that certifying the found works would have increased the supply of Pollocks, thereby diminishing the value of the experts' collections.²⁰¹ In other words, the committee labored under powerful incentives to deny the paintings' authenticities.

In sum, determining the authenticity of a work is quite difficult.²⁰² Many of those best able to provide reliable information refuse to do so, while others may even intentionally provide bad information. Because a work's authenticity and attribution are the essence of its value, the art market's inability to provide reliable information about attribution is quite troubling.

IV. THE INEFFICIENCIES OF THE ART MARKET

While the nature of the art market resembles few other industries, this by itself is neither good nor bad. A problem only

196. See Patricia Cohen, *Fake Art May Keep Popping up for Sale*, N.Y. TIMES, Nov. 5, 2012, <http://www.nytimes.com/2012/11/06/arts/design/murky-laws-give-fake-artworks-a-future-as-real-ones.html> ("The artwork on the wall had been previously identified by the artist's estate as fake Richard Diebenkorns. But here they were again, proudly displayed as Diebenkorns by a new owner who had no idea he had bought discredited drawings.").

197. See Louise Jury, *A Load of Old Pollocks? Thirty-two 'Works' Found in an Attic Now Suspected to be Fakes*, INDEPENDENT (Feb. 11, 2006), <http://www.independent.co.uk/news/world/americas/a-load-of-old-pollocks-thirtytwo-works-found-in-an-attic-now-suspected-to-be-fakes-466222.html>.

198. *Id.*

199. See Georgina Adam, *Thorny Issues*, FINANCIAL TIMES (Nov. 25, 2011, 10:25 PM), <http://www.ft.com/cms/s/2/e079e514-1068-11e1-8010-0014feabdc0.html>.

200. See *id.*; Jury, *supra* note 197.

201. See Adam, *supra* note 199. See generally Lacy, *supra* note 153 (explaining that some purchasers have brought anti-trust claims against the expert committees who authenticate for *catalogue raisonnés*).

202. See Adam, *supra* note 199.

arises when the current legal regime has neglected to account for the unique qualities of art and the history of its trade. First, the UCC and most state laws generally seek to encourage buyers to purchase commodities that are free of titling issues, shielding purchasers from liability if they buy new items from reputable dealers.²⁰³ These schemes neglect to recognize that the majority of works over a couple decades old must be sold on the secondary market and due to the industry's secrecy, almost all of them include titling gaps. In other words, the legal regime requires a level of information that almost never exists. Because buyers and sellers cannot possibly adjust their behavior to what the law demands, they have instead increased secrecy and other undesirable behaviors that contribute to market failures.

Efficient markets maximize the value of the goods traded in them.²⁰⁴ In contrast, for example, a law that forbids homeowners from using their houses as collateral for loans would be inefficient because the value of homes would plummet. Further, market actors who depend upon the real estate market—including builders, contractors, bankers, real estate agents, and lawyers—would lose substantial amounts of business. Economist Hernando De Soto explains that the poverty found in many countries is rooted in their legal systems' needless creation of "dead capital," whereby markets cannot rely upon the primary value of its assets.²⁰⁵ Similarly, the inefficiencies of the art market have systematically destroyed the value of its commodities. Paintings with good titling sell for a certain value, while larger gaps in the title diminish the work's price.²⁰⁶ Some paintings, depending upon their attribution or history of titling, have almost no value despite being fantastic works of art.²⁰⁷ For devaluation to occur, it is not necessary that a work has been stolen, only that it might have been.²⁰⁸ Thus, the art market drowns in a veritable reservoir of dead capital.

Yet another issue stems from buyers incurring high transaction costs to purchase a painting. Even when a work is legitimate, the amount of research required to verify titling, authenticity, attribution,

203. See *supra* Part III.2.B.

204. See *supra* Part II.

205. See DE SOTO, *supra* note 5, at 30–35, 39–40 (explaining that the failure of countries to properly title land prevents owners from harnessing its capital for the purpose of obtaining credit).

206. See Interview with Franklin Feldman, *supra* note 11.

207. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010) (discussing that Sotheby's suspended the sale of the painting because of the cloud created over the work's title).

208. See, e.g., *United States v. Fireman's Fund Ins. Co.*, No. 99 Civ. 2622(BSJ), 2001 WL 88226, at *1 (S.D.N.Y. Jan. 31, 2001) (noting a key issue was the cloud on the work's title, preventing the work's sale).

legal claims, et cetera, can add substantial costs on top of the asking price. Additional costs of ownership result from safeguarding the works against theft and forgery by purchasing either insurance or warranties from the dealer.²⁰⁹ Moreover, the value of most paintings does not often warrant the costs inherent with litigation;²¹⁰ so upon finding that a work is fake or stolen, owners do not typically find that it makes economic sense to either raise or fight a claim.

V. EXPLAINING THE ECONOMICS OF PERSISTENT MARKET FAILURE

The puzzle of the art market is not the market failure itself, but its persistence. Why does market failure exist in equilibrium when the emergence of market failure and dead capital should prompt those who would benefit from increased efficiency to advocate and effectuate some level of change, regulation, or supervision?²¹¹ With respect to the art world, the problem has not been that aggrieved actors have tried and failed to change this market's culture but instead that all parties appear content.²¹² In fact most dealers and patrons adamantly defend the traditional ways in which they have sold and traded art.²¹³

The state of the art trade suggests that markets for goods can exist in a state of failure if the preferences of the buyers and sellers are too aligned. As stated above, it is assumed that all necessary information regarding a good's market value will arise when a sufficient number of buyers and sellers interact in the market place.²¹⁴ The key is that during negotiations, the parties must haggle at arm's length where buyers seek the lowest possible price and sellers demand the highest. The price that results should reflect the good's market value.²¹⁵ If either the buyers or sellers perceive that the manner in which the market sells goods allows one group to exploit the other, a

209. See, e.g., *Art Title Insurance*, ARIS, <http://www.aristitle.com> (last visited Apr. 30, 2012) (providing an insurance plan to guard against adverse titling claims).

210. Epstein, *supra* note 92.

211. See POSNER, *supra* note 1, at 716–17 (explaining that there is a market for legislation—societal groups lobby and spend resources to influence legislators to produce laws that are likely to increase the group's utility or to reduce perceived harms).

212. See Robin Pogrebin & Kevin Flynn, *As Art Values Rise, So Do Concerns About Market's Oversight*, N.Y. TIMES, Jan. 27, 2013, <http://www.nytimes.com/2013/01/28/arts/design/as-art-market-rise-so-do-questions-of-oversight.html> (“Many in the art world insist there is no need for further scrutiny of a market that prompts few consumer complaints and is vital to the New York economy.”).

213. See, e.g., *Porter v. Wertz*, 421 N.E.2d 500, 502 (N.Y. 1981) (noting that the defendant argued that the industry's culture forbids a buyer from inquiring into a work's history).

214. See *supra* Part II.

215. See *supra* Part II (explaining the process by which a good receives its value).

demand for corrective legislation should arise (e.g., supervision or regulation).²¹⁶ It is this adversarial relationship between the buyers and sellers that creates both the efficient trade of goods and the imposition of rules and standards encouraging fair dealings.

What differentiates the art market and encourages its inefficiency lies in the probability that art will appreciate in value. This strips the art trade of a key adversarial quality and causes the preferences of art buyers and sellers to align. Consider again a more traditional market: constant advancements in technology and subsequent usage diminish a television's value from the moment it is initially sold. One who would like to resell a television can generally hope to only receive a moderate fraction of its original purchase price, as televisions are rarely bought as an investment. In turn, those who intend to purchase a television should prefer a market that is particularly favorable to buyers, considering that under almost no circumstances would a buyer benefit from a situation in which dealers possess an inequitable sum of leverage over the buyers.

Art differs substantially from these more traditional goods in that art ownership does not drain a work of its economic value; in fact, most buyers have some knowledge or expectation that their purchase will appreciate while it sits on a wall. The most direct way to realize the work's increasing value is to later resell it.²¹⁷ The key is that buyers can foresee a day when they swap roles and become the seller in hopes of receiving more for the good than what they paid.²¹⁸ In other words, buyers often view the art market from the perspective of the sellers, harboring their interests.²¹⁹

Indeed, as previously discussed, the inequitable and unchecked conduct of the sellers and buyers largely has caused the art trade's market failure.²²⁰ Buyers have failed to demand greater oversight because they expect that, at some point in the future, they can take advantage of these same market inefficiencies. Since art generally

216. See POSNER, *supra* note 1, at 716–17 (describing the marketplace for legislation).

217. Selling art is the most traditional method to capitalize on increased value, although other methods exist. For instance, one can collateralize a piece of art in procuring a loan. See Jennifer Anglim Kreder & Benjamin Bauer, *Protecting Property Rights and Unleashing Capital in Art*, 2011 UTAH L. REV. 881, 921–22 (2011) (“The collateralization of art and antiquities has recently grown in popularity, particularly in response to the current economic downturn. In 2008, renowned photographer Annie Leibovitz, known in legal circles for her copyright suit against Paramount Pictures regarding a nude photo that she took of pregnant actress Demi Moore, borrowed over fifteen million dollars secured by, among other things, ‘the rights to all of her photographs.’”).

218. See Lauren A.E. Schuker, *Art's Anxiety Attack*, WALL ST. J. (Sept. 22, 2007, 12:01 AM), <http://online.wsj.com/news/articles/SB119041430260835718>.

219. See *id.*

220. See *supra* Part III.

appreciates in value, consumers can enjoy a significant profit on a work's more expensive resale than what was lost on the initial purchase. For example, if the art market's inefficiency inflates the average sale price of art by 10 percent, then one who purchases a painting for one-hundred dollars (and thus, overpays by ten dollars) can hope to recoup that ten dollars plus plenty more after it appreciates in value to one-thousand dollars. In this case the buyer enjoys a one-hundred-dollar markup minus the ten-dollar loss. Said differently, it appears that buyers have accepted the inequitable leverage wielded by sellers because they not only see themselves becoming a seller in the future, but because they expect to benefit more from selling the work than they will lose as its buyer.

In turn, art consumers have accepted, for example, the fact that no duty obligates sellers to provide prospective consumers with adverse appraisals that suggest that the work is a forgery.²²¹ This acquiescence would be counterintuitive in other markets, considering that a prospective television buyer would almost always benefit from a safeguard preventing sellers from selling a knockoff. Here, though, buyers foresee that they will potentially sell the work and thus have plenty to lose if an expert later determines that the work was forged after the UCC's warranties have expired. Buyers have, it seems, chosen to accept the fact that a dealer may have buried adverse opinions because they may later need to do so as well.

The upshot of this dynamic is that the preferences of buyers and sellers are now aligned to such a degree that neither party has an incentive to demand increased efficiency. Despite the lack of protest from the art community, its culture of trade has created substantial societal harms by fostering thievery and the silent trade of fenced works. In other circumstances, traditionally accepted shady dealings have created clouds on titles that rendered precious works almost valueless.²²² Moreover, the manner in which dealers actively suppress reliable valuation information has caused patrons to spend extraneous resources that they could have invested in other industries, benefitting additional vendors.

Importantly we should probably expect similar dynamics in most other industries where buyers and sellers are not properly adversarial. The real estate market currently enjoys substantial regulation, possibly due to the potential for graft and abuse. While

221. See Interview with Franklin Feldman, *supra* note 11.

222. See, e.g., *United States v. Fireman's Fund Ins. Co.*, No. 99 Civ. 2622(BSJ), 2001 WL 88226, at *1 (S.D.N.Y. Jan. 31, 2001).

substantially less studied, the markets for diamonds, weapons, drugs, trademarks, and others present similar concerns.²²³

VI. PROPOSALS FOR REFORM

Because most art traders face powerful incentives to conceal information about a work's value, provenance, and authenticity, reforms should consider methods that encourage buyers, sellers, and dealers to be more forthright. The current legal regime reinforces the inefficiencies of the current system; therefore, proposed amendments should focus on changing the law so that communicating relevant information will no longer place a speaker in peril. This will help to increase market efficiency by allowing market actors to more appropriately distribute resources, increasing the value of their assets.²²⁴

A. *The Experts*

A primary reason for the barriers to information flow and resulting market inefficiencies is that aggrieved art owners have chosen to file lawsuits against the art experts who have rendered unfavorable opinions about their pieces.²²⁵ Art experts are typically the only ones with the knowledge and skill to attribute art and spot a fake, but concerns about their legal liability have caused them to withhold their opinions.²²⁶ Indeed, the art market depends upon the flow of necessary information, yet the reluctance of art experts to fill this void has caused the art market to fall further into market failure. However, providing qualified immunity for expert opinions could have the opposite effect, as experts would have little incentive to provide better than negligent assessments.²²⁷ A middle ground must be found.

Some in the art trade acknowledge the art market's inefficiencies and attribute them in part to the fact that the private art market (other than the public auction market) is, on the whole,

223. See, e.g., Edward Jay Epstein, *Have You Ever Tried to Sell a Diamond?*, ATLANTIC (Feb. 1982), <http://www.theatlantic.com/past/issues/82feb/8202diamond1.htm>; Eric Goldschein, *The Incredible Story of How De Beers Created and Lost the Most Powerful Monopoly Ever*, BUSINESS INSIDER (Dec. 19, 2011, 2:00 PM), <http://www.businessinsider.com/history-of-de-beers-2011-12?op=1>.

224. See *supra* Part II (explaining the economics of efficient markets and their ability to appropriately allocate resources).

225. See Sharon Flescher, *The International Foundation for Art Research*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 165, at 95, 101.

226. See *id.* at 95.

227. See POSNER, *supra* note 1, at 213–15 (explaining that the price one is willing to spend to avoid an accident is a function of the probability and magnitude of one's liability).

less regulated and transparent than other significant markets.²²⁸ In France, for example, one can attribute work only upon receiving a license from the French government.²²⁹

Congress should create a similar objective art organization tasked with compiling information about the art trade. An attribution committee of experts would provide a service to art owners who voluntarily seek an opinion. Each expert would be licensed and certified to render an authoritative ruling about a work's authenticity or proper attribution. All of the committee's experts would enjoy immunity from defamation-of-title and product-disparagement lawsuits, as long as they disclose any possible conflicts of interest.²³⁰ Aggrieved art owners could protest only about the process by which the expert attributed the work was flawed, not the substance of the expert's judgment. The art committee should then record all opinions so that future buyers can rely upon already established rulings.

The advantage of utilizing the expert committee is that its attribution process would incentivize those with authoritative and reliable information to provide it.²³¹ There is also no current process that one must follow to become an expert; anyone who holds herself out to be an authority can render an opinion to either validate or defeat a work.²³² This committee could help establish actual authority, so that putative purchasers and sellers could rely upon the committee's knowledge. Hopefully, such a committee would create openly accessible institutional knowledge about existing artworks, reducing the costs borne by future consumers and purchasers who seek to investigate the piece.

228. See Interview with William G. Pearlstein, *supra* note 51.

229. See Jáuregui, *supra* note 148, at 1996–97. Jáuregui notes:

But how have the French professionalized their experts? The expert must obtain certain qualifications to even enter the market, namely credentials—a license from a recognized organization. French experts must belong to a professional association. The experts' prestige stems from their membership in a particular association. Induction into an association that deals exclusively in advising the courts, such as the Union des Experts près de la Cour d'Appel de Paris, brings the greatest prestige. In 1994, out of fifty applicants to the Union, only three became inductees. Not only do magistrates themselves approve the appointment, but the expert also must already belong to one of the professional associations in the field, whether court sanctioned or not. Here again, prestige matters, because not all associations are as selective in their membership.

Id.

230. For instance, an expert would have to disclose whether she owns works by the artist for whom she is an expert or even works for a gallery or dealer specializing in that artist. See, e.g., Adam, *supra* note 199.

231. Experts often refuse to provide expert opinions out of fear of liability. See Flescher, *supra* note 225, at 101; *supra* Part III.C. Providing at least qualified immunity should nullify the incentives to withhold information, creating a regime in which more reliable information will be distributed. See Flescher, *supra* note 227, at 101.

232. See Interview with Franklin Feldman, *supra* note 11.

Importantly, part of the reason why an expert committee would probably be successful stems from the fact that art owners would only submit works to it voluntarily. Buyers willing to spend substantial sums of money would probably prefer, or even demand, that this authoritative committee provide its authentication and attribution services, as opposed to some more unknown expert chosen by the seller. Sellers who eschew this service would likely raise a red flag, suggesting a potential problem with the work. While today's system provides few clues about the credibility of an opinion, this system could provide a means by which buyers can assess a work's authenticity without incurring the costs of engaging expensive information gathering procedures which may be inherently unreliable due to the influence of financial conflicts of interest. Those with attributed works could submit their work to the expert committee without fearing a negative finding. Upon a negative finding, buyers would still be free to supplement the committee's assessment with additional private assessments, although buyers would be on notice that a government agency has deemed its authenticity to be questionable.

Ideally, this process would also diminish what some art experts have referred to as the "tyranny of the *catalogue raisonné*."²³³ A work's current marketability relies heavily upon its inclusion in its author's *catalogue raisonné*, despite the fact that the importance of such catalogues is a rather modern phenomenon and riddled with conflict of interest problems.²³⁴ Again, the experts who contribute to the *catalogue raisonné* must pass no expertise test, often own many of the artist's works, and, thus, have incredible incentives to deny authenticity to works owned by others.²³⁵ The probable reason for the *catalogue raisonné*'s importance stems from the lack of other authoritative sources to authenticate and attribute. This commission could reduce the art market's reliance on defective information sources, such as the *catalogue raisonné*, or at least shed additional light onto the process by which art receives value.

233. Interview with William G. Pearlstein, *supra* note 51.

234. See Michael Findlay, *The Catalogue Raisonné*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 165, at 55, 55–58 (“In the long history of art, however, the catalogue raisonné is a relatively recent entry.”).

235. See Adam, *supra* note 199; Lacy, *supra* note 153, at 215–16.

B. *The Duty of the Dealer*

Holding dealers accountable to those that they serve pursuant to the law of agency would provide another important reform.²³⁶ Currently, only auction houses that accept a work on consignment owe a fiduciary duty to the owner.²³⁷ This requires the auctioneer to serve only the buyer's best interest. Many sellers, however, put their faith in the dealer (who receives a handsome commission) to seek out the best possible deal, ignorant to the fact that the dealer also works for several buyers.²³⁸ Indeed, most dealers assume, per industry custom, that they may play both sides without informing either.²³⁹ Because the dealer has essentially committed to receiving the highest price for the seller and driving the hardest bargain for the buyer, a conflict of interest results whereby at least one party will receive less than what proper market efficiency would demand.²⁴⁰ As a result, the law must assume that dealers owe a principle-agent fiduciary duty to each party with which they contract, unless the dealer clearly and explicitly communicates the dealer's other business relationships and conflicts.

Most importantly, this would help bring important information to light. If the dealer must treat buyers at arm's length, then the dealer will face substantial incentives to find more buyers, one of whom may possibly pay a higher price. Likewise, buyers often have to rely on the dealer's opinion that a proposed transaction makes sense, but dealers should be considered likely to conceal important information about a work's provenance and authenticity if the discovery and communication of such could sabotage a deal and hurt the dealer's interests. In sum, current dealers cannot adequately serve the interests of both the buyers and sellers; eliminating this conflicted relationship would only help the flow of information and market efficiency.

C. *Insurance*

Another reform that may improve the efficiency of the art market is the promotion of art title insurance. Title insurance is a

236. See Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 557 (1988) (suggesting that the laws of agency could be useful to resolving dealer conflicts).

237. See *id.*

238. See, e.g., Cohen, *The New Blow in Art Clash of Titans*, *supra* note 67.

239. See Randy Kennedy, *Gagosian Suit Offers Rare Look at Art Dealing*, N.Y. TIMES ARTS BEAT (Nov. 7, 2012, 5:50 PM), <http://artsbeat.blogs.nytimes.com/2012/11/07/gagosian-suit-offers-rare-look-at-art-dealing>.

240. See *id.*

product—and a concept—that has only recently been introduced and made generally available to the art market.²⁴¹ Title insurance is gradually gaining acceptance in the art market as purchasers weigh the cost of one-time premiums against the consequences of title defects.²⁴² At the time of writing, ARIS is the only dedicated art title insurance company, with the specialized capacity to base underwriting decisions on provenance research.²⁴³ Advantages of more wide spread use of art title protection insurance would be numerous. First, purchasing a policy would provide valuable information about the art market to buyers, as ARIS must obtain sufficient reliable information to assess the risks found in a work. Because experienced insurance companies should become particularly adept at pricing risk, buyers would not have to incur substantial personal costs to learn how to do the same. Second, buyers may be more likely to invest in art if they had a means to purchase title security. Third, ARIS or other insurance agencies could share information about the works that they have determined to be forgeries or stolen. Catalogued information should help buyers to quickly determine a problematic painting and also, prevent sellers from repeatedly endeavoring to resell that same painting every few years.

D. Art-Theft Databases

Requiring that anyone bringing an act of replevin for a stolen painting must provide notice of the theft to the art market would produce even more desirable results. The current issue is that many historic art transactions have occurred in secret and thus buyers or sellers will never be able to determine who owned the work and when.²⁴⁴ Many stolen works even resemble valid pieces.²⁴⁵ Some common law regimes that seek to remedy theft require the theft victim to exercise due diligence to find that stolen work.²⁴⁶ In light of the development of services such as the Art Loss Register and IFAR, which provide an adequate method to provide notice of a theft to good-faith purchasers for value, the law should require this.

While it may seem inequitable to burden theft victims, the manner by which provenances of older paintings inherently contain holes indicates that the law should place the onus to report

241. See ARIS, <http://www.aristitle.com> (last visited Apr. 30, 2012).

242. See Interview with William G. Pearlstein, *supra* note 51.

243. See *About ARIS*, ARIS, http://www.aristitle.com/content_menu.php?id=30&menuid=29 (last visited Apr. 30, 2012).

244. See Turner, *supra* note 25, at 350–56.

245. See *supra* Part III.C.

246. See *supra* Part III.B.

information on those who possess it.²⁴⁷ Unless a buyer has reason to believe a work has been stolen, these reforms should insulate them from replevin suits if the painting had been stolen for a significant amount of time, such as ten years, provided that the owner—the obvious least-cost avoider—has not put putative buyers on notice. If the seller could prove that she owned the painting for many continuous years, buyers would know that others could not challenge their purchase. Other benefits would be that this rule could eliminate expensive, stale litigation and increase the flow of information. By incentivizing sellers to record who owned a work and for how long, provenances will begin to include more, and increasingly accurate, information.

Most importantly, this rule would accommodate the secret history of the art trade. The current system punishes good-faith buyers for acquiring art with provenance holes even though a substantial amount of its transactional history has often been lost. Currently, buyers can do no more than investigate the title, but rarely do provenances include enough information to put a buyer on notice. Requiring theft victims to report theft is a minimal burden for one who endeavors to use the legal system to reclaim property. In addition, this rule would maximize the value of legitimate art with poor titling while destroying the marketability of those that have actually been stolen.

VII. CONCLUSION

The general principles of law and economics indicate that the art trade currently exists in a state of market failure. Efficient markets require the flow of plentiful, easily accessible information; yet the art market's general culture and the laws governing it encourage those possessing and selling art to proceed with the utmost secrecy and to withhold or distort information. Therefore, those who seek to buy or sell art through a private dealer or auction house face substantial peril—the work could be stolen, forged, or worth considerably less than originally assumed. Because of this, significant questions arise about why one would buy art, as opposed to allocating resources to any other commodity.

This Article explores this question by first examining the art market in greater detail and then providing solutions to the particular problems identified. It recommends substantive reforms, including Congress enacting art market regulation and creating a commission on art attribution that could provide information and objective,

247. See *supra* Part III.2 (explaining the circumstances that often create gaps in provenances).

authoritative expertise. Such a reform would remedy several common practices that have led buyers and sellers to errantly believe that their agents serve their interests. Additionally, titling and authenticity insurance could help protect buyers and also supply information. The author welcomes others to suggest methods to increase art market efficiency, as the depth of its market failure has been understudied and misunderstood.