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Article

ARTISTS, GALLERIES AND THE MARKET: HISTORICAL, ECONOMIC AND LEGAL ASPECTS OF ARTIST-DEALER RELATIONSHIPS*

MARK A. REUTTER**

I. INTRODUCTION

Visual art is not only cultural property, but it is also the merchandise of the art market. The art market has grown to such an importance that increasingly it influences artistic behavior and judgments about art by virtue of its inherent forces. Thus, it is not surprising that art is no longer the research field of the art historians and critics only. Art trade has also become a subject of market reports, economic analysis and legal considerations. Cultural Economics and Art Law have joined Art History. The interdependence of these fields was the guideline for the following Article about various aspects of the primary art market and the artist-dealer relationship. Aspects of the development of the art trade through dealers in an historical point of view, the economic situation of the artist vis-a-vis to his dealer in the modern art market, and legal particularities of the artist-dealer relationship are considered.

II. THE VISUAL ARTIST AND THE ART TRADE — HISTORICAL OUTLINES

For the visual artist, meaning and importance of the art trade changed throughout history, as the arts, society and the artist's role in society developed. Presently, the importance and economic necessity of the art trade for an artist is closely related to his or her recognized position as a free and creative artist. This position is mostly taken for granted today. Such was not the case during ear-

* This Article has been edited to the fullest extent possible by the staff of the *Villanova Sports & Entertainment Law Journal*. The author's use of sources written in foreign languages, however, prevented the staff from being able to confirm much of the information relied on by the author. All foreign sources are on file with the author.

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lier times. The artist's role and position in society and his or her reputation as creator had to develop as much as the art trade had to evolve over the course of the centuries. The history of the art trade is also the story of the artists' emancipation.

A. Antiques

Certainly, there has been trade in art ever since art existed. Good examples are given by ancient cultures that were particularly rich in art. A considerable part of the Phoenicians' trade was their trade in art. Ancient Rome imported large amounts of Greek art. In Imperial Rome auction sales were held, and it is well known in which quarters art dealers carried on their trade.¹

During these times, however, the focus was on the trade in art works, and the artist behind the works was secondary. Only few references of the Antiques report about the artists themselves, their way of producing and their living. Even the names of most antique artists are not known.² Such anonymity of the visual artists themselves can be explained by their inferior social position at those early times. This anonymity is in contrast to the high reputation enjoyed by writers and poets in the Antiques. A visual artist was viewed as a simple workman. Seneca expressed exemplary the prevailing disparaging opinion about visual artists.³ He stated in his letters that he never would consider painters and sculptors as liberal artists. He instead compared them to athletes and other "servants of luxury." Seneca reasoned that only together with cooks, barbers, perfumers and other entertainers, could painters and sculptors belong to the liberal arts.

Another important feature of these times was the lack of any importance of authorship. This again distinguished the visual artist from the writer or the performing artist. Visual art was not appreciated for being an expression of original authorship. Authenticity was of no importance. A good copy of a work of art had the same value as the original. In Rome, art was created by artist-slaves and by few free artists. Both the artist-slaves and the free artists were forced to work under the guidance of other people, mostly in the service of the emperors and the nobles. The person of the artist had to stay behind the work of art and behind the commissioner or buyer of art. It was the latter who earned the glory of the artist. This was the glory of possessing art. A glory for creating art was not

1. See GEORGE SAVAGE, *THE MARKET IN ART* 13 (1969).

2. Cf. EUGÈNE GAIRAL, *LES OEUVRES D'ART ET LE DROIT* 43 (1900).

3. See SENECA, *EPISTULAE MORALES* 88, 18.

recognized. The person of the artist remained hidden. Under such circumstances, there could not be an art trade that was important for the artist.

B. Middle Ages⁴

In the early Middle Ages, the church and clergy mainly produced, guided and commissioned art. The major field, book painting, was practiced inside the religious institutions, be it by the members or by servants of the orders. The rules of the orders dictated that art was anonymous and a collective good. The reason behind this rule was that art was created for a higher ideal and for the service of God.

Book painting was later joined by mural and façade painting, be it for churches or the houses of the nobles. Other than the painted books, the members of the religious institutions could hardly create such works. When “in-house creation of art” was no longer possible, art was more and more commissioned to sources outside of religious institutions. What followed was the occupation of painters as craftsmen, and sovereigns as well as some leading families and mainly the church became patrons of the arts. Concisely drafted contracts provided what was to be created. The commissioner dictated the measures of the work, its contents, the delivery time, the materials and the colors to be used. Sometimes artists even had to provide a surety that guaranteed the performance of the contract.⁵ The compensation for the artist was calculated in accordance with the materials used and the time spent to create the work, but the fame of an artist was taken into consideration as well for adequate compensation.⁶ Artists usually traveled from one patron’s place to another. Sometimes the sovereigns engaged artists over longer periods as courtiers. Apart from painting, these artists undertook other, mostly administrative activities at the courts.⁷ In the emerging towns, the evolution of the artists was slightly different. Artists carrying on a painter’s craft appeared.

4. See PAUL DREY, *DIE WIRTSCHAFTLICHEN GRUNGLAGEN DER MALKUNST, VERUSCH EINER KUNSTÖKONOMIE* 44 (1910) (discussing artists and art trade during Middle Ages).

5. Cf. ARNOLD HAUSER, *SOZIALGESCHICHTE DER KUNST UND LITERATUR* 337 (1953).

6. See Kurt Karl Eberlein, *Zur Geschichte des Kunstmarktes*, 11 *PANTHEON, MONATSSCHRIFT FÜR FREUNDE UND SAMMLER DER KUNST* 5, 16, 83, 150 (1933) (giving examples of artists’ compensation in Middle Ages, Renaissance and Baroque periods).

7. Cf. MARTIN WARNEKE, *HOFKÜNSTLER, ZUR VORGESCHICHTE DES MODERNEN KÜNSTLERS* (1985) (comparing positions of these artists in courts).

Their main occupation was not the mural, but the painting on tables. These painters found themselves in a similar position as other craftsmen. Education, working conditions and economic rules followed the same principles. Painters organized themselves like other workmen in guilds. Guilds determined in broad detail how the profession was to be carried out and prevented any competition. The territorial concession granted to the guild by the authority guaranteed that art was commissioned and bought from guild members only. Painters had a monopoly for art-supply in their region; the art trade was completely in the hands of the guilds.

Of course, the social situation and the development of an artist's position differed from region to region. Particularly in Italy since the *Quattrocento*, the position and the reputation of artists were better than in the rest of Europe. But in general, the medieval artist was not at all a free artist in a modern sense. Either he had to rely on his patrons and had to create what they wanted him to create, or he had to be a member of a guild and was restricted by the guild's rules. In both cases, the social reputation of the artist was generally low. He was considered to be merely a craftsman who worked with colors. Only few persons or institutions were willing and able to finance art. The structure of the demand and the social position of the artist in the Middle Ages left no space for an art trade that represented artists. In such narrow and easy to survey structures, an intermediary between the artist and his patron was neither needed nor desirable. The artist was his own dealer.

C. Birth of New Forms of Art Trade at the Beginning of Modern Times

New forms of art trade arose only at the end of the Middle Ages due to the consequence of social changes and an increased demand for art.

- As the welfare, culture, knowledge and horizon of people rose generally, there was as well a greater need and demand for cultural goods. The growing *bourgeoisie* by the end of the sixteenth century added new protagonists to the art market. The growing *bourgeoisie* members started to buy and collect art. They joined or even replaced the church and the aristocracy, who previously had been the only purchasers and commissioners of art. These new buyers, however, purchased art for smaller amounts than the patrons had done before.

- The developing transfrontier trade as well as a growing sensibility for the arts rendered the idea of local and monopolized markets obsolete. The new and increased demand for art could not be met by the old supply structures. The former rule that art could and should be asked for only locally at the monopolized guilds could be maintained no longer.
- Not only did a new group of visual art buyers emerge during these times, but artistic expression was enriched by new elements as well. In addition to religious painting, profane art was being created. Society started to recognize the special creativity of visual artists and the traditional view of the painter as a mere workman faded. But still, it did not disappear entirely. The artist's process of emancipation from being disrespected to being the free and reputable artist as we know and accept him today lasted until the end of the nineteenth century.

All of these developments facilitated the position of an intermediary between artist and buyer and led to the beginnings of new forms of art trade in works of living artists. The debut of the early art dealers at the end of the Middle Ages varied in Europe's main regions in time and manner. Most significant and important was the rise of art dealing in the Netherlands, which became the heart of art trade in Europe in the seventeenth and eighteenth centuries.⁸ The first art dealers often were the painters themselves. Painters often were economically not successful enough and therefore had to trade paintings of other artists as well. For example, even Rembrandt and Vermeer acted as dealers.⁹ Apart from artists, book traders, printers and general merchants traded with art. Paintings were offered on the markets, shown to interested clients in the dealer's atelier or at the dealer's home. The clients could also commission works, but the rule was that the dealer displayed a selection of paintings that were for sale.

A successful art dealer had to know which paintings were the most desired in a certain period. He painted such works himself or

8. See HANNS FLOERKE, *DER NIEDERLÄNDISCHE KUNSTHANDEL IM 17TH UND 18TH JAHRHUNDERT* 68 (1901); see also GISELA THIEME, *DER KUNSTHANDEL IN DEN NIEDERLANDEN IM SIEBZEHNEN JAHRHUNDERT* 13 (1959).

9. See Edwin Buijsen, *The Delft Art Market in the Age of Vermeer*, *DUTCH SOCIETY IN THE AGE OF VERMEER* 124-30 (Donald Haks & Marie Christine van der Sman eds., 1996) (providing information on Vermeer and his position in art market).

instructed and arranged for them to be painted at his atelier. If required, he also bought paintings from other painters or on the markets. In order to have enough stock of sellable paintings at all times, dealers copied their favorite works. Copying was the main occupation and the source of livelihood of young painters. As there was no copyright protection for the image itself, every painting could be copied. A limited protection existed only for the author's name. This protection was merely for creativity and authorship and was primarily for the buyer and for pricing. The artist's name served as a declaration of the origin of a work, thereby protecting the different ateliers. The buyer did not have to accept a painting that did not declare the atelier provenance, expressed by the author's or copyist's name. The prices of artworks depended both on the atelier's and the author's or copyist's reputation. Selling under a wrong declaration could easily end the business of a merchant.

The contracts between the artists and dealers were surprisingly precise and detailed. Even the concept of "exclusive" arrangements was known and utilized already: the dealer offered lodging, material and a certain sum of money to the artist in consideration for the whole production of the artist during the same period. The dealer dictated thereby not only the amount, but also the motives of the works to be created.

D. From the Academy to the Modern Art Trade in France

In France, the politics of the Royal Academy of Painting and Sculpture¹⁰ since the middle of the seventeenth century led to a basic change of the artists' position in the society and of the way art trade was organized.¹¹ The royal declaration to the artists of the Academy from 1677 guaranteed the right of free exercise of the arts. Such guaranty, however, extended only to artists that were liberal artists. An artist who was also a dealer could not invoke this guaranty. Members of the Academy were prohibited from keeping a trade-shop and even from displaying their paintings in the windows of their studios.

10. The Royal Academy of Painting and Sculpture was founded in 1648 according to the example of the First European Academy, established by Vasari in Florence in 1563.

11. Cf. RAYMONDE MOULIN, *LE MARCHÉ DE LA PEINTURE EN FRANCE* 21 (1967). For an abridged English translation of this book, see RAYMONDE MOULIN, *THE FRENCH ART MARKET: A SOCIOLOGICAL VIEW* (Arthur Goldhammer trans., 1987). See also HARRISON & CYNTHIA WHITE, *LA CARRIÈRE DES PEINTURES AU XIXE SIÈCLE, DU SYSTÈME ACADÉMIQUE AU MARCHÉ DES IMPRESSIONISTES* 29 (1991).

The Academy system replaced the corporation system that formerly prevailed in France as well as in other parts of Europe.¹² Apart from an interruption during the revolution, the Academy system characterized art and art life in France until the end of the nineteenth century.¹³ The system was comprehensive in that the Academy claimed to be the sole authority for education, selection and exhibition of art. Since 1737, the Royal Academy mounted the famous Salon exhibitions in Paris.¹⁴ These Salons were the artists' only opportunity to show their paintings to the public. Paintings were sold at the Salons, and the Salons helped the artists to find dealers and collectors interested in their works. The Salon de Paris was in fact almost a public institution and the major event of the year for the art world. The participation at the Salon was a key factor for success in the marketplace; hence, it was of highest importance for an artist to be admitted to the Salon. An admission, however, depended on the decision of the official jury. Art was, under that point of view, subject to a censorship that determined an artist's career.

Given the importance of the Academy, the art trade had to orient itself around the Academy system. This system fostered the development of dealerships for the artists. The prohibition of trade that was imposed to the members of the Academy stimulated an independent art trade, acting as intermediary between artist and purchaser. That is why art trade in France developed earlier as an independent commercial branch and in contrast to other European countries, where for a longer period of time the art trade was handled mostly by the artists themselves. The early French art trade concentrated mainly on the works of those artists who had been chosen for the Salon exhibitions, and more specifically those artists who had been awarded with prizes. At this stage, the idea of the trade was not yet to present and introduce single artists to the public. Rather, a dealer concentrated on having a stock of works of those artists available who were most estimated in the respective period. The trade in paintings was usually not the sole business of the

12. See OSKAR BÄTSCHMANN, *THE ARTIST IN THE MODERN WORLD: THE CONFLICT BETWEEN MARKET AND SELF-EXPRESSION* 9-11 (1997) (discussing Academy). The Academy system marked the move away from the court artist and the artist who maintained a commercial workshop or studio to the exhibition artists. See *id.*

13. See generally THOMAS E. CROW, *PAINTERS AND PUBLIC LIFE IN EIGHTEENTH-CENTURY PARIS* (1985) (discussing Academy system).

14. See BÄTSCHMANN, *supra* note 12, at 12 (describing comprehensively emergence of Academies and exhibitions as almost exclusive medium for presentation of art in different countries).

merchants. They also traded with other art-objects and antiques or kept paper shops in which they sold painters' tools as well.

The next era of art trade emerged in Paris in the late nineteenth century. In addition to the traditional, Academy-system-oriented art dealers, the so-called "*marchands-amateur*" appeared. This new type of art dealer stood for the beginning of trade for living artists' art in a modern sense. The *marchand-amateur* was an independent professional dealer. Other than the traditional dealer, he did not deal primarily with the works of officially recognized and famous artists. Rather, he dealt mainly with the works of not yet generally accepted and renowned artists. Unlike the traditional dealer, he did not present as much art as possible from those painters who were demanded by the clients and the public. He concentrated on a few artists and made them known to the public. He tried to create and build a market and was not only a dealer in art but also maintained a longer lasting and closer relationship with his artists.

The rise of the *marchands-amateur* went together with the upcoming of independent critics and writers. These new protagonists and their writings helped to promote the artists comprehensibly, introduce them to the public and build up their reputation. The collaboration between dealers and critics is the reason why this new era of art trade is also called "*système marchand-critique*."

These developments in Paris at the late nineteenth century marked the beginning of a new form of art trade through dealers as well as the rise of Paris as the leading art city in the world for a long time.¹⁵ The new ideas of dealership reflected the evolution of the visual arts that could not be integrated anymore within the conservative Academy system. Admission to the official Salon depended on the decision of the jury. The official Salon was the artist's sole possibility to exhibit and show his works to a larger public, and a rejection from the Salon was detrimental to his career. Since the middle of the nineteenth century, rejected artists organized several times on their own and established non-official salons, the "*salons des refusés et salons des indépendents*." In particular, the Impressionist painters formed an opposition against the established system. These painters did not want to accept that the Academy should be the sole authority to decide on the quality of art. They considered themselves to be free artists, with their own decision-making power and therefore, organized their own exhibitions,

15. Cf. MOULIN, *supra* note 11, at 21.

without jury, censorship and awards, “*les expositions du groupe impressioniste.*”

General social changes facilitated the artists’ movement against the old structures. The industrialization brought about a new generation of leading persons and a new, prosperous middle class. This new generation believed in progress and supported the change of old structures. New buyers of art, such as industrials, financiers and entrepreneurs were also willing to buy art that was not officially recognized. This willingness to buy unknown art pieces reflected the new buyers’ belief in venture and entrepreneurship. Thus, society began to accept that painters were free artists. As such, painters should create according to their own visions and not adjust their creations to the official opinion and to the particular purposes of a prospective buyer. The works of these new artists were not as easily comprehensible to the public as the traditional and officially approved art had been. New ways of introducing these works to the public had to be developed. Solo exhibitions began to appear and became a most appropriate method of marketing artists and the arts.

One of the first and probably best-known art dealers of the new generation was Paul Durand-Ruel (1831-1922).¹⁶ He later became known as the Impressionists’ dealer. Beginning in 1870, Durand-Ruel chose painters independently from the official opinion, thereby relying more on his own taste and his estimation of future market situations. He introduced these painters to the public before they became generally successful. He took efforts to promote the artists and in return required that they be bound to him for a longer period. Durand-Ruel did not merely act as middleman between artist and buyer. He made advances to painters, took all their output, or as much of it as he could, and always kept a stock of his artists’ works for display to the public. Durand-Ruel bought paintings despite not being sure whether he was able to resell them within a short period. He transformed his father’s stationery shop, which had been connected to trade in paintings, into a pure gallery and expanded this gallery internationally by establishing subsidiaries in London and New York. Durand-Ruel’s activities were not merely altruistic; he also had a good eye for business practices and

16. See ANNE DISTEL, *LES COLLECTIONNEURS DES IMPRESSIONISTES, AMATEURS ET MARCHANDS* 21 (1989) (discussing Durand-Ruel); HERBERT FRANK, *DIE DAS NEUE NICHT FÜRCHTEN, MANAGER DER KUNST* 40 (1964) (discussing Durand-Ruel); PETER WATSON, *FROM MANET TO MANHATTEN [sic], THE RISE OF MODERN ART MARKET* 81-100 (1992) (discussing information on other dealers of that generation such as Alexandre Bernheim, Adolphe Goupil and Georges Petit).

opportunities. He continuously found new ways to promote the art trade. Through Durand-Ruel, the artists too were able to profit, particularly during their less successful periods. The new trading of art resulted in a synergy between artist and dealer; the name of Durand-Ruel became associated with the artists he represented. He became famous with his artists and as their dealer; Monet, Pissarro, Boudin, Renoir, Sisley, Degas, etc. are mentioned together with his name. The way Durand-Ruel took an engagement for his artists, and the way he built up a market for them set an example for a new art dealer generation.

What Durand-Ruel had achieved for the Impressionists, Ambroise Vollard (1865-1939)¹⁷ accomplished for the Post-Impressionists and Daniel-Henry Kahnweiler (1884-1979)¹⁸ accomplished for the Cubists. Kahnweiler deserves recognition because he enriched the art trade with the innovation of the strict exclusive relationship between artist and dealer. Whenever possible, Kahnweiler took over the whole output of his artists in return for paying them a regular salary or fixed prices for all their paintings. Kahnweiler guaranteed in his contracts a regular income to the artists, which permitted them to work in freedom. Because he did not demand a minimum amount of works to be created, the artists were free in their creativity. Kahnweiler represented an artist only if the artist granted him exclusivity. Kahnweiler stated that he could not promote an artist and take the inherent risk, unless he was able to dominate the market. Only a monopoly in an artist's work allowed Kahnweiler to act in the market with a long-term point of view. Kahnweiler later became famous as the Cubist's art dealer. Among others, he engaged artists like Braque, Gris, Léger and Picasso¹⁹ from the moment they appeared in Paris. When Kahnweiler started to promote Picasso after having seen the painting "*Demoiselles d'Avignon*," the established art world, critics and other dealers considered him to be mad because of his enthusiasm for "the

17. See HANS PETER THURN, *DER KUNSTHÄNDLER, WANDLUNGEN EINES BERUFES* 141 (1994) (discussing Vollard).

18. See generally PIERRE ASSOULINE, *DER MANN, DER PICASSO VERKAUFTE, DANIEL-HENRY KAHNWEILER UND SEINE KÜNSTLER* (1990) (discussing Kahnweiler); DANIEL-HENRY KAHNWEILER, *KUNSTHÄNDLER, VERLEGER, SCHRIFSTELLER* (1986) (cataloging exhibition held at Staatsgalerie Stuttgart); DANIEL-HENRY KAHNWEILER, *MEINE MALER-MEINE GALERIEN* (1961) (discussing Kahnweiler's artists and method of art dealing).

19. See generally MICHAEL C. FITZGERALD, *MAKING MODERNISM: PICASSO AND THE CREATION OF THE MARKET FOR TWENTIETH-CENTURY ART* (1995) (giving precise and comprehensive analysis of all dealerships that Picasso had throughout his life, with view to development of art market in general).

moderns.” Nonetheless, Kahnweiler had followed his own way since establishing his gallery in 1907. He employed artists, if possible on contract, and consciously developed a market for them. Even though he experienced setbacks during war times and many of the artists left him, Kahnweiler continued whenever and whichever way possible with his efforts to promote the Cubists and other artists. The Cubists’ real success occurred only after the Second World War – more than forty years after Kahnweiler had established the first exclusive relationships with them. Not all of them stayed with Kahnweiler, yet each of them recognized the importance of Kahnweiler’s engagements for their future careers.

E. Twentieth Century Trade in Living Artists’ Art

Durand-Ruel, Vollard and Kahnweiler were the real pioneers in modern art trade. They gave the first examples and models of a successful trade in living artists’ art for the twentieth century, and their way to do business was followed by many other dealers. An art dealer certainly is and remains primarily a merchant. However, the most successful dealers in this century proved to be not merely merchants. They were also, and still are, forward-looking businessmen, acting as promoters of their artists and taking engagements for them. This business-like dealing explains why names of artists are often linked with the names of their dealers.

The economic recovery after the Second World War especially had strong effects on the art market. A new boom for art trade led to new ideas and ways in marketing the arts. The evolution of business in general influenced the art trade, too. Art dealers became more and more like managers, sometimes merchandising art almost like a commodity. Although there are numerous examples of such dealers, only a few pioneers shall be mentioned, serving as an example and illustration for further developments in art trade in the second half of this century.²⁰

In the fifties, the Marlborough Gallery set a most characteristic example for a new and organized way of marketing the arts. Its owners, Frank Lloyd and Harry Fischer, founded the Marlborough Gallery in London after the Second World War and built it up within a short time to a world-wide art gallery. Their wish to be

20. See MALCOM GEE, DEALERS, CRITICS, AND COLLECTORS OF MODERN PAINTING, ASPECTS OF THE PARISIAN ART BETWEEN 1910 AND 1930 43 (1981) (describing generation of art dealers in Paris); see also WILLI BONGARD, KUNST & KOMMERZ, ZWISCHEN PASSION UND SPEKULATION 65 (1967) (describing in detail analysis of New York’s art life of the fifties and sixties); THURN, *supra* note 17, at 139 (detailing history of art trade in Germany, France and United States).

international leaders in the art trade set the tone for their way of trading. Lloyd and Fischer established gallery branches at places around the world that they considered to be of importance to the arts as well as to the art trade. The presence at different locations permitted them to play a powerful game in marketing the arts. The Marlborough Gallery guaranteed its artists a worldwide exhibition program in all of its branches. In exchange for such a program, Marlborough demanded a strict monopoly in an artist's work. Lloyd and Fischer knew very well that this was the only way to control the market of an artist. In return for the artists' restricting obligations to Marlborough, the Gallery made a comprehensive commitment to its artists. The Gallery acted not only as supportive purchaser on auctions for the works of its artists, but it even filed its artists' tax returns. Marlborough, however, made hardly any efforts to promote young artists. Its orientation on the market did not permit for the promotion of unknown artists. Once artists had already gained some reputation in the marketplace, Marlborough lured them away from other galleries.²¹ Most of the well-known British painters and sculptors of the fifties and sixties were then represented by Marlborough. For years, Henry Moore, Barbara Hepworth, Francis Bacon, Lynn Chadwick, Graham Sutherland and Ben Nicholson were managed successfully by Marlborough. On the other side, Marlborough rose to negative fame when its business practices were discovered in the Rothko case. In the course of commercializing Mark Rothko's estate, the Gallery inadmissibly benefited at the expense of the estate.²²

Numerous other dealers began in the fifties to promote unknown artists and rose together with them to worldwide fame. The gallery founded by Aimé Maeght in Paris may be cited as another example for a gallery acting worldwide through its own branches. Working also on an exclusive basis with its artists, the Maeght Gallery brought Chagall, Mirò, Giacometti, Calder and Tàpies up to their international recognition and success. Unlike Maeght or Marlborough, the New York dealer Leo Castelli did not set up branches of his gallery. Instead, he worked together with several dealers in other regions, dividing territories and the market amongst them. Leo Castelli's name is linked indivisibly with the

21. See generally JOHN RUSSEL TAYLOR & BRIAN BROOKE, *THE ART DEALERS* 175 (1969).

22. See JOHN BERNARD MYERS, *TRACKING THE MARVELOUS, A LIFE IN THE NEW YORK ART WORLD* 213-65 (1983) (describing story of Mark Rothko's estate from point of view of art world and art dealers).

Pop art.²³ Michael Werner in Cologne initially followed a similar concept like Castelli. Michael Werner, however, later expanded himself over the Atlantic and opened his own gallery in New York. He dominated the market with the works of Baselitz, Penck, Lüpertz and Immendorf.

Today's art market is as diverse as never before. The characteristics of the trade, however, still reflect the examples given by these and numerous other dealers during the last decades.

F. Galleries' Incontestable Position as Intermediary Between Artist and Buyer

The history of art trade shows that the need for dealers acting as intermediaries between artist and buyer emerged since the demand for art became more indefinite and was no longer limited to the church and the aristocracy as commissioners of art. For the artist, an independent trade in his works became more important the more he could improve his social position and was able to enter a free profession, as society accepted that art was not just color and canvas, but contained several elements that created something of special value. Later on, the emancipation of the artists from official institutions and their censorship fostered independent dealerships as promoters for art.

The result of all the changes in the art world and the art trade over time is that since the turn of this century and up to the present, galleries are taken for granted as being the intermediaries between artist and buyer. They play a most important role in the presentation and promotion of the visual arts. Artists, at least after having reached certain recognition and success, mostly sell their work through the intermediary of a gallery. Art galleries and art dealers today form a part of cultural and art life. A successful promotion for an artist is almost impossible without the help of a dealer acting as intermediary. The artist must rely on galleries to commercialize his or her works. History of modern art has also become the history of art dealers, their trade and the market they created.

23. See ANN HINDRY, CLAUDE BERRI RENCONTRE LEO CASTELLI (1990) (discussing Castelli). Rauschenberg, Stella, Rosenquist, Johns and Warhol are and were, among others, represented by Castelli. *Id.*

III. THE ARTIST AND THE ART MARKET – ECONOMIC ASPECTS OF THE ARTIST-DEALER RELATIONSHIP

A. Art Market in General

1. *Primary and Secondary Art Market*

As a matter of fact, the art market has grown to high economic importance. Still, it is not a market like any other but has its own characteristic particularities. In order to be effective both economically and culturally, the art market needs to guarantee a competitive evolution of the arts and leave to the artists the possibility of individual development.

One of several possible distinctions within the market for visual arts that can be drawn is the distinction between the primary market and the secondary market. In the primary market, the first commercialization of an artist's work occurs. The secondary market, on the other hand, includes all the artworks that were already before traded and hence do not stem directly from their author. Because of its higher transparency, the secondary market attracts more attention from economists and analysts than the primary market. Various studies about the investment potential of art rely mainly on secondary market developments.²⁴

For the artist, the primary market is more important than the secondary market. He takes his income from the primary market,²⁵ and it is on this field where the main promotional activities for his work take place. Certainly, the secondary market of an artist has its influence as well on the primary market. However, as a general rule, a secondary market for an artist's work comes, if ever, much later into existence than a primary market. In the worse case scenario, a secondary market arises only after the death of a formerly unsuccessful artist, but it can then result in the sale of numerous paintings sold, and maybe even at astronomical prices. Van Gogh provides the best example of such unfortunate developments. Dur-

24. See WERNER W. POMMEREHNE & BRUNO S. FREY, *MUSEN UND MÄRKTE, ANSÄTZE EINER ÖKONOMIK DER KUNST* 85 (1993) (discussing art as investment); see also GERALD REITLINGER, *THE ECONOMICS OF TASTE* (1961-1970); 1 GERALD REITLINGER, *THE RISE AND FALL OF PICTURE PIECES, 1780-1960* (1961-1970) (providing listings, analyses and comparisons of market values of paintings, sculpture and objects d'art from middle of eighteenth century through 1960s); 2 GERALD REITLINGER, *THE RISE AND FALL OF OBJECTS D'ART PRICES SINCE 1750* (1961-1970); 3 GERALD REITLINGER, *THE ART MARKET IN THE 1960's* [sic] (1961-1970) (providing listings, analyses and comparisons of market values of paintings, sculpture and objects d'art from middle of eighteenth century through 1960s); WATSON, *supra* note 16, at 423-82.

25. Resale royalties, which might be paid to an artist in few countries, form an exception to this rule, as the artist earns such royalties on the secondary market.

ing his lifetime, Van Gogh was hardly able to sell his paintings, but today his works rank and sell for the highest amounts.

2. *The Peculiarity of Valuation of Art*

Only the market transforms the aesthetic value of an artist's work into money's worth. The price of an artwork expresses an evaluation. Once artworks are sold to the public, their aesthetic value might be judged as well by a comparison between their prices and the prices of other artists' works. Prices make art measurable and allow comparisons that are comprehensible to a broader public.

The aesthetic component of art is decisive on its economic comprehension. It is this component that forms the peculiarity of art under an economic viewpoint. In terms of economy, the real particularity of art consists of the fact that the value of art cannot be measured in objective terms because of its aesthetic component. Aesthetic value may be judged by art-philosophy or sociology, but it never can be determined objectively. Unlike in earlier centuries, the price of art no longer depends on material costs, production costs and working hours. Skillful craftsmanship and subject matter are also no longer determining factors of the value of art. The more an artist becomes known, the more it is the idea behind the work and its innovative character that will determine the price. The formation of prices in the art market follows its own and specific rules. These rules are different from general economic approaches and can hardly be compared to the rules prevailing in other markets.²⁶

3. *Protagonists of the Art Market*

Aside from the artist, the other protagonists of the art market are the dealers and galleries, critics, collectors, museums, public institutions, art consultants and the journalists. Each of them can be of great importance to the development of an artist's career. The following considerations about the artist and his market focus on the ways art is introduced into commerce. The positions of the three major actors in an artist's primary market will be analyzed: the artist as supplier, the collector as the demander, and the art dealer acting as intermediary between the two.

26. See HANS HEINZ HOLZ, VOM KUNSTWERK ZUR WARE 15 (1972) (discussing art as article of merchandise).

B. The Artist as Supplier in the Market

From an economic point of view, the artist appears as a supplier in the primary market. As such, he has to meet the same challenges as any other supplier of goods, but he faces additionally the particularities of the art market. Like every supplier of goods, the artist has to decide which product he wants to bring on the market. His “product” is the artistic expression, which has a special character due to its decisive immaterial components.

The artist most likely will not consider himself to be a mere supplier of goods. While creating his works, he will not regard the market, but will rather follow his artistic idea with the conviction that his art will lead him to success.²⁷ Such is true as long as he does not place income before reputation. Just like income, however, reputation also depends on success in the market. It is almost impossible for an artist to ignore entirely the market. The market transforms artistic value into its own language; the resulting money value gives to the art a rank, which makes it comparable to other “commodities” offered in the same market. It can be said that without market success there is no art, but only a hobby.²⁸ Most of the time, art cannot make its way without being brought to the public in a convincing way. Prominence of an artist in the market is the most powerful form of persuasion for the public.

1. *Steps of the Artist's Career in the Market – Discovery of an Artist*

For a better illustration and analysis of artistic careers, four distinct steps of recognition on the artist's way to fame and success may be distinguished.²⁹ The first is the recognition by the artistic surroundings, which means that other artists begin to estimate an artist's work and recognize his talent. The second stage is reached when serious critics become interested in an artist and discuss his work. The third stage is marked by the artist achieving recognition and support from collectors and dealers. The fourth stage, and the

27. It will not, however, be of harm at all for an artist to have some thoughts about the art market and the marketing of his works. See SALLY PRINCE DAVIS, *THE FINE ARTISTS'S GUIDE TO SHOWING AND SELLING YOUR WORK* 76-87 (1989); see also BETTY CHAMBERLAIN, *THE ARTIST'S GUIDE TO HIS MARKET* (2d ed. 1979) (discussing these issues for artists).

28. See WALTER GRASSKAMP, *DIE UNÄSTHETISCHE DEMOKRATIE, KUNST IN DER MARKTGESELLSCHAFT* 25 (1992) (discussing value of rank to art).

29. See ALAN BOWNESS, *THE CONDITIONS OF SUCCESS, HOW THE MODERN ARTIST RISES TO FAME* 11 (1989) (outlining four steps of recognition on artists' way to fame and success).

sign of true success and fame, is the recognition received by a larger public.

The first and most difficult task of the artist in the usually long way to success in the market is to bring his personal and private expressions to a larger group of interested persons so that the works are viewed as authoritative and justified. The artist thereby faces a market that is characterized by an over-abundance of supply. For the most part, he does not know the prospective buyers of his works. Thus, he cannot and does not want to consider their needs. He has to create without giving regard to his demanders and can only hope that he can attract attention. Certainly, statements that art of high quality will be discovered always and prevail on the market may be made. The quality of modern art, especially in its early appearance, however, hardly can be judged and is frequently subject to fundamental controversies. Empirical experience shows that the more innovative an artist is, the better is his chance of being discovered. Adding new elements to the arts is one possible factor of success. Artists who create superficial repetitions or variations of already existing styles will most likely have fewer chances on the market.

For the artist, being discovered and entering the market means that his work is being accepted by the market-makers and the insiders of the art world.³⁰ The artist's access to a larger group, or even to a public exhibition, is usually only possible if other people arrange it for him. The insiders have the power to lead an artist to the recognition by a larger circle of people. Once the insiders are aware of the quality of the artist, an artist can take steps toward the public realm. These insiders, already aware of the artist's talent, will help him to become known to a larger public.

Several analyses of the steps of an artist's career point out the importance of these art-world insiders for the artist's career.³¹ Among these insiders is the dealer who is usually the first one to bear the economic risk of the artist's aesthetic innovation. Entering into a relationship with a gallery is, for the young artist, often a decisive move towards the market and represents the step that may

30. See generally *Wie und Warum Macht ein Künstler heute Karriere?*, in DU, DIE ZEITSCHRIFT DER KULTUR, May 5, 1990, at 79 (discussing importance of insiders).

31. See HOLGER BONUS & DIETER RONTÉ, *DIE WA(H)RE KUNST, MARKT, KULTUR UND ILLUSION* (1991); see also ULRIKE KLEIN, *DER KUNSTMARKT, ZUR INTERAKTION VON AESTHETIK UND OEKONOMIE* 192 (1993) (describing and analyzing further steps in artist's career with similar results as far as importance of insiders of market is concerned); RAYMONDE MOULIN, *L'ARTISTE, L'INSTITUTION ET LE MARCHÉ* 327 (1992) (giving general analysis of artist's profession and career).

bring him success in the market. If the artist finds a dealer willing to present his works, he has a good chance of his work being commercialized in a professional manner. If the artist does not find a gallery willing to promote his works, he himself has to search for opportunities to present to them. This usually will not only cost him a considerable amount of time and money, but it will also reduce his chances of ever being accepted in the market.

2. *How Galleries Choose Their Artists*

A survey taken a few years ago at several New York galleries has shown that when galleries choose artists, the opinions of the art world insiders are of major importance.³² An artist has the best chance to be included in a gallery's program when artists or other art world insiders recommend his work. If an artist cannot gain such recognition, it will be difficult for him to be accepted by a gallery. Conventional ways of introduction, such as the mailing of documentation or personal presentations, rarely will bring the desired results.

The quality of an artist's work is not the only factor that may lead to his success. In the marketplace, the artist's personality and his communication skills are of equal importance.³³ Today's artist cannot simply hide behind his work; he must also bring himself to the public. In a communication-oriented world, art is more easily accepted when the artist is known as a person and becomes linked to his works. Ideally, an artist strives to develop personal contact with his collectors and the other protagonists of the market. Marcel Duchamp and Salvador Dalí are examples of artists who were masters in connecting with the public world. Their techniques of selling their personalities was as unique as their art. Jeff Koons most spectacularly exemplifies a living artist, who primarily sells himself as a person and obtrusively connects his work with his personal life.

Galleries choose to accept an artist both on an aesthetic and on a pure economic basis. Many other non-aesthetic factors, however, can influence an economic decision. The general art trend and the personality of the artist may be relevant in this context. It is more likely that artists whose works invoke a reaction by the spectator, whether in a positive or a negative way, will be chosen. The dealer

32. Cf. KLEIN, *supra* note 31, at 195 (describing survey showing importance of opinion of insiders when galleries choose artists).

33. Cf. Nathalie Heinich, *Die Kunst, ein Einmaliges Modell zu Sein*, in DU, DIE ZEITSCHRIFT DER KULTUR, May 5, 1990, at 17 (discussing importance of artist's communication skills and personality for successful sales).

will judge the work and the artist keeping in mind the gallery's program and the general structure of his clientele. The dealer will estimate marketability and placement possibilities; if the latter factors are very important to the dealer, he may even refrain from presenting an artist, though he personally estimates the artist's work as being important. Similar economic criteria will subsequently influence the art buyer's decision. In the ideal scenario, the dealer can anticipate the buyer's criteria and ultimate decision when choosing an artist.

3. *Unavoidable Rules and Characteristics of the Market*

Having been discovered by the insiders of the art world, the artist's entrance to the market commences. Even if the artist opposes the market, he cannot avoid the confrontation with its rules and requirements. Market rules apply to him to the extent that he needs an income. He runs the risk of losing his success if he disregards the market completely. Market requirements may become congruent following its different rules. The market considers additional factors, such as whether an artist's style coheres with the general taste, and demand becomes a relevant factor as well. The media used by an artist may foster or hinder sales. For example, performances, installations, large paintings or sculptures are neither easily displayed nor sold. Marketability strongly depends upon the number of works offered. Whether there are too few or too many works, both may be detrimental for commercialization purposes. The laws of supply and demand, price expectations and speculations have their immediate effects in the narrow market of an artist regardless of the quality of his works. Finally, from an economic point of view, works of art are substitutable, though each original object of art may be unique.³⁴ This is true at least as long as a buyer does not concentrate on a singular artist.

For the individual artist, a market in a true sense can only arise if his works are traded frequently, enjoy some recognition and are acquired by a regular clientele. Single and incidental sales to limited buyers cannot create a market. The market for an artist, if existing at all, is usually a very narrow one. It is characterized by its fragility and by a lack of transparency. Very few artists find a global market for their works. Rather, artists may conquer one or several

34. Cf. Bruno S. Frey & Werner W. Pommerehne, *International Trade in Art: Attitudes and Behavior* [sic], 34 RIVISTA INTERNAZIONALE DI SCIENZE ECONOMICHE E COMMERCIALI, N. 6, 465-486, 470 (1987) (explaining value of unique art).

regional markets for their works that usually do not strongly depend on each other but rather are characterized by their own rules.

The laws of supply and demand are as important in the art market as in any other market. An identifiable quantity of works corresponding to the requirements of the market must be offered. A sufficient amount of works should always be available but should never be offered in a way which would result in an excessive supply. The artist should be able to dispose of enough of his works so that he may be presented in several important places within his market regions. An artist's work is often introduced to a larger public only when an adequate number of works is available and can be shown in multiple places. On the other hand, the market output should never exceed a critical size, which is individually determined for each artist. There is the latent menace that the public may reproach the artist for mass-production. This negative public response usually means that confidence in the quality of his work will diminish because a common opinion holds that whatever is produced en masse cannot be art. Conversely, the public demands a choice among different works. To achieve the right balance between the buyer's desired choice and the danger of overcreation, the artist needs to be very careful. This need for careful balance, however, does not necessarily coincide with the artist's creative needs and intentions.

Fragility is not only a characteristic of the market for young artists but also exists to a certain degree for the established artist. For example, when a dealer decides to liquidate his stock of a certain artist's work, even a well-established market may be destroyed. Important collectors can bring about the same effects when they sell their collections. An example of this was the sale of the "first" Saatchi collection.³⁵ During the eighties, Charles Saatchi was the most important collector for several internationally known contemporary artists. Saatchi bought large numbers of works from "his chosen artists," thereby following a strategy of a dealer.³⁶ Due to his power to create demand, he became a market-maker for some of these artists. However, financial problems with his advertising agency forced Saatchi to sell most of his collection in 1989 and 1990. Because many important works of the same artists entered the market at once, prices dropped. After the sale of the Saatchi

35. Cf. Reiner Luyken, *Der Bildersturz*, DIE ZEIT, Nr. 10, Mar. 1, 1991, at 17; see also ULRIKE KLEIN, *supra* note 31, at 127 (providing references).

36. See HINDRY, *supra* note 23, at 121-27 (giving Leo Castelli's opinion of Saatchi and most important collectors of last decade).

collection, the markets and the market reputation of at least two artists, Sandro Chia and Julian Schnabel, were destroyed.³⁷ Saatchi, however, later re-emerged as a very important market-maker for another group of artists. His next investment focused on the “Young British Artists.” To this day, Saatchi seems to remain successful with his strategy of collecting art. The sale of 130 works out of this collection in December 1998 at Christie’s resulted in record prices. The future of this new generation of artists may be uncertain, yet, it is currently certain that Saatchi has reestablished his reputation as a collector and market-maker for the arts. He can almost claim that it was he who brought the Young British Artists worldwide success.

The sale of important private collections also can be attributed to a considerable rise in prices for an artist’s work. This was true in the Scull auction in 1973 and in the sale of works from the Tremaine collection in 1988. In both auctions, prices for the works of living artists rose to high levels.³⁸ Nonetheless, it is generally in the primary market-makers’ and probably in the artist’s best interest, that sold paintings rarely return to the market. The artist’s market becomes stable and foreseeable only if long-term oriented collectors buy a major part of an artist’s work.

C. The Collector as Demander in the Art Market

1. *Motivations of Art Buyers – Investors and Collectors*³⁹

In economic terms, art can be both a luxury consumer good and a capital good. Consumer goods are characterized by their aesthetic value; capital goods, on the other hand, are measured by their possible yield in comparison to other assets.⁴⁰ Accordingly, the art buyer seeks to derive an aesthetic profit and/or an advance of the monetary value from a work of art. His motivation for an art purchase can be driven by both sides. The buyer appears to be enthusiastic for the arts or acts as an investor, whose main concern is the possible return on his investment. An investor’s motivation to buy is different from that of a buyer, who acquires art mainly for its

37. See MOULIN, *supra* note 31, at 71 (discussing Schnabel’s fast rise in market and to fame).

38. Cf. WATSON, *supra* note 16, at 416-22 (describing Scull auction).

39. See generally CHRISTIAN HERCHENRÖDER, DIE KUNSTMÄRKTE (1979) (giving more comprehensive and general overviews of types of buyers and their importance in art market); CHRISTIAN HERCHENRÖDER, DIE NEUEN KUNSTMÄRKTE (1990); see also TAYLOR & BROOKE, *supra* note 21, at 217-38 (explaining motivation of buyers and collectors). See generally MOULIN, *supra* note 31, at 217 (1992) (discussing most important collectors).

40. Cf. KLEIN, *supra* note 31, at 181.

aesthetic value. The latter buys art because of its decorative value and because he appreciates art as a status symbol or follows a concept by collecting works of art. The more he defines a goal for his collection, the less substitutable works become for him. In contrast, an investor easily finds substitutability. The less substitutable works of art are, the more money a demander is willing to pay for them. The interest of the artist and of the long-term oriented dealer, therefore, gains more clients that are collectors rather than investors.

The degree of importance of either investment or aesthetic value for the buyer varies for each buyer for every deal; the differentiation between investment and aesthetic value helps to explain the buyer's decision in a more comprehensible way.

Aside from the pure investor and the true collector, there is also a class of buyers who, in addition to purchasing art for its aesthetic or investment value, want to profit from art as a status symbol. These buyers also like to derive a personal and social plus-value from their investment in art. They believe that possessing art may make them more interesting and enhance their personal prestige.

There is another distinction that can be drawn between the private art buyer and the corporate collector. Corporate collectors have become very important players in the art market because they regularly spend large sums of money for their collections. Corporate collectors tend to invest more consistently on the market than the private collector does. This consistent investment by corporate collectors is especially true when the amount a corporate collector can spend needs to be budgeted. For the artist, a corporate collector ideally will not only invest in the artist's works, but will also become his patron. Corporate collectors rarely collect for pure pleasure and commonly have specific objectives for collecting art. They define their own collecting guidelines and want their collections to be known by the public. A corporate collection can serve in-house motivation or express a corporate credo such as the innovative character of a company, further its international character, underscore its will to be a trendsetter or show its regional attachment. Corporate collecting is viewed increasingly as a part of the corporate identity. As such, corporate collecting not only enhances the enterprise's prestige, but it is also used for advertising pur-

poses.⁴¹ Corporate collectors are important buyers in the art market but are rarely trendsetters.

Public institutions and museums deserve to be mentioned as art buyers in categories of their own. One of the many important results of the public institutions' collecting is to help young artists make their living. The museums' significance for the art market stems from the fact that they are very important opinion-makers and opinion-leaders. Even if they do not spend significant sums of money in collecting art, every purchase and showing by a museum is a clarion signal to the market.

2. *What Affects the Buyer's Decision – The Influence of Opinion-Leaders*

Only few buyers in the primary market are insiders. Most art buyers are amateurs and are considered to be outsiders of the art world. Whereas the careful buyer seeks to buy works of art that repeat already existing and accepted styles, the "risk-taking" buyer is more willing to purchase new and unconventional art and does not rely on a resemblance to existing works. In both cases, the art buyer will nevertheless depend on other opinions before buying a work.

Modern art is frequently not as easily comprehensible to the public. Art buyers often do not view their own opinions about art as enough of a valid judgment. Even an outsider may be uncertain about accepting works that are presented to him. For this reason, the public and the art buyer turn to authorities and opinion-makers for guidance. The further a work of art moves from traditional and widely accepted norms, the more important intermediaries become in introducing art to purchasers and the public. The public relies heavily on the verdict of the art market's insiders. The art world has learned to meet these demands of a growing art interest by the general public. Critics and curators can explain unexpected and unconventional artworks to a prospective buyer. If an artist is shown in museums, the buyer can become more confident about approving an artist's work. The upsurge of art-consultants and art-marketing advisory services is proof of the art buyer's need for advice. Art consultants neither pretend to engage in the commercialization of artists nor act as opinion-makers. They analyze developments in the art market and offer their knowledge as inside information to the collector. They receive profit from collectors

41. See CORPORATE COLLECTING, MANAGER – DIE NEUEN MEDICI? (Werner Lippert ed., 1990) (discussing corporate collecting).

who ask no more than to be pointed in the right direction when purchasing art.

The most influential person to an art buyer is usually the dealer. The dealer himself, however, needs only to rely upon the support of other insiders and institutions of the art world. If critics are interested in an artist's work and if other galleries or museums are willing to present new art, it can be brought to a large public. Opinions of critics and of museum curators are of great importance to the interested public because they are considered to be objective. Museums and critics are assumed to have no financial interest in an artist's work.⁴² This is why they commonly appear to be more reliable than the art dealer. The more influential these persons are, the more their preferences gain importance in the market. If an art buyer is uncertain about the price of a piece of art, museums and critics may convince the buyer that the price asked for is adequate with respect to the market and quality of the artist.

Additionally, the artist himself can have a decisive influence on the buyer's decision. If the artist is able to develop a personal relationship with his collector, it can influence and facilitate the collector's decision to buy his art. This influence on the buyer's decision to purchase is especially true when the artist provides an explanation of his work or a friendship between the artist and the collector exists. For later generations, a relationship or link to the person of the artist is not possible. This absence of a relationship is one of the reasons why the art is estimated differently. The motivation of a collector who collects work from living artists is often different from one who buys the art of deceased artists.

D. The Dealer as Intermediary Between Artist and Collector

1. *Types of Art Dealers – The Pure Merchant and the Dealer-Entrepreneur*

The particularities of the art market demonstrate that establishing a market for an artist is a task that requires much effort, time, knowledge and capital. Today, artists are unable and unwilling to undertake this job personally. Galleries have become the established intermediaries between artist and collector and seem to

42. The objectivity of museums, however, seems to be more and more in peril. Not only museums in the United States, but those all over the world, are more and more forced to focus their activities on financial returns, too. The traditional museums' tasks of collecting, research, preservation and presentation have been joined by the new tasks, of seeking financing and sponsorship. Museums, under such a viewpoint, are forced to compete with the entertainment business as a whole, and this strongly changes their attitudes.

be adequate market-institutions to commercialize the work of artists. They are not only market-makers, but they also play the role of gatekeepers for artists.⁴³

Other actors, especially big auction houses, also tried several times to become players in the primary art market. Most of these attempts, however, have proven to be unsuccessful. The unsuccessful endeavors of the auction houses to act as intermediary between artists and buyers show that an auction house is not the right place to sell works that have not been on the market yet. An auction, by its nature, is not suited for the presentation and introduction of artists and their work to the public. The mechanisms prevailing in the auction market can not build up an artist's career over a long period. The future will show whether the stakes that some auction houses took in galleries will last. For example, whereas the New York dealer Andre Emmerich resigned from the gallery that bears his name soon after he sold it to a subsidiary of Sotheby's, the same auction house still maintains its joint venture with the contemporary space Deitch Projects in New York. Sotheby's admitted that the investment hopes it created by purchasing of the Emmerich gallery proved to be wrong.⁴⁴ Sotheby's further stated that the different cultures in a professionally-run international auction house and a traditional art gallery were very different.⁴⁵

For the artist, it is important that a dealer makes a commitment to promote the artist. The criterion of commitment to the artist marks an important distinction between the mere art merchant and the dealer-entrepreneur.⁴⁶ The art merchant deals either with artists' works only, considering his own market success, and without really making an effort for the artists, or simply rents gallery space to artists without taking a proper financial risk. The art merchant acts in the primary or secondary market but does not

43. Cf. DIANA CRANE, *THE TRANSFORMATION OF THE AVANT-GARDE, THE NEW YORK ART WORLD 1940-1985* (1987) (exploring galleries' role as intermediaries). Crane examined which elements of the art world sponsored the different styles of art coming up in the United States in the decades following World War II. See *id.* at 19-84. Crane thereby especially analyzed the position and market of New York's avant-garde galleries. See *id.* at 110-43.

44. See Steven Vincent, *Emmerich and Sotheby's: What Happened?*, ART AND AUCTION, Nov. 2, 1998, at 10 (providing more detailed description of "20th Century Art Gallery Program," which Sotheby's wanted to establish through its subsidiary "Ventures" with purpose of actively entering primary market in hopes of gaining synergies).

45. See *id.*

46. Cf. MOULIN, *supra* note 11, at 90; MOULIN, *supra* note 31, at 47; see also ANDREA VILLANI, *L'ECONOMIA DELL'ARTE, MERCATO E PIANO, MILANO 85* (1978) (discussing characteristics of art dealers of sixties and seventies in Milan).

intend to promote an artist comprehensively. He does not undertake to increase the value of an artist and his work and does not want to contribute to the artist's reputation. When acting in the primary market, he can contribute to the artist's income but does not aid in building up the artist's market. In the long-term, this is of little importance and interest to the artist.

The dealer-entrepreneur contributes to both the economic and artistic success of the artist. He may choose young and unknown artists and prepare their entries into the market. He may also, at a later stage of an artist's career, undertake to stabilize the market and/or try to develop new markets for the artist. Ideally, he will be aware of his service and obligation towards the artist. He may insist on an exclusive relationship with the artist, accept a duty to promote or even guarantee earnings to the artist. If he prefers less commitment, he will seek a privileged relationship with the artist over a longer period, regularly buying certain works or at least keeping them in stock to show them to an interested public. The art world reality shows that a lot of dealers fall under the category of dealer-entrepreneurs. Unfortunately, there are also many dealers who do not comply with the needs of an artist. The difficulty for the artist is not only to find a dealer but rather to find the dealer who acts both in his own and in the artist's interest.

A dealer who can combine economical success with enthusiasm for the arts appears to be the best intermediary an artist can find for the commercialization of his work. Artists may often complain about dealers being too business-minded. The dealer's devotion to the arts can only lead to success when he also considers business dealings. Superior knowledge of the arts and a perfect choice of artists cannot alone bring success for the artist or the gallery. Equally important is a strong effort to promote the sales of an artist's work. The "Art of This Century" Gallery was an example of a gallery that was economically unsuccessful though it presented the highest quality art. This gallery was run in New York by Peggy Guggenheim from 1943 until 1947. Her choice of young artists was exemplary. Most of the artists that Guggenheim presented in the first solo exhibition achieved tremendous success and became highly recognized in the art world. Painters like Jackson Pollock, Robert Motherwell, Hans Hofmann, Clyfford Still, Mark Rothko and David Hare were in her program. Guggenheim's excellent taste alone was not sufficient to create market success for the artists. Works were rarely sold, and most of the artists soon left the gallery. Eventually,

Guggenheim closed her gallery because she was unable to commercialize successfully the works of her artists.⁴⁷

2. *The Dealer as Gatekeeper and Market-Maker for the Artist*⁴⁸

As an intermediary between the artist and art demanders, the dealer performs the functions of an entrepreneur promoting culture and the artist. As such, he seeks to maximize his profits and to boost the artist's reputation as well as his own. The dealer's reputation grows with the artist's reputation; building up a gallery lasts as long as launching an artist. Like the artist's reputation, the dealer's reputation depends upon his own abilities to communicate and convey his knowledge of art.

The more the dealer emphasizes reputation, the more he risks his profits. The dealer therefore, must be able to combine his ideals with the business.⁴⁹ The successful art dealer is a mixture of psychologist, impresario, public-relations expert and detective. He should have a sense for aesthetics, knowledge about art and its techniques, while convincing clients to share in his own enthusiasm about art. He should anticipate trends and be able to create trends. Works of art are often not only bought because they are of a certain quality but also because the collectors believe in the dealer's choice and respect his artistic judgment. This trust in a dealer's judgments can motivate a buyer when the creations of an artist are not well known or not easily accessible.

The launch of young and unknown artists, and the collaboration with established artists are important tasks for a dealer. Both involve time, planning and money. The more enthusiastic a dealer is about an artist's work, the more time he has to devote to a long-term promotion of the artist.⁵⁰ The development of an artist in the market is a slow process, and benefits appear long after the initial investments. The launching of an artist as well as long-term market-making are not possible if the dealer does not have a financial background that allows him to advance the artist's promotion. The

47. Cf. WILLI BONGARD, *KUNST & KOMMERZ, ZWISCHEN PASSION UND SPEKULATION* 74 (1967).

48. See MOULIN, *supra* note 31, at 194 (describing market and dealers); ROBERT WRAIGHT, *DAS GESCHÄFT MIT DER KUNST* 163 (1966).

49. See Marcia Bystrin, *Art Galleries as Gatekeepers: The Case of the Abstract Expressionists*, 45 *SOCIAL RESEARCH* 390, 391-408 (giving examples for two different possible ways of this combination, with either priority on enthusiasm for arts or on business side found in analysis of Betty Parsons and Sam Kootz's galleries).

50. See TAYLOR & BROOKE, *supra* note, 21 at 187-216 (providing good analysis of promotion technique); see also VILLANI, *supra* note 46, at 40 (1978) (discussing role of dealer).

dealer needs to be able to wait for the artist's success on the market. The costs the dealer incurred are often, if ever, paid back much later, and there remains the risk that the market will never respond to the dealer's opinion. Therefore, his initial investments may be lost.

The long-term dealer must continually sustain and prepare the market. The dealer needs to ensure that the artist remains in the public's mind. Insiders, collectors and the public need to be kept informed about the artist's development. Regular shows, publications and personal contacts are required. Commissions for works of the artist and expositions at new places are helpful. Support purchases at auctions as well as from earlier buyers might be necessary. The dealer's efforts for the artist must go together with care for the dealer's clientele. If the dealer maintains the confidence of his clientele, he might be able to gain a quasi-oligopoly for the market of an artist.

The success for artist and dealer will follow when the dealer's market strategy has managed to convince interested recipients of the aesthetic and economic value of the artist's work. The balance and control of the market factors and the influence of the market with a long-term perspective are some of the important duties an artist wants to transfer to his dealer.

Galleries often attempt to avoid negative market effects by not contributing to the transparency of the market. At least over a longer period of time, market rules cannot be overcome by such behavior. A dealer's clear and long-term market strategy provides the best basis for a strong and stable market position. On the other hand, it will always be to the detriment of the parties involved if the dealer exaggerates prices or engages in other short-minded actions.

3. *The Relevance and Importance of Pricing*

The importance of correct pricing for the launch and promotion of an artist cannot be overstated. It is one of the very important tasks of the dealer to price the artist's works in accordance with the market's rules and requirements. It is usually the dealer, and not the artist, who determines the sale prices of artworks. The more important an artist is, the more he will be able to influence, or even dictate, the pricing of his works.

Prices are usually fixed before works are offered and exposed to the public. Other than the auctioneer, whose prices are determined by the bids of the prospective buyers, the gallery and the artist have a difficult task when announcing the price for an art-

work. Fixing the price for a work of art is especially difficult when an artist is not yet reputed and is brought to the market for the first time. The prices have to be fixed according to the general state of the art market, should reflect the seller's estimation of the quality and should provide a certain security for the buyer's investment. The latter is the reason why many dealers tend to keep prices of new and upcoming artists' works on a low level as long as possible. The maintenance of new artists' work at a low price level facilitates the buyers' decision and gives them the feeling that a price is adequate compared to the general price structure in the market. The maintenance of new artists' work at a low price level also diminishes the risk for the dealer that his clients will resent him for a miscalculation when the artist does not develop as expected. If prices are fixed too early at a high level, the risks of drop are bigger, and the decrease of the prices may be detrimental for the career of the artist and the reputation of the dealer. If prices appear to be unrealistic, the market soon loses confidence in an artist.

The maintenance of a determined price level is of great importance to the success of the artist and the gallery. As long as an artist's market is controlled by one or several collaborating galleries, an established price level can be upheld if the galleries have sufficient capital. They act as monopolists and can dictate the prices. Once works enter the market through other channels or are resold by former buyers, the monopoly is in jeopardy. This is the "moment of truth" for the artist and his dealers; it will show whether the prices were fixed adequately and whether a certain market for an artist exists. If the conditions for a market in the artist's work have not been prepared, no general price level for an artist's work is established. As soon as works are offered outside the established gallery-structure, prices are determined at random. Certainly, the purchase price of a work of art is regularly higher than its resale price. It is much easier to buy art than to sell art. The art market is a buyer's market. Proof that a certain market for an individual artist exists is given when a work can be resold and when the price earned is in reasonable proportion to the amount paid for it. Yet, the resale prices are too often disproportionately lower than the prices on the primary market. This negative effect can only be avoided if dealers or artists themselves are willing to take back the works at a fixed price.

As a general rule, prices should never be fixed artificially or optimistically high, but they should reflect what the dealer estimates to be appropriate, knowing the market and his clients. On

the other hand, prices should not be too low, as the public tends to measure art according to its price. Prices should be properly managed not only at the beginning but throughout the artist's career. The proper price management is the only way to avoid artists and dealers pricing themselves out of the market.

IV. AGREEMENTS BETWEEN ARTIST AND DEALER

By their nature and function, agreements between artist and dealer should reflect economic surroundings, express the expectations of the parties and form a fundamental part of their collaboration. Generally, a well-drafted contract is an appropriate instrument to fix the relationship and the rights, duties and liabilities of the parties. Reality, however, shows that artist-dealer relationships frequently lack clarity and precision. Precise descriptions of rights and duties do not seem to be the custom in the art world. Imprecise oral agreements sealed with a handshake are typically the rule.

The following considerations focus on these characteristic particularities of artist-dealer agreements and outline structures of artist-dealer contracts.⁵¹

A. Particularities of Artist-Dealer Agreements

It is usually difficult for an outsider to find out the content of the agreements between artists and dealers. On one side, dealers are reluctant to divulge any information about their contracts and negotiation practices. On the other side, artists complain about the weakness of their position towards dealers. Both artists and dealers point out the art-world's dislike of formalities and often pretend not to have any contracts. These facts often reflect the personal relationship between artists and dealers, which may even amount to a friendship. Artist-dealer relationships are of a certain particularity indeed and have elements that are rarely found elsewhere in the business world. A letter that Picasso wrote on May 25, 1912 to his dealer Kahnweiler may illustrate this:⁵² "My dear friend. I write to you and annoy you once again. I need sheets, pillows, neck-rolls,

51. As the legal treatment of artist-dealer agreements in single countries cannot be analyzed here, it is therefore referred to the special literature. See 4 LEGAL ASPECTS OF INTERNATIONAL ART TRADE 199-342 (Martine Briat & Judith A. Feedberg eds., 1993) (providing national reports); see also MARK A. REUTTER, EXKLUSIV-VERTRÄGE ZWISCHEN KÜNSTLER UND HÄNDLER (1993) (referencing national reports).

52. See KAHNWEILER, *supra* note 18, at 110 (Daniel-Henry Kahnweiler trans.) (cataloging exhibition held at Staatsgalerie Stuttgart).

covers, my laundry and my yellow-flowered Kimono. I have no idea how I could arrange all that, but I trust you more than myself and beg your pardon for all these inconveniences I cause you.”⁵³

Many dealers call themselves the artist’s best friend and pretend that their collaboration with the artist is fully harmonious. Dealers like to create this myth of pure friendship, which governs artist-dealer relationships. Reality, however, shows a different picture. Dealers complain about artists demanding too much of them. They are often unhappy about the collaboration of artists with other dealers. Artists protest against the dealers’ business practices, accuse dealers of earning more than disclosed to them and often feel poorly represented by their dealers.

Negotiations between artist and dealer can be tough, and artists often are not able or willing to understand the dealer’s position. They view the dealer as a profit-oriented trader. The artist, if not well reputed, is usually the weaker party of the relationship. He runs the risk of having to accept the demands of the dealer. An early example of the hard struggle that may exist between an artist and his dealer can be found in letters that Camille Pissarro wrote to his son Lucien about negotiations with the dealer Durand-Ruel.⁵⁴ Pissarro even became angry when Durand-Ruel insisted on getting all of his paintings, though Durand-Ruel was not able to sell them. Pissarro also described his long-lasting negotiations with Durand-Ruel as being all about prices. He felt that the dealer never offered him enough money. Although these letters date back to the last century, the same complaints and misunderstandings exist today.

It is characteristic that well-defined and comprehensive agreements in the artist-dealer relationship are not the rule, but the exception to the rule.⁵⁵ The parties are often satisfied with oral and incomplete understandings, possibly joined by a few written notes or receipts. These characteristics of artist-dealer relationships cause particular legal problems. Such problems usually arise only once there is a dispute or debate between artist and dealer. Although not too often brought to the courts, such disputes arise quite frequently. Once a dispute comes before a court, a judge will determine the rights and duties of the artist and the dealer and will fill in the gaps in the agreement. Artist and dealer thereby run the risk

53. *Id.*

54. *See generally* CAMILLE PISSARRO, *LETTRES À SON FILS LUCIEN* (1950), extracts reproduced in RAYMONDE MOULIN, *LE MARCHÉ DE LA PEINTURE EN FRANCE* 501 (1967).

55. *See* Lee Rosenbaum, *Artist Gallery Contracts: Scenes From a Marriage*, *ART IN AMERICA*, July-Aug. 1977, at 10 (illustrating artist-dealer relationship).

that the solutions found by the court will not correspond to their individual understandings, and that the court's verdict will not solve but rather will create further problems. Even if a dispute is not brought before a court, it will often end the artist-dealer relationship. This dissolution of the artist-dealer relationship may be dissatisfying to both parties, especially since problems could have been easily avoided by having a well-drafted contract.

Even though artists and dealers often agree verbally not to have a formal contract, they are still bound by legal obligations. Once parties enter a relationship, they cannot avoid its legal relevance. The parties' rights and duties exist even if they choose to ignore them. If the parties decline to stipulate the terms of a contract individually, it will be up to the law and the courts to determine their rights and duties. Denial of respective obligations does not prevent certain rights and duties of the parties from coming into existence.⁵⁶

Not only are the opinions of artists and dealers about their relationship specific to the art world, the artist's motivation to conclude a contract or to change galleries can be anecdotal as well. This anecdotal aspect can be illustrated by the circumstances that lead to the contract between Francis Bacon and the Marlborough Gallery. Marlborough was one of the rare examples of galleries that actually used concisely drafted contracts. Bacon, however, was famous for his gambling fever and had to pay back at once his wagering debts in the amount of £2,000. Marlborough offered him an advance of that amount in return for a contract. As his previous dealer, Erika Brausen of the Hannover Gallery was not willing to give Bacon the advance, this was reason enough for Bacon to defect from the gallery.⁵⁷

B. Contents of Artist-Dealer Agreements

Statements about the content of artist-dealer agreements remain to be incomplete as long as they do not pay regard to the national law, which governs the single agreement in question. Nevertheless, common and possible structures of such agreements can be outlined in a general way. The following outline could also be a

56. Cf. REUTTER, *supra* note 51, at 62.

57. Cf. ROMAN NORBERT KETTERER, *DIALOGUE: BILDENDE KUNST, KUNSTHANDEL* 362 (1988) (interviewing Wolfgang Fischer).

guide of terms that should be negotiated when artists and dealers enter into a relationship.⁵⁸

1. *Commercialization of Works*

The first and main objective of the artist-dealer relationship is the commercialization of the artist's work through the dealer. In general, there are two basic types of transactions: either the dealer buys the artist's works outright and resells them, or there is a consignment pursuant to which the dealer acts as the artist's selling agent:

- If there is an outright sale contract, the dealer purchases all, or a given quantity, of the artist's output at a specified moment or over a certain period. The dealer, therefore, gives the artist an immediate payment or pays him regular sums over a given period until the balance has been paid, or the amounts paid and the amounts owed are balanced out. An outright contract of sale generally does not impose any duties on the dealer relating to the resale of the artist's works.
- Between the outright sale contract and the consignment can those agreements be located that enable the dealer to sell the artist's work without buying it immediately and without being an agent for the artist. These contracts are characterized by a clause that entitles the dealer to return or sell back works to the artist when he is unable to sell them within a limited or unlimited period.
- Under a consignment, the dealer is the representing and selling agent for the artist and charges a commission for the artworks he sells for the artist. Being an agent, the dealer works for the artist's account and accordingly owes several specific fiduciary obligations to the artist. These obligations distinguish the consignment from the sale contract.

Under a sale agreement, the dealer pays the artist a purchase price. As the artist's agent, the dealer receives a predetermined percentage of the sale price as remuneration. In both cases, be-

58. See FRANKLIN FELDMAN ET AL., ART LAW 341 (1986); RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 3 (2d ed. 1998) (providing checklists of artist-dealer agreements and description of their legal treatment under United States law); Ralph E. Lerner, *Agreements for Visual Artists*, 16 ENT. & SPORTS LAW. 19 (1998).

tween thirty-five percent and seventy-five percent of the market price is credited to the artist. The apportionment between artist and dealer depends on many factors. The medium used for an artwork is one important determinant. The artist's share in the sale of sculptures and paintings tends to be higher than the one in the sale of drawings or prints. The allotment also depends on who paid the production costs and on who paid the costs accruing for exhibition and promotion (such as costs for insurance, storage, transportation, catalogues, invitations, general promotion, framing etc.).

Other than the dealer who sells works as agent for the artist, the dealer who works on his own accounts is usually not restricted when he fixes the resale price. Therefore, for the artist it is highly recommended that he reserve either the right to prescribe an average resale price level or the right to price determination by joint consultation.

2. *Exclusive Right Provisions*

A monopoly for the commercialization of an artist's work helps the dealer to hedge his initial investments in an artist's work. Dealers, therefore, often insist on having at least a limited monopoly. To the artist, the dealer's monopoly can give a certain guarantee that the dealer will engage in a long-term promotion and could also procure him a regular income.

The extent of the dealer's exclusivity in dealing with an artist's work can be varied in several aspects. The exclusive right of the dealer may be worldwide or may be limited to particular geographic areas. It may cover all the works of the artist or be limited to specific works. The artist may either be required to create a certain number of specified works, or he may be free to create any number of works he wants and take as long as he wishes to complete his creations. A point of common dispute between artists and dealers is whether the monopoly of the dealer prohibits studio and barter sales of the artist.

In return for exclusivity, the dealer usually will assume general or concrete obligations to promote the artist's work. Additionally, the dealer may pay the artist a regular wage or promise to buy a certain amount of his works. If the dealer acts as agent, he may guarantee a minimum return to the artist. The dealer must then pay the artist's portion even if the projected sales are not achieved. If the effected sales are higher, the artist will receive additional payments accordingly.

The right of first refusal is another preferential right that the artist may grant to the dealer. It imposes a duty upon the artist to offer his works to the privileged dealer first. The dealer may or may not accept these works. If the dealer does not exercise his right of option, the artist is free to offer them to someone else.

3. *Other Rights and Obligations of the Parties*

A primary obligation a dealer may assume in the course of the commercialization of an artist's work is the general or concretely specified duty to promote and to market the artist's works. In addition, the dealer may undertake certain other affairs for the artist as well. Some of these duties may be implied by law. The dealer, therefore, acts as the artist's agent or has a monopoly in selling an artist's work. Preferably, the parties spell out the dealer's promotional obligations as well as their other rights and duties to the best possible extent.

Beyond a dealer's marketing and promoting obligations, his additional duties are frequently the main motivation for an artist to conclude a contract with a certain dealer. For example, such was the driving force behind Paul Klee's decision in 1919 to appoint the Munich art dealer Hans Goltz from the "*Galerie Neue Kunst*" as his exclusive general agent for three years. "Business correspondences and studio visits have increased to such a size that I had to conclude this contract as an act of self-defense."⁵⁹

Some other common duties of the parties are mentioned below. These obligations are more or less connected to the marketing of works of art and the promotion of the artist.

i. Other Duties of the Artist

a. *Accounting*

The artist might be obliged to account for deals that were effected without direct involvement of the dealer. In this case, the dealer will also participate in the artist's income earned from public and private commissions as well as from direct sales.

59. "Die geschäftl. Correspondenz und die Atelier Besuche wachsen stark an, aus Notwehr einen Vertrag mit Goltz abgeschlossen." Stefan Frey & Wolfgang Kersten, *Paul Klees Geschäftliche Verbindung zur Galerie Alfred Flechtheim*, in ALFRED FLECHTHEIM: SAMMLER. KUNSTHÄNDLER. VERLEGER. KATALOG DER AUSSTELLUNG IM KUNSTMUSEUM DÜSSELDORF 72 (1987).

b. *Attendance*

The artist's presence at particular events (openings, public exhibitions, speeches etc.) may be required. Additionally, the artist may be obligated to meet with collectors, other dealers, museum curators, critics and journalists.

c. *Publications*

The collaboration of the artist is often required if the dealer publishes catalogues about the artist. The artist may also be asked to write his own contributions to publications.

ii. Other Duties of the Dealer

a. *Exhibitions*

It is typical for an artist-dealer agreement to require that a dealer organize one or several exhibitions for an artist. The number of exhibitions, their duration, and other circumstances are often specified. Furthermore, the dealer may be obligated to arrange for the artist's work to be shown at other galleries or to be included in museum exhibits. The dealer also may be required to display an artist's works at art fairs.

b. *Market Strategy and Market Supervision*

A dealer who has a monopoly in an artist's work should control and develop an artist's market conditions in a comprehensive way. The dealer, therefore, needs to arrange for selective public relations work and must carefully observe the artist's market. For example, it is important to maintain regular contacts with critics, collectors and curators. If the balance of the market is menaced, the dealer should try to reestablish it. He may have to support the prices and buy works at auctions or from private sellers. Works of minor quality should be held back by the dealer and only be offered when the market seems stable.

c. *Documentation*

The dealer also may be responsible for the handling of the archives and documentation of the artist's work. This job must be done completely and regularly so that access to the archives by interested third persons is always ensured.

d. *Artist's Right to Be Consulted*

The dealer may grant the artist a right to be consulted with respect to other artists who the dealer may want to represent.

e. *Artist's Copyrights*

Aside from giving the dealer the right to market his works, the artist also may let the dealer commercialize his copyrights. In such cases, the dealer should be required to protect an artist's intellectual property rights against infringement and unlawful exploitation.

f. *Publications and Catalogues*

It is also in the dealer's own interest to publish catalogues or books about the artist. Catalogues and other publications are very useful for marketing purposes and for introducing the artist to the public.

g. *Editions of Prints and Other Multiples*

The dealer also may commit himself to arrange for the edition of prints and multiples of the artist.

4. *Importance of Well-Drafted Agreements*

Artists and dealers often state that concisely drafted agreements indicate a lack of trust between the parties and do not solve any potential conflicts in an artist-dealer relationship. Potential misunderstandings in the artist-dealer relationship can be often avoided by an agreement that clearly reflects the parties' needs and expectations. Later disappointments may be solved if the parties pay close attention to details before entering a relationship. According to the particular circumstances, all relevant aspects of an artist-dealer relationship should be negotiated at the beginning. Well-drafted agreements are for the best interest of both parties and as such can be helpful for the development of an artist in the market.

