

A Review of Counterfeit Artwork Controversies and Civil Case Practices

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As the Korean economy continues to grow, the desire to own art increases. Despite a number of recent controversies surrounding the sale of counterfeit art pieces, the scale of the problem remains small. Nevertheless, there is a lack of relevant analysis and research. Given the increased interest in Korean arts and crafts and the growing awareness of counterfeit art, it is useful to study legal problems related to counterfeit art. The purpose of this review is to examine the concept and range of counterfeit artwork and explore corresponding legal problems and solutions.

Key Words : counterfeit art, replica art, trading arbitration, dispute resolution

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I . Introduction

South Korea's continuing economic growth has increased the average income of citizens, as well as the public interest in art and culture.¹⁾

Throughout the country, art can be seen on the walls and public spaces of complex subway passages²⁾, apartment entrances, and exhibition halls, as art becomes more and more a part of people's daily lives.³⁾ This trend extends to the overall market for art, which has risen along with access to art ownership. Yet, there are still many problems associated with the popularization of art objects for the purpose of private collecting.⁴⁾

One issue is that artworks are largely perceived as expensive products that cannot be consumed on a daily basis, like movies or musicals. Therefore, the purchase of fine art is declining. In order to overcome this problem, the art work of false artwork became the spotlight of another art market.⁵⁾

The counterfeit scandals of recent decades have heightened public interest in controversies surrounding the authenticity of artworks, and even artwork traded in the domestic auction market has been subject to criticism and suspicion.⁶⁾ In fact, there are claims that artworks and antiquities from many famous Korean artists are replicas or fraudulent. Although the scale of the counterfeit artworks market is still small, there is a lack of relevant analysis and research. Given that an interest in arts and crafts has increased in Korea⁷⁾, it is useful to study legal problems related to artworks in Korea.⁸⁾

The purpose of this paper, then, is to explore art duplication and counterfeiting, as well as the legal problems that arise from counterfeiting and trading.

1) Rhee, Dongil, A study on the gallery administration promotion in the nation by fine art market investigation., Majoring in Cultural Planning, The Graduate School of Art Administration, Chugye University, 2004. p.34.

2) Leem, Jaekwang, A study on the activity plan of the fine art market, Major in Administrative Management, The Graduate School of Public Administration, Chung-Ang University, 2004. p.18.

3) Lee, Jieun, A Study on Art Market in Korea : Focusing on Auction Houses, Department of Art Management The Graduate School, Sila University, 2008, p.47

4) Jeong, Youngsook, A Study on Types of Art Consumers according to the Purpose of Purchasing Artworks, Department of Culture and Art, Graduate School at Chugye University for the Arts Major in Culture and Arts Administration Management, 2014, p.84.

5) Kim, Taeseong, Research on investing in fine arts and determining factor of the price of fine art work. Department of Financial Engineering The Graduate School Yonsei University, 2008. pp.5-6.

6) Ryu, Sehee, A Study on Pricing Mechanisms in Art Market, Department of Arttheory The Graduate School Sangmyung University, 2012, pp. 29-30.

7) Song, Taehee, Their own 'Picture & Tech,' a sued chaebol, *Korea Times*, 23. 4, 2009

8) Lee, Juhun, "A Natural Fate of Art," *Hankyoreh Times*, 2009.

II. Counterfeit and Duplicated Art: Definitions and Scope

1. Counterfeit Art

An item of counterfeit artwork can be defined as a replica of a work created through the process of reproduction; it involves the intervention of an artist (without the original artist's permission) in order to obtain the original value of the original work. Reproduced artwork authorized by the artist, on the other hand, is a reproduction of a work which is similar but different, the same but not the same, and which comes out at around the same time the artist makes the original work.⁹⁾

Renowned art conservator Kim Kyum, who served as the team leader for the preservation science team at the National Museum of Contemporary Art from 2005 to 2011, describes cloning as the best method for art preservation. This technique involves working on canvas with gesso cloth and paper on thin paper. In modern art, the preservation of artwork is becoming more difficult. For this reason, some modern art is reproduced, essentially producing the same work to preserve its original form, or to replace a work that has been lost. A representative replica is Marcel Duchamp's Fountain.¹⁰⁾

2. The Scope of Duplicated and Counterfeit Art

Art forgeries are very widely distributed. Contemporary art does not have a limited range of art objects with various materials and various techniques.¹¹⁾ If the artwork itself is reproduced through printing, it can be considered a counterfeit against the original, not a reproduction.¹²⁾ Such art forgeries may be divided into an art form and reconstituted for the commercialization of original art by cloning.¹³⁾

9) McIntyre, *Taste Buds: how to cultivate the art market*, (United Kingdom: British Art Council, 2004), p.27

10) Kim, Kume, *A Study on the Role and Meaning of Art Collection with in the Sphere of Cultural Business in Modern Times*, Art Management Graduate School of Arts Chung-Ang University, 2007, p.8

11) Choun, Hyewon, *Study on Pure Artists' Self-Marketing : Centering on marke TEASE, oriented Damien Hirst's Activity Examples*, Major in Art Management Department of Art Management The Graduate School of Arts Chung-Ang University, 2008, p.10.

12) Cheon, Gowangho, *A study on the improvement of structural analysis and distribution of painting*, international Graduate School of Arts and Design Hanseo University, 2013, p. 14

(1) Prints

One method of reconstructing the original works of an artist in the form of a reproduction is printing. Printing is a kind of sculpting technique that enables the reproduction of many copies of original artwork. When the original artist sets a limited quantity, the artwork still is appreciated even though the quantity is not as scarce.¹⁴⁾ Although the value of prints produced after the death of an artist is still controversial, post-printing results in another kind of duplicated artwork derived from the original artwork.¹⁵⁾

Printmaking begins with a flat copy of an artwork. Most artists work with modern media due to the development of printing technology, but many artists still stay true to classical methods. In regard to techniques for making prints, four types of plates may be used: recessed, concave, and flat, and plate.¹⁶⁾

The recessed type is wooden board, the concave type is a copper plate, the flat type is a lithography slate, and is classified by the plate material. Dry points, sculpted copper plates, and pointed plates are used in the process of making the concave part of the copper plate; etching¹⁷⁾ and aquatint are examples of the corrosion of the copper plate. Stoneware has been used for lithography up to now, but recently, it has almost developed into a quince plate (metal plate), and the plate has been developed from a copper plate using paperboard to a spiral plate, a silk screen, and the like.

(2) Art prints

An art print, a leading type of art product, is a high quality replica of an artwork made possible by the development of printing technology. Some art prints are copyrighted, and others are not. Art prints without copyrights are mainly classical

13) Woo, Sookyi, A Study on the analysis of arts market status and potential investment of an artwork, Department of Cultural and Art Management Graduate School of Business Administration, Kyung Hee University, 2011, p.9.

14) Bae, Sungyoon, A Study on the Role of Art Dealer in the Birth of Modernism in European Art, Department of Museum & Art Gallery Art Theory Major, Graduate School of Art Chung-Ang University, 2012, p. 75.

15) Edward Winkleman, How to start and run a commercial art gallery, (New York, NY: Allworth Press, 2009), p.2.

16) artistic design and manufacture of prints as woodcuts or silkscreens, Doopedia Dictionary, *Doosan Corporation, 2018* : printmaking

17) an impression made from an etched plate, Doopedia Dictionary, *Doosan Corporation, 2018* : etching

paintings, and most are printed by vendors. The output method uses a large output device like a plotter.¹⁸⁾ This method enables one to select an art print and a frame to decorate it according to individual preference.¹⁹⁾

In the last several decades artists have worked with compressed acrylic. Most exhibitions of photographic art display artworks that use compressed acrylic, and most limited edition art prints use compressed acrylic in order to enhance workability. On the other hand, because replica art does not involve the material of the original work, it can be used frequently; the process permanently protects the work and enhances the decorative effect. The highly workable material used in creating limited edition art prints give them an additional quality beyond a simple art print, resulting in a new work different from the existing work. This process easily generates a low-price product that effectively advertises the artist's work.

(3) Other types of reproduction

Many art products are sold at exhibitions where the artist's sales revenue only narrowly covers the operations cost of the facility and the artist's creative costs. By creating art products that cite the work of other, more renowned artists, some artists are able to enhance their income and utilize external advertising for greater effect. Many art products at exhibitions are commercialized replicas that use well-known art images on watches, umbrellas, scarves, and cell phone ornaments. In fact, art collaboration refers to a type of art commodity in which famous artists collaborate with large corporations to use images of their works as part of commodity brands. Such replicas widely found in the branding of large companies and advertisements for large corporations, and on a wide range of consumer items.

The replication of images of art works on such consumer items dramatically increases the value of those products, particularly when some scarcity is produced through limited edition season sales. It can be said that the replica art strategy is successfully

18) The silk screen effect (SSE) is a visual phenomenon seen in rear-projection televisions. SSE is described by viewers as seeing the texture of the television screen in front of the image. SSE may be found on all rear-projection televisions. The effect is most visible when viewing bright white or very light colored images. Viewers also report seeing "sparkles" when viewing very bright colored images ; Doopedia Dictionary, *Doosan Corporation*, 2018 : plotter

19) Cheon, Gowangho, A study on the improvement of structural analysis and distribution of painting. international Graduate School of Arts and Design Hanseo University. 2013, p. 14

used to utilize art works for commercial purposes consistent with our increasingly commercialized societies. Thus, the counterfeit, the replica, and the clone share some similarities in that they all represent ways of utilizing the original work. Replica artworks, then, may be counterfeit copies of original artwork, artwork replicated by the artist, or replicas made for commercial use with the consent of the artist.²⁰⁾

III. Problems with Counterfeit Art Works

1. Disputed Artworks

In the 1970s, a great controversy arose around the sale of certain pieces of artwork. In November 1978, Joong-Sup Lee's Fighting Cow was exhibited, stimulating genuine controversy about its authenticity. Then, it was revealed that Kim Hwan-ki's Spring Girl was found to be a counterfeit by a picture forger who was arrested in February 1991, despite being judged genuine by a gallery association in 1990. On December 19, 2016, the Seoul Central District Public Prosecutor's Office concluded that Portrait of a Beauty, a painting by the artist Chun Kyung-Ja that had been controversial since April 1991, was authentic. On December 27, however, the French appraisal company Lumiere Technology held a press conference and contradicted the prosecutor's conclusion. On January 23, 2017, the surviving family of the painter expressed their intention to appeal to the prosecution's conclusion.²¹⁾ The Seoul Central District Public Prosecutor's Office then denied the findings of the French team and dismissed the charges without charge.²²⁾ Now the Chun family members have submitted a complaint to the Supreme Prosecutor's Office asking them to punish the prosecutors and investigators who concluded that the painting was authentic. This controversy continues, rising to the congressional hearing and state audit levels.²³⁾

In a number of other cases, counterfeit accusations have made headlines. July 1992, Joong-Sub Lee's Bull and White Cattle was unable to be deemed authentic. In 1997, Lee Sang-beom's Chugyeong Sansu was simultaneously displayed at a gallery exhibition

20) Leonard D./Christy O. King DuBoff, *Artlaw in a nutshell*(4thEd), THOMSON WEST, 2006, pp. 58-59.

21) You, byungchul, Based on the controversy over forgery that started in 1991, *Global Economic Times*, 18. 4. 2017

22) Min, kyunggho, Chun family members have submitted a complaint to the Supreme Prosecutor's Office, *Seoul Broadcast System* 14. 9. 2017.

23) Lee, Jaehoon, 26 years of forgery controversy, *Newsis* 13. 10. 2017.

and at the Insa-dong Gallery, after which the gallery announced it was a counterfeit and withdrew it. In 1998, controversy over the authenticity of WaeKuem Gang Okryu Chon was also pending. In 1999, Lee, Kwae-Dae's disputed A Seated Statue of a Boy was confirmed as the work of Kim Jae-seon.

2. Legal Problems Surrounding Counterfeit Art Works

If a copyrighted artifact is forged or imitated, it infringes on the right of the copyright holder to make a secondary work, thus violating the right to display the name of the author and the right to integrity authorship.²⁴⁾ Forgeries do not cause problems, however, unless there are special circumstances in which the artwork is forged or imitated the works whose copyright duration has already expired, though problems do arise when such works are sold or distributed.²⁵⁾ Unlike artwork reproduced as a replica, duplicated artwork that is sold as if it is genuine is fraudulent, allowing the buyer to cancel the contract of sale and request a return of the purchase price.

Some specific issues in the sale of artwork involve the obligation of the seller before the signing of the contract to provide information to the potential buyer about the authenticity of the artwork. Thus, the transaction is conducted on the condition that the authenticity of the artwork is guaranteed, thus ensuring, in the case of a forgery, withdrawal and breach of the contract, the buyer's remedy at the stage of imperfect execution, criminal prosecution against the seller, the seizure and abandonment of the counterfeit, the author's property rights, and the application of international law.²⁶⁾

Importantly, the author's property rights arise from the time a work is created; they do not require the enforcement of any formalities or procedures such as registration.²⁷⁾

In this way, artworks are different from other works. Article 35 of the Copyright Act stipulates special regulations on artworks, thus limiting the right of exhibition and reproduction rights to authors.²⁸⁾

24) Min, Soyoung, A Study on the Function and Improvement Plan of Korea Gallery, Art Theory Major Graduate School of Kyunghee University, 2001, pp. 113-114.

25) Lee, Sangjung, Art and Law, Sechang Publishing Company, second edition, pp. 122-123. 2016

26) Lim, seungteak, Marketability in culture & art, and all legal problems based on this : all legal problems relevant to artwork deal and fake artwork, *Dept. of Culture and Arts Management Graduate School of Business Administration*, pp. 47-48. 2011.

27) copyright law Paragraph 10 of Article 2

IV. Counterfeit Artworks and Civil Case Practices

Controversy over the authenticity of artworks can't be avoided. In Korea, however, the seller of the counterfeit works is legally liable. Among the questions to be addressed are what criteria the judge should use and what points buyers and sellers should consider when completing a contract. When dealing with artworks, the seller's liability involves failure to default, cancellation of the contract, return of the proceeds based on the contract, and liability for breach of warranty.

1. Nonperformance of Obligation Default or Discharge of Obligation

When buying and selling art, is the existence of a defect by another artist, not the original artist who produced the art, may result in legal consequences. In the case of defamation, one may be liable for defects.²⁹⁾ Also, whether or not the debt itself has not been implemented can be a warranty to repair defects. Whether it is a defective default requiring special accountability of the court, or whether it is a type of default raises the question of whether liability for imperfect fulfillment can be claimed.

If the object of a sale is the work of the original author it represents the content of the obligation, but if the seller has delivered counterfeit goods through a third person, it is considered a default. Because the authenticity of an artwork is not only the material property of the object of sale, but also the personality of the object, the sale and purchase of objects other than the object of sale is not a quality defect but a default.

Thus, in the civil law academy, it is widely believed that liability for collateral liability is a kind of default liability.³⁰⁾ Thus, if a defect in the property exists, it may be regarded as a kind of imperfect fulfillment.³¹⁾

28) copyright law Paragraph 35

29) Lee Heejung, A Study On Social Meaning and Revitalization of South Korean Private Collectors, Department of Art Education The Graduate School of Education Korea University. 2009, p.28.

30) Oh, Jonggeun, "A scholar on the liability of certain prostitution", 『Development of Korean Civil Law Theory』, 1999. p. 934.

31) Kim, Daejung "Reconstruction of liability by default.", *The Korean Association of Civil Law*, Volume.9,10, 1993 p.248. : Ahn, Chunsoo, "The Problem of the Self-Definition Act - From the perspective of the notion of default to the particular traffickers", *The Korean Association of Civil Law*, Volume. 11,12

2. Primitive Disability

If the object of the sale is the art of the very same artist whom the trading parties thought was the object of debt, then the case in which the delivered picture is a counterfeit and in reality there is no such artwork can be regarded as primitive disability.³²⁾

If the obligation to pay damages is recognized in accordance with the nonperformance of obligation and if the obligation is regarded as an obligation to heal,³³⁾ the failure of healing cannot be recognized from the beginning. If there is a deficiency that can not be eliminated in the sale target, the debt content itself will not be possible, but the contract will not be null and void because the warranty to repair defect is applied first. If this is the case, there will be no problem of primal inability. On the other hand, if there is no reason to exclude the application of Article 535 of the Civil Code, the contract will be nullified and the seller will have to return the proceeds in accordance with the unfair benefit provisions.³⁴⁾

3. Warranty to Repair Defects Fraudulence Liability

If it an artwork that was thought to be authentic and was entered into a contract of sale and purchase is later found to be a counterfeit, it is reasonable that the buyer can be held responsible for the security against the seller. In such a case, the authenticity of the artwork that was assumed by the buyer changed, and the value of the object changed accordingly. The time limit of warranty to repair defect is not be extended from the time of delivery, but from the day when the buyer becomes aware of the defect. According to the Supreme Court, however, after 10 years from the time of delivery, the claim for damages as a result of a general sample period may be sought.³⁵⁾

; 1995

Myung, Soongu, "Basic Foundation for the Convergence of Non-performing Rules," *The Korean Association of Comparative Private Law*, Volume 13, 2006, p. 4, p. 319.; Soergel/Huber, 12. Aufl., Bd, 3A, 1991, vor 459 BGB, Rn. 145.

32) Cho, Shinsook, A Study of Art authentication & Appraisal to vitalize Korea's Art Auction, Department of culture management, Graduate School of culture, Arts and Design, Dankook University, 2010, p.17.

33) Park, Youngmook, "Spezieskauf und Pflicht zur Übergabe der Sache frei von Sachmängeln", *The Korean Association of Civil Law*, 2009.3, p. 230.

34) Seo, Kwangmin, "Liability of the seller", *The Korean Association of Civil Law*, 1995. pp. 165-193.

35) Supreme Court ruling : rendition of judgment(13. 10. 2011) / pronouncement(2011다10266)

4. Error

Different legal systems govern consumer rights related to defects existing in goods and contracts signed without acknowledgement of defects by the seller. In light of court positions on such cases, however, it seems that recognition of the conflict and subsequent cancellation is consistent.

The courts acknowledge both claims by an illegal act and by default, increasing the possibility of a competitive application even if the claims arising from the same event are in a general and special relationship.

5. Right to Request a Return of Unjust Enrichment

The buyer of a fraudulent artwork shall have the right to request a return of unjust enrichment from the seller if the artwork is recognized as invalid due to its primal inability or if a cancellation based on error is recognized. In the case of a civil error such as a business transaction based on false information, the error and the right to claim return of illicit gains can be recognized. If the retroactive effect of the cancellation is considered, it is possible to exercise the right to return the unjust gain within ten years from the conclusion of the contract.

V. Conclusion

With the growth of the Korean economy, the desire of the public to own artworks has increased. Yet, limiting the possibilities for art consumption to original artworks is now an old-fashioned approach to art popularization. Replica art represents an opportunity to broaden art ownership; as such, it represents a catalyst for popularizing art.

Duplicating images of artworks on consumer items dramatically enhances the value of such products. Duplication of limited edition artworks also creates a sense of scarcity that increases the value of the art. It can be said that replica artwork works successfully as a commercial strategy consistent with the flow of the commercial era.

Counterfeiting, imitation, and reproduction have similarities in terms of utilizing the original work, though A counterfeit copy of an artwork is the theft of an image that

literally infringes on copyright.

The purpose of this study was to examine questions surrounding artworks, duplication, and the range of forms such duplication can take, as well as related legal problems and solutions. Also reviewed were issues related to the liability of sellers of various kinds of artworks, including failure to default, cancellation of the contract, return of the sale price based on the contract.

On the other hand, in order to establish fair trade practices in the art distribution market and to promote the stable art market, it is important to support research and development of art appreciation techniques and foster of art appreciation manpower continuously. In addition, it is necessary to introduce the art trade declaration system through the process of registering permission for distribution and auction of artwork.

This paper has argued that the art market, which is stagnant, may be able to revitalize itself through the promotion of replica art. It is my hope that such replica artworks will provide the chance for more citizens to embrace and enjoy the wonder of art.

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