

Stetson Journal of Advocacy and the Law

The first online law review designed to be read online



3 Stetson J. Advoc. & L. 1 (2016)

Lessons from Two Recent Art Forgery Cases

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I. Introduction

1. In the increasingly globalized art market, the internet is an effective tool to reach audiences and purchasers worldwide. Amateur and professional collectors and art sleuths can use the expanded reach of the internet to track down lost or stolen works, research the provenance² of a piece, peruse catalogues from auctions half a world away, view the sales history of a work, and compare verified original artworks against works that have been “attributed to” a master.
2. In the historically closed world of the art market, this increased access to artwork and information about artwork via the internet has been helpful in unmasking those engaged in committing fraud against purchasers of artworks.³ However, the use of

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2 A provenance is the history of ownership and sales for a work of art.

3 LAURA GILBERT, *Collector Discovers Knoedler Fake After Reading The Art Newspaper*, [THE ART NEWSPAPER](#), March 1, 2015.

the internet to research an artwork can be a double-edged sword. High resolution images of artworks are only a mouse click away. As technology improves so do the methods for an anonymous seller forging artworks and selling forged pieces to a global purchaser. As a result of these changes in the market, and the rise of civil and criminal lawsuits surrounding inauthentic and forged artworks, it is increasingly difficult to get an expert opinion on whether a piece is genuine.

3. This article will discuss the United States laws used to prosecute those involved in crimes related to art fraud, and will discuss two recent art forgery cases and the resulting criminal charges brought in U.S. courts against those involved. The article will conclude with a discussion of some practical tips for practitioners and suggested solutions to combat the lack of evidence available in art forgery and fraud cases. These solutions include the introduction of DNA-based forensic evidence to provide proof that an artwork is legitimate as well as proposed protective legislation for art authenticators.

II. Legal Overview

4. Art, which has cultural value, is also a highly portable, valuable, and volatile financial asset. It is widely reported that art theft is the third largest criminal enterprise in the world behind arms and drug trafficking.⁴ Even with the best scholarship and the assistance of technology and forensics, the difference between the work of an established master and a talented amateur may not be readily apparent even to a trained scholar or valuation expert.⁵ For example, in 2014 an expert from Switzerland's Fine Art Expert Institute (FAEI) estimated that as much as 50% of the artwork on the market is either fake or misattributed.⁶ Art scholars and authenticators may also reasonably disagree about the provenance or authenticity of a piece, and their disagreements can be expensive. Authentication disputes have become so prevalent and contentious that artist foundations including the Keith Haring Foundation⁷ and the Andy Warhol Foundation⁸ have dissolved their authentication boards at least in partial response to these lawsuits and to help insulate themselves against legal liability. Because of the inherent difficulties in identifying a "fake" artwork from that

4 See KRIS HOLLINGTON, *After Drugs and Guns, Art Theft Is the Biggest Criminal Enterprise in the World*, [NEWSWEEK](#), July 22, 2014; cf. *Frequently Asked Questions*, [INTERPOL](#).

5 JAMES TARMY, *Here's How to Make Millions As an Art Forger*, [BLOOMBERG NEWS](#), May 21, 2015.

6 *Over 50 Percent of Art is Fake*, [ARTNET NEWS](#), October 13, 2014.

7 See, e.g., *Bilinski v. Keith Haring Found., Inc.*, [96 F. Supp. 3d 35](#) (S.D.N.Y. 2015).

8 *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, [No. 07 Civ. 6423 \(LTS\)](#) (S.D.N.Y. May 26, 2009); see also *Andy Warhol Found. for the Visual Arts, Inc. v. Philadelphia Indem. Ins. Co.*, [No. 650917/2011](#) (Sup. Ct. N.Y. County Dec. 6, 2012).

of an authentic piece, a lack of willingness amongst experts to provide opinions that a work is authentic, and the potential for high financial return,⁹ art forgery and the corresponding fraud and ability to launder money¹⁰ can be an attractive criminal enterprise. This enterprise is often difficult to identify and prosecute because of a lack of reliable evidence.

III. All Fakes are not Forgeries

5. As used in this article, a “forged” or a “counterfeit” artwork is one created for the purposes of deception. A “fake” is an artwork that is not necessarily created for the purposes of deception, but has been misidentified or mis-represented.¹¹ Creating a copy of a work of art in and of itself is not a crime. However, why that copy was created, and what happens to that copy once it is created can violate both civil and criminal laws.

6. On the civil side, creating a copy of a protected work of art without permission may violate U.S. copyright law if it is not a fair use.¹² Furthermore, falsely representing that a work was created by a well-known artist when it was not can constitute an unfair trade practice, civil fraud, or a RICO violation.¹³ On the criminal side, intentionally representing that a forged work of art was created by a master often goes hand in hand with a variety of charges related to criminal fraud, tax evasion, wire fraud,¹⁴ mail fraud,¹⁵ and money laundering.¹⁶ In the eyes of prosecutors, the “big fish” are generally not the artists and artisans¹⁷ creating copies, but the brokers and dealers of those copies. Two recent criminal cases brought in U.S. courts demonstrate two different facets of art forgery and each highlights the challenges

9 See PATRICIA COHEN, *In Art, Freedom of Expression Doesn't Extend to 'Is It Real?'*, [THE NEW YORK TIMES](#), June 19, 2012.

10 PATRICIA COHEN, *Valuable As Art, but Priceless As a Tool to Launder Money*, [THE NEW YORK TIMES](#), May 12, 2013.

11 TOM SYKES, *Are Over Half the Works on the Art Market Really Fakes?*, [THE DAILY BEAST](#), October 14, 2014.

12 See, e.g., Limitations on Exclusive Rights: Fair Use, [17 U.S.C. § 107](#) (2010).

13 *Takeuchi v. Sakhai*, No. 05 Civ. 6925 (JSR) (S.D.N.Y. Jan. 16, 2006).

14 See *United States v. Sakhai*, No. 1:04-cr-00583 (S.D.N.Y. Jun. 09, 2004); JULIA PRESTON, *Art Gallery Owner Pleads Guilty in Forgery Found by Coincidence*, [THE NEW YORK TIMES](#), December 14, 2004.

15 See *United States v. Sakhai*, No. 1:04-cr-00583 (S.D.N.Y. Jun. 09, 2004); JULIA PRESTON, *Art Gallery Owner Pleads Guilty in Forgery Found by Coincidence*, [THE NEW YORK TIMES](#), December 14, 2004.

16 *United States v. Rosales*, No. 13 Cr. 518 (KPF) (S.D.N.Y. Jul. 17, 2013).

17 Cf. Indictment, *United States v. Bergantiños Diaz*, No. 14 Cr. 217 at 38 (S.D.N.Y. Mar. 31, 2014).

that stem from a lack of reliable and conclusive evidence available to a prosecutor who brings charges against those involved in art forgery.

IV. Cases

James Meyer and Jasper Johns

7. According to his indictment,¹⁸ James Meyer, a studio assistant of American sculptor, printmaker, and painter Jasper Johns, took advantage of that position of trust to steal works from Mr. Johns' studio. What is unique about this theft and corresponding fraud is the manner in which it was completed. As part of his duties as Johns' studio assistant, Meyer was responsible for maintaining a file of work by Johns that the artist considered unfinished (the "un-authorized works"). These unfinished artworks were not authorized by Johns to be placed in the art market. Between 2006 and 2012, Meyer removed at least 22 un-authorized works from Johns' studio, and sold them through an art gallery without Johns' knowledge or consent. To complete the deal, Meyer provided the gallery owner with sworn notarized certifications that the works were finished, authentic works by Johns. Meyer also represented that Johns had gifted the un-authorized works to him, and that he was the rightful owner. As a condition of sale, Meyer required the purchaser to keep the work private for at least eight years during which time the work was not to be loaned, exhibited, or re-sold.¹⁹ To perpetuate the fraud, Meyer also created fake inventory numbers for the works or assigned un-authorized works the same inventory numbers as other complete works by Johns to give the appearance that the works were legitimate. For some of the un-authorized pieces, Meyer created fake registration pages to make it look like the un-authorized works were listed in a three ring binder maintained by Johns Studio of Art, which kept track of registered pieces and their corresponding inventory numbers. Meyer also falsely represented that the un-authorized works would be included in Johns' forthcoming catalogue raisonné.²⁰ Over the years the gallery owner received approximately \$6.5 million in profits, \$3.4 million of which was remitted to Meyer.²¹

8. What is interesting about these facts is that they challenge traditional notions about what it means for an artwork to be fake or forged. Here, the inauthentic

18 Indictment, *United States v. Meyer*, No. 13 Cr. 604 (JPO) (S.D.N.Y. Apr. 24, 2014).

19 It is not uncommon for works of art to be sold with conditions of sale or restrictions of this type. Restrictions may be imposed to protect the privacy of the seller, to discourage art "flipping" which may disrupt the art market, or pursuant to the wishes of the artist. See DANIEL GRANT, *Fine-Art Sales Often Come with Strings Attached*, [THE WALL STREET JOURNAL](#), April 12, 2015.

20 A Catalogue Raisonné is a monograph that provides a comprehensive list of works by an artist.

21 Indictment, *United States v. Meyer*, No. 13 Cr. 604 (JPO) at 2–4 (S.D.N.Y. Apr. 24, 2014).

works at issue were in fact created by famed artist Jasper Johns. However, the works were not finished. Accordingly, when Meyer represented and certified that the works were authentic, finished pieces by Jasper Johns (which he claimed he was authorized to sell), he was engaging in fraud against the purchasers of the works. To perpetuate the fraud, Meyer created false provenance papers and assigned false inventory numbers to the works to encourage a purchaser to believe that the work was authentic. As the person responsible for maintaining some of Mr. Johns' administrative records, Meyer was in a unique position to create these false papers and to cover his tracks successfully for years.

9. On August 27, 2014, Meyer pled guilty to one count of interstate transportation of stolen goods in connection with the theft under 18 U.S.C. §§ 2314 and 2.²² Meyer had been indicted on two counts related to the theft of the 37 works, the above-referenced theft charge and one count of wire fraud under 18 U.S.C. § 1343. On April 23, 2015, Meyer was sentenced to 18 months in prison for his role in selling 37 works that he had stolen from Johns' studio. In addition, Meyer was also sentenced to two years of supervised release, forfeiture in the amount of \$3,992,500, restitution in the amount of \$13,455,719, and was ordered to pay a \$100 special assessment.²³ Meyer and Fred Dorfman of Dorfman Projects LLC, the unnamed gallerist in the underlying criminal complaint against Meyer, were also sued civilly by Frank Kolodny, a purchaser of one of the un-authorized works.²⁴ The case was settled in February, 2015.²⁵

The Unverifiable Mr. X and the Closing of Knoedler Gallery

10. Long Island art dealer Glafira Rosales began her career selling artwork through King's Fine Arts Inc. and Glafira Rosales Fine Arts LLC in New York, New York. Ms. Rosales claimed that the works she sold through these two companies were by famed abstract expressionist artists. Her story was complicated, but simply put she claimed she was selling the works on behalf of a Swiss national, whom she called Mr. X, Jr., who wished to remain anonymous. Mr. X, Jr., reportedly inherited the works from his father who had purchased the works directly from the artists.

²² Plea Agreement, *United States v. Meyer*, No. 13 Cr. 604 (JPO) (S.D.N.Y. Aug. 24, 2014).

²³ *Former Studio Assistant to Jasper Johns Sentenced in Manhattan Federal Court to 18 Months in Prison for Scheme to Sell Millions of Dollars of Stolen Johns Works*, FEDERAL BUREAU OF INVESTIGATION, April 23, 2015.

²⁴ *Kolodny v. Meyer*, No. 1:14-CV-03354 (S.D.N.Y. May 08, 2014) (alleging Racketeer Influenced and Corrupt Organizations Act ("RICO") and fraud charges against James Meyer and Gallerist Fred Dorfman in connection with the sale of inauthentic Jasper Johns works).

²⁵ *Kolodny v. Meyer*, No. 1:14-CV-03354 (S.D.N.Y. May 08, 2014) (alleging Racketeer Influenced and Corrupt Organizations Act ("RICO") and fraud charges against James Meyer and Gallerist Fred Dorfman in connection with the sale of inauthentic Jasper Johns works).

After Mr. X acquired the works, they went directly into storage until his death. Ms. Rosales claimed this was the reason that the works did not appear in any catalogues raisonnés, nor were there sales records for the works. As it turns out, the history of Mr. X, Jr., was allegedly a story created by Ms. Rosales and her co-conspirators as a cover to sell forged paintings created by Pei Shen Qian in his Queens, New York, studio.

11. According to the indictments of those involved, the facts were as follows. Beginning in the early 1990s through 2009, Ms. Rosales, her former boyfriend Jose Carlos Bergantiños Diaz, his brother Jesus Angel Bergantiños Diaz, and painter Pei Shen Qian, (collectively the “co-conspirators”) engaged in a scheme to create forged artworks by prominent abstract expressionist artists, including: Mark Rothko, Jackson Pollock, Willem De Kooning, Richard Diebenkorn, Robert Motherwell, Barnett Newman, Sam Francis, and Franz Kline. Of these forged works, 63 were sold to unsuspecting purchasers as authentic, original works by these famed painters for tens of millions of dollars. The co-conspirators utilized two unnamed but prominent dealers to sell the works.²⁶ The dealers were later identified as Knoedler & Company and Julian Weissman. Forty of the forged works were sold through Knoedler and the remaining twenty-three works were sold through Weissman. Neither Knoedler nor Weissman were subject to indictment, but the two dealers faced their own civil legal difficulties with the defrauded purchasers.²⁷ In the most recently settled civil case, the De Sole family settled their claims against Ann Freedman, former director of the Knoedler Gallery, on February 7, 2016. Knoedler and 8-31 Holdings settled two days later on February 9, 2016. The details of the settlement agreements are confidential, and thus, have not been publicly released.²⁸

12. For her part in the forgery scandal, Ms. Rosales was charged with: (1) conspiracy to commit wire fraud,²⁹ (2) wire fraud,³⁰ (3) conspiracy to commit money laundering,³¹ (4) money laundering,³² (5) two counts of subscribing to false U.S. tax returns,³³ and (6) two counts of willful failure to file reports of foreign bank

26 Indictment of Jose Carlos Bergantiños Diaz, Jesus Angel Bergantiños Diaz, and Pei Shen Qian, *United States v. Bergantiños Diaz*, No. 14 Cr. 217 (S.D.N.Y. Apr. 21, 2014); Indictment of Glafira Rosales, *United States v. Rosales*, No. 13 Cr. 518 (S.D.N.Y. Jul. 17, 2013).

27 See, e.g., *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 293 (S.D.N.Y. 2013); *Martin Hilti Family Trust v. Knoedler Gallery, LLC*, No. 13 Civ. 657 (PGG) (HBP) (S.D.N.Y. Sept. 30, 2015); *Fertitta v. Knoedler Gallery, LLC*, No. 14-CV-2259 (JPO) (S.D.N.Y. Jan. 29, 2015).

28 COLIN MOYNIHAN, *Knoedler Gallery and Collectors Settle Case over Fake Rothko*, *THE NEW YORK TIMES*, February 10, 2016.

29 18 U.S.C. § 1349 (2011).

30 18 U.S.C. § 1343 (2011).

31 18 U.S.C. § 1956(h) (2011).

32 18 U.S.C. §§ 1956(a)(2)(B)(i) and 2 (2011).

33 26 U.S.C. § 7206(1) (2011); 31 C.F.R. §§ 1010.306(c)–(d) (2011).

and financial accounts.³⁴ The Bergantiños Diaz brothers and Pei Shen Qian were charged with: (1) wire fraud, (2) conspiracy to commit wire fraud, (3) conspiracy to commit money laundering, (4) money laundering, (5) conspiracy to defraud the IRS, 6) tax fraud and 7) false statements.³⁵ According to a statement issued by United States Attorney for the Southern District of New York, Preet Bharara, Ms. Rosales and her co-conspirators sold forged artworks for “approximately \$33.2 million. The galleries, in turn, resold the artworks to victims of Ms. Rosales’ crime for more than \$80 million.”³⁶

13. On September 16, 2013, Ms. Rosales pled guilty to nine counts, including:

one count of conspiracy to commit wire fraud, one count of wire fraud, one count of conspiracy to commit money laundering, and one count of money laundering, each of which carries a maximum sentence of 20 years in prison; three counts of filing false federal income tax returns, each of which carries a maximum sentence of three years in prison; and two counts of willful failure to file Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1, each of which carries a maximum sentence of five years in prison. [Ms.] Rosales’ total maximum term of imprisonment is 99 years. She also agreed to forfeit \$33,200,000, including her home in Sands Point, New York, and to pay restitution in an amount not to exceed \$81 million.³⁷

14. In January 2016, a Texas Auction house sold many of Ms. Rosales’ possessions, including her personal collection of artworks. The sale raised \$4.8 million. As of March 2016, Ms. Rosales has yet to be sentenced for her part in these crimes.³⁸ No fine or restitution amount has been set, and it is unclear how much, if any, of this \$4.8 million raised in the auction will be distributed to her victims.³⁹

15. As to her alleged co-conspirators – on February 16, 2016, Spain’s National Court ruled that Jesus Angel Bergantiños Diaz may be extradited to the United States to face charges in New York City. However, to the extent that Mr. Bergantiños Diaz decides to appeal, or to the extent the Spanish government declines to approve the

34 31 U.S.C. §§ 5314 and 5322(a) (2011); 31 C.F.R. §§ 1010.306(c)–(d), 1010.350, and 1010.840(b) (2011).

35 *\$33 Million Art Forgery Indictment Unsealed*, COURTHOUSE NEWS SERVICE, April 22, 2014.

36 *Art Dealer Pleads Guilty in Manhattan Federal Court to \$80 Million Fake Art Scam, Money Laundering, and Tax Charges*, U.S. DEPARTMENT OF JUSTICE, September 16, 2013.

37 *Art Dealer Pleads Guilty in Manhattan Federal Court to \$80 Million Fake Art Scam, Money Laundering, and Tax Charges*, U.S. DEPARTMENT OF JUSTICE, September 16, 2013.

38 *United States v. Rosales*, No. 1:13-cr-00518 (S.D.N.Y. Jul 17, 2013).

39 GRAHAM BOWLEY, *Up For Auction: Real Art Owned by a Seller of Forgeries*, THE NEW YORK TIMES, January 4, 2016.

extradition, this ruling may take months to effectuate. The February ruling does not impact Jesus' brother Jose Bergantiños Diaz because he has asked to be tried in Spain.⁴⁰

16. It is unlikely that Pei Shen Qian, who has both American and Chinese citizenship, will return to the United States to face the criminal charges against him. It is still believed that he has fled to China, and China does not have an extradition treaty with the United States. Thus, it is unlikely that the extradition of Jesus Bergantiños Diaz will happen anytime soon, and it is unlikely that the extradition of Jose Bergantiños Diaz or Pei Shen Qian will happen at all.⁴¹

Observations and Practical Pointers

17. In both *Meyer* and *Rosales*, the underlying criminal charges and prosecutions paved the way for defrauded art purchasers to seek financial redress and civil remedy in U.S. courts for their purchase of the inauthentic works. Any attorney defending a client involved in art related fraud should be prepared for the civil cases that will be brought in tandem with the criminal cases.

Civil and Criminal Cases Go Hand in Hand

18. As a practical matter, an attorney representing the criminal defendant who is also a party to a corresponding civil case based on the same conduct has some choices to make. In some instances, it makes sense to consider requesting a stay on the civil claims until the conclusion of the criminal case. This is to avoid the possibility of any testimony or pleadings that the defendant provides in the civil context being used as party admission evidence in the related criminal proceeding. Federal Courts usually consider three factors when determining whether to stay parallel civil and criminal proceedings: (1) whether there are “substantially similar or related issues in both cases”; (2) whether the parallel cases pose “clear hardship or inequity” on the defendant; and (3) whether the “duration of the requested stay” is immoderate.⁴² Staying the case may also avoid any potential prejudice in the criminal case based on the different standards of proof in criminal and civil trials. However, in some situations, it may make sense to allow the civil cases to proceed

40 See ALAN CLENDENNING, *Spain's National Court Has Ruled That Businessman Suspected of Dealing in High-Priced Fake Art Can Be Extradited to the United States to Face Charges in New York City*, [U.S. NEWS AND WORLD REPORT](#), February 16, 2016.

41 JON SWAINE, *Artist at Centre of Multimillion Dollar Forgery Scandal Turns up in China*, [THE GUARDIAN](#), April 22, 2014.

42 See *C3, Inc. v. United States*, 5 Cl. Ct. 659, 660 (1984).

in tandem with the criminal case to take advantage of the civil discovery process. Where discovery is particularly challenging or expensive, as in art forgery cases, the availability of civil discovery should not be immediately discounted notwithstanding the potential for prejudice to the defendant.

19. For example, the charges brought against Ms. Rosales and her co-conspirators were brought in indictments that were originally sealed. The majority of the information relating to their respective criminal cases was also filed under seal. Now that the indictments have been unsealed, and it appears that Ms. Rosales is cooperating with authorities, the civil cases brought in tandem with her underlying criminal conduct are being litigated, and some have settled. As the pending civil cases continue to develop and evidence is presented, a more complete picture of the conspiracy is being developed by private civil attorneys funded by art collectors. Perhaps to the disappointment of the many individuals who have been actively following these cases, the *De Sole* case settled before Ms. Freedman and the other Knoedler defendants testified as to their knowledge of the underlying set of facts leading to the creation and sale of the forged artworks. This testimony would have been important in building the prosecution's case in the underlying criminal matter, and would have been helpful to plaintiffs' attorneys in the remaining civil cases that have yet to be litigated. As the history of this alleged conspiracy continues to be untangled, it is clear that many new facts that would have been damaging to Ms. Rosales' criminal case are now surfacing. If the Bergantiños Diaz brothers and Pei Shen Qian ever return to the U.S. to face charges, their defenses will be much more challenging based on Ms. Rosales' plea as well as the newly available evidence developed in the corresponding civil cases.

An Evidence Vacuum Exists

20. Another hurdle to art forgery prosecution is that evidence (both inculpatory and exculpatory) is difficult to evaluate without the aid of a wide variety of expensive experts including forensic investigators, provenance researchers, art dealers, and art authenticators. Many of the forged works or allegedly forged works are created so masterfully that proving authenticity will be an expensive and time consuming undertaking. Where there are many works at issue, it may be prohibitively expensive to test each individual work, or have each individual work reviewed by an expert. Further, because of the rise of corresponding civil lawsuits, experts are reluctant to provide opinions on whether a work is legitimate or not. For example, in *United States v. Sakhai*, many forged copies were made, and the bulk of them were sold to foreign purchasers whose command of the English language was apparently poor. The information disconnect was so challenging that after six years of investigating the government could only prove with certainty that twelve of the

works at issue were forged, and the extent of Mr. Sakhai's criminal conduct is still unknown.⁴³ This information disconnect cuts both ways — it is hard for the government to bring a successful case against a criminal defendant charged with art forgery because of the expense of investigating and bringing the claims. Because of the challenges of developing and presenting evidence about authenticity, forgery cases are often bolstered with charges of wire fraud, tax evasion, and money laundering which are easier claims to prove. As a variety of charges are usually compounded in the indictment, the criminal defendant who generally is in possession of the bulk of the evidence may have bargaining power in negotiating a plea.

21. Defense counsel should not discount the fact that much of the best evidence is in the hands of the defendant. For example, in *United States v. Meyer*, Meyer was able to provide the gallery that sold the inauthentic work unique evidence of supposed authenticity through his position as Jasper Johns' studio assistant. As the person in charge of making and distributing the records, he was able to create supporting documentation of his fraudulent activities in a way that most third party dealers or sellers would not be able to replicate.⁴⁴ In the case of *Rosales*, because her phantom seller wished to remain anonymous, Ms. Rosales was the only person able to channel questions of authenticity and provenance. Also, her story of direct sale and storage was a convenient and at least on its face plausible explanation of why the works were not in the corresponding catalogue raisonné. In such circumstances the onus is often on the gallery or the purchaser to authenticate to their satisfaction as there is currently no objective measure of what constitutes sufficient provenance or authenticity. Further, many authenticators and scholars are becoming increasingly reluctant to opine on the authenticity of a work for fear of legal retribution.⁴⁵ As the current system (with its lack of transparency) stands, the evidence vacuum raises inherent challenges in moving forward without a cooperative defendant.

The Press and the Public Will be Interested

22. Art forgery cases are intriguing. They usually involve wealthy international jet-setters, artists, and art collectors. Knoedler's closing and the corresponding civil

43 See *United States v. Sakhai*, No. 1:04-CR-00583 (S.D.N.Y. Jun. 09, 2004); JULIA PRESTON, *Art Gallery Owner Pleads Guilty in Forgery Found by Coincidence*, [THE NEW YORK TIMES](#), December 14, 2004.

44 *Former Studio Assistant to Jasper Johns Sentenced in Manhattan Federal Court to 18 Months in Prison for Scheme to Sell Millions of Dollars of Stolen Johns Works*, [FEDERAL BUREAU OF INVESTIGATION](#), April 23, 2015.

45 DAN DURAY & JULIA HALPERIN, *Scholarly Debate Will Be Stifled After Knoedler; Abstract Expressionism Experts Forced to Watch What They Write and Say*, [THE ART NEWSPAPER](#), March 4, 2016.

cases rocked the art world and extended to the international media. Neutralizing the media and limiting the reporting of negative or prejudicial information during the pendency of a criminal case should not be underestimated. However, this publicity is curious in that it cuts both ways. While there will be lots of information about the case in the media, the media tends to view art forgers with interest. In fact, some art forgers have been highly romanticized and can go on to have astonishing careers.⁴⁶ As such, creating a media strategy early is crucial to protecting the integrity of the defense, especially when the person prosecuted is not the forger, but the dealer of the forged copies.

V. Art Forgery Evidence Going Forward

DNA Evidence to Combat Forgery

23. With advances in technology, forgeries may become easier to create, but may also become easier to identify. In October of 2015, the Global Center of Innovation for i2M Standards at the University at Albany announced that it developed technology that can mark works of art with synthetic DNA. The DNA can then be scanned to verify a work is authentic by checking the DNA against what is registered in a protected database. This new DNA tagging technology took two years to develop and is estimated to cost \$150 per work.⁴⁷ Based on the number of civil cases that contest the authenticity of artwork, DNA tagging could be a great added disincentive to the sale of fake or forged artworks. While this technology is still new and untried in either the civil or criminal context, it will be interesting to see how this DNA tag will change or influence the evidence brought by prosecutors in criminal trials. This will be especially true if DNA tagging is treated by a reviewing court as better than provenance research. As discussed in the indictment of Ms. Rosales and her co-conspirators, the false provenance she created was used as supporting evidence in the wire fraud conspiracy charge. In *United States v. Meyer*, the sellers relied on the authenticity paperwork that Meyer created. If provenance paperwork and certificates of authenticity become disfavored due to the availability of DNA evidence, it will be interesting to see how this new technology will impact how evidence is gathered in art forgery cases, and whether this will be a net improvement.

⁴⁶ FRANKIE MCCAMLEY, *Art Forger Freed and Making Millions*, [BBC NEWS](#), May 10, 2015.

⁴⁷ ANNY SHAW, *Works of Art to Be Tagged with DNA in Bid to Fight Forgeries*, [THE ART NEWSPAPER](#), October 15, 2015.

Legislation to Protect Art Authenticators

24. New York, where many of the recent art fraud and forgery cases have been brought, has recognized that art authenticators are dis-incentivized from providing evidence and opinions regarding authenticity because of potential liability. On June 15th, 2015, the New York State Senate approved Senate Bill S. 1229-A-2015 (the “Bill”) entitled “An act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship of works of fine art.” The purpose of the Bill is to encourage experts to speak out and provide evidence on art authenticity without fear of civil legal retribution. Senator Betty Little, the sponsor of the Bill, recognized that “[a]rt authenticators are critical to preventing art forgery and fraud. However, very expensive lawsuits have deterred these experts from rendering their opinions to the point of disrupting commerce.”⁴⁸

25. After passing the State Senate, the Bill died in the New York State Assembly and has been returned to the Senate for revision in committee. The version of the Bill that previously passed the Senate would have amended New York’s Art and Cultural Affairs Law to: (1) add a definition for “Authenticator,” which would exclude those with a financial interest in the work, (2) heighten the pleading standards for plaintiffs bringing actions against authenticators, which would make it harder to bring a case, (3) preclude a prevailing plaintiff from receiving legal costs (including attorney’s fees and expert witness fees) in successful suits against authenticators, and (4) allow courts to grant an authenticator who prevails at trial his or her legal costs (including attorney’s fees and expert witness fees), if the authenticator is able to show good cause.

26. While it is expected that a modified version of the Bill that is less favorable to art authenticators will be evaluated by the Assembly in the next few months, it remains to be seen whether a modified version will be able to pass. However, regardless of whether the Bill eventually passes, it is a good step forward in identifying that a problem does exist in the field of art authentication, and that it needs to be addressed.

VI. Conclusion

27. Art forgery cases are currently challenging to bring because of evidentiary hurdles. However, new developments including DNA-based tagging and proposed legislation to protect art authenticators may bring better evidence and testimony forward in future art forgery cases. If the use of DNA to tag artworks becomes prevalent, or if the proposed legislation to protect art authenticators is ever passed, it

⁴⁸ *Senate Passes Bill to Protect Art Authenticators*, [NEW YORK STATE SENATE](#), June 15, 2015.

may make art authenticators more willing to speak and present evidence in civil litigation going forward. These changes may increase the government's access to better information about the authenticity of a work of art and may change the way criminal cases related to art forgery unfold in the pleading stage.

28. Despite future uncertainties, one thing remains true — art is a useful vehicle for transferring funds across international borders, and it is a unique asset because its financial worth is tied to what “experts say it is.” Thus, arguably, art forgery and fraud will continue in the near future notwithstanding the fact that the anatomy of an art forgery case may take some interesting turns going forward.