

## **DIALOGUES OF AUTHENTICITY**

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### *Abstract*

Artists operating under a studio model, such as Andy Warhol, have frequently been described as reducing their work to statements of authorship, indicated by the signature finally affixed to the work. By contrast, luxury goods manufacturers decry as inauthentic and counterfeit the handbags produced during off-shift hours using the same materials and craftsmanship as the authorized goods produced hours earlier. The distinction between authentic and inauthentic often turns on nothing more than a statement of authorship. Intellectual property law purports to value such statements of authenticity, but no statement has value unless it is accepted as valid by its audience, a determination that depends on shared notions of what authenticity means as well as a common understanding of what authenticity designates.

## INTRODUCTION

In 1961, the Italian artist Piero Manzoni embarked on a particularly interesting project. Manzoni provided various associates, including the art gallery owner Mario Diacono and the artist Marcel Broodthaers, with certificates of authenticity. Each certificate — numbered, signed, and watermarked — attested that the holder of the certificate was “to be considered as an authentic work of art for all intents and purposes” as of the date of the certificate (Mansoor 2001).

Manzoni’s project, as it was no doubt intended to do, raised questions on two levels. First, it provided yet another iteration of the familiar query: What is art? Can something become a work of art simply because the artist declares it to be so? Does the signature on a painting, or the name of an author on some lines of prose, mark those efforts both in terms of boundaries — defining what the claimed art is and what is outside its scope — and in terms of merit or value? Is the signature what makes a cardboard Brillo box mere commercial speech but a reproduction in wood of that same box by Andy Warhol an invitation to a dialogue on the nature of commerce in the modern age? Second, the project raised a related question: Who gets to decide whether an artwork is authentic? Is the artist’s signature treated as the final word, even if that signature is only physical contact the artist had with the work? Are authenticity questions instead a matter of group consensus (Branigan 2002)? Or does the question of authenticity depend on more objective factors, such as the level of creative contribution the putative artist or author made to the work?

When we ask whether the wood Brillo box is an “authentic Warhol,” for example, we are asking at least two questions. The threshold question is what “authentic” means in this particular

context — in other words, what set of conditions we are asking the work to fulfill. It is only once we have determined this standard that we can then proceed to the next question — namely, whether this particular work has indeed met those conditions. If, for example, we define “authentic” as meaning “no one but Andy Warhol had any hand in its conception or realization,” certain works now considered to be “authentic Warhols” will then become inauthentic. If, by contrast, we define “authentic” as meaning “approved by Andy Warhol,” we will end up authenticating a far broader group of works.

These are not, of course, areas of concern only for creative works. Trademarks serve the same purpose for commercial goods and services, and so the same questions arise in that realm. Does characterizing a product as an “authentic Gucci handbag” mean that only employees of Gucci America, Inc., participated in its production? Or do we have a more capacious notion of authenticity in this context, such that an “authentic Gucci handbag” can encompass bags produced by overseas workers and merely approved by representatives of the Gucci company? Do we have different meanings of an “authentic Gucci” depending on whether we are speaking of a handbag or a licensed product, such as a keychain or shower curtain?

These questions have always lurked at the boundaries, at least, of our consideration of cultural and commercial products. Starting in the twentieth century, however, they became more central. The move in modern art to highlight modes of production and thereby problematize questions of authorship, concomitant with the development in both trademark doctrine and practice of outsourcing and similar modes of manufacturing, regularized a disjuncture between the name on the product and the craftsman who created it. This disjuncture allows for multiple meanings of the word “authentic” and, likewise, of its various opposites, such as “inauthentic” or “fake,” as well as of those characterizations without such strong moral valences, such as

“reproduction” or “copy.” Given the malleability of the concept, it is not infrequently the case, as Manzoni’s work communicates, that a statement of authenticity is often little more than a statement of authorization — reducing, in effect, the meaning of “authentic” to “the statement that names it as such” (de Duve 2006: 101).<sup>1</sup>

The capaciousness of the term is not necessarily troubling, however. As with other relative assessments, such as reputation, we should recognize that the meaning and value of authenticity ultimately depend on community consensus in a particular context (Balkin & Levinson 1999). Whether something is authentic is a matter of the relationship of the audience to the work or good; the expectations inherent in that relationship; and the purposes for which the audience desire authenticity (Beverland & Farrelly 2010). The challenge both for our creative and commercial culture and for the law that regulates it — in particular, copyright and trademark law — is to determine what “authentic” means in any given context, when we care about authenticity and when we don’t, and what types of information are relevant to these considerations.

As a prefatory matter, I note that one can approach such questions from at least two perspectives: the perspective of the author, creator, or producer, or the perspective of the audience, consumer, or market. Considering authenticity from the former perspective invokes issues of moral rights, spirituality, creative impulse, and personality, none of which I mean to diminish here. But I think that one’s concern with authenticity as a creator is ultimately in service of consumer or audience response. One promotes one’s authenticity, or seeks conferral of that status by others, because one hopes to inspire a particular reaction in one’s audience or market: approval, valuation, or critical regard. To the extent we are able to define “authenticity,” then, it is with respect to how particular communities use the term in particular contexts.

## I. DEFINING AUTHENTICITY

In its traditional sense, “authenticity” connotes a connection between the thing at issue and a particular time or place. When an art expert states that a painting is an authentic Rembrandt, she is saying (under this interpretation of the term) something about the co-existence of that work and the artist: that the artist was involved in the work’s creation; that the work was made in the Netherlands in 1630 and not in China in 2012; and that the work can thereby be classified with the other works already so denominated for purposes of analysis and valuation (Gilson 1957). Similarly, in the world of geographic indicators, authenticity relates to provenance in the form of terroir or regional production. The word Champagne, for example, indicates that the beverage comes from the Champagne region of France, rather than from, say, Northern California (Hughes 2006).

When authenticity is defined in such terms, audiences typically look to experts for confirmation that the work or good in fact has the stated genealogy. In the art world, this task is undertaken by authentication boards and art experts, who may issue certificates of authenticity (although fear of litigation has apparently dampened enthusiasm in this regard) (Cohen 2012). For goods, authenticity may be indicated by labeling or other advertising material or, for geographical indicators in some countries, through a separate system of *appellations d'origine contrôlées* (such as Champagne) or certification and collective marks (such as Idaho potatoes) (Hughes 2006).

These connections, to draw from Walter Benjamin (Benjamin 2008), give the work or good an “aura”: something special that makes it attractive to us, and that — we believe — copies or reproductions that share identical aesthetic qualities do not also have. That aura might be an

aura of exclusivity: that there is only one Mona Lisa or only a limited supply of Birkin handbags, each accessible to only a select few. Or it might be an aura of distinctiveness: that the Mona Lisa was painted in an era with the skills and technology of the early 1500s and not the skills and technology of 2012. Or perhaps it is the aura of inventiveness, in that we care more about the authenticity of things that seem to us, for aesthetic or other reasons, to be original or novel, and less about things that seem to be banal or run-of-the-mill. Whatever the reasoning, this aura is what, under this view, distinguishes the authentic from the perfect copy. An exact copy of the Mona Lisa might have the same aesthetic appeal to the unknowing spectator, but it does not have what the original alone possesses: the value attributed to that work's authenticity. That value, in turn, is tied to a particular characteristic or set of characteristics that the relevant audience has deemed necessary to the existence of the work's aura: the participation of a particular artist, for example, or the singularity of the work. And because creators and manufacturers are aware that value in this sense derives from genealogy, they can employ authenticity strategically to create value by allowing only limited numbers of works or goods to emerge.

In another sense, however, "authentic" means something that comports with a particular standard or Platonic ideal, even if not actually tied to time or geography. The manufacturer that advertises that its pasta sauce is an "authentic Italian sauce" is not making any claim that the sauce or its ingredients originated in Rome; rather, it is claiming that its sauce embodies a certain set of qualities that the relevant consumer base would characterize as "Italian." Likewise, we might refer to a country singer or folk singer as "authentic" based largely on her style of music, her dress, or her physical appearance, rather than actual biographical details, and question the authenticity of a performer who transgresses the boundaries of any of these characteristics (Barker & Taylor 2007; Peterson 1997). Politicians in particular strive for authenticity, which, in

today's political arena, often means disdaining ten-dollar words and engaging in activities such as clearing brush and eating hot dogs at state fairs.

Like the standard view of trademarks, then, this version of authenticity uses the term as a shorthand for a set of characteristics that would otherwise take time to discover. Rather than according value to something because it is unique or original, this version accords value to close copying — a lack of departure from an agreed-upon set of qualities. Both types of authenticity, however, allow an individual to engage in self-identification. Authenticity-as-aura allows an individual to mark herself as similarly unique: not everyone can own a painting touched by a famous artist or a luxury good manufactured in limited quantities. Authenticity-as-conformity allows an individual to mark herself as a member of a broader community: those who recognize authentic folk music or eat only authentic New York pizza (Beverland & Farrelly 2010).

Note, however, that as soon as we untether our notion of authenticity from particular facts of time or place, we are using the term in a way that admits of some level of falsity. Our perception of something as authentic does not necessarily depend on actual provenance or biography. The authentic Italian sauce might very well have been manufactured by a Canadian corporation; the folk singer may have spent his formative years in Minnesota, not an area traditionally associated with folk music, and changed his last name from “Zimmerman” to “Dylan”; and the politician may have adopted his folksy persona only fairly recently, after many years spent at private schools and Ivy League universities. In each of these cases, however, we are comfortable using the word “authentic” because we have implicitly defined the term to include only those characteristics that matter to us, setting aside the rest in a (willing) suspension of disbelief (Orvell 1989).<sup>2</sup> And it is how we can even conceive of something as an “authentic

reproduction”: an object that replicates certain of the qualities of the original but does not claim a situation in time or place.

Even when we assume that “authentic” designates a certain group of desired characteristics, a closer consideration may indicate that this link is not as robust as we might think. One authentic Napa Valley wine, for example, may differ considerably in quality from another; indeed, it may not even be the case that 100 percent of its grapes were grown in Napa Valley (Hughes 2006). (California’s law, for example, requires that wine with the name “Napa” contain at least 75 percent Napa Country–grown grapes, but it does not require 100 percent of the grapes to be from the region.<sup>3</sup>) The designation “Made in Italy” may indicate a particular tradition of craftsmanship, but it also may indicate that the goods were manufactured in China or India, with only the finishing touches applied in Italy, or that the goods were made in Italy but by undocumented Chinese workers at a greatly reduced cost (Wilkinson 2008). At least one court has held that a designation of authenticity is essentially nothing more than a sales technique (or “puffery,” to use the false advertising term), not to be relied on as conveying any material information.<sup>4</sup> And to the extent we use authenticity as a way of reducing search costs relating to quality in workmanship and manufacture, we should note that in some instances (both wine and handbags, to take two examples), the imitations are virtually indistinguishable from the authentic items (Hughes 2006; Keefe 2007; La Ferla 2007),<sup>5</sup> leaving the statement of authenticity as indicating little more than its own existence. At this point, then, the statement of authenticity is itself the quality that is being sought (Hughes 2006; Barker & Taylor 2007; Gilmore & Pine 2007), similar to when consumers are persuaded to buy a brand name of sugar or salt over an unbranded version, despite the fact that the products are almost certainly identical (McKenna 2012).



This result is presented most sharply when two works of art are aesthetically identical or two goods derive from identical workmanship but only one bears the designation of “authentic.” A painting designated as an authentic Rothko will sell for more in the marketplace than a visually identical painting not so designated, and it will likely continue to hold much of its value as time goes on (Clark 2004). The sculpture cast by the assistant during his working hours at the studio and approved by his employer is likely to be considered authentic; the same sculpture made by the assistant at his home on the weekend is likely to be considered a fake. A luxury handbag made off-shift using the same materials and workmanship as the product made an hour earlier (the “true fake”) is considered a counterfeit, not only worth much less than its earlier counterpart but also likely illegal (Boudreaux 2000; Beebe 2010; Lindstrom 2008). Native American pottery designs designated by the Indian Arts Fund as authentic became more valuable to tourists over time, despite the fact that such designations were likely motivated by what the Fund thought would be more appealing to buyers (Peterson 1997). In such cases, it is the designation of authenticity that explains the difference in value, regardless of whether that designation is attached to something that exists only in one copy or in multiple copies. At this point, as Deborah Hussey has noted, “the decision that the first twelve original multiples will count as authentic, while the thirteenth that is in all other respects the same will be a reproduction, is arbitrary” (Hussey 2004: 408).

I do not mean by this to suggest that audiences or consumers are acting irrationally by preferring goods or works that are deemed authentic. For consumers interested in the resale market or in longer-term investments, the economic value attached to a good’s status as authentic makes it rational to value this status, even if it turns out to be largely reflexive. Similarly, some consumers may use authenticity as a signaling device, in that possession of a good or work

deemed authentic may communicate something about the owner's wealth, taste, or social status. The Mona Lisa is valued more than an exact replica, despite the fact that the replica presumably would have the identical aesthetic appeal were one not aware of its provenance, because there is only one Mona Lisa and one Leonardo. Its singularity and relative inaccessibility gives it a value that we can appropriate, to some small extent, for ourselves when we are fortunate enough to see it in person. (We don't brag to our friends that we saw a reproduction of the Mona Lisa in a book, for that is an experience that can be shared by all.) For other consumers, the designation of authenticity has value because they desire an authentic good for its own sake. Owning an authentic T-shirt with a favored sports team's logo on it or an authentic painting may provide some measure of satisfaction to the extent that the owner feels that her ownership has a moral valence to it — that she is engaging in a transgression by satisfying her needs with a work or good not authorized by its creator — or possesses an associative meaning. To the extent Coca-Cola is the "real thing," it is not because it is particularly distinctive from its competitors. But in the same way that we borrow some of a scarce work or good's aura when we see it or own it (the feeling that comes from owning a luxury handbag, for example), Coca-Cola aims to get us to feel as if we are in an exclusive group of people who drink Coca-Cola.<sup>6</sup>

The difficulty, then, with defining "authenticity" is its capaciousness in everyday discourse. In some instances, we take "authentic" to be akin to attribution or brand identification, as when we refer to an artwork as an "authentic Rembrandt" or a luxury good as an "authentic Louis Vuitton." In other instances, we use "authentic" to refer to something made or presented in accordance with a set of standards or characteristics, as in "authentic New Orleans jazz" or "authentic Feta cheese." For both these usages, whether something is authentic is often more

easily defined in the negative. Whatever meaning we attribute to “authentic Napa Valley wine,” we can almost certainly say that wine created from New Jersey grapes by a vintner with no knowledge of the California wine-making process is not “authentic Napa Valley wine.” Whatever questions we might have about whether a painting is an “authentic Warhol,” we can be quite sure that the doodles I made on a notepad at lunchtime do not qualify. The fact, however, that it is more difficult to define precisely what authenticity is should not necessarily trouble us. The changing nature of cultural and commercial production starting in the twentieth century has confirmed that authenticity is ultimately contextual, and thus its definition must depend on the assumptions and expectations of a particular audience.

## II. AUTHENTICITY IN THE MODERN ERA

As the foregoing discussion suggests, although authenticity is a designation that many audiences and consumers value for some sort of truth statement, the nature of that statement is not at all clear. When “Napa Valley wine” means that a substantial majority, but not all, of the wine’s grapes come from the Napa Valley, or when a designer good differs from its counterfeit only in that the former is authorized by the brand owner, it becomes apparent that a shared understanding of the meaning of “authentic” in a particular context is necessary to prevent the designation from working its own deception.

The complexity of authenticity is not, however, a new phenomenon. In earlier eras, the limited scope of commerce meant that consumers of tangible goods dealt with producers of goods or suppliers of services in face-to-face transactions. If they wanted more of the same good, needed to resolve a dispute, or wanted to verify some quality about the product, they could simply engage with the seller directly (Paster 1969). There was no need, then, for a mark or

symbol that indicated to the consumer that the good that they were producing was authentic; its value was in whether the good served its intended purpose.

Likewise, audiences were not particularly troubled by whether a creative work attributed to a particular artist was completed in every respect by the artist's own hand. They were well aware that Rembrandt, like many artists of his era, did not paint every inch of his paintings himself; rather, he worked in a studio system, in which assistants were frequently used to fill in backgrounds, sketch a foot, or apply the final brushstrokes (Salisbury & Sujo 2009). An artist in this era was more precisely thought of as an artisan: someone who skillfully produced work according to particular techniques, often to fulfill an order from a patron who was more concerned with the quality of the finished piece than with the name of the painter who produced it. In such circumstances, there was nothing inauthentic about working with apprentices and assistants to produce the finished product, and the purchaser, as one commentator has noted, "was under no illusion as to the nature of his purchase [. . . He] did not demand that the artist should carry out every operation with his own hand, from the priming of a canvas to the final date and signature. The signature was not the hallmark of genius, it was the trade-mark of the studio" (Savage 1963: 2).<sup>7</sup> Thus, to the extent that the concept of authenticity existed, it tended to refer more to the subject matter than to the artist: a portrait was "authentic" not because it was accomplished by a particular artist but because of its aesthetic appeal in accurately representing its subject.

Writers' names functioned similarly. Although authorial names were occasionally attached to written works to lend the work legitimacy or bolster acceptance of the work, there was no expectation that the name conveyed historical provenance. In Shakespeare's time, for example, book publishers "utilized a wide variety of conventions to present 'authors' to their

readers,” including attributing group efforts to a single name, thereby “call[ing] attention to the collaborative production of the text” (North 2003: 25). In the pre-Romantic era, “readers did not often expect authorial attribution on the work itself, either because such attribution was deemed unimportant or unseemly or because the author was well known and so needed no explicit mention” (Heymann 2005: 1386).

With the emergence of the author figure in the Romantic era, our modern focus on personality, and the expansion of spheres of commerce, a concept of authenticity developed that focused on the creator or producer, rather than on the work or good produced. Audiences valued a painting because it was a Rembrandt or Van Gogh, not simply because they appreciated its aesthetics (Savage 1963). The Romantic notion of the creative process conceived of an author as an individual artist, with the work a particular expression of the author’s personality and genius. Producers of commercial goods, likewise, developed trademarks to put the identity of the manufacturer and its reputation front and center, allowing that reputation to travel far from the point of sale (Bone 2006). Although manufacturers did begin to use different marks for various products, there was still a sense that the trademark was a referent closely tied to a manufacturer’s identity. Thus, both creative products and trademarked goods could be thought of as “authentic” in terms of their origin stories, as indicated by the attribution of the creative work to the named author or the attribution of the good to the producer identified by the trademark (Silbey 2008).

In the twentieth century, however, both creative production and commercial production underwent a change that returned the concept of authenticity to its earlier meaning. Modern art has reacquainted us with the workshop: Andy Warhol’s Factory or Dale Chihuly’s glass studio, in which artistic production is often a collaborative effort, and in which the artist whose name is on the work may have entered the artistic process only at the beginning and the end.<sup>8</sup> In the

modern era, however, this notion of authenticity derives not from a focus on the aesthetic but rather from a focus on the conception. It is the idea communicated by conceptual art, not its execution, that gives the artwork its value and is what the attribution signifies. A screen print of a Campbell's soup can is a Warhol work not because Warhol engaged in the manual labor that created the print; it is a Warhol because he conceptualized the subject matter, the mode of presentation, and the technique in advance of such manual labor taking place (Danto 2009). As Marcel Duchamp once noted, "If you take a Campbell's soup can and repeat it fifty times, you are not interested in the retinal image. What interests you is the concept that wants to put fifty Campbell's soup cans on a canvas" (Scherman & Dalton 2009: 217). Of similar note is the photographer Gregory Crewdson, whose staged, cinematic photographs involve teams of upwards of 50 specialists, including a camera operator who stands by, "ready to push the shutter button again and again for different poses, time intervals and lighting until Mr. Crewdson [has] captured every nuance he [seeks]" (Grant 2004: 20).

To be sure, some modern artists — Warhol included — have pushed this concept to its breaking point. Indeed, one of Warhol's assistants has said, as paraphrased by Richard Dorment, that "Warhol's primary role in the creation of [his later works] was simply to sign them when they were sold," such that "a painting could be an original Andy Warhol whether or not he ever touched it" (Dorment 2009). And although Dale Chihuly has been less direct about the involvement of others in his work, there is no dispute that after injuries more than twenty years ago that caused Chihuly to lose sight in one eye and limited the range of motion in his shoulder, Chihuly delegated the actual blowing of glass to assistants, leading some to question the continued attribution of some of the more prosaic work to himself.<sup>9</sup>

Perhaps the sharpest example of conceptual authenticity is the wall art of Sol LeWitt. An authentic LeWitt wall consists of the directions to precisely accomplish LeWitt's intended result (although the directions for some works allow for interpretation on the part of those who execute them), accompanied by a certificate of authenticity, signed by LeWitt, indicating the title and a description of the work, the medium, and the location of its first installation. With these two documents in hand, the wall art can be installed (that is, created) in any location; so long as any previous installation is destroyed, the resulting realization is an authentic LeWitt (LeWitt 1967).<sup>10</sup>

Modern versions of pre-Romantic authorship are not limited to the fine arts. Political speechwriters, judicial law clerks, and employees in work-for-hire situations all produce work that is nominally attributed to another and that raises little concern among their various audiences.<sup>11</sup> Authors' names remain on the cover of treatises, reference guides, and manuals long after those authors have ceased contributing to those works (and, indeed, long after those individuals have passed away). Scholarly conventions in particular disciplines may allow a senior scholar's name to appear on a paper or a lab result even though graduate students did most of the work. Edward Stratemeyer's syndicate, a stable of largely uncredited writers, was responsible for the Nancy Drew books, attributed to the nonexistent Carolyn Keene, among other children's series (O'Rourke 2004).

So too with goods and services: As modern manufacturing practices developed, the notion of the "source" that trademarks were meant to indicate also expanded. Companies now regularly license their marks to other manufacturers, often in association with goods far from their core competency, and outsourcing of production to an overseas company is now an accepted means of doing business. (Although concerns remain about the nature of the labor

practices involved, detractors typically do not contend that outsourcing itself is deceptive to consumers or constitutes unfair competition.) As a result, the Nike trademark, for example, no longer tells us that the running shoe to which it is attached was made in Oregon, where the company is headquartered, as most of Nike's athletic shoes are now made in Asian countries. Rather, the trademark connotes that Nike, Inc., has authorized or approved of the product to which the trademark is attached, and has purportedly done so because the qualities or characteristics of that product are ones with which the Nike trademark is associated by consumers.

In both instances, then, the brand attached to the work or good — whether an author's name or a trademark — communicates who authorizes or approves of the quality of the work or good, even if the actual production was accomplished by another. Whether interpretive communities universally share this understanding, however, is another matter. At this point, a consumer must realize that Donna Karan does not personally sew each garment bearing her name and, indeed, perhaps did not even design them.<sup>12</sup> But there may be no shared understanding among some audiences that Warhol's signature may indicate only conception and approval, not workmanship, or that Nike's production has moved far from its Oregonian roots. Take, for example, the decision of the Andy Warhol Authentication Board as to whether a particular Warhol self-portrait (known as the "Bruno B" portrait) was an "authentic" Andy Warhol. Warhol had signed, dedicated, and dated the print in question, and for some commentators, this alone resolved the question. Discussing the dispute, Richard Dormant wrote, "An artist's authentic signature or monogram has always signified authorship and hence authenticity, which is why forgers fake signatures on counterfeit paintings and why in 1964 Duchamp's signature transformed eight replicas of his 1917 readymade porcelain urinal into works of art that are



accepted as genuine by the author of his catalogue raisonné” (Dorment 2011).<sup>13</sup> But the Authentication Board concluded that the Bruno B portrait was not an authentic Warhol work because Warhol had given instructions to the printer over the phone rather than in person and therefore could not be deemed to have created the work.<sup>14</sup>

For commentators like Dorment, an artist’s signature designates authenticity because it connotes claiming and approval of the work. Like a witness who signs an affidavit prepared by her lawyer, an artist who adopts a work realized by others as her own communication can be deemed to have authored that work if the message conveyed by that work is consistent with her own intentions in conceiving it. This view of authenticity is why Robert Storr, dean of Yale’s School of Art, can say, as he did in the *Wall Street Journal*, “The value of a work of art is not invested in the hand that made it, but in the intention and the realization” (Stesser 2011). A Warhol is valuable to those taking this view because of the creative ideas the work represents, not because Warhol himself engage in the manual labor necessary to produce the particular work in question. The Board, however, viewed authenticity as a matter of process, not merely a matter of ideation. In order for the Bruno B to have been authentic, Warhol needed to have a physical interaction with its production. Warhol’s giving of instructions in person — engaging with the printmaker, reacting to the process as it unfolded, remaining open to changing direction — is what would have made the Bruno B print an authentic Warhol, not simply the fact that it was Warhol’s conception that led to the work’s existence.

Indeed, the distinction between conception and execution helps us to understand the multiple facets of authenticity. The economist David Galenson has distinguished between two types of artists in this regard: “experimental innovators,” whose object is the depiction of elements of visual perception, and “conceptual innovators,” whose goal is to convey ideas or

emotions and for whom most of the work is done before the work is committed to tangible form (Galenson 2009; LeWitt 1967). Duchamp's *Fountain*, in this formulation, was a particularly strong example of conceptual innovation, in that "it proposed that the artist's craftsmanship could be eliminated altogether, and that a work of art could be made simply by the decision of the artist, because what mattered was the idea the work represented" (Galenson 2009: 69). Thus, the work of an experimental innovator is expected to be physically accomplished by the artist herself; the execution and technique is what matters. By contrast, a conceptual innovator can employ assistants and craftspersons without objection, since all those individuals are doing is carrying out the artistic vision of the artist whose name is attached to the work.

Similar conflicts in the meaning of authenticity are seen in the various reactions to revelations that the provenance of a work of authorship is not what was first believed. Consider, for example, the 1976 book *The Education of Little Tree*, which was marketed as the memoir of a Cherokee youth and received wide acclaim for its touching and accurate portrayal of Native American life. Once it was revealed that the name of its author, "Forrest Carter," was actually the pen name of Asa Carter, a white segregationist and confederate of George Wallace, some readers reacted with revulsion, condemning the very text that had been the subject of praise months earlier, while others focused on their emotional reaction to the story. Consider, too, the dust-up over James Frey's *A Million Little Pieces*, which was marketed as a memoir of the author's journey through drug addiction and recovery, exposed as fiction by Oprah Winfrey (after she had recommended it for her book club), and then made the subject of a class-action lawsuit, resulting in a settlement obligating Frey and his publisher to pay up to \$2.35 million. (As it turned out, perhaps people didn't care all that much: Only 1,729 people asked to be reimbursed, costing Random House \$27,348.) Or the imitation of a Vermeer painting created by

the famous forgerer Han van Meegeren, which was one day, as he noted, “worth millions of guilders and experts and art lovers would come from all over the world and pay money to see it,” and the next day, after revelation of its true authorship, “worth nothing, and nobody would cross the street to see it for free” (Salisbury & Sujo 2009: 238). In each of these cases, the authenticity inquiry for some focused on the work — was the work compelling? — and for others focused on the creator — was the story of the creative process true?

Yet in other instances, audiences can be presumed to understand the varying nature of authenticity. We know that judges and politicians and celebrities typically do not write every word that goes out under their names, but no one cries fraud — indeed, we reinforce this fiction by referring to the inspiring speech that the president gave or discussing the stylistic merits of a celebrity’s autobiography. As Daniel Boorstin has noted, we treat the Congressional Record as the official report of what has been said on the floor of Congress, but given that members are allowed to revise and extend their remarks, the Congressional Record has “no more than the faintest resemblance to what is actually said there” (Boorstin 1992: 18). Indeed, the Library of Congress, in its description of the Congressional Record on its website, says that the Congressional Record is *more* accurate than the televised proceedings because of the ability to “grammatically” revise and extend remarks, because “such editing cannot be done during live broadcasts of floor proceedings.” And after the person who was tweeting as Tina Fey, with 8,000 followers, had his account shut down, he started a new Twitter account as “Not Tina Fey,” where he now has more than 460,000 followers.

On the commercial good side, the question of what makes something authentic also admits of a wide range of responses. Consumers likely expect that an authentic Gucci handbag means, if not that employees of Gucci America were involved in its production, at least that they

were involved in its design. But perhaps they do not realize that Gucci key rings and bottles of perfume are likely authentic Gucci products only to the same extent as Warhol's Bruno B portrait: the name connotes approval of the quality of the good, but perhaps little more. Yet despite the market for authentic goods, there are also instances in which consumers seek out the inauthentic: They buy handbags or \$10 "Rolex" watches on the sidewalks of major cities;<sup>15</sup> they hang posters or painted reproductions of Van Gogh landscapes on their living room walls, just above the reproduction of an Eames chair; they buy T-shirts sporting the name of their favorite team or university even though such apparel has not been authorized by the owner of the featured logo.

All of this suggests that it is not so much the variable meaning and relevance of authenticity that is troubling to consumer or audiences but rather the lack of information necessary to determine this meaning and relevance in a particular context. When consumers and audiences are provided with information, the ultimate determination of authenticity becomes (appropriately) more subjective. Jacqueline Kennedy Onassis's fake pearls sold for \$211,000 at an auction in 1996; the buyer, who later characterized them as the "one true copy of Jackie Kennedy's real fake pearls," used them to create exact reproductions for the Franklin Mint, selling more than 130,000 copies at \$200 a strand, each accompanied by a "letter of authenticity" (Resnick 2009: 66-67; Volk 1996). Similarly, an experiment conducted in 2009 called Significant Objects auctioned on eBay various mundane items for which the descriptions were short fictional narratives about the history of the object penned by various writers, including several well-known novelists. Even though customers were told explicitly that the stories were fake, they were willing to pay considerably more for these objects with the narratives attached; about 200 items sold collectively for almost \$8,000 (Stuart 2002; Brophy-Warrant 2011).<sup>16</sup> It

does not much concern us, to take one more example, that the involvement of named authors with certain treatises or textbooks has diminished to the vanishing point (if, indeed, they are still alive) — the authenticity of the text relates to the quality of its contents, not to our engagement with authorial personas.<sup>17</sup> These examples indicate that for at least some individuals, what might otherwise be characterized as “fake” creates value for them, so long as those individuals are equipped with the information necessary to determine whether value exists. Authenticity thus becomes, as Deborah Hussey has suggested, a social fact: Like the fact that a particular green piece of paper is worth five U.S. dollars, authenticity is a status that exists only because the relevant community has explicitly or implicitly agreed that it should be so (Hussey 2004; Searle 1995). For different communities (and even, perhaps, for the same individual in different contexts), authenticity can take on different meanings, depending on that community’s values and goals (Beverland & Farrelly 2010).

The nature of this relationship thus provides the context for determining what version of authenticity matters. A reframing of a Western photograph from a Marlboro cigarette ad can become an authentic Richard Prince photograph because the participants in the relevant artistic community have determined that Prince’s contributions constitute authorship, not copying. (Whether the courts will agree with this assessment remains to be seen.) The student who submits as her own assignment a paper that she has purchased from an essay mill, by contrast, has created nothing authentic; she has breached the agreement between her and her teacher as to the nature of the assignment. And participants who attempt to move from one community to another without adapting to the latter community’s view of authenticity may face opposition. Consider the recent example of Mike Daisey, whose successful stage show (about the working conditions he purportedly witnessed at a Chinese manufacturer of Apple products) turned into a

very unsuccessful piece of journalism when a public radio show retracted his report for falsity not long after it aired. An authentic performance in the theater, where the focus is on the actor, may allow for some creative embellishment; authenticity in journalism, where the focus is on the story, allows for none.

That dialogic relationships should serve as a touchstone is not surprising given the convergence of modern creative production and modern manufacturing, with the artist becoming more of a brand and commodity, and the trademark becoming more of a persona (Assaf 2010; Aaker 1997). Just as Andy Warhol's involvement with his work was often reduced to a signature, so too can a brand name designer's involvement with his line be reduced to the statement of authenticity itself; as Naomi Klein once wrote, apparel designer Tommy Hilfiger "is less in the business of manufacturing clothes than he is in the business of signing his name" (Klein 1990: 28). (Similarly, as Billy Linich, a member of Warhol's Factory, once stated, "At the Factory I was a skilled technician, and the name of what we did there was 'Andy Warhol'" (Scherman & Dalton 2009: 202).) We thus decide whether it is valuable to us to pay for what turns out to be the statement of authenticity itself and, in so doing, reinforce the value of that statement as applied to future works.

By focusing on authenticity as inherently community-based or dialogical, then, we might avoid concern over whether authenticity's byproduct is elitism or hierarchy. When Walter Benjamin criticized reproducibility as disrupting the "aura" of the original, he disparaged this activity as "extract[ing] sameness even from what is unique" (Benjamin 2008: 24; Huxtable 1997). Or as the architecture critic Ada Huxtable put it, "authentic reproduction" are "the con words of American culture" because "a copy is still a copy, no matter how skilled or earnest its intentions" (Huxtable 1997: 18). But other commentators note the democratizing value of a

reproduction, which allows everyone to experience some version of the Gucci bag in their hand or the Mona Lisa on the wall (Bartow 2011; Stadler 2006). Indeed, as Daniel Boorstin has noted, “What is more natural in a democratic age than that we should begin to measure the stature of a work of art . . . by how widely and how well it is reproduced?” (Boorstin 1992: 126; Galenson 2009).

Viewing authenticity as dialogic and contextual means that authenticity thus ceases to be a designation handed down from on high, a conclusion reserved to experts. Such experts can offer their opinions on facts related to provenance or characteristics, but it is ultimately up to the relevant community to determine whether those facts lead to a determination that the painting, the performer, or the pasta sauce is authentic. It is when the rules of the game are not understood from the start that problems arise.<sup>18</sup>

### III. THE LAW OF AUTHENTICITY

Intellectual property law’s approach to authenticity derives from the now-standard economic justifications for both regimes. Both copyright law and trademark law implicitly involve, at root, the same question: Does the defendant’s reproduction of the plaintiff’s intellectual property unjustly interfere with the plaintiff’s (potential) economic returns related to that intellectual property? Both regimes attempt to answer this question by reference to questions of similarity or copying, suggesting that the plaintiff’s intellectual property occupies a position of authenticity: of being an “original” work of authorship or an indicator of the “source” of the plaintiff’s goods or services. And both copyright law and trademark law contain elements of authenticity in the sense in which Benjamin described it: the “aura” that is diminished through increasingly easy reproduction. The prohibition against reproduction that constitutes copyright

infringement and trademark dilution is based, in part, on preserving the original work or mark as something unique, with the fair use provisions in both doctrines creating limited spheres in which others can use the work or mark to challenge its meaning. But these doctrines' ultimate focus on the plaintiff's economic interests can occasionally obscure questions of audiences' or consumers' participation in determining the value of authenticity.

Copyright law purports to think of authenticity in terms of authorship, by which it ultimately means the person or entity that holds the rights in the work. The copyright owner is sometimes, but not always, the individual or individuals involved in the creative process; the doctrine's work-for-hire provision, in which the rights in a work are held by the employer, not the employee who created the work, is one example of the distinction. But as a general rule in U.S. copyright law, as the U.S. Supreme Court has noted, "the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."<sup>19</sup> In many cases, this definition proves uncontroversial, since the person who conceptualizes the work is the same person who gives the work tangible form. But when this is not the case, some courts have recognized that the creative conception, not the mechanical rendering of that idea, is what counts. For example, in an authorship dispute between a map designer and the print shop that translated his designs into print, the Third Circuit held that the designer was the author: "Poets, essayists, novelists, and the like may have copyrights even if they do not run the printing presses or process the photographic plates necessary to fix the writings into book form. These writers are entitled to copyright protection even if they do not perform with their own hands the mechanical tasks of putting the material into the form distributed to the public."<sup>20</sup> Likewise, the documentary filmmaker who conceived of a film showing salvage operations at the Titanic using high-illumination lighting equipment was the



author of the resulting underwater footage because he created the storyboards that identified “specific camera angles and shooting sequences,” directed the filming from onboard the salvage vessel, gave detailed instructions to the photographers, and reviewed the footage at the end of each day to be sure he had what he wanted, even though he didn’t actually operate any of the cameras.<sup>21</sup> In these cases, the courts characterized the actions of the print shop and the photographers as merely transcribing the author’s creative efforts to print or film — their contributions rendered them stenographers, not co-authors.<sup>22</sup>

So despite the law’s insistence on fixation as a condition of copyrightability, copyright’s view of authenticity is not always about the individual who translates an idea into expression. Rather, the law recognizes that in some cases, the translation of idea into expression sometimes takes place pre-fixation: in the creative decisions that are made in order to conceptualize a work of art in the first place. Under this view, it is appropriate to accord Andy Warhol authorship status, and thus designate his work as “authentic,” even if his assistants did all the manual work of creating a print. The contribution that Warhol made to artistic discourse was in the conception embodied in his work, not in the work’s physical appearance, just as Napoleon Sarony’s authorship of the now-legendary Oscar Wilde photograph inhered in the photographer’s “own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines,”<sup>23</sup> and so forth, not in the final act of activating the camera. By contrast, where the appeal of the work is in its physical craftsmanship, not in the conception of its design, a focus on the individual responsible for fixation seems more relevant. (At least some of the more mundane glass sculptures now known as Chihuly’s might therefore be more difficult to so justify.)

Trademark law's view of authenticity is a product of modern marketing.<sup>24</sup> As discussed earlier, it is no longer the case that a trademark identifies the actual producer of a good or service; often, it will at most identify the entity that claims ownership of the messaging associated with the brand. This also means that there is no requirement in trademark law that a product's brand name be identical to the corporate name of its manufacturer. So, for example, Nike can use the Nike mark for its running shoes, but establish a separate mark — Cole Haan — for its dress shoes without any requirement that it disclose the connection on the goods themselves. The airline ValuJet is free as a matter of trademark law to change its name to AirTran following a crash in the Florida Everglades, and the cigarette manufacturer Philip Morris is free as a matter of trademark law to change its name to Altria, even though both moves make it more difficult for consumers to determine the company with which they are dealing. And trademark law does not prevent companies from creating an aura of authenticity around their products, so long as they do not cross the line into deception. So the thoroughly American ice cream Häagen Dazs can suggest a false Scandinavian heritage, and Bombay Sapphire gin can inspire dreams of India, even though the product is distilled in Great Britain (Clegg 2005). The fact that we generally accept these fictions — perhaps even are attracted by them — suggests that we see these marks as connoting a particular set of qualities or characteristics, not as true indications of provenance.

But on occasion, authenticity in trademark law is more about genealogy and less about quality. For example, when members of a band or singing group go their separate ways, with each claiming that they have the right to use the band's or group's name in connection with their individual performances, courts often aim to identify which band members represent the

“authentic” group. Here, the goal is to identify which party embodies the “key creative force” of the group, as opposed to whether the band’s distinctive sound is maintained:

Imagine, for example, a group which lawfully acquires the “Beatles” trademark and performs without one or more of John, Paul, George, or Ringo . . . . Could the corporate owner of the “Rolling Stones” mark replace the present members of the group and continue to sell out Madison Square Garden?<sup>25</sup>

In particular, where the musical group’s name includes a reference to an individual, courts have held that consumers expect that individual to be a member of the group. If the name “Herman’s Hermits” implies that “Herman” (aka Peter Noone) is performing with the group, any use of the name by a group that did not include Noone would be false.<sup>26</sup> Thus, just as it is too simplistic to say that authorship turns on the “person who translates an idea into a fixed, tangible expression entitled to copyright protection,” it is insufficiently nuanced to say that trademarks are a form of source identification. In both areas, authenticity sometimes indicates that the work or good to which a name is attached is of a particular quality and sometimes indicates a particular history or genealogy.

Thus, intellectual property law runs into trouble when it is not sufficiently attentive to the various meanings of authenticity. *Dastar Corporation v. Twentieth Century Fox Film Corporation* is one such example.<sup>27</sup> *Dastar* involved a television series based on the book *Crusade in Europe* by Dwight Eisenhower. Fox had originally owned the copyright to this series, but the copyright expired when Fox failed to comply with certain renewal requirements that copyright law required at the time, putting the footage in the public domain. Dastar, trying to take advantage of the 50th anniversary of World War II, took the series, edited it a bit, and sold it

on videotape under the title *World War II Campaigns in Europe* as a Dastar production, not crediting Fox. Fox couldn't bring a copyright infringement suit, since what Dastar did was perfectly legal under copyright law. Instead, Fox claimed that Dastar was passing off Fox's product as its own, and that this constituted a type of unfair competition.

It was clear that Fox was trying to get under trademark what it couldn't get under copyright; relatedly, it's not at all clear that any consumer cared whether the film was labeled as a Fox production or a Dastar production. But on the way to rejecting Fox's claims, the Court offered an interesting conclusion regarding authenticity:

Section 43(a) of the Lanham Act prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill. It forbids, for example, the Coca-Cola Company's passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product. But the brand-loyal consumer who prefers the drink that the Coca-Cola Company or PepsiCo sells, while he believes that that company produced (or at least stands behind the production of) that product, surely does not necessarily believe that that company was the "origin" of the drink in the sense that it was the very first to devise the formula. The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product — and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.<sup>28</sup>

This may well be true in the case of the television series in *Dastar*, which almost certainly subordinated any sense of artistic vision in its attempt to convey a sense of history. Authenticity for the television series, then, related only to the content of the film, and since Dastar had copied that virtually identically, its product was just as “authentic” as Fox’s. But as the examples discussed earlier indicate, authenticity sometimes relates to the author or producer — the individual who envisioned the sculpture that an assistant brought to life or who imagined how the underwater shot of the Titanic should look. Authenticity, as it turns out, is indeed sometimes about who “came up with the idea for the product,” not merely who did the manual labor to bring it into physical existence (Ginsburg 2005; Cohen 2008).

Two cases illustrate how this type of divide might play out in practice. In *Roddy-Eden v. Berle*, Anita Roddy-Eden agreed to write a “serious novel” to be published under the sole name of the comedian Milton Berle. Roddy-Eden completed the novel, but Berle declined to allow it to be published. The court refused to enforce the agreement, concluding that the contract was void as against public policy due to the parties’ intent to defraud the public as to the true author of the work.<sup>29</sup> In *Freedman v. Arista Records*, by contrast, the court declined to certify a class in a fraud suit based on the revelation that the pop duo Milli Vanilli did not actually perform on their album because, the court concluded, at least some consumers likely bought the album because they enjoyed the music, not because they were induced by the attribution on the album cover.<sup>30</sup> Thus, in the former case, the court concluded that an authentic Milton Berle novel required Berle’s participation in the realization of the work; in the latter case, the court concluded that an authentic Milli Vanilli album provided consumers with music with a particular sound, not music by a particular artist. These facially conflicting results are entirely defensible so long as the law

ensures that the conclusions about what the relevant community values are grounded in more than assumption.

The *Dastar* Court did concede that perhaps these issues do matter in the realm of communicative goods — as the Court noted, one could argue that “[t]he purchaser of a novel is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author).”<sup>31</sup> But the Court was faced with two competing interests: the interest of authors in the unfettered use of public domain material and the consuming public’s interest in authenticity. Because it focused on the former, it did not have to explore further the ways in which authenticity functions in the modern era.

## CONCLUSION

The meaning of a statement of authenticity is variable: it means something different when it is part of a conversation, an opening move in a dialogue to which we respond as consumers, as audience members, as readers, to the narrative that has been presented to us. As Peterson (1997: 6) noted in describing country music, authenticity “is continuously negotiated in an ongoing interplay between performers, diverse commercial interests, fans, and the evolving image.” If modern cultural and commercial production is as much an intellectual and emotional engagement as an economic transaction, authenticity must, in at least some instances, focus on the individual or entity with which the audience or consumer has been asked to engage. So a statement of authenticity is important, but not because it is the final word on something’s value. It matters because it asks of us that we decide to accept or reject its value assertion.<sup>32</sup> Indeed, the ability of the audience to make such judgments is how a Gucci bag has value in the first place, or how

Duchamp's *Fountain* is considered art. Thus, the ultimate authenticity decisions we make are not as important as ensuring the availability of information necessary to that process: Can one determine the process behind creating a Chihuly sculpture? Can one discover that the company behind the microbrew Blue Moon is actually the megabrewery Coors? (Huxtable 1997).<sup>33</sup> In this regard, we might consider instances in which the law is attentive to such information, such as New York's Art and Cultural Affairs law, which governs how certificates of authenticity should discuss the question of authorship,<sup>34</sup> or the Indian Arts and Crafts Act,<sup>35</sup> which regulates the certification of Native American cultural products.<sup>36</sup> In particular, we might take as models the organizational schema provided the New York statute, which distinguishes among various kinds of attribution, such as works "by a named author," works "attributed to a named author," and works "of the school of a named author."<sup>37</sup> The goal toward which the law should ultimately strive is confirmation of objective facts ("Did Rubens make these marks on this canvas?") rather than determination of social facts ("Do those actions make this painting an authentic Rubens?").

Indeed, we might take Rubens as a model. A conceptual artist who "made meticulous plans for his paintings that could then be carried out by others" (Galenson 2009: 187), Rubens appears to have been forthright about the nature of his work's production, while separating these facts from the ultimate question of authenticity. For example, in a 1618 letter to Sir Dudley Carleton, the British Ambassador in the Hague, Rubens offered to sell six thousand florins' worth of paintings, each described in an attached list, including a 13-foot by 9-foot painting of the Last Judgment, listed at 1,200 florins. The painting, noted Rubens, was "begun by one of my pupils, after one which I did in a much larger size for the Most Serene Prince of Neuberg, who paid me three thousand five hundred florins cash for it; but this, not being finished, would be entirely retouched by my own hand, and by this means will pass as original" (Burckhardt 1950:

207).<sup>38</sup> A similar granularity of attribution was employed by Rubens when, late in life, he found himself unable to accomplish the physical work on smaller drawings; hence, he described what was to be done to Erasmus Quellinus, who then executed the drawing, leading to three credits: Rubens for the concept, Quellinus for the execution, and the printmaker for copies prepared for distribution (Galenson 2009; Vlieghe 1977).

We might also consider whether these discussions are best held in extralegal forums, through authentication boards, catalogues raisonnés and other private means of resolution, rather than through the law, which is an expensive and not always efficient way of attempting to divine community interests.<sup>39</sup> As one court noted, in a dispute involving a work by Alexander Calder:

The point is that a declaration of authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace. If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work "authentic." Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the Work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusion in its catalogue raisonné to dictate what is worthy of purchase.<sup>40</sup>



The contextual nature of authenticity suggests, indeed, that the law's reach should be limited to ensuring a robust flow of information, not extending to the ultimate question of authenticity itself.

To the extent the law continues to be involved in questions of authenticity and provide the environment for a dialogic process, the law must resolve some tensions. We need a better sense of how to reconcile copyright's conception of authorship and the public domain with trademark law's focus on attribution; how to regulate against fraud but allow consumers to buy into the fictions that they find fulfilling; how to allow individuals (and sometimes even companies) the ability to be judged free from the bias their name or identity might engender but provide those who engage with them the information they want to participate in those dialogues. And in all of these considerations, we should remember that many of these difficulties arise because there is a moral and personal aspect to questions about authenticity, not just economic considerations.

Thus, as a counterpart to the Manzoni piece with which we started, consider "Donorcard," a 2005 work by artist Carey Young; the work is an ink on paper rendering in the style of an organ donor card. Young's work, unlike Manzoni's, gives the recipient the final word as to whether the card constitutes a work of art, in a mode of offer and acceptance: "In consideration of the donation of this card to me by the Artist, I hereby agree that this object will only become an artwork by her upon the inclusion of my signature, and that it will retain its status as an artwork solely for the duration of the Artist's life, or my life, whichever is the shorter." Young's work makes visual what has long been true: that authenticity is not merely a statement, but a dialogue.

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## ENDNOTES

<sup>1</sup> Besides Duchamp's 1917 work "Fountain," a signed urinal tipped on its side, and Manzoni's certificates, one might also consider Robert Rauschenberg's 1961 work "This Is a Portrait of Iris Clert If I Say So," which consisted of the top of a telegram, purportedly sent from Stockholm to Ms. Clert in Paris, with the message, "This is a portrait of Iris Clert if I say so." McCann (2011).

<sup>2</sup> "The consumer might even himself be recruited into the game of misrepresentation, as in the ad for a 'Trainmen's Special' watch, which says exactly what it is, but isn't exactly what it seems: 'This is a cheap trading watch, made to look like the most expensive 23 jeweled, adjusted railway watch made . . . it is stamped '23 jewels, adjusted' . . . Such an ad functions almost like a play within a play, legitimating the principal fiction ('trust us') by allowing the consumer a glimpse at a world outside the catalogue, where the buyer must beware." Orvell 1989: 54-55.

<sup>3</sup> CAL. BUS & PROF. CODE § 25241 (regarding "Napa" label on wine); 27 C.F.R. 4.25(b) (regarding appellations of origin of American wine); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462 (Cal. Ct. App. 2005) (upholding statute against challenge).

<sup>4</sup> *Henderson v. Gruma Corp.*, No. CV 10-04173 AHM (AJWx), 2011 U.S. Dist. LEXIS 41077, at \*29-30 (C.D. Cal. Apr. 11, 2011) (holding that a label stating guacamole was made in the "authentic tradition" was nonactionable puffery).

<sup>5</sup> In the dispute between Tiffany, the jewelry retailer, and eBay, the online marketplace, over counterfeit Tiffany goods, Tiffany's experts were not able as to some goods to conclusively determine by examination whether they were counterfeit or not. *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 485 (S.D.N.Y. 2008), *aff'd in part and rev'd in part*, 600 F.3d 93 (2d Cir. 2010).

<sup>6</sup> It is impossible, of course, to disentangle the effect of advertising on any of these beliefs, as Ralph Brown famously noted. Brown (1948). Of course, some audiences or consumers reject authenticity as a desirable appellation. To the extent that the word authentic conveys something about the quality or the characteristics of a work of authorship or a commercial good, such consumers don't count those characteristics among those that are meaningful to them, except when a designation of inauthenticity helps to explain the work's or good's low price by reassuring the consumer that the good is likely not stolen.

<sup>7</sup> Nor did audiences seem particularly concerned with preserving works precisely as they emerged from the artist's hand. As noted in Banfield (1984: 148), "[t]he figures in Michelangelo's Last Judgment in the Sistine Chapel were originally nude; Pope Paul IV had them clothed."

<sup>8</sup> Cf. Tomkins (2007: 60), who describes the "industrial process" by which the artist Jeff Koons and his assistants create his works, noting that "Koons himself rarely touches brush to canvas" but that Koons's "attention to the exact carrying out of his most minute decisions" means that there is "no room for individual initiative" by his assistants.

<sup>9</sup> Indeed, as noted in Egan (2006), one former assistant defended a copyright infringement suit brought by Chihuly by arguing that the assistant's new sculptures could not be infringing because he was simply recreating the work he had done under Chihuly's name. Perhaps not unexpectedly, the case settled within a year.

<sup>10</sup> LeWitt's mode of production and authentication was highlighted in a recent lawsuit brought by the owner of one such certificate who alleged that the gallery to which he entrusted the certificate lost it, thus essentially destroying the artwork. Complaint at 2-4, *Steinkamp v. Hoffman* (N.Y. Sup. Ct. May 22, 2012).

<sup>11</sup> The same might be said of other communicative works in which the use of assistants and ghostwriters, while remarked upon, is not often characterized as fraudulent. From time to time, however, the issue arises anew. Moskin 2012.

<sup>12</sup> In some instances, in fact, the named designer may no longer be with the company bearing his name. Cf., e.g., *Richmond Nervine Co. v. Richmond*, 159 U.S. 293, 302 (1895) ("The fact that such trade-mark bears Dr. Richmond's own name and portrait does not render it unassignable to another."); *JA Apparel Corp. v. Abboud*, 568 F.3d 390 (2d Cir. 2009) (holding that apparel company's agreement with designer, which conveyed the designer's name to the company as a trademark, did not necessarily mean that the designer was prohibited from using his own name in a non-trademark sense for a new venture).

<sup>13</sup> As Dormont (2011) continues, "[The Board's decision] would indeed be reasonable if there were no difference between Andy Warhol's signature on a photo and his signature on a canvas. However, the art market has determined otherwise: the first has little value; the second sells for millions of dollars." An interesting recent case is *Gilbert v. Indiana*, in which the court, albeit in dicta, allowed that an artist's signature on a certificate of authenticity for a work he didn't create might, if interpreted generously, serve as evidence of authentication for that work. *Gilbert v. Indiana*, No. 09 CV 6352 (KBF), 2012 U.S. Dist. LEXIS 28133, at \*19-20 (S.D.N.Y. 2012). But see *Arnold Herstand & Co., Inc. v. Gertrude Stein, Inc.*, 626 N.Y.S.2d 74, 75-78 (N.Y. Sup. Ct. 1995) (declining to treat artist's certifications of inauthenticity as conclusive on the grounds that it was hearsay; that there was strong evidence of the provenance of the work; and that it would not be remarkable in any event for an artist to disclaim a work).

<sup>14</sup> Governments can offer their own views when they determine whether an imported good qualifies for tariff purposes as a work of art or as a collection of raw materials. Scherman & Dalton (2009) describe a situation in which Toronto gallerist Jerrold Morris's planned solo show of Warhol's Brillo boxes was thwarted when officials decreed that the boxes were subject to a "merchandise duty" of \$60 per box rather than the standard exemption for artwork; Giry (2002) describes a similar legal dispute over whether Constantin Brancusi's *Bird in Space* would be subject to the U.S. tariff for metal objects or to the exemption for artwork.

<sup>15</sup> "Even when we ourselves are the potential victims, we cannot always find it in us to get unalloyedly furious. That bogus Lacoste shirt, the bottle of 'Johnnie Hawker' Scotch whiskey, the repro Vuitton luggage, the imitation Lego kits: of course we are being cheated (and so is the original manufacturer), but there is also something that makes us ask, Why do I value the maker's name so much? Is not my need for authenticity a bit absurd?" (Barnes 1990: 91). This is not to minimize the harms that can come from some types of counterfeit goods, such as pharmaceuticals, or the labor practices sometimes involved in producing counterfeit luxury goods. See, e.g., Thomas 2009.

<sup>16</sup> See <http://significantobjects.com/>. I recognize that this value might not have resulted solely (or at all) from the value of the stories themselves, but rather from the buyers' desire to take part in the experiment.

<sup>17</sup> The named authors of such texts, by contrast, may take a different view of the authenticity question. See, e.g., *Rudovsky v. West Publ'g Corp.*, No. 09-cv-00727-JF, 2010 U.S. Dist. LEXIS 71062 (E.D. Pa. 2010) (holding that authors' Lanham Act claims regarding a treatise update bearing their names but not their editorial involvement were barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003)).

<sup>18</sup> As Goldsmith (2011) describes, “Koons and Prince began their careers by stating upfront that they were appropriating and being intentionally ‘unoriginal,’ whereas Frey and Leroy — even after they were caught — were still passing off their works as authentic, sincere, and personal statements to an audience clearly craving such qualities in literature.” For a thoughtful view of trademark law as explained by contractarian principles, see Sheff (2012).

<sup>19</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

<sup>20</sup> *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 135 (3d Cir. 1991).

<sup>21</sup> *Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248 (HB), 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999). *See also* *Fisher v. Klein*, No. 86 Civ. 9522 PNL, 1990 U.S. Dist. LEXIS 19463, 16 U.S.P.Q.2d (BNA) 1795 (S.D.N.Y. Jul. 30, 1990), in which the court posited a sculptor

who might sit in a chair, never moving and never touching the materials, perhaps in part because he might be paralyzed or simply because the materials might be large and heavy. There are sculptors nowadays who work in huge materials, I-beams, storage tanks, things like that, that are welded together where the sculptor's contribution is rendered entirely by the giving of instructions to workmen to put a member in a certain position and bolt it to another member and so forth. I think it is clear without question that such participation . . . is recognized as authorship under the copyright law even if the author never places his hand on the material.

<sup>22</sup> Contrast this with situations in which the contribution of the individual who fixed the work was deemed to be an integral, and inseparable part, of the transformation from conception to fixation. *See, e.g., Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (rejecting claim that individual who conceived of a character could not be a co-author with the individual who drew the character; even if neither contribution on its own was copyrightable, resulting character was copyrightable); *id.* at 659 (drawing similar conclusion as to hypothetical situation in which two individuals “collaborate on an academic article, one contributing the ideas, which are not copyrightable, and the other the prose envelope,” each according to his talents).

<sup>23</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1883).

<sup>24</sup> Courts have long described a trademark as being a “distinctive mark of authenticity.” *See, e.g., Elgin Nat’l Watch Co. v. Illinois Watch Case Co.*, 170 U.S. 665, 673 (1901).

<sup>25</sup> *Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 37 n.19 (S.D.N.Y. 1975); *see also* *Traphagen & Litowitz* 1990.

<sup>26</sup> *Noone v. Banner Talent Assocs.*, 398 F. Supp. 260, 263 (S.D.N.Y. 1975).

<sup>27</sup> 539 U.S. 23 (2003).

<sup>28</sup> *Id.* at 32-33.

<sup>29</sup> *Roddy-Eden v. Berle*, 108 N.Y.S. 2d 597 (N.Y. Sup. Ct. 1951).

<sup>30</sup> *Freedman v. Arista Records*, 137 F.R.D. 225, 229 (E.D. Pa. 1991) (“What causes a person to respond positively to a performance is a complex matter, especially in these modern times where popular musical performances involve visual as well as auditory stimulation. One’s response to art is personal and as such is not susceptible to a class based determination of inducement as in securities fraud cases.”).

<sup>31</sup> 539 U.S. at 33.

<sup>32</sup> As Clunas (1992: 151) describes, “the very concept of a ‘fake’ is tied at least as intimately to the world of consumers, to the manner in which a given object is marketed, possessed and discussed, as it is to the sphere of its production, or to any intrinsic features inscribed into a thing at the moment of its manufacture. The audience makes the fake.”

<sup>33</sup> Some take the position that deceit should be treated as a learning experience: “People swindled in this way may lose five pounds or so, but is not the lesson they learn worth very much more to them? The loss of five pounds may well be regarded as a vaccine which ought to offer a considerable degree of protection subsequently” (Savage 1963: 245-46).

<sup>34</sup> N.Y. ART & CULTURAL AFF. L. § 13.01(3).

<sup>35</sup> 25 U.S.C. § 305e; *see also* Native Am. Arts, Inc. v. Waldron Corp., 399 F.3d 871, 874 (7th Cir. 2005) (“A non-Indian maker of jewelry designed to look like jewelry made by Indians is free to advertise the similarity but if he uses the word ‘Indian’ he must qualify the usage so that consumers aren’t confused and think they’re buying not only the kind of jewelry that Indians make, but jewelry that Indians in fact made.”).

<sup>36</sup> Because I focus here on authenticity from the audience/consumer perspective, I do not explore the value in the designation for cultural communities, among others, particularly as such value often involves the ability to provide the definitive meaning of certain products or traditions. For a thoughtful consideration of such issues, see Scafidi (2005).

<sup>37</sup> N.Y. ART & CULTURAL AFF. L. § 13.01(3).

<sup>38</sup> In a subsequent letter, Rubens writes, expressing concern that Carleton wanted to take only the originals on the list, “Your Excellency must not think that the others are mere copies; they are so well retouched by my hand that it would be hard to distinguish them from originals, notwithstanding that they are assigned a much lower price” (Burckhardt 1950: 208).

<sup>39</sup> Indeed, it may well be the case that the relevant community will elevate decisions made in such forums over court decisions because they exhibit a stronger sense of community decision making. As Spencer (2006) describes, “Courts of law may adjudicate authenticity disputes, but if the judge does not apply generally accepted art market and scholarly standards, the art market will come to its own and perhaps different decision.”

<sup>40</sup> *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16, 26 (N.Y. App. Div. 2009).

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