Counterfeit Art

John Henry Merryman*

> [T]ruth, whose mother is history, ...[1]
>
> Works of art have been counterfeited as long as they have been collected. ... The conflict between supply and demand ... constantly invites and stimulates forgery and makes of it a lingering evil.[2]
>
> We are afflicted not only with too many forgeries but also perhaps with too many disquisitions about forgery.[3]

Introduction

A Renaissance painting or a Greek pot or a Mayan stela is not only a work of art; it is a cultural artifact, one of a large, heterogeneous group of objects that are valued by collectors, acquired by and shown in museums and studied by scholars. Commonly referred to as 'cultural property', 'cultural objects' or 'cultural heritage', the category includes things that have *cultural* value or importance apart from their ornamental or utilitarian value. In addition to works of art, a shortlist would include archaeological and ethnographic objects. A longer list would include much more.[4] A cultural object embodies or expresses or evokes some aspect of the culture of its time and place. There is a public interest in the learning that can be derived from the study of such objects and the enjoyment that can be derived from looking at them.[5] Counterfeiters subvert that interest. They vandalize the human record.

"Counterfeiters ... vandalize the human record."

Calling the counterfeiter a cultural vandal clashes with our normally relaxed, almost congenial attitude toward such people. There is a little outlaw in most of us, and the counterfeiter is a beneficiary of the tolerance we accord to, and the envy or admiration many

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often feel for, one who defies conventions and accepted values.[6] We encourage such tolerance by inadequately accounting for the trouble counterfeiters make. Indeed, the suggestion that they do significant harm will seem surprising to many, although they would want the law to deal sternly with forgers of commercial paper or wills or counterfeiters of money.

This article is an attempt to consider the serious side of cultural counterfeiting.[7] We begin by examining a basic flaw in the attitude many of us bring to the topic, an attitude that we find dramatically displayed in what we can call the van Meegeren Problem.

The van Meegeren Problem

> But to the man who has never heard of either Vermeer or van Meegeren and who stands in front of *The Disciples* admiring it, it can make no difference whether he is told that it is a seventeenth-century Vermeer or a twentieth-century van Meegeren in the style of Vermeer.[8]
>
> There is clearly something wrong with a person who asks 'What is wrong with a forgery?'[9]

"... van Meegeren ... has come to symbolize serious art counterfeiters ..."

The Dutch painter Han van Meegeren became famous after World War II for the success of his counterfeits of Vermeer and De Hoogh, some of which had been authenticated by established experts and acquired by major museums.[10] He has come to symbolize serious art counterfeiters: people who combine technical skill, care in the choice of materials and familiarity with art history to produce convincing imitations of the work of other artists.

Van Meegeren became famous because of the then perceived[11] persuasiveness of his counterfeit Vermeers. Accused of collaborating with the Nazis because he had sold a national treasure – a supposed Vermeer entitled '*The Adultress*' – to Hermann Goering during the German occupation of The Netherlands, van Meegeren's objection that he should be considered a patriot because he had deceived the eminent Nazi with a fake was generally disbelieved. As a test, he was supplied with the necessary materials and produced a 'Vermeer' that, together with a technical inspection of his other confessed forgeries, convinced the court.[12] New discoveries of counterfeits continue to occur as time passes and as cultural history, connoisseurship and technical methods of authentication advance.[13] The better the counterfeit, the more difficult the discovery. At the limit is the hypothetical perfect counterfeit that cannot be distinguished from the real thing.

"At the limit is the hypothetical perfect counterfeit that cannot be distinguished from the real thing ... Hence, the van Meegeren Problem ..."

Hence, the van Meegeren Problem: if the painting we are looking at is indistinguishable from an authentic Vermeer, what importance does the fact of inauthenticity have? Isn't the perfect counterfeit,

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by definition, as good as an authentic work? And if it is, what attitude should society take toward the counterfeiter? What is the harm? Why should the counterfeiter be treated as a criminal? Why should the museum director, dealer or collector who happily buys a supposed De Chirico be unhappy when it is shown to be a counterfeit? Why does the market discriminate so sharply between authentic works and counterfeits, by placing a far lower value on the counterfeit, once it is so identified? Suppose the counterfeit is accepted as original by an unwary collector; why does bliss disappear when ignorance ends?

"... the van Meegeren Problem is a false problem ... made to seem real by the accidental conjunction of three disparate influences. One is the work of art populists ..."

As some readers will readily see, and as I shall explain further below, the van Meegeren Problem is a false problem. It has been made to seem real by the accidental conjunction of three disparate influences. One is found in the work of art populists, of whom Professor Banfield is an extreme example,[14] who see the concern about authenticity as one expression of an undesirable and insincere elitism in the visual arts, propagated by corrupt art historians who are tools of the monied class:

> In the United States, the profession of art historian came into being early in the present century when J.P.Morgan and others of the fabulously rich took to stocking their mansions and museums with the art treasures of Europe. In order for their kind of collecting to be a workable game, there had to be umpires whose authority all players in the game would accept. Bernard Berenson, working with Lord Duveen, was the first and most important of these. Soon every major collection had to have its own expert capable of proving that a work long thought to be minor was really major... Not surprisingly, in view of what they are trained and paid to do, art historians are often more sensitive to historical than to artistic values. In their eyes the authenticity of a work is of supreme importance.
>
> To a large extent, the art-interested public consists of college graduates who have learned from books and courses by art historians. Much of the public has been taught to see art as part of the history of culture, rather than as something to be responded to aesthetically. The professional's respect for the authentic, however inartistic, and his contempt for the inauthentic, however artistic, have all too often been communicated to his students and readers.[15]

That is an astonishing charge, particularly coming from a fellow academic. Professor Banfield attacks the entire discipline of art history, ignoring its distinguished origins in Europe and denigrating the imposing body of serious scholarship that American art historians have produced.

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"... people who sentimentalize about counterfeiters ... are a second influence."

Romanticizers, people who sentimentalize[16] about counterfeiters, are a second influence. There is an apparently inexhaustible popular market for romanticizing books and articles by and about art fakers. To name a few: Tom Keating, *The Fake's Progress* (1977) (Keating is a self-confessed art faker); Ann-Marie Stein, *Three Picassos before Breakfast* (1973) (about the exploits of convicted faker David Stein, by his wife); Clifford Irving, *Fake*! (1969) (this is a special case: Mr. Irving, who wrote this book about Elmyr de Höry, an art faker, later wrote a fake biography of Howard Hughes. Thus we have a book by a faker about a faker; it has sold a lot of copies.) Consider the title of a book by Charles Hamilton, *Great Forgers and Famous Fakes* (1980). 'Great?' There are many such books. They play on the van Meegeren Problem, exalting the counterfeiter's skill and motives, ignoring the harm counterfeits do, and demanding of the reader what is wrong with a good counterfeit.

"The third influence grows out of the unsurprising tendency of aesthetic philosophers to focus on aesthetic questions."

The third influence grows out of the unsurprising tendency of aesthetic philosophers to focus on aesthetic questions. Leaving historical concerns to others, they inquire whether a well-made copy is not *aesthetically* the equivalent of the original.[17] This allows the unwary reader to infer (and some unwary aestheticians to imply) that authenticity does not matter.

"Once the misunderstanding encouraged by these influences is resolved, the van Meegeren Problem evaporates ..."

Once the misunderstanding encouraged by these influences is resolved, the van Meegeren Problem evaporates, though it leaves an imposing residue of popular misconceptions about and consequent social ambiguity toward the counterfeiter and his work. The misconceptions and ambiguity are the sources of a set of real social/legal problems, which are discussed below. First, however, let us take a closer look at van Meegeren's '*Supper at Emmaus*', one of his most noted Vermeer counterfeits.

The painting now hangs in the Boymans-van Beuningen Museum in Rotterdam, a gift from the Dutch collector van Beuningen, a successful businessman who bought the painting from van Meegeren and continued to insist that it was a Vermeer long after it was universally attributed to van Meegeren by the art world. It is not a copy of an existing work attributed to Vermeer; it is a composition of the kind that Vermeer might have painted early in his career. The subject is an appropriate one in light of what is known about Vermeer's career, and the materials used, the manner of execution and style are consistent with Vermeer's work. Thus the painting is historically, technically and stylistically plausible, and since it is not a copy, there is no original with which to compare it. Such 'original' counterfeits[18] present particularly difficult problems for the authenticator, but other varieties are also troublesome. Thus a persuasive copy of a known work will, until it is definitively shown which is the original and which the copy, cast doubt on the original. Where it cannot be conclusively shown which is which, the unsettled question arises again, and again. A famous example is the Leonardo painting

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called *La Belle Ferronière*, in the Louvre. Another version of the same picture in private hands was the subject of the famous case of *Hahn* v *Duveen*.[19] The owner, Mrs. Hahn, represented that hers was painted by Leonardo. Duveen said that it was not and that the original was in the Louvre. Mrs. Hahn sued Duveen for damages, and the authenticity of Hahn's version was accordingly a central issue unfortunately left unresolved by settlement of the case. The Hahn *Belle* is still around, still offered as a genuine Leonardo.[20] False attributions, sometimes achieved by replacing the lesser figure's signature with that of the master – painting out the signature of a lesser artist and forging Rembrandt's name, for example – are another variation. Or the counterfeiter may copy bits of authentic works and combine them into one 'pastiche'. We could use the terms 'fake', 'copy', 'forgery' and 'pastiche' for these varieties. They are not exclusive categories: fakes frequently include elements of pastiche;[21] fakes, copies and pastiches often include forged signatures or monograms. When they are of comparable quality, a forgery or a pastiche may be indistinguishable in effect from a fake. In these terms The *Supper at Emmaus* would be a 'fake'. The term 'counterfeit' refers to any or all of them.

There are two reasons why a perfect counterfeit is inferior to an authentic work. The first has to do with the relationship between knowledge and perception. Suppose we distinguish between 'truth' questions and 'beauty' questions about cultural objects. According to the view implicit in the van Meegeren Problem, the 'beauty' questions are independent of authenticity; whether the van Meegeren *Supper at Emmaus* is aesthetically significant has nothing to do with its authenticity as a Vermeer. Vermeer was a great master, but it is reasonable to suppose that others might produce works of equal or greater aesthetic quality. Knowing that a painting is by Vermeer does not add to its inherent quality, just as knowing that it is not by Vermeer leaves the object unchanged. Beauty is of course subjective, and styles and standards change, but the intrinsic qualities of the object in question – the painting – are unaffected. Taking this view, the way people behave (placing a high value on authentic objects and disdaining quality counterfeits) is inexplicable and unjustifiable. This is the simplest form of the 'van Meegeren problem'.

"There are two reasons why a perfect counterfeit is inferior to an authentic work. The first has to do with the relationship between knowledge and perception."

Such thinking seriously oversimplifies matters. Aesthetic quality does not reside exclusively in the object. As the old saw has it, 'beauty is in the eye of the beholder'. The observer perceives and evaluates the work. There is no immaculate perception.

"Aesthetic quality does not reside exclusively in the object."

> The difference between *seeing* or merely *looking at* a thing and *seeing that* it has certain qualities is often lost on aestheticians. Their view, too often, is that we need to bring to aesthetic experience no concepts whatever: that we perceive that a

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painting is balanced or passionate, for example, by contemplating it with an open but empty mind. This is absurd.[22]

"Discovery that the painting is a fake changes the way it is perceived."

The expectation that the work is a Vermeer affects our way of seeing and evaluating it. Discovery that the painting is a fake changes the way it is perceived.

> [W]hen they find that the work of art they have acquired is 'wrong', or at least questionable, they will almost always tell you that it seems to 'fall to pieces'.
> It is most striking, in fact, how often very different collectors use this same phrase to describe this kind of disillusionment. It means – it really does mean, for the collectors themselves will tell you so – that the unwelcome news that an admired work of art is a fake can affect the actual visual perception of that work by highly trained eyes.[23]

Recognition that the viewer brings something to the act of perception thus subverts the van Meegeren Problem.[24]

"... the counterfeit ... is an objectified falsehood.

The problem vanishes entirely if we approach the counterfeit as the object of 'truth' questions: '[A] forgery distorts our view of art history and hence our view of other works of art...'[25] By definition, the counterfeit lacks authenticity. It is an objectified falsehood, historically distinguishable from the Vermeer it purports to be because Vermeer did not make it or authorize it to be made or supervise its making or accept it as a Vermeer. It is a van Meegeren and authentically plays its role in our cultural history only as a van Meegeren. Together with other van Meegerens, it forms a body of work that can be evaluated in art historical terms. In those terms, van Meegeren is remarkable only as a counterfeiter. He made no other cultural contribution, either as an innovater or as a member of an influential school or movement. Aside from his success in imitating the work of Vermeer and others his artistic product was insignificant.

The art market empirically verifies the distinct contributions of historical and aesthetic considerations to society's valuation of works of art; both are usually in play. A Vermeer offered for sale as a Vermeer will bring a price representing both its aesthetic appeal and the complex of values placed by society on any work by Vermeer. When a van Meegeren successfully posing as a Vermeer is offered for sale, the same phenomenon applies, and Vermeer values come into play. But when the van Meegeren is offered as a van Meegeren, the historical judgments applicable to a Vermeer no longer apply, and the market reflects this fact. The statement that:

> Since the boom in art collecting in the nineteenth century there has been a tendency to equate the financial value of a work of art with its aesthetic value.[26]

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has it exactly wrong. Aesthetic quality is not irrelevant; there is always a market for a well-made, beautiful or powerfully moving painting, and a better Vermeer will bring a higher price than a bad one. But the worst Vermeer will bring a far higher price than the best van Meegeren. The market strongly favors truth over beauty.

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Truth is also favored in non-market situations. The British have the Elgin Marbles in London, and the Greek government agitates for their return. The suggestion that well-made copies would serve as well as the originals is rejected by both parties. The Greeks want the originals, and the British want to keep them.[27] The entire cultural property repatriation movement[28] would evaporate if accurate reproductions would serve as well as originals. The illegal international traffic in cultural objects exists because nations want to retain, and collectors, museums and scholars – and hence dealers – want to acquire, enjoy and study originals.[29] There is an entire museum dedicated to replicas of great works of art in Rome (the Museum of the History of Roman Civilization in EUR), rooms full of such replicas in the Victoria and Albert Museum in London and similar collections in other museums. In an era when museums are usually crowded, these are typically empty of visitors. People want to see the real thing. 'Copies are always second best...'[30]

"The entire cultural property repatriation movement would evaporate if accurate reproductions would serve as well as originals."

"People want to see the real thing."

If we compare the attitude toward works of art with other kinds of cultural property, the point becomes even clearer. Suppose a collector buys a letter purportedly written by Thomas Jefferson. If the letter is treated as authentic, its contents can significantly affect our understanding of American history during the formative years of the Republic. It is a valuable historical document, however pleasant ('aesthetic') or unpleasant its contents may be. The same is true of a painting by Vermeer: if authentic, it is a valuable document, a piece of our cultural history. So, too, of the manuscript of an undiscovered story by Balzac or a newly-found violin sonata by Mozart. Even if these works are not themselves peaks in the creative careers of their composers, they are historically significant. The question of authenticity is basic; if they are real, they change in some measure what we know of our past.

"Even if ... works are not themselves peaks in the creative careers of their composers, they are historically significant ... if they are real, they change in some measure what are know of our past."

The van Meegeren Problem can be made to seem to be a real problem only by (1) restricting our attention to the aesthetic quality of the object and (2) disregarding the relationship of perceived authenticity to aesthetic effect. If we admit history to the inquiry, authenticity assumes primary importance, and the problem vanishes.[31] The well-made counterfeit is not 'just as good as' the authentic work. The best fake Picasso still is not a Picasso. One who insists that successful counterfeits are equivalent to authentic works exalts counterfeiters, demeans creativity and misses the point of cultural history. Most readers would probably agree that these are significant offences, though others might dismiss them as unduly recondite or trivial. There is, however, another side to the van Meegeren problem: counterfeits make real trouble and do real harm.

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The Bad That Good Counterfeits Do

'Anyway, what's wrong with a good honest forgery?'[32]

The social indictment of counterfeit cultural objects contains a number of counts. They are morally offensive; they impair the search for truth; they skew the allocation of scarce resources; they misrepresent the artist; and they are convenient instruments of fraud. The 'better' – i. e. the more successful – the counterfeit, the more such trouble it makes.

Morality

"The immorality of counterfeiting cultural objects ... is deceives ... deliberate deception for selfish purposes is hardly an admirable activity."

The immorality of counterfeiting cultural objects, or anything else, is obvious and needs little discussion. Deliberate deception for selfish purposes is hardly an admirable activity. That works of art or other cultural objects are involved is only incidental; there is no basic difference between the art counterfeiter and others who set out to deceive and defraud. The social judgment of immorality embodied in the criminal law of forgery, deceit and fraud of other kinds applies equally to culture counterfeiters. (Some counterfeiters would appear to disagree. Consider Anne-Marie Stein's complaint about her art-forging husband's misfortunes: 'I do not believe that David committed a crime serious enough to warrant his imprisonment here for a year and a half and two more imprisonments in France. He did not take anyone's life, nor had he harmed the hair on anyone's body. *He merely took people's money.*' (emphasis supplied).[33] Clifford Irving wrote that the art counterfeiter de Höry insisted that he was not a criminal since he had not stolen from the poor or killed anyone, was not an extortionist or a member of the Mafia.)[34]

"The van Meegeren Problem lies at the bottom of any confusion that we may feel about the morality of cultural counterfeiting ..."

The van Meegeren Problem lies at the bottom of any confusion that we may feel about the morality of cultural counterfeiting because it diverts our attention from the importance of authenticity. It is easy for the populist who advocates wide circulation of reproductions and denigrates the concern for historical authenticity to accept counterfeits as merely another type of reproduction. The romantic/sentimentalist excuses the faker because he is a creator of beautiful things and/or a crusader against the hypocrisy of the art world. To the aesthetic philosopher the interesting question is whether the counterfeit is aesthetically successful; the morality issue does not arise because authenticity is not a concern.

Truth

"... good counterfeits ... confuse and misdirect the search for valid learning."

The most serious harm that good counterfeits do is to confuse and misdirect the search for valid learning. The counterfeit object falsifies history and misdirects inquiry. We care about authenticity because we want to know the truth about ourselves and our past, to know

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how earlier societies lived their lives and expressed their values, to know who we are and where we come from.[35] In the study of cultural objects, authenticity is essential to validity. It is the same for all serious inquiry. As in science we seek validity and scorn false data and rigged results, so in cultural history we seek authenticity and denigrate counterfeits.

Society makes a substantial investment in the quest for cultural truth: the thousands of museums and libraries in which cultural objects are preserved, studied, verified, attributed and interpreted; the university departments of anthropology, archaeology, art and history, and the imposing body of scholarship that they produce about, or based on, cultural objects. Consider, for example, the amount of talent, scholarship and supporting infrastructure that has gone into restoration of the Michelangelo frescos in the Sistine Chapel in Rome.[36] Or consider the Rembrandt Study Project which, for several years, has engaged a group of distinguished scholars and extensive resources in an effort to assess all works attributed to Rembrandt and produce an authoritative restatement of the Rembrandt corpus.[37] Comparable, if less elaborate, enterprises of this kind are constantly going on. Truth about the culture is, in its way, as important to humanity as truth of other kinds — as scientific truth, for example.

Counterfeits corrupt the stream of information about cultural objects. If we think of the culture as a kind of environment — the cultural environment — then it is not fanciful to call the counterfeiter a polluter. Worse, he is a deliberate polluter, conscious and unconcerned. Worse yet, his pollutant is not, like the emissions from a coal-fired power plant, the by-product of some useful activity; it is his primary product. Counterfeit works of art are themselves authentic cultural objects whose study can tell us something about their producers and about ourselves. But until they are correctly identified and labeled and removed from commerce they can only mislead, misinform, misrepresent.

"... corrupt the stream of information about cultural objects."

Resource Allocation

Museum and art historical resources are always limited. What gets acquired, displayed, conserved and studied is the result of a continuous process of *triage* in which some objects can be favored only at the expense of others. Counterfeit objects distort the process. Money used to buy the counterfeit could have been used to acquire an authentic work or spent on some supporting good or service. The fake painting that hangs in the museum fills exhibition space that an authentic work left in storage might have occupied. The inauthentic object given conservation treatment uses resources that would be better spent on genuine artifacts needing care. The time and learning

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"... the brooding threat posed by ... counterfeits requires that scarce resources be spent in constantly scrutinizing acquisitions and collections ..."

spent in studying the fake could have been devoted to other objects. In addition, the brooding threat posed by the existence of counterfeits requires that scarce resources be spent in constantly scrutinizing acquisitions and collections to detect and remove possible counterfeits.

Misrepresenting the Artist

A group of more than 150 fake Rodin drawings was consigned to Sotheby Parke-Bernet, a leading New York auction house, in 1975. They were authenticated by a young scholar from Harvard, trained on the Rodin drawings in the Fogg Museum, who commented that the Sotheby Rodins displayed the same qualities, including 'poor draftsmanship', as those in the Fogg. In fact, both the consigned drawings and the Fogg examples were the work of Ernst Dürig, a well-known and prolific Rodin faker. In this case the mistake was corrected by the intervention of a senior Rodin scholar, but Dürig's fakes permeate museum collections and the offerings of art dealers and auctioneers throughout the world, misrepresenting the work and impairing the reputation of an historically important artist.[38]

"A counterfeiter seldom adds favourably to the reputation of his artist-victim ... and in any case ... always misrepresents the artist's intentions and standards."

A counterfeiter seldom adds favorably to the reputation of his artist-victim, almost invariably the contrary, and in any case the counterfeiter always misrepresents the artist's intentions and standards. The same 'personality interest' of the artist that is protected by the 'right of integrity' is violated by the counterfeiter. (The right of integrity, also called the right of respect, is an aspect of the moral right of the artist. It protects the artist against alteration of his work after it leaves his hands.)[39] Like those who alter an artist's work, those who fake it misrepresent the artist. 'The single forged Rembrandt painting changes the whole conception of Rembrandt and ... certainly not for the better'.[40]

Fraud

"... counterfeit cultural objects are instruments of fraud."

There remains the most obvious harm of all: counterfeit cultural objects are instruments of fraud. Most are created in order to deceive and defraud, but even 'innocent' counterfeits can, and often will, be so used. The same considerations of justice and social order that make deliberate fraud of other kinds criminal apply equally to fraud through the medium of counterfeit art. Such fraud can take other forms than merely offering the counterfeit for sale as authentic. A restorer may keep the original and return a counterfeit to the owner; if the work looks different that can be explained as a result of restoration work. Or a thief might postpone discovery of the theft by leaving a counterfeit in place of the work stolen. This possibility that 'fakes can be used for theft or the fraudulent transformation of authentic objects' has led UNESCO to urge that 'measures must be taken to prevent their circulation'.[41]

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The proposition that art counterfeiters do significant harm will come as no surprise to most readers. Still, the argument is incomplete until we have seen the case for the other side. Do cultural counterfeiters do good as well as bad? A look at the justifications/rationalizations offered for what counterfeiters do is interesting, has specific relevance to the art world, and reintroduces the van Meegeren Problem in slightly more sophisticated form.

The Counterfeiter's Apologia

The combination of populism, romance and narrow focus described earlier clouds society's view of the nature and consequences of art fraud. It makes a culture [sic] hero of the counterfeiter, conceals the harm counterfeits do, creates ambiguity in public policy toward counterfeiters and counterfeits, and leads to uncertain enforcement of existing law. The resulting complaisance and confusion are encouraged by a set of stock ideas used by counterfeiters and their apologists to justify what they do and divert attention from the trouble they make.

"... the apologia pictures the counterfeiters victims as wealthy collectors and pompous experts."

The commonest element in the apologia pictures the counterfeiter's victims as wealthy collectors and pompous experts. In this scenario the counterfeiter is a Robin Hood who takes from the undeserving rich and merrily exposes empty pretension. The scenario has an undeniable appeal. The wealthy collector who gets fooled is hardly a tragic figure. Popular culture admires the forger who can deceive the experts. Van Meegeren arguably performed a patriotic act when he sold a fake Vermeer to Hermann Goering during the German occupation of the Netherlands in World War II. It is difficult to feel sympathy for people who seek status by hanging something with a great artist's name on it over the fireplace. There is pretense and posturing in the art world, and 'There is something which appeals to the anarchic strain in all of us about the "experts" – those pompous connoisseurs are always putting us in our places – being taken for a ride'.[42]

"The counterfeiter's typical victim is an inexperienced colletor."

This sentimental view of the counterfeiter ignores the fact that innocent people who are not experts or wealthy collectors or Nazis also get defrauded. Wealthy collectors are in fact less likely to be victimized; they have easy access to expert advice and tend to buy through established dealers and auctioneers who take care in what they offer and readily accept the return of questioned works. Since the quality of most counterfeits is low, experts seldom are deceived by them. The counterfeiter's typical victim is an inexperienced collector. This fact is illustrated by the Dali print scandals. Whether sold over the telephone or in establishments calling themselves 'art galleries', phoney Dali prints that are really nothing but photomechanical reproductions with forged signatures and deceptive numbers that cost the seller $25 to $50 are sold in large numbers to a

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gullible public at prices as high as $3000. Such works, usually promoted as 'good investments', in fact have no secondary market. Dealers don't want them and auction houses refuse to accept them. No one with even a slight familiarity with the art world, and certainly no 'wealthy collector' or 'expert', would touch them. Still, until state and federal authorities began to investigate and prosecute these clearly fraudulent enterprises in the late 1980s, the amount spent by the uninformed public on fake Dali prints was in the tens of millions of dollars a year.[43]

Dealers are another villain in the counterfeiter's apologia. Thus Tom Keating:

> As well as the old masters, I had also made a close study of the lives and work of the French Impressionists. It seemed disgraceful to me how many of them had died in poverty. All their lives they had been exploited by unscrupulous dealers and then, as if to dishonour their memory, these same dealers continued to exploit them in death. I was determined to do what I could to avenge my brothers and it was to this end that I decided to turn my hand to Sexton Blaking.[44]

"The notion that faking is justified as revenge on dealers or restorers is difficult to take seriously."

The notion that faking is justified as revenge on dealers or restorers is difficult to take seriously. Though the accusation that dealers are exploiters is congenial folklore among unsuccessful artists, it lies uneasily in the mouth of an exploitative (exploiting the credulous and the gullible among the art public) counterfeiter. Even if it were true that the Impressionists died poor (they didn't), what dealer living today was in any way responsible? In the contemporary art world, where some artists in their 30s are multimillionaires and have 'retrospective' exhibitions in major museums, often as the result of diligent and skilful promotion by dealers, the characterization of dealers as exploiters of artists loses all meaning. Dealers would not, in any case, be the principal victims of Mr. Keating's revenge, which would instead be borne by the innocent art-buying public. Finally, what possible benefit is there to the dead artist, or his heirs, in counterfeiting his work? How does misrepresenting the artist by making and circulating fakes accomplish anything beneficial to him? As shown earlier, fakes hurt the artist's reputation.

"How does misrepresenting the artist by making and circulating fakes accomplish anything beneficial to him?"

Mr. Keating's book also contains this effort by a supporter:

> Some people might argue that to work in another artist's style automatically precludes originality or 'inspiration'. But they do so at their peril, for the history of art is a history of borrowings and adaptations. All artists lean on the experience and achievements of others and the work of different artists is often hard to tell apart, even when there has been no conscious effort to deceive... The word 'fake' sets up highly derogatory vibrations... In fact, to be a successful 'Sexton Blaker' you must

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> have a technical facility which equals or nearly equals that of the artist you are copying; moreover, you must have the spiritual sensitivity to assimilate, and to some extent share, his inspiration. In other words, you must be an artist... We allow [artists] to stand, as it were, outside society and its mores. Now, if you have followed my argument that picture fakers are artists, in spite of the negative connotation of the word 'fake', it follows that they too stand outside society and should not be judged by conventional standards. Tom Keating is ... an artist.[45]

There are several interesting fallacies here. First, as to originality, all would agree that artists are influenced by the work of other artists and that the history of art informs what schooled artists produce today. That, however, is true in all creative fields, whether literature, music, dance, mathematics or theoretical physics. But we easily distinguish the kind of 'influence' Manet had on Picasso from his 'influence' on someone who fakes his work. No one would mistake Picasso's variations on Manet's *Déjeuner sur l'herbe* for the original, or any other, work by Manet. The more an artist's work truly resembles, and is accordingly difficult to distinguish from, another's, the less interesting it is likely to be. The artist who survives as a figure in art history does so on the basis of his own distinctive contribution, not on the similarity of his works to those of other artists.

"The more an artist's work truly resembles ... another's, the less interesting it is likely to be."

A related assumption, about craft as the measure of artistic excellence, further mars the Keating apologia. Some degree of skill in the mechanics of drawing and in handling the materials of painting or sculpture is necesssary for the creation of visual art, just as vocabulary, grammar and syntax are the basic equipment of a writer. To be a competent grammarian, however, does not make one's writing literature. So with art; craft may be necessary, but it is not sufficient. Originality of conception and of style, medium and format, plus the accumulation of a body of highly regarded work, are the marks of artistic greatness today. The related assumptions that copying is 'as good as' creating and that craft is the mark of artistic merit merely restate the van Meegeren Problem in slightly different form. A painter who accurately copies a work by Matisse has no more shown that he is a great artist than a writer who accurately copies Hamlet has shown that he is a great dramatist. Faking – producing a work of the sort that the great artist might have made – is a step above mere copying, but it still is imitation, an exercise in mere craft. We respect the creative act, not the emulative act. The confusion about craft and artistic quality is illustrated by the stock figure of the viewer standing in front of a minimalist painting by, say, Ellsworth Kelly who says: 'My kid could do that'. A good answer is: 'After the artist showed her what to do, perhaps; before, very unlikely'. Keating's fluency in imitating the work of great artists does not make him great.

"To be a competent grammarian ... does not make one's writing literature. So with art; craft may be necessary, but it is not sufficient ... A painter who accurately copies a work by Matisse has no more shown that he is a great artist than a writer who accurately copies Hamlet has shown that he is a great dramatist."

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The Keating apologia contains another idea, that artists 'stand outside society and its mores' and 'should not be judged by conventional standards'. There is of course a substantial history of thought and a body of literature[46] supporting the idea that the rules should be bent to permit the expression of genius. The same notion is palely reflected in the constitutional doctrine that otherwise obscene works of art may not be legally repressed if they have 'serious artistic value'.[47] But the idea behind such attitudes is that 'conventional standards' may repress creativity. To use such reasoning to excuse counterfeiters, whose work is the antithesis of creativity, would be perverse.

The motives of art counterfeiters are sometimes complex. Vanity may be a prominent element, as Keating's and Stein's flamboyance shows. Joseph Alsop writes that:

> [T]alented art fakers are seldom content with money alone. When their works succeed, and all the world of art says their works are great, art fakers then tend to hanker for recognition as great themselves.[48]

Even successful artists may become counterfeiters out of a kind of vanity: Ernst Ludwig Kirchner predated some of his works, perhaps to promote his position in history as an artistic innovator.[49] Giorgio De Chirico also predated paintings and may be the only artist ever judicially found to have counterfeited his own work, but in his case the motive seems to have been profit; his early surrealist works had a much stronger market than his later versions of similar subjects – a 1916 *Piazza d'Italia* was worth a great deal more than one painted three decades later. De Chirico was also found to have committed what might be called 'reverse counterfeiting' by declaring an authentic work to be false (the court, relying on the testimony of experts in preference to the painter's own testimony, found the work genuine).[50] Other major contemporary artists are commonly believed by knowledgable people in the art world to have pre-dated later works done in their own earlier styles to cash in on the higher market value their earlier works command.

"Giorgio de Chirico ... may be the only artist ever judicially found to have counterfeited his own work ..."

The principal motive of art counterfeiters, in fact, is profit. That is as true of the Rockefeller Collection[51] as it is of de Höry, Keating, Stein and van Meegeren. Other motives – revenge on society, exposing the gullibility of experts and the vanity of collectors, protesting against the commodification of art, making great art available to a wider public, etc. – are at best secondary motives and at worst disingenuous rationalizations. Art counterfeiting, like counterfeiting of other kinds, offers the opportunity for easy profits and is for this reason attractive.

"The principal motive of art counterfeiters ... is profit."

> If we examine the various motives which may induce a person to make artistic counterfeits, the most frequent and powerful

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> is, no doubt, the hope of financial reward ... even the earliest art forgeries known to us, those of ancient Rome, were made with an eye to financial gain.[52]

The secondary motives and rationalizations serve two purposes: as self-justifications and self-image builders for counterfeiters, and to divert attention from the social and cultural mischief counterfeits do.

The 'Forgeries By Stein' Case

"Some readers ... will be sobered by considering the opinion of Judge Fein in *State v Wright Hepburn Webster Gallery Ltd.*"

Some readers will have grown impatient with this exposition. Why, they inquire, should so much effort be spent to refute arguments that are so transparently specious? They will be sobered by considering the opinion of Judge Fein in *State* v *Wright Hepburn Webster Gallery, Ltd*[53] The case was an attempt by the New York Attorney-General to enjoin the sale of counterfeit paintings made by David Stein.[54] Stein had been convicted of 'counterfeiting art work and grand larceny' and had served time in New York. Deported to France, he was convicted and imprisoned for selling art forgeries in that country. While in prison he was permitted by the French authorities to continue to produce paintings in the style of Chagall, Matisse, Picasso, Braque and others, provided that they bore his own signature. A number of those works were exhibited for sale by defendant gallery, which advertised them as 'Forgeries By Stein'. The court rejected the Attorney-General's application in an opinion by Judge Fein that includes the following statements:

> Stein ... mastered the styles of such great artists as Chagall, Picasso, Matisse, Braque, Klee, Miro, Cocteau and Rouault... The court is asked to [prevent] this man from earning a livelihood by utilizing his peculiar and unusual talents. It cannot be disputed that whatever Stein's motives, he is an artist... His work in perfecting the style of the masters may properly be ascribed to that special talent with which true artists are uniquely endowed... In this context, perhaps consideration should be given to Goethe's query: 'People are always talking about originality; but what do they mean? As soon as we are born the world begins to work upon us, and keeps on to the end. What can we call ours, except energy, strength, will? If I could give an account of what I owe to great predecessors and contemporaries, there would be but a small remainder'... It must be seriously doubted whether the court, at the instance of the State, should prevent conscious appropriation of knowledge where no deception of the public is proven.

Perhaps the defendant art gallery had an unusually clever and persuasive lawyer, and perhaps the Attorney-General's case was

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poorly presented. Judge Fein may have read and been carried away by some of the sentimental literature about art fakers. We do not know the reasons, but this is the only published US decision to discuss the topic, and in it we find the judge equating simulation with creation and craft with artistic excellence. He describes Stein as having 'mastered' and 'perfected' the styles of great artists and as having 'that special talent with which true artists are uniquely endowed'. The opinion exudes admiration for the counterfeiter. The mischief these counterfeits might do is brushed aside in the judge's eagerness to protect Stein's right to 'earn a living by utilizing his peculiar and unusual talents'.

"... we find the judge equating simulation with creation and craft with artistic excellence ... The opion exudes admiration for the counterfeiter."

Judge Fein repeatedly emphasized that the paintings in question, though intended and advertised as 'forgeries' of Matisse, Picasso and others, did not bear the forged signatures of those artists but were instead initialed 'D.S.' The Attorney-General argued that these initials could easily be replaced by forged signatures and that the painting itself was the offending object, since it could deceive incautious and inexperienced collectors. Judge Fein responded:

> However fraudulent or criminal his past transgressions have been, they cannot militate against Stein's right as an artist to sell his own works, acknowledged as such... The signature of Stein on these paintings establishes there is no forgery... Neither this advertising [the exhibition was advertised as 'Forgeries By Stein'] nor the possibility or suspicion that in the future someone may remove Stein's name and substitute the name or signature of one of the masters is a sufficient basis for finding that the exhibition and sale of these paintings is a public nuisance.[55]

"There is something simple-minded about the idea that counterfeits are harmless if they do not bear forged signatures, when it is not the authenticity of the signature that is in question. The problem is with the work itself ...."

In a way, Judge Fein's statement is another expression of the van Meegeren Problem. There is something simple-minded about the idea that counterfeits are harmless if they do not bear forged signatures, when it is not the authenticity of the signature that is in question. The problem is with the work itself; whether or not the object is authentic is the crucial question. Judge Fein's reasoning would, if extended, allow counterfeit $100 bills to circulate if the counterfeiter signed them with her own name, rather than that of the Treasurer of the United States. Forgery of signatures is only one form of counterfeiting, and we have a developed body of law to deal with that. Forgery of artists' images and styles to produce works that can pass as authentic is a different and more troublesome kind of activity. Like the French, who allowed Stein to continue to produce counterfeit Matisses while in prison so long as he signed them with his own name, Judge Fein's attention was diverted from the question of counterfeit art, which is legally novel and socially interesting, to the authenticity of signatures, which is familiar and of dubious relevance.

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The Ubiquity Of Counterfeits: A Taxonomy

Counterfeit works of art abound. Their extent obviously cannot be accurately measured, but the tendency among those unfamiliar with the art market is to underestimate it. Thomas Hoving, the flamboyant former Director of the Metropolitan Museum, 'estimates that 40 per cent of the art on the market today, with the exception of contemporary works, is fake'.[56] Consider one painter, Ingres, of whom 'A Paris connoisseur complained: "In a single month I have been shown at least three times as many works as Ingres can possibly have painted."'[57] Corot has been a particular victim of counterfeiters. It is often said that of the 2,000 works painted by Corot in his lifetime, 6,000 are in the United States alone. Schüller reports that 'No less than 235 "Corots" were exported to France in 1888 from a single Brussels workshop' and 'The Berlin art dealer Paul Cassirer reports that after the war some two hundred "Corots" were offered him by soldiers on leave'.[58] 'A Dr. Jousseaune boasted of possessing between two and three thousand drawings by the master without ever having paid more than 110 francs each for them.'[59] Utrillo's market is notoriously fake-ridden:

> The Parisian post-impressionist master, who died in 1955, painted 2,000 works but there is growing evidence that as many as 20,000 certificates of authenticity of Utrillo works have been granted [by French experts].[60]

There are thousands of fake Rodin sculptures and drawings. The number of counterfeit 'fine prints' is of course much larger; one company alone, Magui Publishers Inc., has been accused of producing at least 22,000 of them – mostly counterfeit Dalis.[61]

The art world is riddled with imitations that vary widely in two important particulars: (1) the intentions of those who produced them and (2) the ease with which they can pass, or be made to pass, as authentic. At one extreme are poster-quality color reproductions of paintings of the kind that museum and other bookstores commonly sell. They are produced without guile and could not be taken by a reasonably alert person to be originals. They are harmless reproductions. At the opposite extreme are works made with the intent to deceive that look enough like the real thing to pass inspection by any but the most expert and skeptical dealer, curator or collector.[62] Between the extremes are a number of varieties. Here are some typical examples.

"Counterfeit works of art abound ... It is often said that of the 2,000 works painted by Corot in his lifetime, 6,000 are in the United States alone."

"The art world is riddled with imitations that vary widely in two important particulars: (1) the intentions of those who produced then and (2) the ease with which they can pass, or be made to pass, as authentic."

Photomechanical Reproductions

There is a substantial industry in making and selling reproductions of works of art and other cultural objects. Most commonly the reproduction is in a different medium on a different support than

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the original – oil paintings on canvas are photomechanically reproduced as color printing on paper, for example – and create no problem. Such reproductions are clearly and indelibly distinguishable from the originals. Even so, unscrupulous people can frame and offer such reproductions as 'fine prints', with or without added signatures and limited edition numbers, and some extremely gullible people will pay 'fine print' prices for them. The purchaser need not be so gullible to be taken in by a photomechanical reproduction of a work that, in the original, is itself a 'fine print', since both are made by printing on paper. Since prints are issued in multiple form, a photomechanical reproduction with a forged or reproduced signature and edition number cannot easily be distinguished from an example from the authentic edition. The increasing market value of authentic prints by important artists has naturally led to widespread production of this kind of counterfeit of prints by, for example, Picasso, Miro and Chagall.[63]

"The increasing market value of authentic prints by important artists has naturally led to widespread production of this kind of counterfeit of prints by, for example, Picasso, Miro and Chagall."

Exact Reproductions

Some reproductions emulate the original not only in the image but in the medium. Reproductions on paper of works on paper, such as the reproductions of Picasso, Miro and Chagall prints just discussed, are one variety. Here are some others:

> When is a fake not a fake? The answer, to the growing profit of a number of market-wise artists and dealers, is when everybody knows it's a fake... Daniel Delamare, a 34-year old Parisian, decided to open an entire gallery devoted to exacting reproductions of the great masterpieces... Delamare has already sold 140 'legitimate copies', as he prefers to call them... Everything down to the size and the frame style is a duplicate of the original: Delamare interviewed hundreds of artists across Europe to find painters who could not only produce faithful copies but who would also be able to retain the spirit and vitality of the original...
>
> In an attempt to remove any residual taint of impropriety about the business ... Delamare negotiates directly with the owners of private collections and with national museums for the right to copy specific masterpieces complete with authentic signature... The price: About $10,000 to $15,000, more for larger than normal works... The canvas is stamped with the word COPY in large letters on the back.[64]

"Exotic as it may seem to some ... this enterprise is far from unique."

Exotic as it may seem to some (what may seem exotic is not that there is a market for such works, which meet a demand for decorative objects of certified good taste, but that their open production and marketing with 'authentic' signatures and other assurances of indistinguishability from the originals is tolerated: the van Meegeren

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Problem again.), this enterprise is far from unique. There are operations comparable to that of Mr. Delamare in Cremona, Italy, where something calling itself the 'Museo dell'immaginario' openly produces and markets copies of paintings with forged signatures;[65] Chicago, where the candidly self-denominated Forgery of the Month, Inc., once thrived;[66] and New York, where The Rockefeller Collection, established during former Governor Nelson Rockefeller's life to sell replicas of works in his personal art collection, survived his death and, in the 1980s, maintained a boutique on 57th Street in New York and sold through the mail with widely distributed catalogs. It is a highly visible example of the practice of publishing and selling objects that are promoted as *exact* reproductions and that sometimes include signatures and, in the case of fine prints, numbers. The practice with reproductions of sculptures is even more questionable. Thus Rodin's *Age of Bronze* is offered in a Nelson Rockefeller Collection catalog in a 'limited edition of 150 individually numbered pieces' and another Rodin, *Torso of Adele*, in a 'numbered First Edition limited to 250 pieces'.[67] A bronze *Torso* by Gaston Lachaise is offered in 'A numbered First Edition limited to 350 pieces'. *First Edition*? And in describing a replica of a nineteenth century American hand-carved wood fish, the catalog states: 'To match the color and texture of the original, old wood has been used'.[68]

"Even museums enter the exact reproduction business."

Even museums enter the exact reproduction business. In 1986 the Palace Museum in Beijing began selling exact reproductions of ancient Chinese bronzes 'to the exact scale of the originals ... using alloys of the same metallurgical composition as the originals'.[69] The Museum Store Association, an American group, would clearly disapprove such a project. Its Code of Ethics provides:

> Their [reproductions, replicas and derived products] sale in museum stores must be carefully regulated because of the ease with which they may be misperceived by the public... All reproductions and replicas must be clearly and indelibly identified as such. Advertising which implies that reproductions are in fact original works is unethical, misleading and in some instances illegal. Likewise any representation which suggests that the value of a reproduction appreciates is unacceptable.[70]

Though exact reproductions are seldom truly exact in the sense that a qualified expert could not distinguish them, many are close enough to mislead the art-buying and art-viewing public. The problem is particularly acute with bronze sculptures, whether casts made from the original models or molds or surmoulages made from prior casts.[71]

Study Copies

Student artists learn by copying the works of masters. The practice is time-honored and the motivation benign. Still, the resulting copies,

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"The more persuasive the copy the greater the possibility of confusion and ease of misuse."

if accurate, can create confusion and invite misrepresentation. The more persuasive the copy the greater the possibility of confusion and ease of misuse. Museums typically impose restrictions on copiers — such as requiring that the copy be significantly larger or smaller than the original — in order to limit the trouble such copies can make.

Style Studies

Student artists also frequently learn by making works in the style of admired masters. Thus, before he developed his own style, Arshile Gorky studiously emulated the styles of Cézanne and Braque, among others, producing works that could plausibly have been attributed to them.[72] Gorky signed these works, and the standard catalog raisonée of his paintings clearly illustrates and identifies them, so that the danger that they will successfully pass as works by Cézanne or Braque is reduced. There is a substantial market for works by Gorky, even those from the time when he worked in others' styles, which tends to protect their identity as Gorkys. But where the student is not herself a famous, well-documented artist the style studies she produces can, if well made, pass as works by the master. The student may have no intention to deceive, but to potential victims a skillful style study is as misleading as a deliberate fake.

"... to potential victims a skillful style study is as misleading as a deliberate fake."

Simulationist Art

In the 1980s a group of artists variously called 'simulationists' or 'appropriators' thrived in New York.[73] The best-known of them are Mike Bidlo, Sherry Levine and Elaine Sturtevant. Bidlo had a one-man show at the Leo Castelli Gallery, until then the most respected of contemporary art galleries, in 1988. He copies works by other artists, in the original dimensions and media. Bidlo's works are not interpretations or variations on themes; they are copies. The Castelli show, entitled 'Picasso's Women', consisted of copies of Picasso's paintings of women, including the *Demoiselles d'Avignon*. Many of them sold, at substantial prices, to people who knew they were buying copies. Sherrie Levine has made exact reproductions of photographs by Walker Evans and other famous photographers. Elaine Sturtevant makes exact copies of drawings and paintings by Jasper Johns, Roy Lichtenstein, Frank Stella, Claes Oldenburg and Andy Warhol.[74]

"... their explanations of why what they do has independent artistic value may seem abstruse and, to some, disingenuous ..."

Although their explanations of why what they do has independent artistic value may seem abstruse[75] and, to some, disingenuous,[76] these artists' intentions with respect to the physical objects they produce are clear. Thus Elaine Sturtevant:

> *Leo*: ... [you] then proceeded to try to do paintings by Jasper or others. I think it was as faithfully as you could do it?

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Elaine: Yes, as close as you could.
Leo: The idea was to do them as perfectly as possible.
Elaine: As exactly as possible.
Leo: So that they would be really, if you didn't know, if you looked at them as close as possible, that this was a work by Oldenburg or Jasper Johns or Andy Warhol.
Elaine: Yes.[77]

We can assume that when Sturtevant copies a Jasper Johns painting she intends to engage in a significant and independent process of making art, rather than merely feeding off of the reputation and achievement of a great artist. It is clear, however, that these professionally produced copies can do the same mischief as expert copies made with the intent to deceive. The difference in intention may be real, but it is not visible to the viewer. One is reminded of Borges's Pierre Menard:

> It is a revelation to compare Menard's *Don Quixote* with Cervantes'. The latter, for example, wrote:
> '...truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor'.
> Written in the seventeenth century, written by the 'lay genius' Cervantes, this enumeration is a mere rhetorical praise of history. Menard, on the other hand, writes:
> '...truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor'.
> The contrast in style is vivid.[78]

The Social Response To Counterfeit Art

We have seen one side of the social response to counterfeit art in the popular tendency to glorify fakers, caricature victims and ignore the bad that good counterfeits do. Police, prosecutors, jurors and, as shown in the 'Forgeries by Stein' case,[79] judges, share this tendency. This gives law enforcement against art counterfeiting an unusually casual and uninformed character. Success in protecting the social and cultural interests subverted by counterfeit art depends at bottom on public recognition of what those interests are and how counterfeits impair them. A better educated art public might be less romantic about counterfeiters and less easily taken in by the more obvious forms of counterfeit art. It should also more effectively enforce the law against art counterfeiters, to which we now turn.

"... the popular tendency to glorify fakers, caricature victims and ignore the bad that counterfeits do ... gives law enforcement against art counterfeiting an unsually casual and uninformed character."

The Law

The other part of the social response to cultural counterfeiting art lies in the law to be applied against offenders. Here realism counsels

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"... the most carefully designed legal effort to deal with the counterfeit problem will have only a limited impact."

modest aspirations; the most carefully designed legal effort to deal with the counterfeit problem will have only a limited impact. There is no reason to suppose that the law can be more effective at eliminating counterfeit cultural objects than it is in eliminating the other kinds of fraud that thrive despite widespread public disapproval and clearly applicable criminal provisions. There is, in addition, the danger that intrusive legal measures in the hands of zealous police, lawyers, judges and juries unfamiliar with the territory will chill artistic creativity and impair the delicate ecology of the art world. Within the area in which law can effectively and responsibly deal with counterfeits, however, there may be a small space for improvement.

Suppose that public attitudes toward counterfeiters change and the problem is taken seriously. How responsive are the applicable legal provisions?[80] Looking first at the criminal law, three kinds of existing statutes might apply: criminal simulation, false pretences and forgery. A fourth kind of statute, found in the laws punishing counterfeiters of US securities, coins and stamps and protecting commercial goods against counterfeits, may also apply by analogy.[81]

Criminal simulation

Model Penal Code s224.2, entitled 'Simulating Objects of Antiquity, Rarity, Etc.', provides:

> A person commits a misdemeanor if, with purpose to defraud anyone or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he makes, alters or utters any object so that it appears to have value because of antiquity, rarity, source, or authorship which it does not possess.[82]

Such a statute is directly and specifically applicable to counterfeit cultural objects and indeed appears to have been drafted to deal with that problem.[83]

False pretenses or theft by deception

One who makes or sells counterfeit cultural objects might also violate 'theft by deception' statutes. For example, Model Penal Code s223.3 provides:

> A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely: (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind.

It seems clear that such a statute could reasonably be interpreted to apply to one who purposely creates a false impression of the authenticity of a work of art or other cultural object.

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Forgery

The Model Penal Code defines the offense of forgery in Section 224.1 as follows:

> A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
> (a) alters any writing of another without his authority; or
> (b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or
> (c) utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).
> 'Writing' includes printing or any other method of recording information.

Whether a work of art would qualify as a 'writing' within the meaning of this provision is not clear. The drafters of the Code intended that the criminal simulation statute set out above (Model Penal Code Section 224.2) apply to forgery-like offences in which the object forged could not qualify as a writing.[84] Still, painting and sculpting are 'method[s] of recording information'. Forging another's signature to a work should of course clearly qualify as forgery, but the interesting question is whether the work itself, without a forged signature, could be so considered.[85]

Observe how the offenses are graded in the three statutes. The Model Penal Code's criminal simulation provision, intended to apply to counterfeit cultural objects, makes the offense a misdemeanor, without reference to the amount or value involved. Theft by deception is 'a felony of the third degree if the amount involved exceeds $500...' and is otherwise a misdemeanor. Most forgeries are felonies. In short, counterfeiting the culture is treated as less socially harmful than theft by deception (over $500) and most kinds of forgery. If monetary loss is an appropriate measure, it seems clear that counterfeit art often, indeed almost always, is sold for more than $500. If we look instead to some broader measure of relative social harm, surely a successful counterfeit Monet painting or a fake Matisse drawing is a greater offender than many forged commercial instruments. This relative trivialization of the offense of cultural counterfeiting is further evidence that 'the bad good counterfeits do'[86] is generally underestimated, another manifestation of the van Meegeren Problem.

"... counterfeiting the culture is treated as less socially harmful than theft by deception (over $500) and most kinds of forgery."

"... surely a successful counterfeit Monet painting or a fake Matisse drawing is a greater offender than many forged commercial instruments."

The Element of Intent

Each of the three statutes includes the element of intent: that the defendant be shown to have had the intent to deceive or defraud.

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Absent such blackness of heart, the defendant would have committed none of the three crimes. Thus a van Meegeren could make excellent Vermeers without incurring criminal liability so long as he could not be shown to intend to use them to deceive or defraud others.

Direct proof of intent to deceive or defraud is difficult to establish.[87] It can be strongly inferred if the counterfeiter, who presumably knows that the work is a counterfeit, misrepresents it as authentic. Intent may even be inferred if one who knows that the work is not authentic sells it to an innocent purchaser without indicating that the work is not what it appears to be. To avoid such inferences the art underworld has developed a standard disingenuous division of labor and responsibility, in which the one who makes the counterfeit professes the innocent intention to make art in the style of an admired master, with no thought of deception, and the accomplice who sells the work professes to have believed that it was authentic. 'It is easy for the faker to claim he had no knowledge the fakes would be sold as originals. It is easy for the dealer to claim he thought the works were authentic.'[88]

Other facts that might suggest the existence of fraudulent intent would include the use of old materials in making a plausible 'antique' or a work in the style of an earlier master (contemporary pigments, canvas, frames, etc.), artifically ageing the work and, of coure, false signatures, founders' marks and other identifying matters. Still, the accumulation of such facts must be imposing in order to establish, beyond a reasonable doubt, intent to deceive or defraud. By taking minor precautions counterfeits can insulate themselves against criminal liability. Further, 'innocent' counterfeits, even though made with no intent to deceive or defraud, pass as easily as 'guilty' ones in the art market. These considerations raise the question whether the intent requirement, however plausible it may be for other kinds of crimes, makes sense when applied to counterfeit art. The obvious analogy is with the counterfeiting of money, stamps and commercial products.

Counterfeiting Money and Stamps

"Federal ... statutes that protect paper money, coins and stamps penalize counterfeiting without proof of intent to deceive or defraud."

Federal counterfeiting statutes that protect paper money,[89] coins[90] and stamps[91] penalize counterfeiting without proof of intent to deceive or defraud. Judicial decisions confirm convictions under these statutes: '[T]he mere making of an impression in the likeness of an obligation or security issued by the United States is a violation of the statute without proof of unlawful intention.'[92]

Artists transcend limits and resist hardening of the categories, and we should not be surprised to find them doing things that challenge such statutes. Thus, in *Wagner* v *Simon*,[93] an artist who had a black and white photographic enlargment (15 by 36 inches) made of a $20 bill changed the image by (1) replacing the oval

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portrait of President Jackson with a portrait of President Nixon; (2) replacing the words 'Federal Reserve Note' with the words 'Inflationary Note'; (3) replacing the numeral '20' with the numeral '30'; (4) replacing the word 'Twenty' with the word 'Thirty'; (5) replacing the statement, 'This note is legal tender for all debts, public and private' with the statement, 'This is legal tender for all debts, public and private incurred by President Housing'; (6) replacing the 'Series' date with the date '1973'; and (7) replacing the letter in the Federal Reserve seal with a teapot. Then, accompanied by counsel, he went to the office of the United States Secret Service for an opinion on the work's legality. The Secret Service Agents seized it as contraband[94] and advised Wagner that possession of the facsimile was a violation of federal counterfeiting laws[95] for which he could be arrested, though they did not arrest him. The United States Attorney confirmed this advice. Wagner sued for the return of the seized work and a declaratory judgment that it did not violate federal law.

The artist argued that he had no intent to counterfeit, to which the court predictably replied that '[I]ntent in causing the reproduction to be made is not a factor'. To the suggestion that the enlarged, altered, black and white photograph was hardly a 'likeness' of a $20 bill the Court answered: 'Even with the modifications, it is readily discernible that the facsimile is a photographic enlargement of an actual Federal Reserve note. The Court has no difficulty in finding and concluding that the facsimile, as modified, is a likeness within the meaning and purview of section 474.'[96] Finally, the Court held that the statute did not impair plaintiff's freedom of expression under the First Amendment, finding that the regulation was within the constitutional authority of Congress, protected a substantial governmental interest unrelated to suppression of freedom of expression, and the restriction on expression was no greater than necessary to the furtherance of that interest.[97]

The artist argued that he had no intent to counterfeit, to which the court ... replied that '[I]ntent in causing the reproduction to be made is not a factor'."

The Wagner decision seems extreme, though not because of the Court's position on the First Amendment question or because it found intent irrelevant. What seems wrong is to treat something that no one could possibly mistake for a genuine $20 bill as a counterfeit $20 dollar bill.[98] Wagner's work was black and white, one-sided, enormously out of scale, and differed in important textual details from authentic bills. Where was the harm? Who could be misled? Similar questions must have dominated the thinking of the English Jury that acquitted the American artist J.S.G. Boggs of the charge of counterfeiting British banknotes.[99] Boggs's drawings of banknotes are the same scale and color as the originals but are one-sided and contain deliberate variations in detail from authentic notes. The obverse bears his signature and documentation of the transaction in which he 'spent' the drawing.[100] At the trial in the Old Bailey, despite explicit instructions from the judge calling for conviction, the jury quickly returned a verdict of not guilty. The

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artist's attractive personality and evident sincerity probably had something to do with the jury's action, but the basic difficulty for the prosecution was that Boggs's drawings could not be mistaken for the real thing.

The decisions do not explain why the counterfeiting statutes dispense with the intent requirement. The statement in Wagner that: 'It cannot be disputed that the Government has a very substantial interest in protecting its currency, stamps and obligations against counterfeiting activities' was addressed to the First Amendment question. It is also, however, a plausible basis for omitting the element of intent; the interest in the integrity of money and stamps, whose value depends on their authenticity, is so strong that imitations should be rigorously prohibited.

The Analogy with Cultural Objects

If penal statutes aimed at counterfeiting money and stamps can properly omit the element of intent to deceive or defraud, then the argument for a similar approach to cultural counterfeits becomes plausible. Works of art, for example, are analogous to money and stamps: there is a public interest in their integrity; both their historical and market value depend on their authenticity.[101] As with counterfeit money, the social harm of counterfeit art occurs when the false painting or sculpture or fine print is taken for real by another. The same is true of other cultural objects; the possibility that the counterfeit, even if innocently made, will be used to mislead others makes even innocent works dangerous. If the purpose of the penal statute is to deter socially dangerous activity, then it should apply to all counterfeits, including those made without intent to deceive or defraud.

"Works of art ... are analogous to money and stamps: there is a public interest in their integrity; both their historical and market value depend on their authenticity."

Private Remedies

Cultural objects resemble money and stamps in another way. Unlike commercial counterfeiting (fake Apple computers, counterfeit Gucci bags), in which producers (Apple, Gucci) are motivated to bring judicial actions to control counterfeiters in order to protect their own interests, the only effective legal remedy for counterfeiting works of art is by way of public action. The cases in which private remedies would be used to control art counterfeiting are theoretically interesting but practically insignificant. One is the right of the copyright owner to prohibit unauthorized copying. Its effectiveness requires that the work of art be copyrighted (many are not),[102] that the copyright period (life of the artist plus fifty years) not have expired and that the copyright-holder – typically the artist – know of the infringement and be motivated to act. It is also necessary, of course, that the counterfeit be, in whole or in part, a copy rather

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than a work 'in the style of' or falsely attributed to the artist who made the original.[103]

The moral right, though not as fully developed in the US as it is in some European nations, might also provide a private remedy against fakes and false attributions that impaired the artist's 'right of paternity'. The California Art Preservation Act[104] provides that 'The artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art'. There is a similar provision in the New York Artists' Authorship Rights Act.[105] Such statutes, although now enacted in nine states, have yet to provide the basis for significant legal action by offended artists, and there is general agreement that a federal law is needed to provide effective protection of the artist's right of paternity.[106] Such a law was enacted in late 1990,[107] but neither it nor the surviving (i. e., unpreempted by the federal statute) provisions of state laws seem likely to have much effect on the production of or traffic in counterfeits. The artist must be alive,[108] aware of the existence of the counterfeit and willing to make the effort and risk the cost of legal action, a combination of factors that will not often occur.[109]

It is also possible that the owner of the original might, with the aid of a creative lawyer, be able to devise an unfair competition-like cause of action against one who held out a copy or a fake as the original, but the probable remedy would be unlikely to encourage such an action by the owner.[110] Finally, the buyer of course has a civil remedy based on express or implied warranties of authenticity against the seller and, ultimately, against the counterfeiter, if he can find her and if she is collectible. In practice, the prospect of identifying, locating and executing an eventual judgment against the counterfeiter will usually be thoroughly discouraging.[111] That there are few reported examples of such private actions against counterfeiters suggests that they offer little promise of an effective legal remedy.

The Analogy to Commercial Counterfeiting

Although the analogy is otherwise persuasive, money and cultural objects differ in an important practical way. When a dealer offers a work of art or antiquity he expects the prospective buyer to examine it closely, ask questions, take time to deliberate, do research, perhaps consult an expert. When the buyer pays, however, he does not expect the seller to go through a similar process to establish that the money paid is authentic. People seldom examine money for authenticity unless it is 'collectible' money – old coins, for example – as to which buyers act much like purchasers of works of art or antiques, for the same reasons. One function of reliable money is to expedite transactions by making such investigations unnecessary. This difference weakens the analogy between works of art and money and postage stamps and makes the analogy

"... money and cultural objects differ in an important practical way ... People seldom examine money for authenticity unless it is 'collectible' money ..."

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with sales of commercial articles, where the opportunity for inspection and investigation typically does exist, particularly important.

In laws enacted to protect trademarked products[112] and Native American crafts[113] the closest thing to an intent requirement is that the defendant 'knowingly' or 'wilfully' make or offer goods bearing a false trademark or falsely purporting to be produced by Native Americans. While the distinction between knowledge of falsity and intent to defraud may in some cases seem more metaphysical than real, in practice the burden on the prosecution is significantly lighter if it need only establish knowledge. The difference can be shown by considering the Delamare and Rockefeller Collection enterprises, described above.[114] These and similar enterprises explicitly promote their merchandise as copies, not as authentic works, and could not be charged with intent to deceive those with whom they deal. They know, however, that the works they offer closely resemble authentic works. Indeed, they emphasize similarity to originals in their advertising. That is an important part of what they sell. They also know, as anyone at all familiar with the market knows, that such works can be used by others to deceive innocent buyers. They may lack intent, but they certainly have knowledge.

"These and similar enterprises ... know ... that such works can be used by others to deceive innocent buyers. The may lack intent, but they certainly have knowledge."

In sum, the prosecution's burden in money, stamp and commercial counterfeiting prosecutions is measurably lighter than it is when the work counterfeited is a cultural object. The relative unavailability of effective private remedies in cultural counterfeiting cases, when added to the difficulty of proving intent to defraud, places cultural counterfeiters at a decided advantage over their commercial counterparts. And, as we have seen,[115] violation of criminal simulation laws is commonly treated as a mere misdemeanor, while violations of other counterfeiting statutes and related criminal provisions (theft by deceit and forgery) are typically felonies. The message is: Parents, do not raise your children to be counterfeiters, but if they lean that way, advise them that art and antiquities counterfeiting is safer than other kinds (it also has greater *cachet*). If the analogies to counterfeiting money, stamps, and commercial articles are at all persuasive, then the continued inclusion of intent to defraud as an element of the crime committed by the faker, whether it is criminal simulation, forgery or theft by deception, seems perverse. There is ample legislative authority for penal action based on mere knowledge. Familiarity with the art market suggests that making and passing counterfeit cultural objects, commonly treated as a misdemeanor, is at least as socially and economically damaging as other kinds of counterfeiting offences that are routinely treated as felonies.

"Parents, do not raise your children to be counterfeiters, but if they lean that way, advise then that art and antiquities counterfeiting is safer than other kinds (it also has greater cachet)."

A Diffident Proposal

The primary purpose of the fraudulent intent requirement in penal statutes is to protect morally innocent actions from the legal penalties and the social opprobrium that flow from characterization as

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'criminal'. Even if we agree that counterfeit works of art are analogous to counterfeit money, stamps and commercial objects, it still seems wrong to treat morally blameless conduct as criminal. To be acceptable, a proposed penal statute would have to deal fairly with innocent counterfeiters. This could be accomplished by, first, requiring a showing that the alleged counterfeit work could plausibly[116] pass as genuine and, second, that the defendant knew, or was chargeable with knowledge, that the work appeared to be something it was not.

Suppose the applicable statute reads as follows:

> *Criminal Simulation of Cultural Objects.* A person commits an offense if he knowingly makes, alters or utters any object so that it appears to have value because of antiquity, rarity, source or authorship which it does not possess.[117]

"A person commits an offense if he knowingly makes, alters or utters any object so that it appears to have value because of antiquity, rarity, source or authorship which it does not possess."

That statute would apply to deliberate counterfeiters and, since 'knowingly' has replaced 'with intent to deceive or defraud', would make successful prosecution of offenders a more realistic possibility.

The statute could also apply, however, to the work of student copiers, simulationists and those who make and sell reproductions. Assuming, as seems right, that we wish to protect some of those people from criminal liability, some refinement is necessary, and refinement entails complication. For example, the hypothetical statute could be made inapplicable to copies that met four criteria: (1) that the work copied be documented in some generally accessible source (i. e. generally accessible to collectors, dealers, museum personnel and scholars — as, for example, in a catalog raisonée or a leading monograph); (2) that the copy vary substantially, in some apparent and indelible way, from the documented description of the original; (3) that the copy not include marks of originality or authenticity, such as the artist's signature or monogram, founders' marks, series numbers, dealers' labels or other false indications of provenance, etc. and (4) in the case of older originals, that the copier not use materials of that period (old canvas, old paper, old frames, pigments that were then in use but are not now used, etc.) or artificially age the work.

"None of these requirements would seriously inconvenience the student or teacher making copies."

None of these requirements would seriously inconvenience the student or teacher making study copies. The extent and variety of published and documented works provides ample range for anyone interested in learning by copying. Variance from the original cannot, of course, be treated disingenuously. We have already seen that for the student to sign her own name to the copy does not sanitize it; the signature can easily be erased or painted out and another added. Nor does writing or painting the information that it is a copy on the back of the support serve, since the canvas can be rebacked or the warning message effaced in other ways. It is not difficult to alter or efface founders' marks and other identifying features of sculptural casts.

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There are two principal ways of satisfying the injunction that the copy vary obviously, substantially and indelibly from the original. One is to require that the copy's linear dimensions be sufficiently larger or smaller than those of the original to warn anyone who took the trouble to consult the [readily available] documentation that the copy was not the original. A second distinguishing method is to use unmistakably different materials (e.g. paper instead of canvas, cast bronze instead of welded iron, gouache rather than oil). There is no apparent reason why an innocent copier should need to reproduce such indicia of authenticity as the artist's signature or monogram, original founders' marks and series numbers or use old materials or artificial ageing processes in copying older works.

"... style studies ... present a difficult, perhaps an insoluble, problem."

Unlike copies, style studies (see discussion note 72 supra and text) present a difficult, perhaps an insoluble, problem. A student who produced plausible works in the style of Matisse would violate the proposed statute as clearly as one who made such works with the intent to pass them as genuine. Except for the relatively small number of artists whose entire output is authoritatively recorded in catalogues raisonées — Dubuffet and Picasso are examples of artists for whom nearly complete documentation exists — there is no simple way to establish that a plausible work, not a copy, was or was not made by that artist. Neither is there a simple way to distinguish innocent style studies from fakes, but style studies will, and should, continue to be made. The problem appears to be intractable.

"... simulationists usually (always?) copy the works of prominent artists, often from published reproductions ..."

Would a simulationist have difficulty meeting such conditions? The requirement that the original be fully documented is not likely to be a problem, since simulationists usually (always?) copy the works of prominent artists, often from published reproductions in catalogs or monographs or from museum postcards. The requirement of an apparent and indelible difference from the original might lead to a claim of infringement of the artistic freedom protected by the First Amendment. To a judge who has been disabused of the van Meegeren problem, however, that regulation, like the prohibition of indicia of originality and of artificial ageing or the deceptive use of aged materials, would appear to be a reasonable 'time, place and manner' limitation on artistic freedom.[118]

Finally, how would the proposed statute affect those in the reproduction business, which is an important source of income to museums, galleries and bookstores? The great majority of such reproductions would be unaffected, since they create little danger of passing as originals. It is only disingenuous enterprises like the Rockefeller Collection's and Mr. Delamare's, which attempt to reproduce the original exactly in size, medium, color, support, and execution, with the inclusion of signatures and other indicia of authenticity, that would be impaired. Our hypothetical statute would apply to Mr. Delamare's paintings and to the surmoulages of Rodin sculptures and the high fidelity reproductions of prints and drawings marketed by the Rock-

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efeller Collection and similar productions from other sources. Such deliberate counterfeits would become illegal.

Although such a statute provides a potentially more effective basis for criminally prosecuting counterfeiters of cultural objects, it is an incomplete solution. Whether it would be widely enacted by state legislatures or by Congress, whether if enacted it would be energetically enforced by police and prosecutors, and whether it would be appropriately interpreted and applied by courts and juries all are uncertain. In any case, more effective penal action against art counterfeiters is only one way of dealing with cultural counterfeits. Even if counterfeiters were effectively prosecuted, it would still be necessary to do something about the disposal problem: what is to be done with the counterfeit work itself, the object that, so long as it remains at large, can mislead and deceive. That may, indeed, be the more important aspect of the problem.

"... such a statute ... is an incomplete solution ... what is to be done with the counterfeit work itself, the object that, so long as it remains at large, can mislead and deceive ... Once created, counterfeits take on lives of their own. They ... remain at large to pollute the clear stream of cultural history, skew resource allocation, deceive purchasers and misrepresent the creator."

The Disposal of Counterfeits

Once created, counterfeits take on lives of their own. They do not die natural deaths but remain at large to pollute the clear stream of cultural history, skew resource allocation, deceive purchasers, and misrepresent the creator. The problem is clearly stated in a 1971 'Report on Disposition of Fake Art':[119]

> There has been presented to this Committee by persons involved in the administration of the arts and enforcement of the criminal laws questions relating to the confiscation, continued retention by law enforcement authorities and ultimate disposition of concededly fake art... Returning the piece to the owner concededly raises the risk that future potential purchasers may suffer a similar fate. In justifying a policy of confiscation, law enforcement officials assume that some owner-seller will willfully fail to disclose the object's status... Moreover, it is argued that years hence, due to the passage of time and a rapidly expanding art market, the fake status may have become obfuscated by continuous commercial transactions. It is thus concluded that this result would occur despite the immediate owner's disclosure that the work was a fake.[120]

This well states the problem. The Committee's discussion of what to do about it, however, is perfunctory and superficial, and its conclusion is that little can or should be done. For example, on the centrally important proposal that works found to be counterfeit be confiscated, the Report states: '[T]he Committee is opposed to confiscation... [R]isks to innocent purchasers do exist if the fake object is allowed to re-enter the art market. However, in the Committee's view, the equities weigh heavily in favor of the deprived

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owner.'[121] This statement is unsupported; the Report neither identifies nor discusses the equities to which it refers.

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The Committee also considered six alternatives to confiscation: (1) Reliance on existing law; (2) Marking the object to denote its fake status; (3) Establishing a central registry of fake art; (4) Establishing an archive of fake art; (5) Allowing the artist or his estate to destroy or reclaim the fake; and (6). Issuance of a court order to the present owner directing her not to resell or transfer the fake without full disclosure. Its conclusion:

> The concept of a central register is ambitious but possible. It is doubtful, however, whether this system will ever effectively reach the general art-buying public in a way that provides meaningful protection.
> [F]urther statutory coverage is needed which includes broader and more stringent penalty provisions for knowingly selling fake art. One key question to be decided, if any marking system is to be adopted in situations where notice to and consent by the owner as to subsequent sale is not appropriate, is whether or not to deface the object; use of a removable tag does not appear to be an effective solution. As the center for the art market in the United States, New York has particular responsibilities which are not being adequately met. These responsibilities will necessarily have to be shared by the various organizations which are concerned with creating, buying, selling, importing and exporting works of fine art.[122]

In short, the Committee agreed that there was a problem here but threw up its hands. Was it right to do so?

"The disposal problem arises in two principal ways. In the more common situation, one who purchases (or is offered) work from a dealer or auction house becomes suspicious about its authenticity ..."

The disposal problem arises in two principal ways. In the more common situation, one who purchases (or is offered) work from a dealer or auction house becomes suspicious about authenticity, consults the leading expert on the work of that artist and, if the expert's opinion is against authenticity, declines to buy or, if she has bought, presents the evidence to the seller. In the normal case, where the seller is a reputable dealer or auction house and the expert's opinion is respected in the trade, the matter is amicably settled: the seller returns the purchase price to the buyer and the buyer returns the counterfeit work to the seller. No recourse to lawyers is necessary and no case goes to court. The buyer is relieved to have avoided buying a fake or, if she bought, to have her money back and to be rid of an embarrassment. The seller has lost the sale and now possesses a work that is a known counterfeit — known at least to the buyer and the expert, and probably to others. What does the seller do with it? The immediate seller will of course turn to *his* seller for relief, and so the chain of transactions unwinds until a link is missing or a prior transferor refuses to accept liability. At

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some point someone is stuck with the counterfeit. That person decides what to do with the work; no public official is aware of the situation or in a position to affect the outcome. In such cases it is not unusual to find that the counterfeit reappears on the market or in the collection of a charitable institution that accepted it as a gift without being informed that it was false.[123] Such cases present little opportunity to exert the public interest in removing the counterfeit from circulation.

"At some point someone is stuck with the counterfeit ... In such cases it is not unusual to find that the counterfeit reappears on the market or in the collection of a charitable institution ..."

Less frequently a work will be evidence in a criminal or civil proceeding in which its counterfeit status is established or conceded. This situation is significantly different in that public officials — the police, the prosecutor, the judge — are in a position to affect the decision about what to do with the counterfeit. The case provides an opportunity to assert the public interest in removing the counterfeit from the market or neutralizing its potential for harm in some other way.

"Less frequently a work will be evidence in a civil or criminal proceeding in which its counterfeit status is established or conceded."

There are three obvious alternative ways of dealing with the counterfeit work: destruction, impounding and sanitization. Of these, destruction is the most obvious and effective course but has the disadvantage of irreversibility. While most counterfeit works are easily and accurately identified as such, certainty in such matters is only relative. The uncertainty runs more strongly in one direction: counterfeits are more frequently judged to be genuine than *vice versa*. Still, the probability remains that authentic works will occasionally be called counterfeit, and the possibility that this would cause the mistaken destruction of an authentic work cannot be ignored. A second difficulty is that the counterfeiter may turn out to be an important figure in art history, like Michelangelo,[124] and any work by such an artist should be preserved. Finally, the counterfeit may in fact be an authentic work that has been misattributed, perhaps retouched and with a forged signature, that should, restored and properly attributed, be preserved.

Counterfeits can be removed from commerce in less drastic ways by impounding them or by placing them in study collections in art museums. The museum capacity for and interest in such study collections is, however, limited. Maintaining, presumably at public expense, an archive of cultural counterfeits is the residual impounding solution. The expense of establishing and maintaining such an archive could be substantial, and it would seem irrational to spend resources in carefully documenting and conserving the thousands of obviously counterfeit Dali, Chagall and Miro prints that, at this writing, still flood the market. Surely one example from each such 'edition' would be adequate. The rest could be safely destroyed. Other classes of obvious counterfeits with no claim to preservation could also be destroyed, so that the archive was reserved for works of dubious but uncertain authenticity, possible art historical value, etc. Thus the public archive of counterfeit works would for practical reasons have to be combined with selective destruction.

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"Any proposal to destroy or impound counterfeits must deal with the owner's property interest in the work ... Compensation is an obvious possibility, since the value of the counterfeit as a counterfeit, is likely to be slight."

Any proposal to destroy or impound counterfeits must deal with the owner's property interest in the work. One who has paid a Matisse price for a fake Matisse may be reluctant to give it up for destruction or for transfer to a museum or archive even though she knows that the work has slight monetary value as a known counterfeit. If it is left with the owner she will be tempted to consign it to a dealer or place it at auction or donate it to a charity without disclosing its counterfeit character. Compensation is an obvious possibility, since the value of the counterfeit, as a counterfeit, is likely to be slight. The transaction costs of determining fair market value in a contested proceeding can, however, be substantial, so that compensation could in practice be an expensive alternative.

Would compensation to the counterfeit's owner be necessary? In the case of counterfeit money, as we have seen, confiscation without compensation is the normal procedure.[125] Confiscation is also a standard remedy in commercial counterfeiting statutes.[126] If the social problem posed by counterfeit cultural objects is, as previously suggested, analogous to that presented by counterfeit money, stamps and commercial articles, then the legislature's power to order confiscation would seem to follow.[127] Other nations confiscate counterfeit art,[128] but there is no certainty that an American court would reject a constitutional challenge to a confiscation statute.

"The idea that counterfeits could be treated or marked to make then easily detectible is ... attractive ... The difficulty ... is that any such treatment or mark, once known, can be reversed or effaced or otherwise neutralized."

The idea that counterfeits could be treated or marked to make them easily detectible is accordingly attractive; the work could be left with the owner, since its counterfeit character could be established by a specific, infallible process, and the possibility of deception would accordingly diminish or disappear. (If such a process existed it could also be used to identify innocent copies, style studies, etc. and greatly simplify the counterfeit art problem in other ways.) The difficulty with this sensible proposal is that any such treatment or mark, once known, can be reversed or effaced or otherwise neutralized. That statement may seem extreme, and it may prove to be incorrect, but knowledgeable people in the art world have yet to identify a reliable treating or marking system. Even something as drastic as slashing a canvas or sawing through a bronze can be repaired well enough by a careful restorer to convince all but experts. High technology proposals (embedding a minute quantity of a radioactive substance in the object; adding a microdot containing identification of the work as a counterfeit) are no more likely to work. Once the process is known – as it inevitably will be – the radioactive substance can be found and removed; the microdot can be painted over or otherwise effaced. Actually, such treating/marking proposals might increase the cost and difficulty of passing previously identified counterfeits, not a bad thing in itself. Still, the potential for misuse of the technology must also be considered. Suppose that the temporary possessor of an authentic work – a restorer, for example – makes and keeps for himself a convincing copy and treats the original in such a way as to mark it invisibly

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as a counterfeit before returning it to the owner. The possibilities for sophisticated vandalism are also increased by such proposals: think of the trouble a clever vandal could make with radioactive spray or paste or a few microdots, followed by a letter to the local newspaper.

Another strategy would be to reduce the counterfeit's credibility by making its lack of authenticity known in the art world. This could be accomplished by requiring publication of a photograph and description, together with the circumstances of the determination of inauthenticity, in a widely distributed art publication. IFAR Reports, published by the International Foundation for Art Research in New York is an obvious candidate. Such publication would effectively alert dealers, museum staff, auction house personnel and knowledgeable collectors. If the system were developed to include cumulative indexes it might serve other purposes — e.g., as a public register that would give potential acquirers, including dealers and auction houses acquiring works for resale, as well as collectors, constructive notice of the work's inauthenticity.

"Another strategy would be to reduce the counterfeit's credibility by making its lack of authenticity known in the art world."

The Social Response to Cultural Counterfeits: A Synthesis

We have examined several kinds of social response to the problem of counterfeit art: criminal prosecution of counterfeiters and those who knowingly pass counterfeits; private legal remedies; destruction of works found to be counterfeit; donation to a museum study collection; impounding in a public archive of counterfeits; treating or marking the work as a counterfeit; and publication. These are not mutually exclusive courses of action; one would wish criminal prosecutions to continue independently of decisions about how to dispose of the works themselves. As to disposal, the solution might best be left to the decision-maker in the case in which the work's authenticity was decided or conceded. In one case the judge might give the defendant a choice: allow the work to be destroyed, donate it to a willing museum or a public archive, or pay the cost of publication. In another case the judge might, because of the patent inauthenticity of the works involved and the clearly criminal nature of the defendant's actions — e.g., fake Dali prints — simply require destruction.

"These are not mutually exclusive courses of action ..."

The opportunity for such a judicially supervised process arises only in criminal prosecutions of those who make or pass counterfeits and in civil actions in which a work's authenticity is in issue. As we have seen, these are relatively rare events. Authenticity is more frequently questioned in private circumstances in which the work, even if found to be false, will remain in private hands and the event will leave no residue of public information. There clearly is a public

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interest in acquiring and appropriately using the information produced in such private transactions. Consider these cases:

> Case 1. Dealer A becomes suspicious of a Franz Kline drawing he got from Dealer B and shows it to the leading experts on Kline's work, who agree that it is a fake. Dealer A returns the work to Dealer B and gets a refund.
> Case 2. Auctioneer is offered a group of Rodin drawings and consults the leading Rodin expert, who identifies them as the work of Ernst Dürig, the prolific Rodin faker. Auctioneer declines the consignment.
> Case 3. Art historian, guest curator of a Géricault exhibition, concludes that a work from a private collection is a skillful fake and excludes it from the exhibition.

Dealer B in Case 1, the consignor in Case 2, and the collector in Case 3 all now know (if they did not already know) that their works are, in the opinions of experts, false. One or the other of them might decide to destroy her work or donate it to a museum study collection as a counterfeit or publish the facts of the case. But we should not be surprised if, instead, some of those works reappear on the market, offered as genuine. That is bound to occur unless there is some readily available public record that the work has been questioned.

"In each case, the expert is the centrally important authority determining inauthenticity."

In each case, the expert is the centrally important authority determining inauthenticity. Many experts care about art history and the reputation of the artist and would, in principle, favor the exposure of counterfeits and those who make and deal in them. People like Dealer A in Case 1 and the auctioneer in Case 2 also have an interest in cleansing the market of counterfeits. If it were convenient and costless for such people to publish the determination of inauthenticity, those counterfeits would be effectively removed from circulation. There are three reasons why that does not often happen.

First is the problem of incentive: how could the expert or interested party be encouraged to send a photograph and description of the work and a statement of inauthenticity to the periodical? Some inconvenience, effort and expense are neccessarily involved. The realities of human dynamics are on the side of inertia. Second, most collectors, dealers and experts fear that if they publicly express an opinion on authenticity they will be liable for damages in an action by the offended owner. Although such liability exists only if negligence or malice is shown,[129] an angry owner may still sue; the winning defendant will suffer the inconvenience and aggravation of litigation, and he (or his insurer) will have to pay an attorney.[130] Many well-disposed people fear litigation and potential liability and will accordingly be reluctant to speak up.

Third, any system that encourages unilateral exposure of counterfeits by private persons is vulnerable to misuse. Unlike a judicial

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action, in which the court impartially determines authenticity after the opportunity for proof and argument by interested parties, the hypothetical cases set out above include no system for verifying the claim of inauthenticity. Without such a system, unreliable information supplied by people with dubious motives or credentials could creep into the record, sabotaging both art history and the art market by impugning authentic works of art.

These difficulties in the way of systematic public reporting of private determinations of inauthenticity are imposing and may be insurmountable. Some art historians will publish; dealers who have been burned, or almost burned, may go public; but they will be exceptions. In the usual case the only residue of the episode will be some art world insider gossip shared by a few dealers, experts and collectors. Private determinations of inauthenticity will, on the whole, remain private. This fact makes it even more important that public findings be made public and that, where appropriate, counterfeit works be destroyed or permanently removed from circulation.

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Conclusion

The cultural counterfeit problem illustrates familiar propositions about law and society. One is that laws imposing criminal penalties on actions that most people do not regard as seriously offensive will not be aggressively enforced and rigorously applied. The complex of attitudes described above as the van Meegeren Problem assures counterfeiters that prosecution is unlikely, conviction uncertain and probable sentences light.

The significant corollary is that proposed changes in the law, unaccompanied by equivalent changes in social attitudes, will have only a marginal effect on cultural counterfeiting. Widespread enactment of the proposed criminal simulation statute discussed above would, alone, accomplish little. If enactment results from public concern about counterfeits, then something significant may be done. But it is the change in public appreciation of the problem, not the enactment of yet another statute, that makes the main difference.

Most people would rightly consider counterfeit cultural objects one of the lesser ills confronting humanity, far less serious than, for example, AIDS or the drug traffic or the destruction of the rain forests or international terrorism or the Greenhouse Effect or a multitude of others. It would be wrong to overestimate the relative importance, in the great scheme of things, of the work of a Tom Keating or an Elmyr de Höry. The attitudes summed up in the Van Meegeren Problem, however, make any such error seem remote. There is little danger that the state will turn its big guns on so small a target. The equation between social problem and social response is out of balance, but in the opposite direction.

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The idea that cultural interests exist and call for legal recognition and protection, while not new,[131] has yet to receive the kind of sustained attention routinely given to more familiar economic, political, and social interests. The greater public attention to cultural matters in the United States since the end of World War II[132] suggests that more people now care more about such matters. This article addresses those people. The basic message is straightforward. Counterfeit cultural objects do serious harm, harm that the van Meegeren Problem conceals behind a haze of sentimentality, misguided populism and narrow aesthetic theory. Art counterfeiters are not Robin Hoods or social critics or cultural avengers. They are opportunists who are in it for the money. It seems absurd that our law should deal less harshly with the faker of Corot paintings or Mayan ceramics than with the counterfeiter of $100 bills or Gucci handbags, when the former clearly does comparable economic and far greater cultural mischief. Society can more effectively protect itself against art counterfeiters without impairing the legitimate interests of innocent copiers, appropriators and reproducers. Counterfeiters should be deterred, tried and punished, but it is at least equally important to destroy, impound or neutralize the false objects themselves.

Finally, the question is not merely how to deal with counterfeit cultural objects, though I have tried to show that that is an important question in itself. Counterfeits are part of a larger puzzle: how to deal properly with the variety of interrelated cultural property questions that continually arise and call for public action. There is a public interest in the conservation of, truth about and access to cultural objects.[133] Eventually, whether through the accumulation of ad hoc decisions or some more ambitious deliberative process or, more likely, both, we will have a more or less comprehensive and coherent cultural property policy, in which protection against those who counterfeit the culture will have a modest but significant place.

Notes

1 Miguel De Cervantes, *Don Quixote* (Modern Library ed. 1949) p. 73.

2 Hans Tietze, *Genuine and False*, London, 1948, pp. 16, 80; cited herein as 'Tietze'.

3 Rudolf Arnhem, 'On Duplication', in Denis Dutton (Ed.), *The Forger's Art* (1983), p. 232.

4 See, for example, the definition of 'cultural property' in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 U.N.T.S. 231 (1972). The U.S. Cultural Property Implementation Act of 1983, 96 Stat. 2350, 19 U.S.C. §§2601 ff., incorporates the UNESCO Convention definition of cultural property.

5 This rather obvious point is belabored in Merryman, 'The Public Interest in Cultural Property', 17 *Cal. L. Rev.* 339 (1989), cited herein as 'The Public Interest'.

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6 The phenomenon is explored in Margaret Gardiner, 'The Art Forger as Cultural Hero' (student paper in author's files, 1981).

7 For prior legal discussions see Crystal-Kirk, 'Forgery Reforged: Art-Faking and Commercial Passing-Off Since 1981', 49 *Mod. L. Rev.* 608 (1986); Elsen & Merryman, 'Art Replicas: A Question of Ethics', *ARTnews*, Feb. 1979, p. 61; Elsen with Merryman, 'Legal and Illegal Counterfeiting of Art in America', in *The Penal Protection of Works of Art* (Quaderni di Scienze Criminali 1983) 53, cited herein as 'Elsen'; DuBoff, 'Controlling the Artful Con: Authentication and Regulation', 27 *Hastings L.J.* 973 (1976); Hodes, 'Fake Art and the Law', 27 *Fed. Bar. J.* 73 (1967): Houseman, 'Current Practices and Problems in Combatting Illegality in the Art Market', 12 *Seton Hall L. Rev.* 506 (1982); Karlen, 'Fakes, Forgeries, and Expert Opinions', 16 *J. Arts Management & Law*, 5 (Fall 1986); Shientag, 'Some Legal Aspects of Art and Fake Art', 54 *Women L. J.* 23 (1968); Note, 'Art Forgery: The Art Market and Legal Considerations', 7 *Nova L.J.* 315 (1983); Comment, 'Current Practices and Problems in Combatting Illegality in the Art Market', 12 *Seton Hall L. Rev.* 506 (1982); Note, 'Legal Control of the Fabrication and Marketing of Fake Paintings', 24 *Stan. L. Rev.* 930 (1972); Comment, 'Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery', 14 *Wm. & Mary L. Rev.* 409 (1972).
The reader interested in the history and/or sociology of art counterfeiting or in the works and lives of famous counterfeiters will find a substantial literature of uneven quality. The best and, at this writing, most recent of them is Mark Jones (ed.), *Fake? The Art of Deception* (1990), which originated as the catalog for the 1990 exhibition at the British Museum. It contains an illustrated (often in colour) and thoughtfully annotated list of notable counterfeits from all periods and cultures, plus a number of unusually informative essays. Among other works are: Tietze, see Note 2 above; Sepp Schüller, *Forgers, Dealers, Experts* (1959); Joseph Alsop, *The Rare Art Traditions* (1982); Frank Arnau, *The Art of the Faker* (1961); Louis Charles Jean Courajod, *L'Imitation & la Contrafaçon des Objets d'Art Antiques* (1889); Adolph Donath, *Wie die Kunstfälscher Arbeiten* (1937); Leo M. Drachsler (Ed.), *Forgery in Art and the Law* (1956); W.R. Gerald (Ed.), *The Eye of the Beholder: Fakes, Replicas and Alterations in American Art* (1977); David L. Goodrich, *Art Fakes in America* (1973), *Aspects of Art Forgery* (1962); Ian Haywood, *Faking It: Art and the Politics of Forgery* (1987); Lawrence Jeppson, *The Fabulous Frauds: Fascinating Tales of Great Art Forgeries* (1970); James Koobatian (Comp.), *Faking It: An International Bibliography of Art and Literary Forgeries* (1983); Otto Kurz, *Fakes* (2d ed. 1967); Fritz Mendax, *Art Fakes and Forgeries* (1955); John Fitzmaurice Mills & John M. Mansfield, *The Genuine Article: The Making and Unmasking of Fakes and Forgeries* (1982); George Savage, *Forgeries, Fakes and Reproductions: A Handbook for the Dealer and Collector* (1963); Karina Türr, *Fälschungen Antiker Plastik seit 1800* (1984); Christopher Wright, *The Art of the Forger* (1985). For a recent Marxist discussion see MacLean, 'False Images: On the Meaning of Art Forgery', 2 *Law and Critique* (1991) ("The rise of artistic individualism and difference can be understood as following from the more general social and ideological conditions of alienation which were a necessary part of the development of the capitalist economic structure ... A society which is in many of its conditions false can only expect to engender false images.").

8 Alfred Lessing, 'What is Wrong with a Forgery?' *in* Denis Dutton (Ed.), *The Forger's Art: Forgery and the Philosophy of Art* (1983).

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9 Francis Sparshott, *The Disappointed Art Lover*, *id.* at 251.

10 For book-length discussions of van Meegeren see Paul B. Coremans, *Van Meegeren's Faked Vermeers and de Hooghs*, Amsterdam. 1949; John Godley, *Van Meegeren: Master Forger* (1967); Lord Kilbracken, *Van Meegeren: Master Forger*, New York. (1967). There is a good brief account in Hope B. Werness, *Han van Meegeren fecit*, *in* Denis Dutton (Ed), *The Forger's Art* (1983). Werness cites the extensive literature about van Meegeren.

11 As time passes van Meegeren's Vermeers look less convincing. This is normal. The counterfeiter is a captive of his time, producing works that reflect the way he and his contemporaries perceive, construe and respond to authentic works by the artist he simulates. Counterfeits thus express the taste of the moment and become dated when tastes change. '[I]t is interesting to find that forged paintings are easily recognized as such after some decades. Van Meegeren's romantic interpretation of Vermeer can now be easily detected.' Peter Van Mensch, 'Museums and Authenticities' *in* 'International Committee for Museology, Originals and Substitutes in Museums' (1985) pp. 13, 17. To a similar effect see Tietze, Note 2 above, at pp. 55–6, repeating Mark Twain's remark that modern copies of old masterpieces were always more pleasant to look at than the masterpieces themselves. Joseph Alsop warns, however, that the slogan 'no fake succeeds for more than a generation ... is still very far from dependable in all cases.' Alsop, 'The Faker's Art', *N.Y. Review of Books*, 23 October 1986, p. 25.

12 Werness, see Note 10 above, at 42 ff. Van Meegeren escaped conviction on the collaboration count but was found guilty of fraud and forgery (p. 49).

13 Establishing that a work is or is not authentic varies from simple to extremely difficult. Often the question of authenticity is better rephrased as one of attribution: the work is an authentic painting by some sixteenth century Italian, but it may or may not be by Leonardo. The notion of authenticity itself varies from one kind of object to another, as shown by African tribal art, for example, when compared with Western painting or sculpture. See the articles in Volume IX of *African Arts* (1975–76); Jonathan Adlai Franklin, 'Hourglass Syncretism: The Temporal Factor in Ethnoart Authentication' (Thesis, Stanford University Department of Anthropology, 1988). More generally on authentication see Stuart James Fleming, *Authenticity in Art: The Scientific Detection of Forgery (1975); Roger H. Marijnissen, Paintings: Genuine, Fraud, Fake: Modern Methods of Examining Paintings* (1985).

14 Edward C. Banfield, *The Democratic Muse* (1984).

15 Id. at 153. The quoted text is a part of Banfield's argument in favor of the production and wide distribution of 'high-quality reproductions' of works of art. For the fuller statement see his Chapter 6. Ian Haywood appears to share Banfield's attitude, stating of art dealers, auctioneers and collectors that: 'A safe way to ensure good returns is to further the cult of the original artist, to convince the buyer of the sheer worth of a unique, original production of a famous mind.' Ian Haywood, *Faking It: Art and the Politics of Forgery* (1987) p. 105. Koestler complains of elitism and snobbery in 'The Aesthetics of Snobbery', *Horizon*, Winter 1965, p. 50. There is a less invidious but otherwise similar populist argument in favor of wide distribution of exact reproductions in Battin, 'Exact Replication in the Visual Arts', 38 *J. Aesthetics & Art Criticism* 153 (1979).

16 Jean Chatelain uses the expression 'sentimentalité douteuse' in discussing public attitudes toward counterfeit art in France in his *Oeuvres d'Art et Objets de Collection* (Paris 1982) p. 264.

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17 For a representative collection of essays see Denis Dutton (Ed.), *The Forger's Art: Forgery and the Philosophy of Art* (1983).
18 A common variation of the 'original' counterfeit is a rough copy or sketch of an authentic work that is passed off as a preliminary study. Private communication from art dealer André Emmerich, 26 September, 1989.
19 133 Misc. 871, 234 N.Y.Supp. 185 (Sup. Ct. 1929).
20 See Andrew Decker, 'The Multi-Million Dollar Belle', *ARTnews*, Summer, 1985, p. 86. The problem of the counterfeit that will not die or go away is discussed further below.
21 According to art dealer André Emmerich, fakes usually include elements of pastiche because counterfeiters lack the artistic vocabulary to produce inventions typical of the master and are reduced to copying and combining images taken from authentic works.
22 Sagoff, 'Historical Authenticity', 12 *Erkenntnis* 83 (1978).
23 Alsop, 'The Faker's Art', *N.Y.Review of Books*, 23 October, 1986, p. 25. Cf. Keats: 'Beauty is truth, truth beauty ...' (*Ode on a Grecian Urn*). Accepting for the moment that 'poets are the unacknowledged legislators of the world' (Shelley, *A Defence of Poetry*), this bit of unacknowledged legislation seems ambiguous. I read it to confirm that lack of truth (authenticity) impairs beauty, though it is open to the contrasting reading that beauty supplies its own truth, which should thus survive any difficulty about authenticity.
24 For an authoritative discussion of the relation between cognition and perception see U. Neisser, *Cognition and Reality* (1976).
25 Sparshott, 'The Disappointed Art Lover', *in* Denis Dutton (Ed.) *The Forger's Art: Forgery and the Philosophy of Art* (1983) p. 249. Alsop, in making the same point, speaks of 'the historical response,' which he distinguishes from the 'pure aesthetic' response. Alsop, 'The Faker's Art', see Note 23 above.
26 Haywood, see Note 15 above, p. 105.
27 For discussions of the Elgin Marbles see William St. Clair, *Lord Elgin and the Marbles* (rev. ed. 1983); Merryman, 'Thinking about the Elgin Marbles', 83 *Mich. L. Rev.* 1880 (1985).
28 See Nafziger, 'The New International Framework for the Return, Restitution, or Forfeiture of Cultural Property', 15 *N.Y.U.J.Int.L. & Pol.* 789 (1983).
29 See Merryman, 'The Retention of Cultural Property', 21 *U.C. Davis L. Rev.* 477 (1988).
30 Marianne Bro-Jorgenson, *in* 'International Committee for Museology Symposium: Originals and Substitutes in Museums', 157 (ICOFOM Study Series No. 8, 1985).
31 Some may object that this merely replaces the van Meegeren problem with a different one: why do people place such importance on authenticity? That question, to which there is no short answer, is discussed in 'The Public Interest', see Note 5 above.
32 Lovejoy, *in* Jonathan Gash's *Gold by Gemini* (Penguin ed. 1988) p. 124.
33 Anne-Marie Stein, *Three Picassos before Breakfast: Memoirs of an Art Forger's Wife* (1973) p. 177.
34 Clifford Irving, *Fake: The story of Elmyr de Hory, the Greatest Art Forger of Our Time* (1969) pp. 119–120.
35 For a fuller discussion of why we care about cultural property at all and of the importance of authenticity to our concerns see 'The Public Interest', see Note 5 above.

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36 For discussions see Carlo Pietrangeli (Ed.), *The Sistine Chapel: The Art, the History, and the Restoration* (1986); Talley, 'Michelangelo Rediscovered', 86 *ARTnews* 159 (Summer 1987); Kathleen Weil-Garris Brandt, 'Twenty-five Questions about Michelangelo's Sistine Ceiling', 126 (n.s.) *Apollo* 392 (December 1987).

37 The project is described in J. Bruyn *et al.*, *A Corpus of Rembrandt Paintings* (The Hague, 1982). For a critical discussion of the project and its work see Talley, 'Connoisseurship and the Methodology of the Rembrandt Research Project', 8 *Int. J. Museum Management & Curatorship* 175 (1989).

38 Elsen, see Note 7 above, at 67–8.

39 The right of integrity originated in France, has been widely adopted in the civil law world and is included in Article 6bis of the Berne Copyright Convention. At this writing it has been enacted, though with varying terms and degrees of protection of the artist, in nine states, and a federal version was enacted in 1990. For a fuller discussion see Merryman and Elsen, *Law, Ethics and the Visual Arts* (2d Ed. 1987) pp. 143–75.

40 Tietze, see Note 2 above, at 73.

41 UNESCO, Recommendation for the Protection of Movable Cultural Property (1978) art. II.8.

Successful counterfeits may also dilute the market value of authentic works by increasing the number of purchasable objects available to satisfy a fixed pool of collector money. The confusion created by counterfeits can drive money out of the market for the work of a particular artist – e.g. Rodin drawings – and thus reduce the market value of authentic works. These market effects can be substantial, but they fall outside the scope of this article.

42 Geraldine Norman, 'Art Trading and Art Faking', *in* Tom Keating, *The Fake's Progress* (1977) 261.

43 See Douglas McGill, 'Fake Art Prints: Big Business Getting Bigger', *N.Y. Times*, 22 July, 1987, p. 1; July 23, 1987, Sec. B 1:2; Terry Pristin, 'Net Closes around Publisher of Dali Copies', *San Fran. Chronicle*, 21 July, 1989, p. E5; Andrew Decker, 'Unlimited Editions', *ARTnews*, Summer 1988, p. 138. Although reduced, the traffic continues. Visit any flashy 'art gallery' in a major city or resort area and show interest in Dali and watch what happens.

44 Tom Keating, *The Fake's Progress* (1977) p. 79. 'Sexton Blaking' is Keating's term for faking.

Compare this variation, aimed at restorers: '...I'd been to the Goya exhibition at the Royal Academy. And I'd been so appalled by the scandalous way that some of them had been restored that I decided that it would be right for me to make a self-portrait of Goya as a replacement. It was presumptuous of me I know, but I could think of no better way of taking my revenge on those savages who are not fit to clean the boots of the masters, let alone their priceless paintings.' (p. 165)

Similar efforts to characterize the counterfeiter as a crusader against the corruption of dealers and others in the art world are set out in Stein and Irving, both passim.

45 Geraldine Norman, 'Art Trading and Art Faking', *in* Tom Keating, *The Fake's Progress* (1977) 197, 200–201.

46 For example, Pierre Louys' story, 'The Wearer of Purple', *in The Collected Works of Pierre Louys* (1951), p. 535.

47 *Miller* v *California*, 413 U.S. 15 (1973).

48 'The Faker's Art', *N.Y. Review of Books*, 23 October, 1986, p. 25. Tom Keating's eager 'confession' and assiduous self-promotion in the media as a successful counterfeiter is perhaps an extreme example.

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49 Gordon, 'Kirchner in Dresden', 48 *Art Bulletin* 335, 336 (1966); Donald E. Gordon, *Ernst Ludwig Kirchner* (1968) p. 28.
50 The case is reported in Il Foro Italiano 1966, II, 513. These and other legal incidents in the life of a litigious artist are briefly described in Delfino, 'Giorgio De Chirico in the Courts' (student paper in author's files, n.d.).
51 The Rockefeller Collection is discussed below Notes 67–8 and text.
52 Tietze, see Note 2 above p. 9.
53 64 Misc. 2d 423, 314 N.Y.S. 2d 661 (Sup. Ct. 1970).53.
54 For his wife's account of Stein's career as a counterfeiter see Anne-Marie Stein, *Three Picassos Before Breakfast* (1973).
55 This conclusion was aproved by the Committee on Art of the Association of the Bar of the City of New York in its Report on Disposition of Fake Art, 26 Record 591 (1971). The Report is discussed below.55.
56 Topolnicki, 'The Fine Art of Fraud', *Money*, September 1986, p. 73. Hoving's exception for contemporary art may be optimistic if one considers the rampant fakes in the market for prints by Chagall, Dali, Miro and Picasso and the money to be made by successfully faking the works of recently deceased contemporary artists like Andy Warhol. Cf. 'Some Warhol Artworks May Be Forged', *S.F.Chronicle*, 10 July, 1989, p. 1; 'Peers, Bogus Brushstroke: Is It Really a Matisse, or a Forgery?', *Wall St. J.* 22 May, 1989, p. C1.
57 Schüller, see Note 7 above p. 81.
58 *Ibid.* at 83.
59 *Ibid.* Dr. Jousseaune illustrates another aspect of the counterfeit art problem: some of the traffic is sustained by people unrealistically looking for a bargain. The fact that the price is remarkably low, rather than putting them on guard, stirs their avarice. The cliché that 'You can't cheat an honest man' applies to many dubious transactions in the art market, as in other markets.
60 'French Scholar Cites Utrillo Forgeries', *San Francisco Chronicle*, 15 September, 1989, p. E11.
61 Terry Tristin, 'Net Closes Around Publisher of Dali Copies, S.F.Chronicle', 21 July, 1989, p. E6. Magui is not the only source of questioned Dalis. If counterfeit Dali prints number in the tens of thousands, can the false Chagalls, Miros, Picassos and others be far behind?
62 Among these are some exotic variants. Thus there are works sold by the estate or the surviving spouse of the artist as lifetime works made by the deceased master, though in fact they are posthumous fabrications passed off as authentic. This is commonly supposed to be the case with works sold as authentic by the widows of two famous twentieth Century French painters. One even hears the argument that, under the French law of moral right, the surviving spouse's assertion that these posthumously created works are authentic cannot be legally challenged. Another example: someone (the estate, a foundry, a collector) in possession of a plaster has casts made and sold as authentic, though the sculptor is dead. See the discussions of problems in the sculpture market cited below, Note 71.
63 Fraudulent practices in the 'fine print' market are legion, and the variations are too numerous to describe here. The practice described in the text and the highly publicised Dali print scandals of the 1980s are merely two illustrations of what lies in store for the unwary collector or 'investor' attracted to the print market. See the discussions cited above Note 43, and Merryman and Elsen 525–542.

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64 'The Fine Art of Faking It, Respectably', *U.S.News & World Report*, 29 August/5 September, 1988, p. 94. For a similar account see Ned Geeslin with Cathy Nolan, 'Paris Copy King Danial Delamare Makes a Good Impression(ist)', *Time*, 11 April 1988, p. 45. There are reports of like enterprises in Nicole Swengley, 'Old Master' to Order, *The Times*, 10 March, 1990 (about Susie Ray, each of whose copies is 'technically correct, executed in oils on the sort of canvas used for the original, and mounted in a frame in keeping with the original'); 'Bogus Art Stands up to the Fickle Finger of Fake', *Chicago Tribune*, 26 June, 1988, p. 21 (about Michael Britton, who appears to have had legal advice: 'What's to keep the copyists from being identified as forgers? 'A fake is intended to defraud,' says Britton, whereas his paintings are intended for education and appreciation.').

65 It is described in Lowenthal, 'Fake, Falso, Faux', *IFAR Reports*, November 1987, p. 3. Concluding her description Ms. Lowenthal states: 'IFAR's experience allows us to predict that in some secondary sales there will be deceptions and that real heartache will be caused by these fakes.' IFAR is the acronym for the International Foundation for Art Research, a non-profit organization active in dealing with problems of art theft and authenticity.

66 This operation, which has since gone out of business or underground, is described in *Stolen Art Alert*, July 1983, p. 4.

67 Within a few months a Rockefeller Collection Rodin copy was offered as authentic by a Parisian dealer with the 'RC' mark obscured by shoe polish. Personal communication from Professor Albert E. Elsen to the author.

68 Quotations are from an undated catalog: 'The Nelson Rockefeller Collection Compliments of Neiman-Marcus.'

69 Lowenthal, 'Limited Edition' Museum Replicas from Beijing', 8 *IFAR Reports* No. 1 (January/February 1987) p. 3. The report adds that each of the bronzes was cast in a numbered edition of fifty, stamped 'on the bottom or in another inconspicuous place' to show that they are reproductions. Jessica Rawson, Deputy Keeper of Oriental Antiquities at the British Museum, which has a set of the bronzes, is quoted in the same article as saying that each replica is distinguished from the original by the presence of 'some foreign material' which would be visible in an X-ray. Lowenthal reports a number of concerns about this project and concludes: 'However, one wonders how long it will be before one of these fine replicas is sold with its marks removed to an unwary collector who fails to X-ray it.'

70 *Museum News*, January-February 1982, p. 51.

71 For fuller discussions of the sculptural reproduction problem see Elsen, Note above 7; Trustman, 'Abuses in the Reproduction of Sculpture, *ARTnews*, Summer 1981, p. 84; Hochfield, 'Flagrant Abuses, Pernicious Practices and Counterfeit Sculpture are Widespread', *ARTnews*, November 1974, p. 21. Cf. Elsen and Merryman, 'Art Replicas: A Question of Ethics', *ARTnews*, February 1979, p. 61; Merryman and Elsen, *Law, Ethics and the visual Arts* 543–551 (1987).

72 This problem and the Gorky example were suggested to the author by Eugene Victor Thaw in a letter of 11 September 1989.

73 See Hayt-Atkins, 'Masterminding Masterpieces', IFAR Reports, January 1988, p. 3.

74 John Carlin thoughtfully discusses these people and their work in his 'Culture Vultures: Artistic Appropriation and Intellectual Property Law', 13 *Columbia-VLA J. of Law & the Arts* 103 (1988). Carlin's emphasis is on the copyright and trademark law remedies available to those whose images

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are 'appropriated' by such as Bidlo, Levine and Sturtevant and the role of 'fair use' in preserving space for artists' creative use of others' images. See also Wang, '(Re)Reproductive Rights: Copyright and the Postmodern Artist', 14 *Columbia-VLA J. L. & the Arts* 261 (1990).

75 Here is a fair sample, all referring to Elaine Sturtevant's work. Thus:
[S]he was the first to reverse the modernist direction of creative flow – not from idea to object, but from object to idea ... and did it by putting that object out of view – by giving the viewer nothing new to see . . . only that which he had seen before... *I tell you, the woman is an original*... Sturtevant's work was new, though of course she never meant it to be original ... new-to-think, yes ... new-to-feel, yes ... but never new-to-see... *she made new work by not departing from other artists' original work.* Sturtevant's work ... has to do with something beyond *the shop-worn notion or originality*... She gets down underneath the surface imitation and reveals the naked truth within. (emphases supplied). Eugene M. Schwartz and Douglas Davis, A Double-Take on Elaine Sturtevant, FILE Magazine, Xmas '86 issue.
Herbert Muschamp associates the artist with:
... a rupture of our belief in such ideas as authorship and originality. There was something irresistibly oxymoronic about this first copyist, this original unoriginal... her painstaking fidelity to her model...
Herbert Muschamp, Sturtevant, in Sturtevant Drawings 1988–1965. Bess Cutler (1988).
Christian Leigh offers this insight:
Lichtenstein drawings ... were a research project in genre styles of painting; a rendering of the modes of expression employed throughout the ages to depict. Once removed, via Sturtevant, they take on a meaning of their own. They become a study of the depiction of depiction. *Her art is hers and hers alone, no matter how seemingly dependent upon model.* (emphasis supplied) (in Christian Leigh, *I Teach You the Superman*) And then came this woman, who made the biggest change of all: no change. Who made the most original move of all: no originality... Johns' daring in using a naked flag becomes – in Sturtevant – the daring to use a naked Johns ... Eugene M. Schwartz, *End Game*). Post End Game. ibid. and Stephen Westfall suggests that:
Sturtevant concentrates on making extremely accurate replicas of actual phenomena, a rendering procedure that art has traditionally concerned itself with. Instead of painting vases or landscapes, however, she's painting art. You could say she's selecting her subjects from a textual landscape rather than a primary, natural landscape. Stephen Westfall, Elaine Sturtevant at White Columns, *Art in America* October 1986, p. 164.
And in a press release from her dealer, Bess Cutler, the following appears:
Sturtevant models her work after well-known objects of contemporary art such as a Johns flag. These objects have been fully consumed by the art system and have already lived a full public life. In seeing a Johns flag, one no longer sees it as only an esthetic object, but as a tamed reservoir of art-history and market values. *In producing an identical flag, Sturtevant shifts the reference from Johns to herself, giving the flag a fresh perspective.* In this new context, the flag becomes, once again, controversial. (emphasis supplied) *Sturtevant Drawings at Bess Cutler*, 12 October, 1988.

76 'We're in this double-speak age now where you've got words like 'appropriation' – they don't even call imitation 'imitation' anymore. What liars specialize in is changing the word for the thing, and thereby passing it off as legitimate.' Solomon, 'On the Waterfront with Mark di Suvero', *View*,

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a Supplement to The Journal of Art, October (1990) pp. 7, 9 (quoting the artist Mark di Suvero).

77 Transcript of an interview between Leo Castelli, Elaine Sturtevant and Dan Cameron, 3 October, 1987. Bess Cutler Gallery, New York.

78 Jorge Luis Borges, 'Pierre Menard, Author of the Quixote', *in Labyrinths* (1964) pp. 36, 43.

79 See Note 53 above.

80 I discuss only United States law in this article, but similar legal difficulties exist in other nations with art museums, dealers, auction houses and collectors. For a discussion of French Law see Jean Chatelain & Françoise Chatelain, *Œuvres d'Art et Objets de Collection en Droit Français* 145–172, 213–232 (1990).

81 Other possible forms of public action that are potentially effective in dealing with some kinds of counterfeits – particularly phoney fine prints – include prosecution for violation of state securities laws (e.g. the Carol Convertine Galleries case in New York, *The ARTnewsletter*, 23 December, 1986, p. 3), administrative action by the Federal Trade Commission (e.g. the Austin Galleries case, *The ARTnewsletter*, 21 June, 1988 p. 3) and state consumer protection agencies (e.g. Wisconsin where, at this writing, the Attorney General proposes to issue a consumer fraud regulation directed at art galleries dealing in 'fine prints').

82 American Law Institute, Model Penal Code and Commentaries: Official Draft and Revised Comments, with Text of Model Penal Code as adopted at the 1967 Annual Meeting of the American Law Institute at Washington, D.C. May 24, 1962 §224.2 (1980-). Statutes based on this model exist in several states: Ala. Stat. §13A-9–10; Alaska Stat. §11.46.530; Ariz. Rev. Stat. Ann. 13–2004; Ark. Code Ann. 5–37–213; Conn. Gen. Stat. Ann. 53a-141; Ky. Rev. Stat. Ann. §516.110; Me. Stat. Title 17-A §705; N.J.Stat. 2C:21–2; N.Y. Penal Law s 170.45; Ohio Rev. Code Ann. §2913.32; Tex. Stat. & Codes Ann. Title 7 §32.22. 82.

83 'According to the Report of the Arizona Criminal Code Commisssion ... the criminal simulation statute was designed to address "the problems of forged art treasures or the sale of faked antiques or rare natural objects."' *State* v *Rea*, 145 Ariz. 298, 701 P. 2d 6, 8 (1985). '[The criminal simulation statute] extends to the forgery of ancient and modern works of art ...' *Tawfik* v *State*, Tex. Crim. App., 643 S.W. 2d 127, 128 (1983).

84 '...it should be noted that Section 224.2 provides coverage against forgery of 'any object' other than a writing.' Model Penal Code, Section 224.1, Comment 3. In *State* v *Rea*, 145 Ariz. 298, 701 P. 2d 6 (1985) the Court held that forgery and criminal simulation were distinct offenses, so that criminal simulation could not be treated as a lesser included offense in a prosecution for forgery.

85 Although there seem to be no American cases in point there are two British decisions. In *Regina* v *Closs*, (1858) Dears & B. 460, in which the defendant had the signature of the painter John Linnell added to a copy of one of Linnell's paintings, the Court said:

A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his.

In *Regina* v *Douce*, (1971) Crim.L.Rev. 105, where the paintings bore the signature of Edward Seago, a charge of forgery was admitted because: '[T]he signatures made all the difference as they purported to tell you

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something about the paintings.' In a comment on Douce, D.J. Lamming states: 'The essence of the forgery in both *Closs* and *Douce* was the painting – on its own the signature would be meaningless', *Ibid.* at 106. There is an interesting discussion of this and related questions in *Great Britain, Law Commission, Report on Forgery and Counterfeit Currency* (Law Com. No. 55, 1973), pp. 10–12.

86 See discussion Notes 31 ff and text.

87 See Note, 'Legal Control of the Fabrication and Marketing of Fake Paintings', 24 *Stan.L.Rev.* 930 (1972).

88 Note, 'Art Forgery: The Art Market and Legal Considerations', 7 *Nova L.J.* 315, 329 (1983). The use of this strategy by Elmyr de Höry and his accomplices is decribed in Clifford Irving, *Fake!*
Compare the discovery, in 1987, that highly regarded ceramic figures from Vera Cruz said to date from 600 to 900 AD in the collections of major museums were made by a living Mexican sculpture restorer, Brigido Lara. Mr. Lara maintained that he had nothing to do with any fraud, 'which was perpetrated by middlemen who obtained the pieces and passed them off as the real thing.' Museum's pre-Columbian Artworks Revealed as Copies Made in 1950's. *San Jose Mercury News*, 25 April, 1987, p. 10A. Douglas C. McGill, 'Sculptures Could be Forgeries', *N.Y.Times Arts & Entertainment Section*, 20 May, 1987, p. 26. He insisted that the sculptures had always been sold to tourists and art collectors and dealers as his own original works. 'He later learned, he said, that people would sometimes buy his works, doctor them to appear aged, and then resell them as authentic pre-Columbian sculpture. But he never condoned this activity.'

89 e.g. 18 U.S.C. §473. This statute punishes several related offenses: 1) misuse of plates made for the purpose of printing 'any obligation or other security of the United States'; 2) making likenesses of such plates; 3) selling or importing such plates; 4) possession of such plates 'with intent to use... or suffer the same to be used in forging or counterfeiting any such obligation or other security'; 5) possessing counterfeit obligation or other security' with intent to sell or otherwise use same'; 6) making or selling any likeness of such obligation or other security; 7) possessing distinctive paper similar to that 'adopted by the Secretary of the Treasury for the obligations and other securities of the United States.' Of the seven types of offense included in the statute, only 4) and 5) include any element of intent.

90 18 U.S.C. §489 punishes 'Whoever... makes or... possesses with intent to sell, give away, or in any other manner uses... any token, disk, or device inthe likeness or similitude as to design, color or the inscription thereon of any of the coins of the United States'.

91 18 U.S.C §501 punishes a group of related offenses: 1) forging or counterfeiting stamps; 2) making, printing, using or selling or possessing with intent to use or sell, forged or counterfeited stamps; 3) making, knowingly using or selling, or possessing with intent to use or sell paper bearing the watermark of any stamped envelope or postal card; 4) making or printing stamps of the kind authorized by the Post Office Department or Postal Service without authority; 5) delivering such stamps, with intent to defraud, to an unauthorized person.

92 *Webb* v *U.S.*, 216 F.2d 151, 152 (1954). To the same effect for procuring a plate to be made, *Michener* v *US*, 170 F.2d 973 (1948). A comparable result is achieved when the court infers intent. Thus in a prosecution for possession of a plate with intent to use, intent was inferred from possession. *Michener* v *US*, 157 F.2d 616 (1946), rev. on other grounds 331 U.S. 789 (1946). And

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in a subsequent prosecution for procuring a plate to be made the court stated: 'The crime is complete with the plate is unlawfully made or procured to be made... The intent to use the plate unlawfully is not a necessary ingredient of the crime, but, even so, the charge of intent to unlawfully use it is implicit in the charge of unlawfully making.' *Michener* v *US*, 170 F.2d 973, 975 (1948). Cf. *Britt* v *US*, 391 F.2d 540 (1968); US v Green, 474 F.2d 1385 (1973), cert den. 414 US 829 (19).

Justice Brennan, dissenting in *Regan* v *Time*, Inc. 468 U.S. 641 (1984), argued that the absence of a requirement of intent to deceive or defraud in 18 U.S.C. §474 impaired *Time's* freedom of expression under the First Amendment. Although his dissent was joined by Justice Marshall, none of the other justices commented on the matter.

In Great Britain, under the Forgery and Counterfeiting Act 1981 §14, making a counterfeit note or coin intending to pass it as genuine is an offence punishable by up to ten years' imprisonment, while making a counterfeit note or coin without lawful authority or excuse (no intent specified) invites imprisonment for up to two years.

93 412 F.Supp. 426 (D.C.W.D.Mo. 1974). The strength of *Wagner* as a precedent is weakened by reservations expressed in *dicta* in *Regan* v *Time*, Inc., Note 92 above at p. 651, n8.

94 18 U.S.C. §492 provides for forfeiture of counterfeits or 'any articles, devices, and other things made, possessed, or used... or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority...' Paragraph 3 of §492 permits the Secretary of the Treasury to remit or mitigate the forfeiture only if he finds that it 'was incurred without willful negligence or without any intention on the part of the petitioner to violate the law... upon such terms and conditions as [the Secretary] deems reasonable and just.'

95 Specifically, 18 U.S.C. §474.

96 The statutory scheme permits some reproductions: 18 U.S.C. §504 allows black and white illustrations for 'philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums' if the linear dimensions of such illustrations are less than three-fourths or more than one and one-half those of the original.' This provision was the focus of disagrement between Justice White, for the majority, and Justice Brennan, dissenting, in *Regan* v *Time, Inc* 468 U.S. 641 (1984).

97 The Court's First Amendment discussion was expressly based on *US* v *O'Brien*, 391 U.S. 367 (1968).

98 Compare the reference to *Wagner* as 'one arguably unconstitutional application of the statute' in *Regan* v *Time, Inc.*, see Note 92 above at 651, n8.

99 The case is described in Lawrence Weschler's two-part profile of Boggs in the New Yorker of 18 January, 1988, p. 33 and 25 January, 1988, p. 88. Although Boggs regularly shows his work in a New York gallery he has apparently not been prosecuted under US counterfeiting laws. Boggs has also produced drawings of Swiss banknotes in Switzerland without interference by Swiss authorities.

100 Boggs's methods of disposing of his drawings is an important aspect of his work and is described at length by Weschler. Briefly, Boggs offers the drawings at face value in exchange for goods and services and insists on receiving change.

101 The public importance of authenticity is developed in 'The Public Interest', see Note 5 above.

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102 Before the Copyright Act of 1976 and the legislation accompanying US accession to the Bern Copyright Convention in 1989, the requirement of registration or placing a copyright notice on the work, plus the aesthetic and ideological concerns of many artists, meant that most works were not protected by copyright. See Note, 'Courting the Artist with Copyright: The 1976 Copyright Act', 24 *Wayne L. Rev.* 1685 (1978); Sheehan, 'Why Don't Fine Artists Use Copyright', 22 *Bull. Copr. Soc.* 242 (1975): Merryman and Elsen, 175 ff.

103 On the ineffectiveness of copyright as a remedy against counterfeiting see Nelson, 'Art Forgery and Copyright Law: Modifying the Originality Requirement to Prevent the Forging of Artworks', 8 *Cardozo Arts & Entertainment L. J.* 683 (1990).

104 California Civil Code §987.

105 New York Arts & Cultural Affairs Law §14.55.

106 See Merryman and Elsen, *Law, Ethics and the Visual Arts* 143 ff. (2d ed 1987).

107 Title VI of the Judicial Improvements Act of 1990, entitled: Visual Artists Rights Act of 1990. It provides that: 'the author of a work of visual art shall have the right to prevent the use of his or her name as the author of any work of visual art which he or she did not create', 17 U.S.C. §106A (a).

108 The federal law protects paternity only during the life of the artist, 17 U.S.C. §106A (d). 108.

109 In California, France and Germany, where versions of the artist's resale proceeds right (*droit de suite*) exist, an interesting question arises for one who sells a counterfeit work. If he takes the position that it is genuine, then presumably he owes the artist or her successors a part of the 'resale' price. He could of course avoid such payment by showing that the work is counterfeit. Paul Katzenberger, 'The Penal Protection of Copyright in Artistic Works and the Practice of Prosecution in the Federal Republic of Germany', *in* International Institute of Higher Studies in Criminal Sciences, *The Penal Protection of Works of Art* (Quaderni di Scienze Criminali 1983) p. 315, 321. The resale proceeds right is discussed in Merryman and Elsen 213 ff.

110 Compare the result in *Factor* v *Stella*, reproduced in Merryman and Elsen at 502–3, in which the court found that additional copies of a painting (made, in this case, by the artist himself) violated the artist's obligation to the owner of the original work, but that the plaintiff suffered no resulting provable damage. 110.

111 Comment, 'Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery', 14 *Wm. & Mary L. Rev.* 409 (1972).

112 15 U.S.C.A. §§1051 ff.; Cal. Bus. & Prof. C. §14340;

113 18 U.S.C. §1159; Alaska Stat. §§45.650.010 ff.; Ariz, Rev. Stat. Ann. §§44–1231 ff.; New Mex. Stat. Ann. 30–33–3 to 30–33–8; Col. Rev. Stat. Ann. §12–44.5.

114 See Note 67 and text above.

115 See text at Note 86 above.

116 The question of plausibility is difficult and inescapable. In part it depends on the quality of the counterfeit work and in part on the standard of knowledge and perception expected of the buyer. The same question arises, however, under existing criminal simulation statutes. Whether an object 'appears to have value because of antiquity, rarity, source or authorship which it does not possess' (Model Penal Code §224.2, discussed above) depends on a judgment about whether the simulated object resembles the real thing (objective plausibility) and an assumption about the probability

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that people of varying degrees of knowledge and discrimination would be deceived by it (subjective plausibility).

117 This language is adapted from that of Model Penal Code §224.2, discussed above, with the element of intent replaced by knowledge. A similar result, without the necessity for any legislative action, could be reached by judicial interpretation of the part of Model Penal Code §224.2 that reads 'or with knowledge that he is facilitating a fraud to be perpetrated by anyone' to apply to enterprises like those of Mr. Delamare and the Rockefeller Collection. That was not, however, the meaning intended by the drafters; see Model Penal Code §224.1, Comment 5.

118 On the constitutionally permissable 'time, place and manner' limitations on expression under the First Amendment see Melville B. Nimmer, *Nimmer on Freedom of Speech* (1984) §§2.04, 4.03.

119 The Report (hereinafter ABCNY Report) was prepared by the Committee on Art of the Association of the Bar of the City of New York and was published in 26 Record 591 (1971).

120 ABCNY Report 591–2.

121 ABCNY Report 598

122 ABCNY Report 598–9

123 The text description is based on the writer's experience in the art market and on conversations with dealers, auction house personnel, museum personnel and collectors.

124 The story is told by Vasari that Michelangelo made a marble sleeping cupid and artificially aged it so that it could be sold as an antique. Giorgio Vasari, *Lives of the Most Eminent Painters, Sculptors and Architects*, vol. 9 (London 1912–1915) p. 12.

125 See discussion at Note 94 and text above.

126 See, for example, the Trademark Counterfeiting Act of 1984, 15 USC 1051 ff. Section 1116(d)(1)(a) provides for seizure of counterfeit objects, section 1118 for destruction. State law contains similar provisions. Thus Cal. Bus. & Prof. Code section 14340(b) authorizes seizure and destruction of counterfeit commercial articles. U.S.C. Title 18 §2318(a)(d) provides for confiscation of counterfeit records, and Title 17 authorizes confiscation of copyright infringing works in §§503(a) & (b) and 506(a)(b). Articles employed in RICO violations may be confiscated under Title 18 §1963(a). The remedies of confiscation and destruction are available in civil as well as criminal actions under both statutes.

127 See the discussion Notes 101 ff. above and text.

128 In France the power of the police to seize counterfeits (*la saisie-contrefaçon*) without prior judicial authorization puts the burden of sueing to recover the works on the person claiming them. Such an action by a counterfeiter or dealer-accomplice is of course unlikely, and even an innocent party may decide not to take the trouble to recover something devalued by being labelled counterfeit. Various French laws applicable to counterfeit art also expressly provide for seizure and destruction, although the innocent owner may reclaim them. There is an excellent discussion in Chatelain 271–280. A similar rule prevails in Italy under the Law of 20 November 1971, n. 1062, Art. 7.

129 Karlen, 'Fakes, Forgeries and Expert Opinions', 16 *J. Arts Management & Law* 5 (Fall 1986) is a useful discussion of the liability of experts. See also Bresler, 'Expert Opinions and Liability', 254 *Practicing Law Institute Patent, Copyright and Trademark Institute* 269 (1988); Colin & Easby, 'Legal As-

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pects of Forgery and Protection of the Expert', 26 *Bull. of the Metropolitan Museum of Art* 258 (1968); Merryman and Elsen, 569 ff.

130 See, for example, *Travis* v *Sotheby Parke Bernet, Inc.*, reproduced in Merryman and Elsen, 571–3, for an example of an apparently unfounded action of this kind. Cf. *Mount* v *Sadik et al.*, No. 78 Civ. 2279 (WCC) (D.C.S.D.N.Y. 1980) in which plaintiff's record as authenticater of disputed paintings and seller of forged John Singer Sargent watercolors, described in an article in *ARTnews* by Sylvia Hochfield, became the basis of an action for defamation.

131 The first wave of legal interest in the protection of cultural property occurred in the second half of the nineteenth century, with arts. 34–36 of the Lieber Code and a series of international conferences from which emerged a group of multilateral conventions ('The Hague Conventions') that included special provisions protecting cultural property from the acts of belligerents during hostilities. The development is summarized in Merryman, 'Two Ways of Thinking about Cultural Property', 80 *Am. J. Int. L.* 831, 833–5 (1986). The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May, 1954, 249 U.N.T.S. 240, is presently the reigning multilateral convention on the topic. The United States, to its discredit, has not acceded to it.

The second wave of international interest in the legal protection of cultural property began in 1933 but achieved real momentum only after World War II and the establishment of the United Nations and UNESCO. The emphasis during this development has been of two kinds: to protect cultural property against loss from negligence, ignorance and mismanagement during peace time, and to control the international movement of stolen and illegally exported cultural objects. The key instrument is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November, 1970, 823 U.N.T.S. 231. The United States, to its credit, is a party – indeed the only major cultural property importing nation to have acceded to the Convention at this writing. The development is described in 'Two Ways', at 242 ff.

132 Examples would include establishment of the National Endowment for the Arts; a variety of state and federal laws protecting historic sites and monuments and archaeological sites and objects; the proliferation of museums of all kinds, particularly in Washington, DC, which has become one of the great museum cities of the world; the increased legal attention to artists' rights, living and working conditions and hazardous materials; and many others. See generally Merryman and Elsen, Law, *Ethics and the Visual Arts* (2d ed 1987); Feldman, Weil and Duke Biederman, *Art Law* (1986).

133 See 'The Public Interest', Note 5 above at 355 ff.

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