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Gareth S. Lacy

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*Gareth S. Lacy**

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ABSTRACT

Art authentication boards are powerful; their determinations of authenticity can render artwork worthless or add millions of dollars to market value. In the past, boards that denied authenticity of artwork typically risked tort liability for disparagement, defamation, or fraud. In Simon-Whelan v. Andy Warhol Foundation for the Visual Arts, Inc., *however, an art collector alleged monopolization and market restraint after an authentication board denied the authenticity of his Andy Warhol painting by stamping "DENIED" on the back of it. The case is the first antitrust lawsuit against an authentication board to survive the defendant's motion to dismiss. The decision therefore suggests potential liability exposure under the Sherman Antitrust Act for art professionals who render opinions on the authenticity of artwork. This Article discusses how* Simon-Whelan *provides a framework for pleading antitrust claims against authentication boards and considers what standard could be appropriate for analyzing similar claims at trial. This Article also describes how antitrust law governing standards setting and product certification outside the art world could apply to art authentication and organizations setting authenticity standards.*

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* Gareth S. Lacy, University of Washington School of Law, Class of 2011. Thank you Professor Anita Ramasastry, University of Washington School of Law, and student editor Kendra Rosenberg for creative input and valuable feedback. Thank you Professor Dwight Drake for sharing your expertise in the area of antitrust law and Leonard DuBoff for your insider's perspective on art law.

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INTRODUCTION

In 1962, Andy Warhol began mass-producing silkscreened prints of Coke bottles, soup cans, and movie stars.[1] Warhol produced this art in his studio, known as The Factory, in much the same way corporations mass-produced consumer goods.[2] The line between business and art soon blurred for Warhol: "Business art is the step

[1] Robert Hughes, *The Rise of Andy Warhol*, N.Y. REV. BOOKS, Feb. 18, 1982 at 6.

[2] *The Factory*, WIKIPEDIA (Jan. 22, 2011, 1:48 PM), http://en.wikipedia.org/w/index.php?title=The_Factory&oldid=409360588.

that comes after Art. I started as a commercial artist, and I want to finish as a business artist."[3] Warhol reached his goal: In 2007, the art collection of the Andy Warhol Foundation for the Visual Arts, Inc. approached $500 million.[4] But with business-style success came business-style litigation.

In 2007, art collector Joe Simon-Whelan filed the first antitrust lawsuit against the Andy Warhol Art Authentication Board, Inc. ("Board"), a non-profit organization that renders opinions about whether Warhol paintings are authentic or not.[5] Simon-Whelan had submitted his $195,000 painting for authentication, but the Board stamped "DENIED" on the back of the painting, rendering the work of art worthless.[6] Simon-Whelan documented the painting's provenance and resubmitted it for authentication, but the Board again stamped "DENIED" on his painting.

In response, Simon-Whelan sued the Board and the Andy Warhol Foundation for the Visual Arts, Inc. ("Foundation") in the United States District Court for the Southern District of New York.[7] He

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[3] ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL (FROM A TO B AND BACK AGAIN) 92 (Harcourt Brace Jovanovich, 1st ed. 1975).

[4] Richard Dorment, *What is an Andy Warhol?*, N.Y. REV. BOOKS, Oct. 22, 2009, at 17, *available at* http://www.nybooks.com/articles/archives/2009/oct/ 22/ what-is-an-andy-warhol/. The Foundation was formed in 1987 shortly after Warhol's death, pursuant to his will, and received hundreds of millions of dollars of Warhol's artwork from his estate in 1991.

[5] Amended Class Action Complaint at 4-13, Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), 2007 WL 4825571; Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint at 14, Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), 2008 WL 877019.

[6] *Id.* Simon-Whelan's Web site contains a detailed chronology of these events. Joe Simon-Whelan, *My Story*, MY ANDY WARHOL, http://www.myandywarhol.eu/ my/my_story.asp (last updated Feb. 25, 2010). In 2006, the BBC also produced an interesting documentary about the events leading up to the litigation. *Imagine . . . Andy Warhol: Denied* (BBC television broadcast Jan. 24, 2006), *available at* Andy Warhol Art Authentication, YOUTUBE (July 7, 2007), http://www.youtube.com/ watch?v=mA1NBGtIlHE.

[7] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009), *available at* http://scholar.google.com/scholar_case?case=467837269032 7755692&hl=en&as_sdt=2&as_vis=1&oi=scholar.

claimed the Foundation and the Board violated section 1 of the Sherman Antitrust Act ("Sherman Act"),[8] which prohibits conspiracies in restraint of trade; and section 2, prohibiting monopolization.[9] In particular, he alleged the Board restricted the market for authentic Warhols to drive up the value of the Foundation's own art collection.[10] Defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[11] But the court denied this motion and allowed plaintiff's monopolization and market restraint claims to proceed based on the Board's rejection of the painting as an authentic Warhol.[12] Although the lawsuit was eventually dismissed with prejudice,[13] the court's decision provides useful analysis of what elements need to be alleged under the pleading standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*[14] to survive a motion to dismiss and proceed to discovery.

This Article will explain how Simon-Whelan alleged sufficient facts to survive the Board's motion to dismiss, will describe the analysis courts use to evaluate antitrust allegations, and will discuss how antitrust cases involving certification and standards setting outside the art world could contribute to an emerging antitrust theory

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8 Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

9 Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2006).

10 Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *1, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009), *available at* http://scholar.google.com/scholar_case?case= 4678372 690327755692&hl=en&as_sdt=2&as_vis=1&oi=scholar.

11 FED. R. CIV. P. 12(b)(6); *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint at 14, Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), 2008 WL 877019.

12 Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *8, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009).

13 Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), *complaint dismissed per stipulation*, No. 07 Civ. 6423(LTS)(AJP) (Nov. 30, 2010); Press Release, The Andy Warhol Foundation for the Visual Arts, Warhol Foundation Case Dismissed By U.S. Court (Nov. 15, 2010), http://www.warholfoundation.org/foundation/ 32_ detail.html?page=1.

14 550 U.S. 544, 570 (2007).

and also suggest best practices to reduce exposure to liability.

I. ART MARKET AND AUTHENTICATION PRINCIPLES

Contemporary art is bought and sold on two basic markets: the primary market for newly-created work of living artists; and the secondary market for work that has already been sold on the primary market.[15] Secondary art market sales generally occur through auctions and private-dealer sales where prices are often much higher than in primary markets.[16] The primary market involves curated gallery exhibitions of work obtained directly from artists' studios. The supply side of both markets includes individual collectors, private owners, museums, foundations, and dealers holding inventories, while the demand side includes collectors, museums, and dealers seeking inventory. Intermediary dealers, galleries, and auction houses bring these buyers and sellers together on the primary and secondary art markets.

Authentication supports the secondary art market by stamping out forgery and misrepresentation and providing a measure of certainty in the secondary market.[17] "[Stylistic] authentication is the process by which art experts—academic or independent art historians, museum or collection curators, art dealers, auction house experts—attribute a work of visual art . . . to a particular artist."[18] Opinions about authenticity can change and various experts may have competing views on the authenticity of a particular work of art.

Stylistic authentication methods vary, but often include: connoisseurship, in which the expert expresses observations in words;

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[15] *New or Secondhand: The Ins and Outs of Primary and Secondary Markets*, ECONOMIST (Nov. 6, 2009), http://www.economist.com/node/14941173.

[16] Auction prices of art sold on the secondary market can be tracked through various online services. *E.g.*, *Most Frequently Asked Questions About the Fine Art and Design Price Database*, ARTNET, http://www.artnet.com/products/ pdb_faq.asp?H=1 (last visited Jan. 18, 2011).

[17] Sam Sachs II, *Introduction: Right or Wrong, Real or Fake: Who Cares?*, 8 IFAR J. 6 (2006), http://www.ifar.org/publication_detail.php?docid=1210707503.

[18] Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 23 (N.Y. App. Div. Dec. 1, 2009) (citing Ronald D. Spencer, *Introduction* to THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS xi (Ronald D. Spencer ed., 2004)), *appeal denied*, 15 N.Y.3d 703 (2010).

reviewing the *catalogue raisonné*, an annotated book of the artist's works; documenting provenance; and gathering eyewitness testimony.[19] Authentication based solely on stylistic inquiry is inherently subjective and therefore exposes the expert to potential liability.[20] Another approach is scientific authentication in which the expert conducts objective investigation based on tests including radiocarbon dating, chemical analysis, or x-ray diffraction.[21]

Authentication of certain artwork, such as Warhol or Rembrandt, can be particularly challenging when the artist was prolific and employed assistants. Auction houses face considerable liability regarding the authenticity of artwork sold on secondary markets and will often refuse to sell work excluded from an artist's *catalogue raisonné*. In other words, authentication is as much a product of market consensus as expert or scholarly inquiry.

If a work of art is not listed in a *catalogue raisonné*, secondary market actors may, however, turn to authentication boards.[22] Authentication boards are often created by artists' foundations and comprised of individuals who have scholarly interest in an artist's work or first-hand experience working with the artist. Unlike a *catalogue raisonné*, an authentication board only reviews artwork as it is submitted by owners. In addition, the *catalogue raisonné* is often attributed to a single author, while an authentication board is a committee.

Some authentication boards have been short-lived, which can make secondary market actors cautious about their opinions. For

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[19] Steven M. Levy, *Authentication and Appraisal of Artwork*, *in* ART LAW HANDBOOK 829 (Roy S. Kaufman ed., 2000); Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 COLUM. J.L. & ARTS 71, 73-74 (2004).

[20] Steven M. Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 WIS. L. REV. 595, 596 (1991).

[21] LEONARD D. DUBOFF, ET AL., THE DESKBOOK OF ART LAW 22-41 (2d ed. 1993). Scientific and stylistic authentication methods are not mutually exclusive, but rather can be used together to make even more reliable determinations.

[22] Examples of authentication boards include: Roy Lichtenstein Authentication Committee, Calder Foundation, The Moholy-Nagy Foundation, The Keith Haring Foundation, and The Pollack-Krasner Authentication Board (disbanded). Jack Cowart, A Listing of Some Deceased Visual Artists' Foundations Filing 990 PFS (Jan. 19, 2008) (on file with author), http://sharpeartfdn.qwestoffice.net/supplement/D-3_A-Listing-of-Some-Deceased-Visual-Artists.pdf.

example, the *Comite Picasso*, a group of experts and members of Pablo Picasso's family, formed to make definitive assessments of Picasso artwork, but broke up after Picasso's daughter refused to participate. The Andy Warhol Art Authentication Board, Inc. was formed in 1995.[23]

II. HOW SIMON-WHELAN'S LAWSUIT SURVIVED THE BOARD'S MOTION TO DISMISS

Before *Simon-Whelan*, plaintiffs typically alleged tort theories such as defamation, disparagement, or fraud against those who denied the authenticity of submitted artwork.[24] Only one of the six major art-law treatises even mentions an antitrust cause of action.[25] Until *Simon-Whelan*, no plaintiff who had attempted an antitrust claim against an authentication board had ever survived the defendant's motion to dismiss.[26]

Although the Federal Rules of Civil Procedure only require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief,"[27] the plaintiff in *Simon-Whelan* had additional hurdles at the pleading stage under *Bell Atlantic Corp. v. Twombly*:

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[23] Key members of the Board have included: Gary Garrels, Judith Goldman, Christoph Heinrich, Jed Johnson, Sally King-Nero, Neil Printz, Robert Rosenblum, and David Whitney.

[24] *See, e.g.*, McNally v. Yarnall, 764 F. Supp. 838, 840 (S.D.N.Y. 1991) (defamation); Hahn v. Duveen, 234 N.Y.S. 185, 187 (Sup. Ct. 1929) (disparagement); Goldman v. Barnett, 793 F. Supp. 28 (D. Mass 1992) (fraud). *See generally* Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, *in* THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 144 (Ronald D. Spencer, ed., 2004).

[25] RALPH E. LERNER, ET AL., ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 624 (3d ed. 2005). At press time, art-law expert Leonard D. DuBoff has said future editions of LEONARD D. DUBOFF, ET AL., THE DESKBOOK OF ART LAW (2d. ed. 1993) and LEONARD D. DUBOFF & CHRISTY O. KING, ART LAW IN A NUTSHELL (4th ed. 2004) will contain discussions of the issues raised in this Article.

[26] *See, e.g.*, Vitale v. Marlborough Gallery, No. 93 Civ. (PKL) 6276, 1994 WL 654494 (S.D.N.Y. July 5, 1994); Kramer v. Pollock-Krasner Found., 850 F. Supp. 250 (S.D.N.Y. 1995).

[27] FED. R. CIV. P. 8(a)(2).

> [S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[28]

Antitrust litigation is tremendously complex and therefore factual allegations in the complaint must be pled with sufficient specificity to justify dragging the defendant through discovery.[29] The Board moved to dismiss plaintiff's complaint on grounds it did not meet *Twombly's* pleading requirements. But *Simon-Whelan* found the complaint did meet *Twombly's* requirements by alleging (A) "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face[]'" which (B) occurred within a "relevant market" and (C) caused antitrust injury.[30] As a result, discovery was allowed to proceed. The litigation ultimately cost defendants nearly $7 million in legal fees before the case was dismissed with prejudice.[31]

A. Plausibility

Plaintiff alleged Sherman Act section 1 ("Section 1") violations involving collusion between the Foundation that sold Warhol artwork and the Board that authenticated Warhol artwork. Plaintiff also

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[28] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

[29] *Id.* at 558 ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. . . .[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.")

[30] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *4, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

[31] Linda Sandler, *Warhol Foundation's $7 Million Defense Beats Collector's 'Fakes' Lawsuit*, BLOOMBERG, Nov. 16, 2010, *available at* http://www.bloomberg.com/news/2010-11-16/warhol-foundation-for-the-visual-arts-wins-lawsuit-with-7-million-defense.html.

alleged Sherman Act section 2 ("Section 2") violations including claims that the Foundation used the Board to remove competing Warhol artwork from the market to drive up the value of the Foundation's art collection. The court found such allegations satisfied *Twombly* because they "raise[d] a right to relief above the speculative level."[32]

The court concluded Simon-Whelan's Section 1 claim met the "plausibility" standard by alleging the Board (1) made unsolicited suggestions that Warhol owners submit their work for authentication, (2) reversed prior authentication determinations, (3) refused to authenticate works the Foundation had attempted to purchase, and (4) and was not independent of the Foundation.[33] A recent decision from the New York Supreme Court, Appellate Division, *Thome v. Alexander & Louisa Calder Foundation*, has discussed how these allegations are now a possible framework for pleading antitrust complaints against parties who deny authenticity.[34]

Simon-Whelan also found sufficient allegations of a Section 2 violation.[35] Section 2 complaints must allege facts "indicative of anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power . . . ."[36] It is notable that the court did not analyze the "specific intent to monopolize" element. A Section 2 complaint should allege monopoly power resulted from *willful acquisition*, not just accident or business acumen.[37] It is possible this element was adequately met by pleading facts establishing plausibility, such as the Board's alleged refusal to authenticate works after attempting to purchase them. Nevertheless, future authentication committee defendants should consider raising the issue of specific intent to weaken complaints after *Simon-*

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[32] *Id.* at 555.

[33] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *5, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009).

[34] 890 N.Y.S.2d 16, 32 (N.Y. App. Div. 2009), *appeal denied*, 15 N.Y.3d 703 (2010).

[35] Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2006).

[36] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *5, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009).

[37] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Whelan.[38] Moreover, given how much this case ultimately cost defendants, courts in the future may be more vigilant about scrutinizing complaints before so readily allowing discovery to proceed.[39]

B. Relevant Market

After meeting *Twombly's* plausibility standard, Simon-Whelan also alleged the anticompetitive effects occurred within a "relevant market."[40] Section 1 and 2 claims both require plaintiffs to define this relevant market.[41] The relevant market includes both a "geographic market," where the defendant competes, and a "product market" with which the defendant's product competes.[42] (Both elements should be established.)[43] Antitrust plaintiffs argue the relevant market is narrow, while defendants will downplay their market share by arguing their products fit within a broader market.[44] Although products like artwork exist within a broad market, distinct submarkets can also constitute distinct products.[45]

Two key decisions discussed in *Simon-Whelan* helped establish there is a relevant submarket for Warhol artwork within the market for modern and contemporary art. First, *Simon-Whelan* relied on

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[38] See *infra* text accompanying notes 95-97.

[39] *Cf.* Tamayo v. Blagojevich, 526 F.3d 1074, 1083 (7th Cir. 2008) (citations omitted) ("For complaints involving complex litigation—for example, antitrust or RICO claims—a fuller set of factual allegations may be necessary to show that relief is plausible."); Kirihara v. Bendix Corp., 306 F.Supp. 72, 76 (1969) ("This court believes that in potentially complex cases, particularly in cases involving violations of the antitrust laws, the plaintiff should go beyond the 'short' requirements of Rule 8 if necessary to present a 'plain', i.e., understandable and factual statement of the alleged antitrust violations.")

[40] *See, e.g.*, *Grinnell*, 384 U.S. at 570-72; United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380 (1956).

[41] Adam J. Biegel, et al., *Private Enforcement of the Antitrust Laws*, *in* ANTITRUST ADVISER § 10.23, at 10-71 (Irving Scher ed., 4th ed. 2009).

[42] 1 Irving Scher, *Horizontal Restraints and Monopolization*, *in* ANTITRUST ADVISER § 1.22, at 1-63 (Irving Scher ed., 4th ed. 2009).

[43] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[44] *Compare* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-82 (1992) (finding a relevant market for a single brand of replacement parts) *with* Elliot v. United Ctr., 126 F.3d 1003, 1005 (7th Cir. 1997) (rejecting allegation of a relevant market for food sales within a single sports arena).

[45] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

dictum in *Vitale v. Marlborough Gallery* to find a relevant market for famous works within the modern and contemporary art market.[46] In *Vitale*, the court had noted that "paintings by Jackson Pollock may constitute a submarket, the monopolization of which may be unlawful . . ." under the Sherman Act because such paintings lacked a practical substitute.[47] Second, the court relied on *Kramer v. Pollock-Krasner Foundation* to find a narrowly defined submarket for famous artwork can be a relevant market sufficient to state a claim.[48]

Although the court correctly stated "relevant market" contains two elements—product market and geographic market—it may have conflated the analysis. In particular, *Simon-Whelan* found the "distinct submarket . . . of Andy Warhol works within the modern and contemporary art market" was a sufficient "*relevant geographic product market.*"[49] Again, product market concerns whether defendant's product can be substituted,[50] while geographic market concerns the region of "effective competition."[51] While future antitrust plaintiffs can safely assert the existence of a "relevant submarket" for famous paintings, they should still carefully evaluate both elements of the relevant market. Indeed much of the contemporary art market is concentrated in New York City, but it is also an international market. A clearly defined relevant market helps courts identify the area of economic activity and whether defendant has exercised sufficient market power in that relevant market to constitute a violation.

Another problem with the court's definition of the relevant

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[46] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *6, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009) (citing Vitale v. Marlborough Gallery, 1994 WL 654494, at *4 (S.D.N.Y. July 5, 1994)).

[47] Vitale v. Marlborough Gallery, No. 93 Civ. (PKL) 6276, 1994 WL 654494, at *4 (S.D.N.Y. July 5, 1994).

[48] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *6, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009) (citing Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 254 (S.D.N.Y. 1995)).

[49] *Id.* (emphasis added).

[50] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-482 (1992).

[51] United States v. Grinnell Corp., 384 U.S. 563, 575-76 (1966).

market is that it seems to overlook the possibility that other contemporary artwork could substitute for Warhol work in the secondary market. While some collectors might prefer Warhol, this does not necessarily create a submarket for Warhol artwork. By analogy, consumers might prefer particular automobile manufacturers, but this does not necessarily create separate relevant markets for Hondas and Toyotas. In sum, the court's finding—that there is a relevant submarket for Warhol work—seems to exclude artwork from other contemporary artists that are potential economic substitutes for Warhol artwork.

C. Antitrust Injury

After establishing plausibility and relevant market, Simon-Whelan alleged an "antitrust injury."[52] He argued the Board action caused an injury that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[53] Simon-Whelan alleged the Board's practice of stamping "DENIED" on his artwork prevented him from participating as a seller in the market for authentic Warhol art.[54] The court affirmed the Board's practice of stamping "DENIED" on artwork, deeming it "not authentic," was a sufficient antitrust injury: "the double-stamping of 'Denied' on his artwork in furtherance of the alleged antitrust conspiracy has prevented him from competing as a seller in the lucrative market for authentic Warhols . . ."[55]

One unresolved issue is what type of market restraint occurs when an art authentication committee prevents a seller from marketing his or her own artwork. The first possibility is that such practices are nonprice vertical restraints in which the committee is analogous to a

[52] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *6, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009).

[53] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[54] Amended Class Action Complaint at 4-13, Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009), 2007 WL 4825571

[55] Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *6, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009)

producer dictating terms of sale to dealers.[56] A second possibility is that authentication is a nonprice horizontal restraint in which various dealers conspire to shut out a particular dealer—a practice that would be per se illegal.[57] A plaintiff's ability to uncover unlawful horizontal market restraints often requires discovery, which is why surviving a motion to dismiss was significant in *Simon-Whelan*.[58]

III. TWO LITIGATION PATHS: PER SE ILLEGAL OR RULE OF REASON ANALYSIS

Surviving a motion to dismiss is just the beginning. Next, a successful antitrust plaintiff must either prove defendant's actions were so blatantly anticompetitive as to be "per se illegal" or the negative anticompetitive effects of such actions outweighed any pro-competitive market effect. Whether a practice is per se illegal or analyzed under the more flexible—and defendant-friendly—"rule of reason" is a matter of law.[59] This section describes how courts might determine whether the per se or rule of reason analysis applies to an art authentication activity.

A. Categorizing Market Restraints

Some business practices are considered unreasonable by their very nature and therefore per se unlawful under the Sherman Act. Unlawful Section 1 activities include agreements to fix prices, boycott competitors, or limit production and control markets. To determine whether a practice is per se illegal, courts will: (1) distinguish between vertical and horizontal market restraints, (2) consider the effect on both interbrand and intrabrand competition, and (3) may analyze price and nonprice restraints differently. Antitrust cases often

[56] *See* Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-59 (1977); see *infra* notes 62-66 and accompanying text.

[57] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

[58] All discovery is stayed pending resolution of a motion to dismiss an antitrust cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007).

[59] Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 772 (8th Cir. 2004).

turn on how courts categorize a particular business practice.[60]

First, courts determine whether a business practice is a vertical or horizontal market restraint.[61] A vertical restraint occurs when businesses at different levels of competition collude in the same market, while a horizontal restraint is an agreement between businesses at the same level of competition. For example, an agreement between a producer and dealer not to supply to other dealers could be a vertical restraint.[62] Collusion between dealers to fix prices would be a horizontal restraint. Vertical restraints are often subject to rule of reason analysis; horizontal restraints are more likely to be per se illegal.[63]

The distinction between vertical and horizontal restraints blurs in a "dual distribution" system in which a producer also competes with dealers that sell the producer's products.[64] For example, an artist or an art collector might sell paintings directly to the public and also through particular private dealers. In most cases, the rule of reason applies to such dual distribution systems.[65] But if there is evidence of a horizontal conspiracy to limit sales to particular dealers—even if a dealer arranged the conspiracy—that would be per se illegal.[66] Dual distribution could involve a vertical group boycott (per se illegal) or a

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[60] Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1210 (2008).

[61] *See* A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1402-03 (7th Cir. 1992) (vertical restraints are analyzed under rule of reason unless they involve price fixing).

[62] *See* Yeager's Fuel, Inc. v. Pa. Power & Light Co., 953 F. Supp. 617, 654 (E.D. Pa. 1997) (forcing contractors to install only electric heating was a vertical restraint because the power company and developers were at different distribution levels).

[63] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135-36 (1998) (antitrust law does not apply per se rule to vertical boycotts unless there is also horizontal agreement or price fixing); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988).

[64] Lemley, *supra* note 60, at 1235-41.

[65] *See* AT&T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 531 (3d Cir. 2006) (although vertical relationship had horizontal elements, per se analysis was inappropriate for dual distributorship arrangements).

[66] *E.g.*, Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 934-36 (7th Cir. 2000) (finding evidence that dominant toy dealer coordinated a horizontal conspiracy among manufacturers to limit their sales to certain dealers); *accord NYNEX Corp.*, 525 U.S. at 133-37 (single dealer's decision to buy from one producer was a vertical agreement not subject to per se rule against horizontal group boycotts).

unilateral refusal to deal (likely to be lawful under rule of reason analysis).

Second, courts always consider the effects of a business practice on both interbrand and intrabrand competition. Interbrand competition means competition between businesses with developed brands or labels; intrabrand competition, in contrast, means horizontal competition between distributors of the same product.[67] Some art authentication services arguably reduce interbrand competition by suppressing the market for products deemed "not authentic." Another possibility is that art dealers reduce interbrand competition between various authentication services by refusing to acknowledge the opinions of certain types of authentication experts. Antitrust law is mostly concerned with protecting interbrand competition; practices that restrain interbrand competition are more likely per se unlawful.[68]

Courts have upheld exclusive dealership plans when such decisions had only slight effects on intrabrand competition and a high level of interbrand competition already existed.[69] This suggests that if a producer took action to shut down all sales of artwork outside authorized channels that could arguably be an unlawful restriction on intrabrand competition of certain distribution channels.[70]

Third, courts sometimes distinguish between price restraints and nonprice restraints such as prohibiting sales outside designated geographic areas or limiting sales to particular classes of customers.[71]

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[67] Competition between Coca-Cola and Pepsi is an example of interbrand competition. Competition between department stores and discount outlets selling the same products is an example of intrabrand competition.

[68] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-52 n. 19 (1977) describes this principle: "[W]hen interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."

[69] *E.g.*, Elecs. Commc'ns. Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 244-45 (2d Cir. 1997).

[70] *Cf.* Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1075-76 (2d Cir. 1980) (territorial restrictions imposed by producer upon distributors were unreasonable when restrictions eliminated intrabrand competition within each distributor's territory); Graphic Prods. Dist., Inc. v. Itek Corp., 717 F.2d 1560, 1577-78 (11th Cir. 1983) (benefits to interbrand competition did not outweigh the significant burden on intrabrand competition).

[71] *E.g.*, Beach v. Viking Sewing Mach. Co., 784 F.2d 746, 750-51 (6th Cir.

After *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the rule of reason applies to both price and nonprice vertical restraints.[72] Nevertheless, courts might still view price restraints with more caution and scrutinize vertical price restraints for related unlawful horizontal price restraints.

B. Per Se Antitrust Violations

Standards setting and certification activities outside the art world are usually subject to the defendant-friendly rule of reason analysis.[73] Nevertheless, it is important to consider the potential for a per se violation because the consequence can be disastrous for an antitrust defendant: If plaintiff establishes a per se violation, defendant will be barred from attempting to offer procompetitive justifications for why the restraint was reasonable.[74] The penalty for an antitrust violation is treble damages and the cost of suit, including attorney's fees.[75]

A per se Section 1 Sherman Act violation requires plaintiff to prove: two or more entities engaged in a conspiracy, combination, or contract;[76] to effect a market restraint prohibited per se;[77] that proximately caused of the plaintiff's antitrust injury.[78] In general, the per se rule applies to boycotts and price fixing, but not to unilateral decisions to only buy goods from one producer.[79] For example, *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission* held it was per se illegal for competing clothing designers and dealers to agree not to deal with stores that sold copied styles.[80] If

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1986) (prohibitions requiring dealers to provide after-sale services were non-price restraints evaluated under rule of reason).

[72] 551 U.S. 877, 881 (2007).

[73] *Cf.* 15 USC § 4302 (2006) ("a standards development organization while engaged in a standards development activity, shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness").

[74] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

[75] Clayton Antitrust Act, 15 U.S.C. § 15 (2006).

[76] *E.g.*, Guzowski v. Hartman, 969 F.2d 211, 214 (6th Cir. 1992).

[77] Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982).

[78] Hodges v. WSM, Inc., 26 F.3d 36, 38 (6th Cir. 1994).

[79] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998).

[80] 312 U.S. 457, 465 (1941).

competing art dealers banded together to shut out disfavored dealers, this could also be an unlawful horizontal restraint.

In addition, an art producer's actions could be unlawful if other dealers were involved in setting market restrictions, rather than just merely acceding to them.[81] It could even be per se unlawful for distributors to lobby a producer to impose price restraints.[82] On the other hand, the plaintiff would have to show other dealers were actively setting the market restraints in concert with the producer—if dealers merely go along with a producer's restrictions, that would not be enough.[83]

In summary, the following practices are likely per se illegal: a vertical agreement between a producer and a dealer to fix prices; horizontal agreements between dealers or producers to fix prices; and practices that eliminate all interbrand competition for production or sale of particular works of art. In contrast, a nonprice vertical restraint—such as refusal to sell artwork from producers who have not obtained authentication—is likely subject to a rule of reason analysis.

C. Rule of Reason Analysis

If a court does not find a per se antitrust violation, it will conduct a rule of reason analysis of the alleged market restraint.[84] *The Chicago Board of Trade Case* gave the analysis its classic formulation: "whether the restraint imposed is such as merely regulates and

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[81] *See, e.g.*, Toscano v. Prof'l Golfers' Ass'n, 258 F.3d 978, 984 (9th Cir. 2001) (rejecting claim of conspiracy, when local golf tournament sponsors did not participate in negotiating terms of restraints).

[82] *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 734-36 (1988) (agreement between a manufacturer and a distributor to terminate a competing price-cutting distributor could be a per se violation if the parties actually agree on the price to be charged).

[83] Morrison v. Murray Biscuit Co., 617 F. Supp. 800, 808-09 (N.D. Ind. 1985), *aff'd*, 797 F.2d 1430, 1439 (7th Cir. 1986).

[84] FTC v. Indep. Fed. of Dentists, 476 U.S. 447, 458-59 (1986); *See generally*, M. Howard Morse, *Standard Setting and Antitrust: The Intersection Between IP Rights and the Antitrust Laws*, IP LITIGATOR, May-June 2003, at 17, *available at* http://www.drinkerbiddle.com/publications/ (select articles from 2003; then scroll to June 1, 2003).

perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[85] Today, the basic rule of reason test is whether "anticompetitive effects outweigh . . . pro-competitive effects."[86] This ad hoc balancing approach generally requires the plaintiff to prove an agreement to restrain trade exists[87] and the agreement was anticompetitive.[88]

While courts differ on how to conduct the ad hoc rule of reason analysis, all courts focus on some of the following factors: (1) the severity of the restraint; (2) defendant's market power; and (3) defendant's intent.[89]

First, courts weigh the severity of the market restraint. Restraints with "pernicious effects" will be held unlawful.[90] For example, restraints involving price restrictions will likely be unlawful.[91] Second, courts examine whether the defendant has significant market power.[92] Market power means dominant market share in a well-defined product and geographic market.[93] A standard measure of

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[85] The Chicago Board of Trade Case, 246 U.S. 231, 244 (1918).

[86] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1988). In particular, a prima facie case requires proving: (1) the defendant contracted, combined, or conspired; (2) the combination or conspiracy produced adverse anticompetitive effects; (3) within relevant product and geographical markets; and (4) plaintiff was injured as a proximate result. Int'l Logistics Grp., Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989).

[87] *E.g.*, St. Martin v. KFC Corp., 935 F. Supp. 898, 905-06 (W.D. Ky. 1996).

[88] *E.g.*, Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991).

[89] *E.g.*, Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992) (analyzing vertical relationship under rule of reason); Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986) (affirming that establishing market power is a necessary element of every rule of reason case); United States v. United States Gypsum Co., 438 U.S. 422, 436, n.13 (1978) (noting "the general rule [is] that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect.").

[90] *E.g.*, Schaeffer v. Am. Honda Motor Co., 976 F. Supp. 736, 740-41 (W.D. Tenn. 1997).

[91] *See* Clairol, Inc. v. Bos. Disc. Ctr. of Berkeley, Inc., 608 F.2d 1114, 1124 (6th Cir. 1979) (upholding vertical customer restraints when seller did not impose any restrictions on resale prices).

[92] *E.g.*, Winter Hill Frozen Foods & Servs., Inc. v. Haagen-Dazs Co., 691 F. Supp. 539, 546-48 (D. Mass. 1988).

[93] *E.g.*, James M. King & Ass'n., Inc. v. G.D. Van Wagenen Co., 717 F. Supp. 667, 675 (D. Minn. 1989).

market power would be sales within the relevant market divided by total sales.[94] Nevertheless, the art market's relatively inelastic nature and barriers to entry may allow dealers with smaller market share to dominate—consumers will not necessarily turn to substitutes if prices increase. Third, courts frequently indicate that unlawful intent does not violate the rule of reason in the absence of anticompetitive effects.[95] Intent may, however, be relevant in determining whether the effect of a restraint is unreasonable.[96] Even a denial of authentication that rendered art unmarketable would not violate antitrust law unless there is some anticompetitive rationale, such as evidence that the committee who made the decision also sells artwork in the same relevant market.[97]

Regardless of which factors a court considers, the key inquiry is the reasonableness of the challenged standard or certification.[98] "Reasonableness" in this context generally refers to the effect of the standard on competition, not to substantive reasonableness of the standard itself.[99]

Once plaintiff shows anticompetitive effects of a market restraint, the burden shifts to the defendant to offer a procompetitive justification.[100] Courts have accepted procompetitive justifications such as

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[94] There is no magic number, but courts have rejected challenges to geographic restraints when producers only command 10% of the relevant market. *E.g.*, Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1231-34 (8th Cir. 1987).

[95] *E.g.*, Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 186 (N.J. Super. Ct. App. Div. 1995).

[96] Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (association liable for restraint of trade by misinterpreting an standard for association's own purposes).

[97] *Cf.* DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57-58 (1st Cir. 1999) (defendant not liable for denying certification of laboratory-grade water because defendant represented laboratories, rather than competing producers).

[98] *See e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); U.S. Trotting Ass'n. v. Chi. Downs Ass'n., 665 F.2d 781, 787 (7th Cir. 1981); *see generally*, ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 6-7 (1999).

[99] 13 HERBERT HOVENKAMP, ANTITRUST LAW, ¶¶ 2232a, 2232b, at 414 (2d ed. 2005).

[100] *E.g.*, Expert Masonry, Inc. v. Boone County, 440 F.3d 336, 343 (6th Cir. 2006).

increased information for consumers,[101] uniformity across geographic regions,[102] and improved product quality.[103] Art authenstication has the important procompetitive effect of suppressing forgeries and helping consumers select genuine artwork. The defendant must show this procompetitive effect cannot be achieved in a substantially less restrictive manner.[104]

Courts will investigate proffered justifications to determine whether they are genuine. Sometimes courts determine a purported procompetitive justification is just a sham to cover for an underlying anticompetitive practice. For example, courts found a warranty regulation system was a façade for an anticompetitive vertical market allocation.[105] Courts have examined press releases and meeting minutes for evidence of ulterior motives in imposing a geographic restraint.[106] If dealers were refusing to sell artwork in an effort to drive up the value of their holdings—rather than to exclude forgeries—this would weigh against the dealers in an antitrust analysis. Practices could also be unlawful if solely motivated by price considerations, rather than assisting customers or increasing market efficiencies.[107]

In summary, vertical nonprice restraints are likely to be upheld as reasonable under the "rule of reason" if the restraint promotes interbrand competition without overly restricting intrabrand competition.[108] But vertical restraints may be struck down if they have a pernicious effect on interbrand competition, which will more likely

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[101] *E.g.*, Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 296 (5th Cir. 1988).

[102] *E.g.*, Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126, 129-30 (6th Cir. 1980) (the standard "helps promote nationwide competition and enables manufacturers . . . to be reasonably sure they will not have to modify their product . . . .").

[103] *E.g.*, Mendelovitz v. Adolph Coors Co., 693 F.2d 570, 575 (5th Cir. 1982) (manufacturer has legitimate interest in taste and quality of its product).

[104] Wilk v. Am. Med. Assn., 719 F.2d 207, 227 (7th Cir. 1983); Kreuzer v. Am. Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984).

[105] Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1076-81 (2d Cir. 1980).

[106] Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1012-13 (3d Cir. 1994).

[107] *See* Beach v. Viking Sewing Mach. Co., 784 F.2d 746, 751 (6th Cir. 1986).

[108] *See, e.g.*, Three Movies of Tarzana v. Pac. Theatres, Inc., 828 F.2d 1395, 1399 (9th Cir. 1987).

occur when there is a latent horizontal component to the restraint.[109] Courts have also struck down vertical nonprice restrictions under the rule of reason when a producer was not acting independent from distributors in imposing a market restraint.[110] Again, this might occur when the restriction on a producer is imposed at the behest of another dealer.[111]

IV. FUTURE FRAMEWORKS: APPLYING ANTITRUST ASPECTS OF CERTIFICATION AND STANDARDS SETTING TO ART AUTHENTICATION

Allegations of antitrust violations may be on the rise within the art world so it is useful for authentication boards to consider the application of antitrust law as it applies to certification and standards-setting organizations.[112] This section will explain how certification and standards setting can raise antitrust liability and will describe how best practices adopted by certification and standards-setting bodies could apply to art authentication boards.

An industry standard is "a document established by consensus and approved by a recognized body that provides for common and

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[109] *E.g.*, Carlson Mach. Tools, Inc. v. Am. Tool, Inc., 678 F.2d 1253, 1261-62 (5th Cir. 1982) (rejecting distributor's assertion that territorial restraints curbed intrabrand competition without allegations of harm to interbrand competition).

[110] *See* Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d 1560, 1569-70 (11th Cir. 1983) (violation found under rule of reason when dual distributor-supplier with 70% market share terminated a distributor for not complying with market restrictions).

[111] *See, e.g.*, Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 934-36 (7th Cir. 2000).

[112] In January 2010 art collector Susan Shaer also sued the Andy Warhol Art Authentication Board for denying the authenticity of Warhol artwork. Shaer v. Andy Warhol Foundation For The Visual Arts, Inc., No. 2010 Civ. 00373 (S.D.N.Y. filed Jan. 15, 2010), *available at* http://dockets.justia.com/docket/court-nysdce/case_no-1:2010cv00373/case_id-357265/; *see generally* Eileen Kinsella, *Warhol Board Faces New Lawsuit*, ZIMBIO.COM (Jan. 26, 2010), http://www.zimbio.com/Andy+Warhol+Art+Authentication+Board/articles/8wlxvvExOKA/Warhol+Art+Authentication+Board+Faces+New. *But see*, *Andy Warhol's Red* Self-Portrait*: An Exchange*, ARTNET, (Nov. 17, 2010), http://www.artnet.com/ magazine us/news/artnetnews/joe-simon-andy-warhol11-17-10.asp. (describing how the lawsuit was abandoned in November 2010).

repeated use, rules, guidelines or characteristics for activities . . ."[113] Examples include standards for wall sockets, organic produce, and cellular phone frequencies. Some standards are government mandated, while others result from voluntary self-regulation.[114] Groups such as the American National Standards Institute (ANSI) have promulgated thousands of industry standards to promote safety or quality.[115] Standards are also important for facilitating commerce and providing valuable information to consumers.

Once an industry standard is set, third-party certification bodies often assess whether products conform to the standard.[116] For example, the Good Housekeeping "Seal of Approval" certifies that a product underwent testing to meet a quality standard.[117] When an art authentication board authenticates a painting, it is, for all purposes, certifying that the artwork met an authenticity standard.

Standards and certification activities by their nature restrain trade because they divert business from one competitor to another.[118]

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[113] *What are standards?*, EUR. TELECOMMS. STANDARDS INST., http://www.etsi.org/WebSite/Standards/WhatIsAStandard.aspx (last visited Jan. 19, 2011); Maureen A. Breitenber, *The ABC's of Standards-Related Activities in the United States* (Nat'l Inst. of Standards & Tech., Paper No. NISTIR 7614, Aug. 2009), *available at* http://gsi.nist.gov/global/docs/pubs/NISTIR_7614.pdf. *See also* Herbert Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C. L. REV. 87 (2007), http://lawdigitalcommons.bc.edu/bclr/vol48/iss1/4/;

[114] NAT'L RESEARCH COUNCIL, STANDARDS, CONFORMITY ASSESSMENT AND TRADE INTO THE 21ST CENTURY 11 (1995), *available at* http://www.nap.edu/openbook.php?record_id=4921&page=R1.

[115] AM. NAT. STANDARDS. INST., *About ANSI Overview*, http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 (last visited January 19, 2011).

[116] Jonathan T. Howe, Leland J. Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U. L.Q. 357 (1982-1983).

[117] *The History of the Good Housekeeping Seal*, GOOD HOUSEKEEPING, http://www.goodhousekeeping.com/product-testing/history/good-housekeeping-seal-history (last visited Jan. 18, 2011).

[118] FTC, Bureau of Consumer Protection, STANDARDS AND CERTIFICATION (FINAL STAFF REPORT) at 275-76 (1983); Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Associations Standards and Certification*, 19 DAYTON L. REV. 471 (1994). For an excellent overview see Andrew Updegrove, *Laws, Cases and Regulations*, CONSORTIUMINFO.ORG (2007), http://www.consortiuminfo.org/laws/.

Antitrust violations occur when standards are promulgated in an effort to exclude competitors from the market.[119] Standards setting and certification practices are generally subject to the same antitrust analysis as any other business practice. Nonprofit entities are also subject to antitrust liability just like for-profit businesses.[120]

Drawing on these principles, an art authentication board should ensure its authentication service benefits the market: "The paramount antitrust challenge for nonprofit product certification products is to demonstrate aggressively that such programs strengthen the competitive market system on an industry-wide basis."[121]

A. Does Per Se or Rule of Reason Apply to Standards Setting and Authentication?

In general, the rule of reason analysis applies to standards setting: such activities will be upheld as long as the standard is reasonably necessary to achieve a procompetitive benefit.[122] For example, a court refused to apply the per se rule to the American Kennel Club's establishment of mandatory dog "breed" standards because uniformity was necessary for competition among owners and breeders.[123]

Although rule of reason generally applies, some practices—such as group boycotts—would be blatantly anticompetitive and always per se antitrust violations.[124] If a group of art dealers or auction houses coordinated to exclude a particular authentication service from the market for authentication services, this could arguably constitute a

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[119] 13 HOVENKAMP, *supra* note 99, ¶ 2231a, at 409.

[120] *See, e.g.*, Cal. Dental Ass'n. v. FTC, 526 US 756, 768-69 (1999).

[121] Howe, *supra* note 116, at 357.

[122] *See, e.g.*, Cont'l Airline, Inc. v United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002) (per se rule inapplicable to a standard imposed by trade association to limit the size of carry-on baggage). *But see* United States v. Nat'l Ass'n. of Broadcasters, 536 F. Supp. 149, 160-62 (D.D.C. 1982) (television broadcasters trade association standard prohibiting the advertisement of more than one product in a commercial lasting less than 60 seconds held per se illegal).

[123] Jessup v. Am. Kennel Club, Inc., 61 F. Supp. 2d 5 (S.D.N.Y. 1999), *aff'd per curiam*, 210 F.3d 111 (2d Cir. 2000).

[124] FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990) (competitively motivated horizontal group boycotts). A group boycott, also known as a refusal to deal, means "withholding or enlisting others to withhold patronage or services from the target." St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541-43 (1978).

per se violation. A per se violation could also occur if an authentication committee forced others to follow its recommendations.[125]

In *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, the Supreme Court found a per se illegal boycott when a powerful group of producers manipulated an industry standard to arbitrarily deny certification to a competitor's product.[126] This suggests an authentication practice could also be per se illegal if the standard constituted a horizontal agreement among competitors not to deal with a particular dealer.[127]

It is worth noting, however, that courts sometimes refuse to apply the per se rule in cases involving unique markets on the ground that courts lacks experience to condemn certain practices on their face.[128] For example, *Vogel v. American Society of Appraisers* refused to apply the per se rule to the practice of barring member appraisers from charging fixed appraisal fees.[129] Commentators have similarly argued the art market is sufficiently complex such that courts should not decide issues of authenticity on a per se basis.[130]

In summary, standards setting will generally be subject to rule of reason analysis unless the standard is a mere sham to facilitate exclusion. Moreover courts generally apply rule of reason analysis to certification decisions about particular products.[131] In part, this is

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[125] *See* Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1998); Int'l Healthcare Mgmt. v. Haw. Coal. For Health, 332 F.3d 600, 606 (9th Cir. 2003) (no antitrust violation when professional association did not force anyone to follow its advice).

[126] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). Although *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.* has since held that boycotts should be analyzed under the rule of reason, a restraint can be per se unlawful if plaintiff "present[s] a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." 472 U.S. 284, 298 (1985).

[127] *See e.g.*, Pretz v. Holstein Friesian Ass'n., 698 F. Supp. 1531, 1539 (D. Kan. 1988); Consol. Metal Prods., Inc. v. Am. Petroleum Instit., 846 F.2d 284, 292 (5th Cir. 1988).

[128] *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 24 (1979) (refusing to apply the per se rule to issuances of blanket licensing to music).

[129] 744 F.2d 598, 603-04 (7th Cir. 1984).

[130] *See e.g.*, Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 COLUM. J.L. & ARTS 71, 85 (2004).

[131] *E.g.*, Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126, 129-30 (6th

because courts do not want to condemn practices with which they lack sufficient expertise.[132]

B. Status of the Essential Facilities Doctrine

When product certification is necessary for a business to compete in a given market, denial of certification could be a per se violation.[133] This "essential facilities" doctrine is not really an independent basis for antitrust liability, but rather a type of monopolization claim.[134] The Supreme Court has not directly supported a cause of action for denial of essential facilities.[135] Nevertheless, the concept still has applicability to standards and certification and lower courts continue to speak in terms of "essential facilities."[136]

Radiant Burners found a producer of gas burners properly alleged an antitrust claim against an industry association who refused to certify the company's gas burners as safe, thereby making them impossible to sell.[137] Denial of the association's "seal of approval" raised antitrust concerns because the seal had such prestige in the industry that it had become mandatory in some local codes. An art authentication board's opinion could raise similar issues if a work of

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Cir. 1980); Moore v. Boating Indus. Ass'ns, 819 F.2d 693 (7th Cir. 1987); Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977); Jessup v. Am. Kennel Club, Inc., 61 F. Supp. 2d 5 (S.D.N.Y. 1999).

[132] *E.g.*, Vogel v. American Society of Appraisers, 744 F.2d 598, 603 (7th Cir. 1984) (noting, "the novelty of the challenged practice (novel to the courts, that is) is a reason against per se classification.").

[133] Brett M. Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

[134] Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 257 (S.D.N.Y. 1995).

[135] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[136] Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1204 (10th Cir. 2006); Daisy Mountain Fire Dist. v. Microsoft Corp., 547 F. Supp. 2d 475, 490 (D. Md. 2008). Sanjuan v. Am. Bd. of Psychiatry & Neurology, 40 F.3d 247 (7th Cir.) (1994) (holding American Board of Psychiatry and Neurology did not improperly refuse certification that was unnecessary for medical practice and did not inhibit competition), *cert. denied*, 516 U.S. 1159 (1996); *accord* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 558 (1st Cir. 1974) (standards setting did not restrain trade when few architects followed the standard).

[137] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

art becomes unsalable without an authentication opinion.[138]

Given the factual similarities between "seals of approval" and opinions about authenticity, plaintiffs like Simon-Whelan might consider the reasoning from *Radiant Burners* when challenging authentication decisions. This issue could also perhaps arise if auction houses and dealers refused to sell paintings without authentication from a particular board.

C. Liability Theories Challenging the Substantive Standard Itself

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Supreme Court held that standards setting must be substantively and procedurally fair.[139] Courts rarely analyze the substantive "reasonableness" of the standard itself on grounds they lack expertise to analyze the technical details. That said, if there is evidence that the standard is patently arbitrary, a court might reject the substantive standard itself as unreasonable.

According to an FTC advisory opinion, standards should be kept current with new research and authentication based on rigid "pass/fail" processes should be avoided.[140] In cases challenging a substantive standard, the burden of proof with respect to reasonableness lies on those who develop and enforce the standards.[141] This suggests there is a significant liability exposure for authentication boards employing secretive methods or methods based on subjective knowledge rather than a consistent industry standard. *Radiant Burners*, for example, struck down a certification test for lack of "objective standards" because the standards had a potential to be arbitrary and capricious.[142]

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[138] *See* Brookins v. Int'l Motor Contest Ass'n., 219 F.3d 849, 853-54 (8th Cir. 2000); *Kramer*, 890 F. Supp. at 256.

[139] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509 (1988) (holding legality of standards-setting conduct under antitrust law "depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.").

[140] FTC Advisory Opinion No. 457, 78 F.T.C. 1628, 1971 WL 128741 (Mar. 8, 1971).

[141] *Id.*

[142] *Radiant Burners*, 364 U.S. at 658.

There must be a basis for determining whether a product complies with the standard. A standards setting organization might even be forced to alter its standard if there is no reasonable justification for excluding new products from the standard.[143] For example, *Wilk v. American Medical Association* struck down American Medical Association standards denying chiropractors access to health facilities because plaintiffs provided detailed information about the medical benefits of chiropractic treatments.[144] Those seeking authentication should also marshal all relevant extrinsic evidence showing their artwork is authentic.

D. Liability Based on Procedural Defects in the Authentication Process

As collectors, boards, and courts grapple with antitrust litigation over art authenticity, laws governing certification and standards setting could provide guidance for evaluating the procedural aspects of art authentication practices.[145] If there is evidence that standard setting or authentication was improperly manipulated to gain a competitive advantage, this could raise antitrust concerns.[146]

Radiant Burners held standards and certification should be evaluated by looking at the intent of those setting them and whether the defendants have anticompetitive incentives.[147] Evidence that authentication practices were applied arbitrarily in the past would also help the plaintiff.[148] Courts might examine the composition of a

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[143] Am. Soc'y of Sanitary Eng'g, 106 F.T.C. 324, 329 (1985), 1985 WL 668922.

[144] 719 F.2d 207, 213-217 (7th Cir. 1983).

[145] There is precedent for examining certification, standards setting, and authentication under the same lens. For example, the Indian Arts and Crafts Board within the U.S. Department of the Interior assists with registering certification marks to ensure Native American art is genuine. 25 U.S.C. § 305a (2006).

[146] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc. 635 F.2d 118 (2d Cir. 1980), *aff'd* 456 U.S. 556 (1982); Jessup v. Am. Kennel Club, 61 F. Supp. 2d 5 (S.D.N.Y. 1999); Carleton v. Vermont Dairy Herd Improvement Ass'n., 782 F. Supp. 926, 934 (D. Vt. 1991).

[147] *Radiant Burners*, 364 U.S. 656.

[148] *See* Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 653-54 (5th Cir.

Board to identify procedural irregularities or possible conflicts of interest.[149]

In response to an FTC advisory opinion regarding antitrust liability for certification, ANSI promulgated due process guidelines to ensure decisions are based on objective judgments rather than economic self-interest.[150] These guidelines are consistent with emerging practices in the art world. For example, College Art Association authentication guidelines prohibit certifying bodies from offering self-interested opinions.[151]

The U.S. Department of Justice has also affirmed that certification bodies should award seals of approval on non-discriminatory bases.[152] In short, numerous standards and certification guidelines make clear there is a duty to administer authentication fairly and without hindering competition:

> [T]he objective character of a seal, and a reputation for reliability, give rise to an obligation to administer the seal with the utmost fairness and to make it available to everyone who can meet the tests. This follows from the fact that *when a seal has such prestige it can mean the difference between success and failure to a*

1977) (rejecting a challenge to a decision not to register a horse as a quarter horse because the standards "were not applied in a discriminatory, arbitrary, or capricious fashion").

149 *Cf.* Pretz v. Holstein Friesian Ass'n, 698 F. Supp. 1531, 1539 (D. Kan. 1988) (holding cattle-breeding association liable for denying certification of plaintiff's cattle for failing milk content test because cattle became worthless without certification).

150 *See, e.g.*, *ANSI Essential Requirements: Due process requirements for American National Standards*, AM. NAT. STANDARDS INST. (Jan. 5, 2010, 8:10 AM), http://publicaa.ansi.org/sites/apdl/default.aspx (follow "American National Standards" hyperlink; then follow "Procedures, Guides, and Forms" hyperlink; then follow "2010 ANSI Essential Requirements" hyperlink; then follow "2010 ANSI Essential Requirements" hyperlink).

151 *Compare* FTC Advisory Opinion No. 457, 78 F.T.C. 1628, ¶ 16, 1971 WL 128741 (1971) *with Standards and Guidelines: Authentications and Attributions*, COLLEGE ART ASS'N (Oct. 25, 2009), http://www.collegeart.org/guidelines/ authentications.

152 Joel E. Hoffman, *Industry-Wide Codes, Advertising, Seals of Approval and Standards: As Participated in by the Trade Association*, 13 ANTITRUST BULL. 595 (1968).

> *business*.[153]

Authentication committees should therefore consider less restrictive alternatives to stamping "DENIED" on rejected artwork.[154] Alternatives could include refusing to provide a letter of authentication or publishing a denial decision in the artist's *catalogue raisonné*.

In the 1970s, the International Foundation for Art Research (IFAR) was formed as an independent art accreditation service after New York Attorney General Louis J. Lefkowitz raised concerns about the growing risk of forgeries flooding the art market.[155] Although organizations like IFAR had fewer conflicts of interest, there were still concerns about transparency because "[authentication committees] possess[] the aura of impartiality and scholarship . . . [but their] internal procedures are secret . . . ."[156] Some art professionals responded to these concerns by adopting codes of ethics or best practices guidelines.

Most museums, for example, prohibit curators from consulting on third-party works.[157] The Art Dealers Association of America also adopted an ethical code.[158] The College Art Association of America issued authentication guidelines that require "[a]rt-historical documentation, stylistic connoisseurship, and technical or scientific

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[153] Robert B. Hummel, *Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval*, 13 ANTITRUST BULL. 607 (1968) (emphasis added).

[154] See *supra* note 104. On the other hand, such practices would likely be upheld under a rule of reason analysis if there were a rational basis for taking those steps. Given that Warhol art is, quite literally, a product of mass reproduction through near-identical series, there is a potentially high risk of Warhol forgeries entering the market. Nevertheless, connoisseurship or scientific authentication could provide less restrictive alternatives of weeding out fakes.

[155] Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 1020 (1976) (citing Arnason, *Introducing the International Foundation for Art Research*, MUSEUM NEWS, Apr. 1972, at 28). *See generally*, INT'L FOUND. FOR ART RESEARCH, http://www.ifar.org/authentication .php (last visited Apr. 4, 2010).

[156] DuBoff, *supra* note 155, at 1019-20.

[157] ELAINE A. KING & GAIL LEVIN, ETHICS AND THE VISUAL ARTS 257 (2006).

[158] *See generally*, *Professional Guidelines*, INT'L. FOUND. FOR ART RESEARCH, http://www.ifar.org/professional_guidelines.php (last visited Jan. 18, 2011); LEONARD D. DUBOFF & CHRISTY O. KING, ART LAW IN A NUTSHELL 85 (3d ed. 2000).

analysis . . ."[159] Despite such efforts, many authentication boards continue to conduct their work in secret.[160] This strategy could be harmful in defending against antitrust lawsuits because clear procedural safeguards in the standards development and authentication process can tip the rule of reason analysis in the defendant's favor.[161]

In summary, antitrust issues arising from non-art certification and standards setting could offer additional legal theories for litigants challenging art authentication decisions by suggesting procedural protections the authentication boards should provide. At the same time, adopting formal procedures for authentication shields authentication boards that consistently follow the procedures. Committees should not attempt to enforce their standards by punishing market actors that deviate.[162] Instead, the authentication process should include clear criteria, appeal processes, and a mechanism for amending existing standards.

CONCLUSION

Simon-Whelan potentially increases the liability of art professionals who pass judgment on the authenticity of artwork.[163] Tort litigation has already shuttered many authentication bodies in the past.[164] After *Simon-Whelan*, antitrust liability has the potential to

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[159] *Standards and Guidelines: Authentications and Attributions*, COLLEGE ART ASS'N (Oct. 25, 2009), http://www.collegeart.org/guidelines/authentications.

[160] Kai B. Singer, *'Sotheby's Sold Me a Fake!'—Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art*, 23 COLUM. J.L. & ARTS 439, 449 (1999-2000); *See* Steven M. Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 WIS. L. REV. 595, 596 (1991)

[161] Committees that insist on secret authentication practices should consider carrying an Errors and Omissions insurance policy. *CRSA Guidelines for Issuing Scholarly Opinions about Authenticity*, CATALOGUE RAISONNÉ SCHOLARS ASS'N (Apr. 2010), http://www.catalogueraisonne.org/CRSAGuidelines.pdf.

[162] *See, e.g.*, Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 132-33 (3d Cir. 2005) (no antitrust violation when trade association criticized plaintiff's products, but did not coerce market actors).

[163] Sharon Flescher & Mary Morabito Rosewater, *Dispute Against the Warhol Authentication Board Allowed to Proceed*, 11 IFAR J. 36 (2009), http://www.ifar.org/publication_detail.php?docid=1251923912.

[164] The Pollock-Krasner Authentication Board, for example, shut down after fighting numerous legal battles with disappointed collectors. McCloud v. Lawrence

make this line of work even more risky. As this new legal theory emerges, the law of antitrust governing certification and standards setting could both strengthen causes of action against art authentication bodies and suggest best practices to reduce liability. Authentication bodies should therefore respond by carefully evaluating the current practices and protections offered by certification and standards setting outside the art world.

PRACTICE POINTERS

- A denial of authenticity that prohibits a collector from selling his or her painting can constitute a sufficient antitrust injury under the Sherman Antitrust Act, but factual allegations in a complaint must be sufficiently specific to justify dragging a defendant through discovery. Plaintiffs should review the factors outlined in *Simon-Whelan* and *Thome* to ensure pleadings contain a plausible claim for antitrust relief under *Twombly*.
- Famous paintings, such as works by Jackson Pollock or Andy Warhol, might constitute a relevant submarket for purposes of antitrust pleading. But the exact contours of a submarket for Warhol artwork remains unclear and may overlook the possibility that other contemporary artwork could be economic substitutes for Warhols.
- Antitrust law has a rich body of precedent dealing with standards setting and certification that could also apply to art authentication. Those laws suggest there is a duty to administer authentication fairly and without hindering competition.
- Art authentication is likely subject to "rule of reason" antitrust analysis and therefore lawful unless the anticompetitive effects of the authentication process outweigh the procompetitive benefits. While courts usually will not analyze the substantive reasonableness of a standard itself, a court might reject a substantive standard if there is evidence it is patently arbitrary.

Gallery, Ltd., No. 90 Civ. 30(KMW), 1991 WL 136027 (S.D.N.Y. July 12, 1991); Kramer v. Pollock-Krasner Found., 890 F. Supp. 250 (S.D.N.Y. 1995); Lariviere v. Thaw, 2000 NY Slip Op. 50000(U), 2000 WL 33965732 (N.Y. Sup. Ct. June 26, 2000).

- Organizations authenticating artwork should avoid conflicts of interest—or perceived conflicts of interest—by ensuring no one involved in authentication sells potentially competing artwork. Procedural due process protections should be transparent and organizations should conduct periodic reviews to ensure internal compliance.