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Leslie Kaufman Akst

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COMMENTS

REGULATION OF THE NEW YORK ART MARKET:
HAS THE LEGISLATURE PAINTED
DEALERS INTO A CORNER?*

I. INTRODUCTION

Until 1966, the purchase and sale of artwork remained unregulated by any statutory scheme directed solely at the art market. Works of art were treated merely as personal property,¹ to be governed by existing bodies of law.² Furthermore, no distinction was made between the rights of the participants in the sale of a work of art and those of the participants in the sale of other personal property. However, on the basis of public hearings,³ the New York State Attorney General perceived a need for legislation designed specifically to deal with the problems of the art market.⁴ The result was the addition over several years of new articles to the New York General Business Law which focused upon the rights of both the artist⁵ and the consumer.⁶ The statutes pertaining to the artist seek to protect him in his relations with dealers,⁷ museums,⁸ and purchasers of his work.⁹ Those statutes directed at protecting

* The author wishes to thank the following individuals for their helpful suggestions in the preparation of this Comment: John Koegel, Esq.; Joseph Perillo, Professor of Law, Fordham University; Laura Werner, Assistant New York State Attorney General; and Carl Zanger, Chairman of the Committee on Fine Arts, Association of the Bar of the City of New York.

2. For example, N.Y. U.C.C. § 2-105(1) (McKinney 1964) specifically provides that "'goods' means all things . . . which are movable at the time of identification to the contract for sale...."
4. Id.
5. See N.Y. Gen. Bus. Law arts. 12-C (originally enacted as ch. 984, § 1, 1966 N.Y. Laws), 12-E (originally enacted as ch. 668, § 2, 1966 N.Y. Laws), 12-G (originally enacted as ch. 1065, § 1, 1968 N.Y. Laws) (McKinney Supp. 1977-1978). These articles seek respectively to define the artist-dealer relationship, to preserve the artist’s copyright upon sale or other transfer of his work, and to protect the nonresident artist from seizure of his work while it is on exhibition for cultural purposes. In addition, there is legislation currently pending designed to provide a statutory royalty to the artist on certain qualifying resales. See Koegel, Art Law—Recent Legislation, 177 N.Y.L.J., May 18, 1977, at 1, col. 1. This Comment will discuss N.Y. Gen. Bus. Law arts. 12-C, the artist-dealer relationship, and 12-E, the artist’s reproduction rights.
6. N.Y. Gen. Bus. Law arts. 12-D (originally enacted as ch. 454, § 1, 1968 N.Y. Laws), 12-F (originally enacted as ch. 320, § 1, 1969 N.Y. Laws), and 12-H (originally enacted as ch. 301, § 1, 1975 N.Y. Laws) (McKinney Supp. 1977-1978). These articles are designed to provide added protection to the consumer through regulation of warranties, certificates of authentication, and the sale of fine prints, respectively. This Comment will discuss N.Y. Gen. Bus. Law arts. 12-D, warranties, and 12-F, certificates of authentication.
7. See id. art. 12-C.
8. See id. art. 12-G.
9. See id. art. 12-E.
the consumer address the general problem of forged art through provisions dealing with express warranties, false authentication, and deceptive practices in the sale of fine art.

There is continuing disagreement among lawyers practicing in the field as to whether statutory regulation of the art market is desirable—whether the artist and the purchaser of artwork need special protection and whether the protection provided is effective. A major concern to many of these lawyers is whether the provisions of the General Business Law relating to art are consistent with bodies of existing law and whether, taken in conjunction with traditional bodies of law, they yield results not contemplated by the drafters. Another concern is that some of these statutes may not pass constitutional muster. This Comment will examine the necessity, effectiveness, and validity of the New York statutes designed to regulate various aspects of the art market.

II. PROTECTION FOR THE ARTIST

A. General Business Law Article 12-C: The Artist-Dealer Relationship

1. The Statute

Before article 12-C of the General Business Law was enacted, sales on consignment between an artist and a dealer were regulated by the Uniform Commercial Code (UCC). Under the UCC, goods held on consignment are subject to claims of the consignee's creditors while in the consignee's possession unless the consignor has complied with the statute's public notice requirements. Proper notice can be given in several ways: (1) by the consignor's compliance with applicable law providing for a consignor's
interest or the like to be evidenced by a sign,23 (2) by the consignor establishing that the consignee normally engages in selling the goods of others and that his creditors are aware of this practice,24 or (3) by the consignor's compliance with the filing provisions of article 9 of the UCC.25 Thus, under the UCC, where an artist has delivered his work to a dealer on consignment, and that dealer subsequently becomes bankrupt, the dealer’s creditors are entitled to that work. Furthermore, the relationship between the artist and the dealer, at least from the dealer’s point of view, was merely that of creditor and debtor.26

Article 12-C of the General Business Law was enacted in an effort to protect the young, naive artist from the experienced dealer who is in a position of greater bargaining strength.27 As originally enacted, section 220 of article 12-C28 created an agency relationship between the artist and dealer29 any time the artist delivered his work to the dealer on consignment and prohibited any waiver of that provision.30 In 1969, subdivision 1 of section 220 was amended31 to include provisions characterizing as trust property any creation32 of the artist or any proceeds33 from the sale of such work held by the dealer for exhibition and/or on consignment for the artist. The rationale underlying the amendment was that, while prosecutors were willing to charge a dealer who wrongfully withheld a work of art entrusted to him by the principal with larceny, they were hesitant about prosecuting the dealer who had sold a work and thereafter wrongfully withheld the proceeds from such a sale.34

Subdivision 1 was further amended in 196935 to provide that any work

23. Id. § 2-326(3)(a).
24. Id. § 2-326(3)(b).
25. Id. § 2-326(3)(c); see notes 93-96 infra and accompanying text.
27. New York State Attorney General Louis Lefkowitz recognized this and in fact proposed article 12-C. Lefkowitz, supra note 3, at 29.
29. Id. § 220(1).
30. Id. § 220(3).
33. Id. § 219-a(1)(a)(iii).
34. Legislative Memorandum, supra note 26, at 475. Under the common law, the principal's property and the proceeds from a sale of such property in the hands of the agent belong to the principal. Restatement of Restitution §§ 202-215 (1937). Therefore, it appeared unnecessary to the drafters of article 12-C to designate the property and proceeds from its sale as trust property in the hands of the agent-dealer. See also Britton v. Ferrin, 171 N.Y. 235, 244, 63 N.E. 954, 957 (1902); Restatement (Second) of Agency § 399 (1958).
originally transferred to the dealer on consignment would remain trust property, even if the dealer bought it on his own account, until the dealer had paid the artist the full purchase price.\textsuperscript{36} Finally, in 1975, subdivision 1 was amended\textsuperscript{37} to ensure that the trust property thus created was not subject to the claims of the dealer's creditors, notwithstanding provisions of the UCC to the contrary.\textsuperscript{38}

The provision designating the proceeds from a sale of consigned works as trust property may be waived only if the artist complies with the requirements of subdivision 2:

(a) that such waiver is clear, conspicuous, in writing and subscribed by the consignor and (b) that no waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve-month period commencing with the date of the execution of such waiver and (c) that no waiver shall be valid with respect to the proceeds of a work of fine art initially received "on consignment" but subsequently purchased by the consignee directly or indirectly for his own account.

(d) that no waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under subdivision one of this section.\textsuperscript{39}

It should be noted, moreover, that even if the artist executes a valid waiver as to the proceeds, the dealer remains a trustee as to the consigned works themselves.\textsuperscript{40}

The thrust of article 12-C is to give the artist a special status apart from other consignors and to impose upon the dealer greater responsibility than that demanded of other consignees. This special status and additional burden create potential difficulties for the dealer, his creditors, and the artist himself.

2. Problems Posed by Article 12-C

a. The Dealer as Trustee

By characterizing those works of an artist held by the dealer on consignment as trust property, the statute places upon the dealer the stringent fiduciary obligations of a trustee.\textsuperscript{41} The trustee is under a duty of loyalty to

\textsuperscript{36} Id.


\textsuperscript{38} See notes 20-25 supra and accompanying text.


\textsuperscript{41} See Hallgring, The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary
his beneficiary, a duty which mandates that he "act always in the interest of the beneficiary, and never in his own interest, in any matter pertaining to the object of the relationship." The trustee is therefore prohibited from profiting at the expense of the beneficiary and from entering into competition with the beneficiary unless he has the informed consent of the beneficiary or is given such authority by the terms of the trust. The end result of this prohibition is that the trustee may not buy trust property for his own account even if he acts in good faith and is willing to pay a fair market price.

Placing a rigid fiduciary obligation on a marketplace relationship gives rise to potentially severe "conflict of interest" difficulties. For example, it is not unusual for a dealer to represent more than one artist. If the dealer recommends the work of one artist over another, he may find himself liable for breach of the trustee's duty of loyalty. If, however, the dealer declines to make any recommendation in response to an inquiry by a potential purchaser, both artists "may have grounds to complain of the dealer's lack of diligence in marketing his works."

A dealer may also be liable in his capacity as trustee if he buys some of the artist's works outright for future resale. This is often done by dealers in an effort to subsidize struggling young artists as well as to invest early in an artist who appears especially promising. Where, however, the dealer is also offering for sale works of the same artist which he holds on consignment, the dealer's own property is in direct competition with that of the trust—a clear breach of his fiduciary obligation. "There is in these situations great tension between the dealer's role as a marketing institution and the law's demand that a dealer as trustee be 'held to something stricter than the morals of the market place.'"

_Responsibility_, 41 Wash. L. Rev. 801, 802, 803 & n.10 (1966); _Niles, Trustee Accountability in the Absence of Breach of Trust_, 60 Colum. L. Rev. 141, 142-43 (1960); _Perillo, Beyond Rothko—The Dealer as a Fiduciary_, Art & the Law, Summer 1976, at 7, col. 3.


43. _Hallgring, supra_ note 41, at 803 (footnote omitted).

44. "Consent will insulate the trustee from liability, however, only if the artist is aware of his legal rights and the dealer can prove that he exercised the utmost degree of candor and fairness in the transaction." _Perillo, supra_ note 41, at 7, col. 4.

45. _Restatement (Second) of Trusts_ § 170, Comment a (1959).


47. _Perillo, supra_ note 41, at 8, col. 2.

48. _Id._

49. _Id._ cols. 2-3. "The show wasn't as successful as Miss Harvey [a young artist] had hoped. She sold only three small watercolors . . . and she failed to get the all-important review in _The New York Times_ . . . . All this causes Miss Harvey to worry about how hard the gallery is pushing her work . . . . 'I sometimes wonder if [the dealer] shows my stuff to customers.' " _Gallese, For Art's Sake_, Wall St. J., Feb. 2, 1977, at 1, col. 1, at 18, col. 2.

50. _See Restatement (Second) of Trusts_ § 170, Comment b (1959).

51. _See id._ Comment a.
Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior . . . ."\(^52\)

b. Effect of Dealer's Trustee Status on his Creditors

Another potential problem created by this statute is that it discriminates among the creditors of dealers.\(^53\) To illustrate, a printer who was not paid for brochures which he had supplied to a dealer in contemporary art held on consignment for the artist would not be entitled to any of those works in the dealer’s possession because, under section 219-a of the General Business Law, they remain the property of the artist-consignor.\(^54\) On the other hand, if the printer had been unpaid by a dealer in Rembrandts, that dealer’s inventory would be subject to a legally valid claim\(^55\) by the printer as provided in the UCC.\(^56\) This latter situation is covered by the UCC rather than by the General Business Law because section 219-a applies only to those works consigned by their creator.\(^57\) The statute also discriminates among consignors. Any noncreator consignor, for example, an ordinary collector, or an artist who consigns a work not created by himself, who does not satisfy one of the provisions of section 2-326(3) of the UCC, runs the risk of losing his property to the dealer-consignee’s creditors should the dealer become bankrupt. On the other hand, an artist consigning his own work is protected by the General Business Law\(^58\) even if he does not meet the conditions set forth in the UCC.

c. Loss of the Artist’s Tax Advantage

Section 219-a\(^59\) may also mark the end of certain tax advantages which were available to the successful artist by virtue of the pre-article 12-C creditor-debtor relationship between the artist and the dealer. Commentators have noted that successful artists may enter into deferred payment arrangements whereby a dealer who has been paid upon purchase disburses the proceeds to the artist on a particular schedule designed to minimize the artist’s tax burden.\(^60\) “Surely, the characterization of the dealer as ‘agent’ and of the sale proceeds as ‘trust funds . . . for the benefit of’ the artist would jeopardize the effectiveness of such deferred payments as a means of reducing the artist’s tax burden.”\(^61\)

On the same theory, since “the statute [section 219-a] could be construed as requiring that the first moneys received be credited entirely to the artist,”\(^62\)

\(^{52}\) Perillo, \textit{supra} note 41, at 8, col. 3 (quoting Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)).


\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) N.Y. U.C.C. § 2-326 (McKinney 1964).


\(^{59}\) Id. § 219-a(1)(c).

\(^{60}\) Id. § 219-a.


\(^{62}\) Id.
the statute potentially interferes with any agreement between artist and dealer that proportionately allocates the risk involved in deferred payments by the purchaser. Where the purchaser buys a work on credit, both the artist and the dealer depend upon the purchaser's future payments. In the event of the purchaser's failure to make payment, a prior agreement between the artist and the dealer to allocate the risk ensures that any loss is shared between them. This type of risk allocation is another method of reducing the artist's tax burden by use of deferred payments, and has the added advantage of diminishing the dealer's tax burden as well.

The loss of these tax advantages may be at least partially averted by the limited waiver provision found in subdivision 2 of section 219-a. Under subdivision 2, the artist may waive application of the trust relationship to the proceeds of the sale of his consigned works after the first two thousand five hundred dollars have been received, provided that the waiver agreement meets the other requirements of the section. By using the waiver, the artist may, to a limited extent, ease his tax burden by receiving deferred payments from the dealer and by sharing with the dealer the risk of deferred payments by the purchaser.

3. Proposed Solutions

Article 12-C was enacted primarily to protect the young, unknown, legally unsophisticated artist who is anxious to be sponsored by a gallery. The perceived need for such legislation derived from the image of the artist as a poor Bohemian, unfamiliar with the ways of the world. Nevertheless, it is not clear that the artist requires more statutory protection than the ordinary person who enters the marketplace. Perhaps the proponents of article 12-C saw the artist's talent as something mysterious and precious, something to be safeguarded as part of our cultural heritage. It is also not clear that the dealer must be given the status of a trustee in order to protect the artist's interests and to ensure that unscrupulous dealers are prosecuted for misappropriation of funds. It is suggested that a principal-agent relationship alone, without the "trust" provision, gives the artist sufficient protection while eliminating some of the problems created by the present statute.

Like a trustee, an agent is under a fiduciary obligation to his principal. However, an agent's obligation is less stringent than that of a trustee because the agent's authority and control over the principal's property is "more limited in scope and duration." Generally an agent has only possession of the

63. Id.
64. See note 60 supra and accompanying text.
66. Id., quoted in text accompanying note 39 supra.
67. See generally Gallese, supra note 49.
68. See id.
69. N.Y. Penal Law § 155.05 (McKinney 1975).
70. See pt. II(A)(2) supra.
72. Hallgring, supra note 41, at 802 n.10.
principal's property, whereas a trustee has legal title to the trust property.\textsuperscript{73} Moreover, an agent is subject to the control of the principal. In fact, the principal can usually terminate the agency at any time.\textsuperscript{74} The trustee, on the other hand, unless the trust agreement provides otherwise, is not subject to the direct control of the beneficiary, although he is obligated to deal with the property solely for the beneficiary's benefit.\textsuperscript{75}

Unlike a trustee, an agent may represent his principal's competitors, provided the principal is aware of such representation either through agreement, course of dealing, or trade custom.\textsuperscript{76} In the art field, representation by a dealer of several artists is a long-established trade custom.\textsuperscript{77} Therefore, an agency relationship has the advantage of allowing the dealer to represent more than one artist without breaching his duty to any of them, while at the same time requiring him to use his best efforts on behalf of all the artists who use his services.

In addition, the dealer as agent would be permitted to buy for his own account works originally received on consignment, provided that he made full disclosure to the artist of any facts that would materially affect the latter's consent to the sale.\textsuperscript{78} To illustrate, it would be permissible for the dealer to purchase the work of a yet unknown artist-client in whom he sees potential. Not only would the dealer's purchase provide the artist with needed income, it might also give his work additional exposure and thus increase the desirability of his work. On the other hand, if the dealer knows that a prospective purchaser is interested in a particular artist's work, the dealer would be obligated to disclose that interest to the artist before the artist could give valid consent. In the event of the dealer's failure to disclose a material fact, the artist would have an action for common law fraud against the dealer based on the breach of his fiduciary duty.\textsuperscript{79} Here there would be a choice of remedies, either for money damages or for the imposition of a constructive trust on the proceeds of the sale.\textsuperscript{80}

In addition to protecting the principal's property from the agent, the agency relationship also protects it from the agent's creditors. "The rights of the principal in property held for him by the agent or held by the agent in breach

73. Restatement (Second) of Agency § 14B, Comment b (1958).
74. H. Henn, Agency-Partnership 49 (1972); Restatement (Second) of Agency § 14, Comment b (1958).
75. Restatement (Second) of Agency § 14B, Comment f (1958); Hallgring, supra note 41, at 803.
76. Restatement (Second) of Agency § 391, Comment a, § 393, Comment a (1958). A trustee, however, may in effect compete with the beneficiary if he discloses in advance to the beneficiary all the material facts necessary to make an informed decision. G. Bogert & G. Bogert, Handbook of the Law of Trusts § 87, at 317 (5th ed. 1973); 2 A. Scott, The Law of Trusts § 170.1, at 1300-03 (3d ed. 1967).
77. See, e.g., Gallese, supra note 49, at 18, col. 1.
78. See Restatement (Second) of Agency § 390 (1958).
80. Id.
of trust are not affected by the agent's bankruptcy or discharge in insolvency proceedings. The agency relationship therefore appears sufficient to overcome the effect of the UCC's consignment provisions without placing the overly burdensome obligations of a trustee on the dealer.

Furthermore, an agency theory should be sufficient to overcome the reluctance of prosecutors to bring a charge of larceny against a dealer who misappropriates the proceeds of the sale of a work taken on consignment from the creating artist. Funds received by an agent in exchange for the property of his principal clearly belong to the principal, as evidenced by the fact that the agent's creditors cannot reach any assets of the principal held by the agent. Under the New York Penal Law, embezzlement is included in the crime of larceny. An agent is guilty of embezzlement when he misappropriates property in his possession belonging to his principal. Thus, when a dealer, acting as agent, sells a painting for an artist and misappropriates the proceeds, he would be guilty of embezzlement, punishable under the larceny statute.

Retaining the agency relationship, while dispensing with the provisions creating the trust relationship, resolves many of the problems raised by article 12-C of the New York General Business Law without sacrificing a substantial amount of the protection originally anticipated by the enactment of that article. However, the potential tax complications for the successful artist resulting from section 219-a of article 12-C are not cured by removing the stringent trust obligations from the dealer. Once an agent is paid on a sale of the principal's property, the proceeds are deemed to belong to the principal, and therefore are taxable to him. When it is recalled that article 12-C was designed to provide protection for the artist in his business contacts with dealers, the justification for any resulting tax disadvantages becomes clear. The artist who stands to lose his tax shelter as a result of article 12-C must have a certain level of income in order to utilize a tax shelter. In addition, an artist with an established reputation whose work commands high prices is in a stronger bargaining position with the dealer than the unknown, unproven artist. In short, the successful artist is not in need of the statute's protection. This problem would not be alleviated by exempting "successful" artists from the provisions of article 12-C. In order to be effective, it must be applicable to all artists, no matter what their status. The reasons for this are twofold. First, if a distinction in the applicability of the statute were made between well-known artists and lesser-known artists, criteria for classification would have to be developed. Such a standard would in all probability be too

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81. Restatement (Second) of Agency § 420(2) (1958).
82. N.Y. U.C.C. § 2-326(3) (McKinney 1964).
83. Restatement (Second) of Agency § 420(2) (1958).
84. N.Y. Penal Law § 155.05(2)(a) (McKinney 1975).
86. Id.
87. See notes 59-66 supra and accompanying text.
88. See F. Feldman & S. Weil, supra note 53, at 477-78.
89. See note 27 supra and accompanying text.
cumbersome to enforce. Second, if some artists were permitted to waive the prohibition against total disclaimer, a less-established artist in a weaker bargaining position with his dealer might be pressured by the dealer into waiving the provisions of the disclaimer section designed to protect him. Therefore, in weighing the tax disadvantage to the successful artist caused by the creation of an agency relationship between artist and dealer against the protection thereby afforded the unknown artist who is in a position of relative weakness, the legislative choice is clear. The disadvantage must necessarily remain.

Although the agency relationship appears to adequately protect the artist in his transactions with the dealer, it should be recalled that as a result of concern on the part of some skeptics,\textsuperscript{91} article 12-C was amended to include the trust provisions as a supplement to the agency relationship.\textsuperscript{92} In the event that this skepticism cannot be overcome, an alternative to the agency relationship is suggested. It is proposed that the dealer be compelled to comply with subdivision 3 of section 2-326 of the \textit{UCC}\textsuperscript{93} which requires the filing of a security interest pursuant to article \textit{9} in order to protect the consignor's interest in the consigned property from the consignee's creditors. In other words, upon compliance with the article 9 filing requirements,\textsuperscript{95} the works consigned by the artist are protected from seizure by the dealer's other creditors in the event of the dealer's bankruptcy.\textsuperscript{96} Thus, by requiring the dealer to file a security interest in the consigned works on behalf of the artist, there would be no doubt that the artist's work would be protected from the dealer's creditors. In addition, all the dealer's creditors would have the same rights vis-à-vis each other whether the work had been consigned by its creator or by someone else.\textsuperscript{97}

In the event that the dealer failed to file notice of a security interest according to the requirements of article \textit{9},\textsuperscript{98} the work in question could be deemed trust property, triggering the high fiduciary responsibility of a trustee. Such a provision would give the honest dealer relief from the burden of the trustee's obligations while retaining protection for the artist in the form of a criminal penalty should the dealer sell the consigned work and misappropriate the proceeds.\textsuperscript{99} Furthermore, imposition of such a penalty on the dealer would not affect the rights of his creditors. Whether the dealer had properly complied with the article 9 notice requirements or was deemed a trustee as a result of his failure to do so, his creditors would not be entitled to those works consigned to the dealer.

\textsuperscript{91} See note 34 \textit{supra} and accompanying text.
\textsuperscript{92} See notes 28-33 \textit{supra} and accompanying text.
\textsuperscript{93} N.Y. U.C.C. § 2-326(3) (McKinney 1964).
\textsuperscript{95} \textit{Id.} §§ 9-401 to -410.
\textsuperscript{96} \textit{Id.} §§ 9-114, -312 (priority among security interests).
\textsuperscript{97} See notes 53-57 \textit{supra} and accompanying text.
\textsuperscript{98} See note 95 \textit{supra} and accompanying text.
\textsuperscript{99} N.Y. Penal Law § 185.05 (McKinney 1975).
Finally, it is proposed that the limited waiver\textsuperscript{100} as to proceeds be retained. This provision does provide some needed protection for the artist who is in a relatively weak bargaining position vis-à-vis the dealer.\textsuperscript{101} By allowing waiver only where the stringent requirements of the section have been met,\textsuperscript{102} struggling artists would be insulated from undue economic pressure imposed by the more powerful dealers. Without such a restriction upon the waiver of the statutory provisions, the effectiveness of those provisions would be vitiated.

B. \textit{General Business Law Article 12-E: Reproduction Rights}

Historically, the federal government has granted statutory copyright protection only to published works,\textsuperscript{103} while unpublished works retained a common law copyright regulated by the states.\textsuperscript{104} Traditionally, artists have not sought statutory copyright protection although they have long been given the right to such protection.\textsuperscript{105} One reason for artists' lack of interest in the copyright grant has been that, whereas a composer or an author derives commercial benefit through the sale of multiple copies of his work,\textsuperscript{106} the value of an artist's work generally lies in its uniqueness.\textsuperscript{107} Indeed, until recently, mass reproduction has had comparatively little impact upon the art market.\textsuperscript{108} Therefore, since the artist was primarily interested in selling individual works to individual purchasers who did not intend to reproduce them, it appeared unnecessary to obtain copyright protection.

Another reason for artists' failure to utilize the federal copyright statute is that, in the past, because most of their work was not considered to be in the public domain as a result of publication,\textsuperscript{109} it was covered by common law.

\textsuperscript{100} N.Y. Gen. Bus. Law § 219-a(2) (McKinney Supp. 1977-1978); see notes 39-40 \textit{supra} and accompanying text.
\textsuperscript{101} See \textit{generally} Gallese, \textit{supra} note 49.
\textsuperscript{104} \textit{Note, Goldstein v. California: Validity of State Copyright Under the Copyright and Supremacy Clauses,} 25 Hastings L.J. 1196, 1198 (1974).
\textsuperscript{105} See Act of July 8, 1870, ch. 230, 16 Stat. 198.
\textsuperscript{106} Interview with Carl Zanger, Esq., chairman of the Committee on Fine Arts of the Association of the Bar of the City of New York, in New York City (Feb. 3, 1977).
\textsuperscript{108} Interview with Carl Zanger, Esq., chairman of the Committee on Fine Arts of the Association of the Bar of the City of New York, in New York City (Feb. 3, 1977). With the advent of methods of reproduction such as lithography, however, the "limited edition" has become increasingly popular. "[L]imited edition' means prints, all of which are of the same image and bear numbers or other markings to denote the limited production thereof to a stated maximum . . . number of copies or impressions." S. 3000, A. 4057, 1976-77 Reg. Sess. N.Y.S. Legis.
\textsuperscript{109} A general definition of publication derived from relevant case law is that "publication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold,
copyright. However, in *Pushman v. New York Graphic Society, Inc.*, the New York Court of Appeals held that once an artist gave an absolute and unconditional bill of sale of an uncopyrighted painting, he relinquished his common law copyright. In other words, an unconditional sale was deemed to be equivalent to publication. Article 12-E of the General Business Law was enacted to negate the decision in *Pushman*. It declares that a transfer by the artist of his work through sale or other means does not constitute publication and that the artist therefore retains his common law copyright even though he no longer possesses the object. However, with the revision of the federal copyright statute, effective as of January 1, 1978, article 12-E is vulnerable to a constitutional challenge under the doctrine of preemption.

On October 19, 1976, Congress passed a bill revising the federal copyright statute in its entirety. Among the revisions is a section which clearly expresses Congress' intention to preempt the states from granting rights equivalent to the copyright. This section of the statute replaces the "present anachronistic, uncertain, impractical, and highly complicated dual system" with a single federal system. Congress suggested four major advantages to a single federal system: a single system will (1) promote the constitutional goal of national uniformity; (2) eliminate the concept of publication, a concept which "has become increasingly artificial and obscure," (3) eliminate the perpetual duration protection granted by the states which flies in

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leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur." 1 M. Nimmer, Nimmer on Copyright § 49, at 194-95 (1976) (emphasis & footnotes omitted). Nimmer further suggests that exhibition of a work of art would not constitute publication. *Id.* § 52, at 206.3-208.

111. *Id.* at 308, 39 N.E.2d at 251.
115. It appears that, when enacted, article 12-E would not have been preempted as long as it was limited to unpublished works, as defined by federal law. This conclusion is based on prior case law holding that where Congress has either remained silent or has not specifically excluded an item from protection, the states are not prohibited from providing such protection. *See* Goldstein v. California, 412 U.S. 546 (1973); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).
119. *Id.* at 113.
120. *Id.*
121. *Id.*
the face of the “limited Times” provision in the Constitution; and (4) facilitate international negotiation for copyrighted material.

Since the statute preempts the states from granting rights equivalent to those listed in the statute for any work, whether published or unpublished, coming within the scope of article 12-E, the New York statute reserving reproduction rights to the artist appears to be preempted. The preservation of the artist’s reproduction rights sought by the drafters of the New York statute is, however, similarly protected by section 202 of the federal statute. Like article 12-E, section 202 of the federal statute provides that the copyright on a work is separate and distinct from the work itself. Transfer of the work alone does not constitute transfer of the copyright. Rather, a written conveyance of rights is required to accompany the work in order to transfer the work and the copyright. Like the drafters of the New York statute before them, the drafters of the new federal statute intended this section to overcome the presumption expressed in , that unless the artist reserved his copyright when conveying his work, it was automatically transferred along with that work. Although the federal statute overcomes this presumption, it has not provided full protection to the creator of a unique work of art. “The basic problem is the attempt to fit art into the mold made for literary and other mass produced works . . . .” Under the new statute, copyright protection is lost by public distribution of a work not bearing a notice of copyright. Such distribution occurs upon the sale or other transfer of ownership of the work. Consequently, although a sale no longer transfers the copyright to the purchaser as under , it may constitute a public distribution, thereby destroying the copyright. Although the new federal copyright law appears at first glance to leave states powerless to grant protection in the copyright field to artists and their works, the new law does not preempt the states from providing rights not equivalent to those provided by the statute. The concept of droit moral

124. id. § 106.
125. id. § 102.
128. id.
129. 287 N.Y. 302, 39 N.E.2d 249 (1942); see notes 109-14 supra and accompanying text.
131. See generally Crawford, supra note 116, at 3, col. 1.
132. id.
134. id. § 106(3).
135. Crawford, supra note 116, at 3, col. 1. It should be noted that the copyright is not destroyed if “the notice has been omitted from no more than a relatively small number of copies distributed to the public . . . .” 17 U.S.C.A. § 405(a)(1) (West 1977).
encompasses a group of rights\textsuperscript{137} afforded to artists in many European countries, most notably France, which are distinct from those protected by the copyright laws.\textsuperscript{138} The \textit{droit moral} differs from an artist's property right in his work, which is protected by copyright; in that the \textit{droit moral} is designed to protect "the literary personality of the author."\textsuperscript{139} Unlike the right granted by a copyright which is freely alienable but limited in duration, the right embodied in the \textit{droit moral} is inalienable and perpetual.\textsuperscript{140} Although the United States has never specifically recognized the \textit{droit moral} as an enforceable right, American courts "have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . or the tort of unfair competition . . . ."\textsuperscript{141} Other approaches used to achieve results analogous to the \textit{droit moral} have included actions for invasion of privacy,\textsuperscript{142} libel,\textsuperscript{143} or breach of implied contract.\textsuperscript{144}

The rights represented by the doctrine of \textit{droit moral} are valuable to the artist because he "must rely on the continued existence and integrity of the work to exploit his other rights . . . ."\textsuperscript{145} For instance, an important factor in determining the value of an artist's work is his reputation. Therefore, he certainly has an interest, if not a right, in not having his works altered without his approval\textsuperscript{146} or displayed without proper accreditation or attribution. On a broader level, violation of these rights distorts and damages our cultural heritage. A painting by a particular artist which is altered to match

\textsuperscript{137} These rights include: "the right to preserve the integrity of the work against alteration, the right to maintain authorship of a work, the right to deny attribution if the author so chooses, and the right to deny exhibition without proper creditation." S. Hodes, What Every Artist and Collector Should Know About the Law 69 (1974). \textit{See also} Price & Price, \textit{Right of Artists: The Case of the Droit de Suite}, 31 Art J. 144 (Winter 1971-72), reprinted in F. Feldman & S. Well, supra note 53, at 67.


\textsuperscript{139} P. Masse, \textit{Le Droit Moral} (1907), quoted in Sarraute, supra note 138, at 465.

\textsuperscript{140} Sarraute, supra note 138, at 485.


\textsuperscript{142} Elliot v. Jones, 66 Misc. 95, 120 N.Y.S. 989 (Sup. Ct.), aff'd, 140 App. Div. 911, 125 N.Y.S. 1119 (1910) (unauthorized use of author's name violated N.Y. Civil Rights Law §§ 50, 51).

\textsuperscript{143} D'Altomonte v. New York Herald Co., 208 N.Y. 596, 102 N.E. 1101, modifying 154 App. Div. 453, 139 N.Y.S. 200 (1913) (plaintiff's name falsely given as author of sensational article held to constitute libel).

\textsuperscript{144} Hodes, supra note 137, at 69.

\textsuperscript{145} Price & Price, supra note 137, at 74

\textsuperscript{146} \textit{See Joseph, Is a Smith of Another Color Still a Smith?}, Art & the Law, Dec. 1974, at 5, col. 1.
the decor of a room no longer truly reflects the artist's genius. Furthermore, the original creation is lost to future generations.

Although American courts have protected some of the rights referred to as *droit moral*, there have been cases where the artist's work was intentionally destroyed without his consent or where he has been deemed to have waived his rights by failing to reserve them by contract. It is submitted that artists and the community as a whole would profit by legislation codifying those decisions which support the artist's personal right in his work. California has led the way by passage of the California Art and Public Buildings Act in which the state architect is required to “ensure that each work of art [purchased for state buildings] is properly maintained and is not artistically altered in any manner without the consent of the artist.” Furthermore, the artist retains certain intangible rights upon sale:

1. The right to claim authorship of the work of art.
2. The right to reproduce such work of art, including all rights to which the work of art may be subject under the copyright laws.
3. If provided by written contract, the right to receive a specified percentage of the proceeds if the work of art is subsequently sold by the state to a third party.

Of course, the California statute provides the artist with the rights encompassed in the *droit moral* only in the limited situation where the state buys the work for a public building. It appears that a more comprehensive state statute would not be preempted by the new federal copyright statute, since the rights under a new state statute would grant the artist personal rights in his work, whereas the federal copyright statute grants property rights in the work itself. It is not suggested, however, that the *droit moral* should be adopted in toto as it exists in France. Rather, a careful codification of the American cases recognizing such rights would appear to be better adapted to our legal system.

III. PROTECTION FOR THE ART CONSUMER
A. Warranties
1. The Statute

Article 12-D of the General Business Law was drafted in an attempt to minimize the spread of forged works in the art market. The statute as

147. See, e.g., Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).
148. See, e.g., Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947).
151. Id. § 15813.5(a)(1)-(a)(3).
enacted established a presumption that the authorship of a work of art is part of the basis of the bargain.\textsuperscript{156} It also creates an express warranty of authorship when the seller gives the buyer a written instrument in which the authorship is indicated.\textsuperscript{157} Finally, article 12-D attempts to increase the seller's difficulty in disclaiming any express warranties he may have created by requiring that the disclaimer be in the form of a conspicuous, clear writing.\textsuperscript{158}

It is suggested that these provisions are unnecessary and that the same results can be achieved by utilizing both the common law and those existing statutes designed to regulate the sale of personal property.\textsuperscript{159} In situations where a cause of action for breach of express warranty cannot be made out, one of the other warranties specified in the UCC could be utilized.\textsuperscript{160} Failing that, an action at common law for fraud\textsuperscript{161} could be brought in order to provide relief to the buyer.

2. Express Warranties

a. Basis of the Bargain

Under the UCC an express warranty can be created by an “affirmation of fact or promise made by the seller,”\textsuperscript{162} a “description of the goods,”\textsuperscript{163} or by a “sample or model,”\textsuperscript{164} so long as the affirmation, description, or sample is part of the “basis of the bargain.”\textsuperscript{165} The seller need not have intended to make a warranty or have used specific words such as “warranty” or “guaranty” in his negotiations with the buyer in order to create a warranty.\textsuperscript{166} A critical issue in warranty cases is whether the seller actually made an affirmation of fact or whether he was merely extolling the virtues of his product. Generally, according to the UCC and the case law, a statement of value or the opinion of the seller is considered mere puffing and does not create a warranty.\textsuperscript{167} Although no foolproof rule can be articulated, sellers

\begin{itemize}
\item \textsuperscript{157} Id. § 219-c(1)(ii). The statute also codifies the trade terms relating to the designation of authorship. Id. § 219-c(2).
\item \textsuperscript{158} Id. § 219-d.
\item \textsuperscript{159} See, e.g., N.Y. U.C.C. art. 2 (McKinney 1954).
\item \textsuperscript{160} N.Y. U.C.C. §§ 2-314 (warranty of merchantability), -315 (warranty of fitness for a particular purpose) (McKinney 1964).
\item \textsuperscript{162} N.Y. U.C.C. § 2-313(1)(a) (McKinney 1964).
\item \textsuperscript{163} Id. § 2-313(1)(b).
\item \textsuperscript{164} Id. § 2-313(1)(c).
\item \textsuperscript{165} Id. § 2-313(1)(a).
\item \textsuperscript{166} Id. § 2-313(2).
\item \textsuperscript{167} See, e.g., Titus v. Poole, 145 N.Y. 414, 40 N.E. 228 (1895); Wasserstrom v. Cohen, Frank & Co., 165 App. Div. 171, 150 N.Y.S. 638 (1914); Ginsberg v. Lawrence, 121 N.Y.S. 337 (App. T. 1910); St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N.Y.S. 582 (App. T. 1909); Stumpp & Walker Co. v. Lynber, 84 N.Y.S. 912 (App. T. 1903); Nash v. Gay Apparel Corp., 27
\end{itemize}
who have been found to have given express warranties tended to assert facts which were in some way measurable. On the other hand, those words of the seller held to be mere sales talk have generally dealt with the worth of the object.

Some lawyers do not believe that the UCC "draw[s] appropriate distinctions which are required to be made where a work of fine art or other unique article is involved." One argument against the adequacy of the UCC in regulating transactions in the art market is that under the UCC any statement as to authorship made by a seller could be construed as "merely words used to identify and describe the object itself," or as the mere opinion of the seller, and not as the basis of the bargain. Section 219-c of the General Business Law eliminates this potential weakness by providing that any description as to authorship will create an express warranty as to the authenticity of the authorship and will create a presumption that the authorship was indeed part of the basis of the bargain.

The need for such a presumption is, however, open to question. To deny that a dealer's description or affirmation of the authorship of the work is a basis of the bargain does not reflect the realities of a typical transaction in the art market. A purchaser, particularly when buying for investment purposes, is paying for more than the mere cost of materials and labor. He is buying a work of art having an intrinsic value, derived from the artist's talent and


169. See Olin Mathieson Chem. Corp. v. Moushon, 93 Ill. App. 2d 280, 235 N.E.2d 263 (1968) (representations that explosives were of good quality were mere sales talk); Carpenter v. Alberto Culver Co., 28 Mich. App. 399, 184 N.W.2d 547 (1970) (representation that a product would yield fine results did not create express warranty); Lowe v. Lamb, 2 Crawford 125 (Crawford, Pa. County Ct. 1962) (representation that one ring was as good as another and worth twice the contract price was not an express warranty).


reputation, as judged by art critics, major dealers, and collectors. In the marketplace, the price is generally higher for works by well-known artists than for those by lesser-known artists. A statement of authorship clearly refers to a specific attribute of the work, unlike a statement of predicted value. Furthermore, since authorship is a major price-influencing factor, it seems reasonable to conclude that it is part of the basis of the bargain.

The analysis can be further articulated as follows. The materials in a particular medium cost x and the artist's time is worth y. Given only these factors, the seller has a concrete basis upon which to fix the price and the buyer a concrete basis upon which to judge the fairness of the price. Only the influence of less determinate factors, however, can explain the wide price discrepancy among works of art. The artist's "name" is certainly one such factor.

A second argument against the adequacy of the UCC is that the only certain way to determine authorship is through an acknowledgement by the artist himself or by an eyewitness to the creation of the work. Once the artist (and eyewitness, if one exists) dies, determination of authorship is less precise. It would, therefore, according to this argument, be unreasonable for a buyer to rely on the seller's words as warranting authorship. A description of the property does, however, create an express warranty under the UCC—a clear legislative indication that buyers are indeed justified in relying upon certain of the sellers' words. Furthermore, "it is an accepted custom in the trade to value art on the basis of expert opinion." Therefore, "[i]t would seem only logical and equitable that if the seller is supported by the benefits [higher prices] of something less than absolute [the expert's opinion], he also should bear the burdens [e.g., possible action for breach of warranty] of something less than absolute." In other words, the seller who charges more for a painting on the basis of an expert's opinion that it is a genuine Rembrandt should bear the burden if that opinion is later proven mistaken or false.

b. Disclaimer of Express Warranties

Once it is determined that the seller's "affirmation of fact or promise" or "description of the goods" is part of the basis of the bargain, the seller is

175. See New Protection, supra note 170, at 665.
177. See notes 168-69 supra and accompanying text. Furthermore, there are words in the trade which indicate the dealer's degree of certainty as to authorship. These words have now been codified in the General Business Law. N.Y. Gen. Bus. Law § 219-c(2) (McKinney Supp. 1977-1978).
178. See New Protection, supra note 170, at 665.
182. Id. § 2-313(1)(b).
deemed to have made an express warranty. That warranty, however, may be subject to a disclaimer. Prior to the passage of the UCC, caveat emptor was the guiding principle in sales transactions. The seller was free to disclaim virtually all warranties.

The UCC has attempted to give some protection to the unwitting buyer by modifying the harsh common law rule. The UCC provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The specific goal of this provision is "to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty." It is still left to the trier of fact, however, to determine whether the seller's statement that the painting is by Van Gogh is consistent with his later declaration that he made no warranties as to authorship.

Article 12-D of the General Business Law appears to take the prohibitions against disclaimers found in the UCC one step further. Although section 219-d of that article provides more specific guidelines than the UCC in an attempt to lessen the possibility of unfair disclaimers, it does not appear to succeed.

The three subdivisions of section 219-d set forth the situations in which a disclaimer is to be deemed unreasonable and therefore inoperative. Subdivision 1 of that section states that language of disclaimer is unreasonable if it is not conspicuous, written and contained in a provision, separate and apart from any language relevant to the creation of the warranty, in words which would clearly and

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185. "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." Id. § 2-313, Comment 3; see Weintraub, Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC, 53 Tex. L. Rev. 60 (1974).

186. See Lefkowitz, supra note 3, at 29.


188. Id. § 2-316, Comment 1. Where both the express warranty and the disclaimer are contained in the same written instrument, courts have generally held the disclaimer to be inconsistent with the warranty and therefore inoperative. J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 12-3 (1972).

A more difficult situation arises where the express warranty is made orally prior to a written agreement containing a disclaimer of all warranties, a problem made more acute by the applicability to the warranty provisions of the parol evidence rule in § 2-202. Where the written instrument purports to be the final expression of the parties' agreement, normally § 2-202 will only permit evidence of consistent additional terms, trade usage, course of performance, or course of dealing. N.Y. U.C.C. § 2-202 & Comments 1 & 2 (McKinney 1964).


190. Id.
specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of the authorship of such work of fine art.\textsuperscript{191}

Language of general disclaimer would also not be sufficient under this subdivision to extinguish an express warranty.\textsuperscript{192}

The subdivision clearly provides the buyer with less protection than the analogous UCC provision, for it would permit the operation of a disclaimer of express warranty under circumstances where the UCC would render it inoperative. For example, although a clear, conspicuous, and written disclaimer of the warranty of authenticity is effective under this subdivision, under the UCC it cannot be construed as consistent with the warranty and is therefore inoperative.\textsuperscript{193}

Subdivision 2 of section 219-d of the General Business Law provides that a disclaimer will be ineffective where the work sold proves to be counterfeit. A work is deemed to be counterfeit if it is created in such a manner that it appears to have an authorship it does not in fact possess.\textsuperscript{194} No intent to deceive is required.\textsuperscript{195} This result is no different from that which is reached under the UCC. Since by definition a counterfeit work is not created by the purported artist, any express warranty as to authorship is clearly breached.\textsuperscript{196} Since any disclaimer as to authorship would be inconsistent with an express warranty of authorship,\textsuperscript{197} the disclaimer would also be deemed inoperative under the UCC.\textsuperscript{198}

Finally, subdivision 3 of section 219-d deems the disclaimer inoperative where an unqualified statement as to authorship is made and where the statement is proven "false, mistaken or erroneous"\textsuperscript{199} as of the date of sale. This situation is also covered by the UCC, because where a seller makes an unqualified statement as to authorship, he has created an express warranty\textsuperscript{200} which may not be disclaimed by language inconsistent with the warranty.

It therefore appears that the express warranty and disclaimer provisions of the UCC do, in fact, provide adequate protection to purchasers of fine art.\textsuperscript{201} Nevertheless, it seems clear that sections 219-c(1) and 219-d enable the consumer to more easily make out a prima facie case for breach of warranty by: (1) creating the presumption that authorship forms the basis of the bargain.

\textsuperscript{191} Id. \textsuperscript{\textbullet} 219-d(1).
\textsuperscript{192} Id.
\textsuperscript{193} N.Y. U.C.C. \textsuperscript{\textbullet} 2-316(1) (McKinney 1964); see J. White \& R. Summers, supra note 188, \textsuperscript{\textbullet} 12-3.
\textsuperscript{195} Id.
\textsuperscript{196} It has been argued earlier that because of the nature of a work of art, authorship is the basis of the bargain, and thus any statement as to authorship would create an express warranty. See pt. III(A)(2)(a) supra.
\textsuperscript{197} See, e.g., J. White \& R. Summers, supra note 188, \textsuperscript{\textbullet} 12-3.
\textsuperscript{198} N.Y. U.C.C. \textsuperscript{\textbullet} 2-316(1) (McKinney 1964).
\textsuperscript{199} Id.\textsuperscript{\textbullet} 219-d(3) (McKinney Supp. 1977-1978).
\textsuperscript{200} N.Y. U.C.C. \textsuperscript{\textbullet} 2-313 (McKinney 1964); see pt. III(A)(2)(a) supra.
\textsuperscript{201} See notes 168-69, 177-82, 189-200 supra and accompanying text. It should be noted that the UCC also provides implied warranties of merchantability and of fitness. See N.Y. U.C.C. §
in any sale of art from an art merchant to a consumer, (2) construing any written instrument containing a statement as to authorship as an express warranty,202 and (3) explicitly defining what constitutes an unreasonable disclaimer. Whereas under the UCC the consumer-plaintiff would be required to prove the creation of an express warranty as to authorship and the inconsistency of any disclaimer with that warranty, the existence of the presumptions under sections 219-c(1)203 and 219-d makes it possible for the consumer-plaintiff to be awarded summary judgment.204 Thus, these presumptions tend to decrease the difficulty and expense in maintaining warranty actions, a result consistent with the public policy of facilitating the maintenance of consumer suits.205

B. Criminal Sanctions

Article 12-F206 of the General Business Law was drafted to afford the consumer protection against fraudulent certificates of authenticity.

The term "certificate of authenticity" means a written or printed statement of fact or opinion confirming, approving or attesting to the authenticity of the authorship of a work of fine art, which statement is subscribed by the authenticator and is capable of being used to the advantage or disadvantage of some person.207

In addition, this article208 avoids the usual warranty problem of whether the statement is an affirmation of fact or a mere expression of opinion since it makes clear that the authenticator's signature on the certificate is "prima facie evidence that he holds himself out as having the knowledge, skill or expertise requisite to the making of such a statement."209 Indeed, article 12-F has made it a misdemeanor to make a false express warranty of authorship intentionally.210 It may be questioned whether this protection is necessary or whether

202. New York State Assistant Attorney General Laura Werner has stated that she has achieved successful results for defrauded consumers by sending a copy of article 12-D, together with an explanatory letter, to the dealer in question. Interview with Laura Werner, Assistant Attorney General, in New York City (Aug. 16, 1977).

203. Section 219-c(2) also furthers this result by codifying the trade terms used to designate authorship. N.Y. Gen. Bus. Law § 219-c(2) (McKinney Supp. 1977-1978).

204. "The motion [for summary judgment] shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." N.Y. Civ. Prac. Law § 3212(b) (McKinney Supp. 1977-1978).


207. Id. § 219-h(c).


209. Id. § 219-h(c).

210. N.Y. Gen. Bus. Law § 219-i (McKinney Supp. 1977-1978) specifically provides: "A person who, with intent to defraud, deceive or injure another, makes, utters or issues a false certificate of authenticity of a work of fine art is guilty of a class A misdemeanor."
it is already available under the forgery provisions of the Penal Code.\textsuperscript{211}

Article 170 of the Penal Code sets forth the elements of the various degrees of forgery. Basically, forgery involves the creation or alteration of an object or document in order to make it appear to be the work of someone other than the actual creator.\textsuperscript{212} Section 170.45 provides criminal sanctions against a person who, "[w]ith intent to defraud . . . makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess."\textsuperscript{213} or against a person who knowingly possesses or circulates such a work.\textsuperscript{214}

Under section 170.05 of the Penal Law "[a] person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument."\textsuperscript{215} The thrust of this section and the other sections dealing with forgery is to prohibit one from creating or altering a document so that it appears to have been executed by someone other than the actual executor.\textsuperscript{216} In other words, it would be a crime under section 170.05 for a person to draft a certificate of authenticity and sign an expert's name in order to convince a prospective buyer of the authenticity of the work. This section is violated even if the work which is the subject of the certificate of authenticity is, in fact, genuine.\textsuperscript{217}

On the other hand, General Business Law article 12-F provides protection in a different, though similar situation which slips through the forgery provisions of the Penal Law.\textsuperscript{218} The Penal Law does not cover the situation

\begin{itemize}
  \item \textsuperscript{211} N.Y. Penal Law art. 170 (McKinney 1975).
  \item \textsuperscript{213} N.Y. Penal Law § 170.45(1) (McKinney 1975).
  \item \textsuperscript{214} Id. § 170.45(2).
  \item \textsuperscript{215} Id. § 170.05.
  \item \textsuperscript{216} "‘Falsely make.’ A person ‘falsely makes’ a written instrument when he makes or draws a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker or drawer, but which is not such either because the ostensible maker or drawer is fictitious or because, if real, he did not authorize the making or drawing thereof.” Id. § 170.00(4). “‘Falsely complete.’ A person ‘falsely completes’ a written instrument when, by adding, inserting or changing matter, he transforms an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that such complete instrument appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer.” Id. § 170.00(5). “‘Falsely alter.’ A person ‘falsely alters’ a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer.” Id. § 170.00(6).
  \item \textsuperscript{217} See N.Y. Penal Law § 170.05 (McKinney 1975).
  \item \textsuperscript{218} See Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973) (person making and using a genuine instrument to defraud is not guilty of forgery under New York law and is therefore not subject to extradition); State v. Wright Hepburn Webster Gallery, Ltd., 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), aff’d mem., 37 App. Div. 2d
where a dealer makes a false statement as to authorship in his own name in order to convince the prospective buyer of the work's authenticity. This situation is, however, covered by General Business Law article 12-F, the aim of which is to punish the seller who falsely states the authorship of the work, whether he refers to the specific creator or to the "period, culture, source or origin" of the work.

Articles 12-F and 12-D of the New York General Business Law and article 170 of the Penal Law are complementary statutes which, when taken together, provide a full range of protection to both the prospective and the already-wronged buyer. Article 12-F attempts to provide the future buyer with protection not afforded him in the forgery sections of the Penal Code by imposing criminal penalties for intentional creation of false warranties. Theoretically, as a result of these statutes, dishonest dealers will be subject to criminal penalties which may remove them, at least temporarily, from the marketplace. In addition to the protection afforded the buyer by these criminal penalties, the wronged buyer is provided with a civil remedy which attempts to make him whole under article 12-D of the General Business Law. Taken together, these statutes provide the art consumer with the most complete protection.

IV. CONCLUSION

In an attempt to regulate the New York art market, one of the major art markets in the United States, the New York State Legislature enacted articles 12-C, 12-D, 12-E, and 12-F of the New York General Business Law. Not all of these statutes are consistent with existing law, a problem which has led to unanticipated results. In addition, there is some duplication of pre-existing law. However, these difficulties are by no means insurmountable.

One object of the legislation's protection is the artist. Article 12-C deals with the artist's relationship with the dealer. It has been noted that the trust obligation imposed on the dealer by article 12-C is an inappropriate device with which to protect the artist, given the nature of the dealer's business.
Two alternative solutions were proposed: (1) the creation of an agency relationship between the artist and the dealer, or (2) the imposition of a duty upon the dealer to file a security interest in the consigned work on behalf of the artist.\textsuperscript{226} It is suggested that either of these solutions would provide the artist with virtually the same protection provided by a trust relationship with the dealer, while imposing a more realistic burden on the dealer.

Although article 12-E, which protects the artist's reproduction rights, has been preempted by the new federal copyright law, other interests of the artist related to the copyright which are open to state regulation have been suggested.\textsuperscript{227} While courts have often protected these interests, known in Europe as the \textit{droit moral}, by means of tort or contract law, the results have not always been consistent or satisfactory.\textsuperscript{228} Conversion of these \textit{interests} of the artist into \textit{rights} of the artist would provide the state legislature with an excellent opportunity to come to the aid of the artist.

The other object of these statutes is the art consumer. The creation of a presumption that the authorship of a work of art is part of the basis of the bargain under article 12-D aids the art consumer by facilitating the maintenance of an action for breach of warranty against a dealer.\textsuperscript{229} However, it is maintained that the final result of the action would be no different had the consumer been forced to rely on the UCC for protection.\textsuperscript{230}

The art consumer is further protected by the creation of a criminal penalty under article 12-F for creation and circulation of false certificates of authenticity.\textsuperscript{231} As has been noted, this misdemeanor reaches a situation not penalized by the forgery provisions in the Penal Law.\textsuperscript{232}

During the past decade, New York has been in the forefront of regulation of the art market.\textsuperscript{233} The resulting statutes, although they achieve their purpose of protecting the artist\textsuperscript{234} and the art consumer,\textsuperscript{235} have sometimes led to unanticipated difficulties. However, through careful drafting, the present drawbacks can be remedied, while similar problems can be avoided in any future legislation.\textsuperscript{236}

\textit{Leslie Kaufman Akst}

\textsuperscript{226} See pt. II(A)(3) supra.
\textsuperscript{227} See notes 136-53 supra and accompanying text.
\textsuperscript{228} See, e.g., notes 147-48 supra and accompanying text.
\textsuperscript{229} See notes 204-05 supra and accompanying text.
\textsuperscript{230} See note 201 supra and accompanying text.
\textsuperscript{231} See pt. III(B) supra.
\textsuperscript{232} See notes 217-19 supra and accompanying text.
\textsuperscript{234} See note 5 supra and accompanying text.
\textsuperscript{235} See note 6 supra and accompanying text.
\textsuperscript{236} See generally Koegel, supra note 5.