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## Fakes, Fears, and Findings - Disputes over the Authenticity of Artworks by A.L. Bandle

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# **Fakes, Fears, and Findings – Disputes over the Authenticity of Artworks**

Anne Laure Bandle\*

## **Abstract**

Authenticity is claimed to be the most important quality of artworks. When authenticating art, experts decide whether a work is of real cultural and economic significance. Given the high stakes involved in art authentication, owners have not refrained from commencing legal proceedings against experts. In doing so, they have attempted to coerce experts to provide or change their opinion as to the work's authenticity. Most suits fail, but the experts' fear of becoming entangled in lawsuits has soared, resulting in them becoming increasingly reluctant to deliver opinions. Owners, on the other hand, have to bear the consequences of oscillating attributions and scholarly disagreement. This article aims to investigate why experts have become so fearful, whether their anxiety is well-founded, and how their indispensable activity may be secured for the interests of scholarship and the art market.

## **1. Fakes - Determining Authenticity**

An artwork is not esteemed on the basis of its external appearance, but primarily through its attribution to a specific creator or location of origin, date or period, and provenance. While an attribution may provide an historical context to the work, establish quality and uniqueness, all these subjectively meaningful parameters are undermined should the work turn out to be a forgery. Authenticity ensures that the artwork's attribution has been accurately identified. When authenticating art, experts not only accredit the aura associated to an artwork, but also eventually decide what is of cultural significance and what is not. Authenticity has concrete repercussions on the market, in the form of its influence on an artwork's economic value, and in law, given the liability of experts and sellers for misattributions and the sale of forgeries. The implications of an artwork's authenticity have seen the authentication process come to be of paramount importance.

Experts have come under closer scrutiny as scientific techniques for gauging authenticity have advanced and the chances of identifying incorrect attributions have increased. Additionally, many of the collectors who have joined the market in recent years do not tend to have extensive connoisseurship in art and, therefore, are fully reliant on the authentication provided by dealers or independent advisors when they wish to sell or purchase art.

Authenticating and appraising artworks is, arguably more than any other field of expertise, complicated by the peculiarities of the context in which it operates, i.e. the art world. First of all, whereas anyone may claim to be an art expert,

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since no specific qualifications are necessary to bear this title, only very few are actually recognised as such by the art market. This is where the expert's reputation is essential.<sup>1</sup> Should experts not agree on an artwork's attribution, it is the opinion of the "most respected expert"<sup>2</sup> for a given artist that matters in the art market.<sup>3</sup> The so-called "authority" prevails over any other expert opinion,<sup>4</sup> leading to a seeming consensus on the attribution of a given work.

The above-mentioned impact of expert opinions on the objects' cultural importance and market value is amplified if an authority is involved. Given that authorities enjoy unparalleled reputations, when they declassify an artwork it is very difficult to outweigh by dissenting opinions and the perception of the viewer. An unfavourable expert opinion from an authority significantly weakens the artwork's expressive and monetary value.<sup>5</sup> For high-end art, dealers generally do not proceed with the sale without the authority's approval on the artwork's attribution, which further increases the already very high stakes in art authentication.<sup>6</sup>

In the second place, the process of authentication is exposed to scholarly changes. Given that attributions are based on connoisseurship, they are an unstable parameter, resulting from "a continuous comparative analysis, studies of style and style-critical comparisons and which is often changing".<sup>7</sup> When experts proceed with an examination of an artwork, they may only rely on available historical, scientific and artistic evidence.<sup>8</sup> Despite all diligence, new information and technology may arise and lead to the re-assessment of established attributions. Thanks to the art market's process of self-correction, several highly publicised forgeries have been detected.<sup>9</sup>

Except for those elements which may be subject to scientific analysis, such as the age of the given artwork,<sup>10</sup> the determination of whether the work is an original by a given artist ultimately remains within the realm of "intellectual speculation".<sup>11</sup> Depending on its acceptance by the art market, which may for instance occur "as one authority is replaced by another",<sup>12</sup> the new attribution takes over. The *Rembrandt Research Project* (RRP) is well known for re-

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<sup>1</sup> Stéphanie Lequette-de-Kervenoaël, *L'authenticité des œuvres d'art* (2006) LGDJ 176

<sup>2</sup> Eugene Victor Thaw Interviewed by Ronald D Spencer, 'The Authentic Will Win Out' in Ronald D Spencer (ed), *The Expert Versus the Object - Judging Fakes and False Attributions in the Visual Arts* (OUP 2004) 73

<sup>3</sup> Lequette-de-Kervenoaël (n 1) 176

<sup>4</sup> Thaw (n 2) 73; Eric Turquin, 'Le point de vue de l'expert en art' in Quentin Byrne-Sutton and Fabienne Geisinger-Mariéthoz (eds), *Resolution Methods for Art-Related Disputes, Studies in Art Law Vol 11* (Schulthess 1999) 92

<sup>5</sup> Tilo Gerlach, *Die Haftung für fehlerhafte Kunstexpertisen, Schriftenreihe des Archivs für Urheber-, Film-, Funk- und Theaterrecht (UFITA) Vol 156* (Nomos 1998) 27; Friederike Gräfin von Brühl, *Marktmacht von Kunstexperten als Rechtsproblem – Der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis, Bucerius Law School Schriften Zum Kunstrecht Vol 4* (Carl Heymanns Verlag 2008) 47

<sup>6</sup> Ibid; John R Cahill, "'Keeping it Real": A Brief Primer on the Law of Art Authenticity' (2012) 35 Colum J L & Arts 357, 365

<sup>7</sup> Gerlach (n 5) 10

<sup>8</sup> Lequette-de-Kervenoaël (n 1) 303

<sup>9</sup> Thaw (n 2) 73

<sup>10</sup> Lequette-de-Kervenoaël (n 1) 254

<sup>11</sup> François Duret-Robert, 'Fictions de l'authenticité, réalités de l'expertise' *Connaissance des Arts* 285 (1 November 1975) 110

<sup>12</sup> Van Kirk Reeves, 'The Rights and Risks of Experts in French and American Courts' (2011) 12 *IFAR Journal* 18, 18

examining a body of works attributed to Rembrandt for the purpose of creating a catalogue on his oeuvre.<sup>13</sup> In the course of that process, a great number of works attributed to Rembrandt were de-classified, thereby seeing the opinion of one of the greatest Rembrandt scholars of the first half of the 20<sup>th</sup> century effectively being overridden.<sup>14</sup> The subjectivity in art authentication, and the exposure of attributions to possible changes, is what makes the field so contingent.

Besides being subject to change, the question of authenticity may sometimes remain unresolved because of a continuous debate among scholars. Complications arise in particular when it comes to determining whether the artwork was created by the Master artist or one of his pupils or followers. Artworks which have been recently attributed to major Old Master artists such as Michelangelo or Leonardo da Vinci are very unlikely to obtain the experts' universal acceptance<sup>15</sup>.

As long as the attribution battle persists, liability concerns remain in a sort of limbo, leaving owners and dealers in a precarious situation. Moreover, such an artwork may be neither included in exhibitions or new editions of catalogues *raisonnés*, nor traded on the market<sup>16</sup>.

Overall, the momentariness of attributions and ongoing debates over the creatorship of certain works relativize the stability of expert statements on authenticity. Moreover, reattributions may impact the owner anytime. Given the respect that expert opinions attract in the market, and the fact that owners generally lack sufficient knowledge to contest an expert opinion, the latter are completely exposed to the power of authenticators. Both aspects generate insecurity on the market, shaking the market players' confidence in the validity and sustainability of attributions and in the expertise of the specialists owners rely on.

## 2. Fears – Threat of Liability

Despite their connoisseurship, experts have increasingly become reluctant to speak out on the attribution of artworks. Targeted by lawsuits, the threat of liability alone has sufficed for authentication boards to disband and expert-sellers to discontinue their activities.<sup>17</sup> In doing so, owners of contested artworks have

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<sup>13</sup> Samuel Butt, 'Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence' (2004) 28 Colum. J.L. & Arts 71, 71

<sup>14</sup> Martin Bailey, 'Rembrandt Research Project ended' *The Art Newspaper* (24 January 2011) <<http://www.theartnewspaper.com/articles/Rembrandt+Research+Project+ended/23044>> accessed 5 March 2013

<sup>15</sup> Milton Esterow, 'The Real Thing?' *ARTnews* (1 January 2010) <<http://www.artnews.com/2010/01/01/the-real-thing/>> accessed 5 March 2013 (referring to *La Bella Principessa* possibly by Leonardo da Vinci); Peter Dittmar, 'Kurzer Traum' *Die Welt* (26 January 2006) <<http://www.welt.de/print-welt/article193475/Kurzer-Traum.html>> accessed 5 March 2013 (on Michelangelo)

<sup>16</sup> Martin Bailey. 'National Gallery's Dürer Shunned' *The Art Newspaper* 238 (September 2012) 3; Esterow (n 15)

<sup>17</sup> *Larivière v E V Thaw, the Pollock-Krasner Authentication Board et al*, 2000NYSlipOp50000(U), 2000WL33965732 (NYSup) at 3; AT, 'Collectors, Artists and Lawyers' *The Economist* (24 November 2012) <<http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art->

attempted to compel experts to provide authentication, to reconsider their opinion, or to include an artwork in forthcoming editions of a catalogue *raisonné*, as well as attempting to force sellers to cancel the sale and pay damages.

While experts and dealers have been challenged by the peculiarities of art authentication described above, the threat of becoming entangled in lawsuits is the ultimate source of their fear. However, most of such lawsuits seem destined to fail, as expert liability may be narrowed down to few scenarios.

In the United Kingdom, experts are widely protected, as contractual force is rarely attached to their opinions.<sup>18</sup> Instead, they are free to express their personal opinions for which they may only be held liable if they were party to a contract,<sup>19</sup> or warranty,<sup>20</sup> or when acting negligently.<sup>21</sup>

Under Swiss law, quite the opposite may be true. Experts are generally bound by an agency contract to the requestor of an expertise, except in limited cases where the absence of an intent to enter such a contract may be established according to the circumstances in which the opinion was given.<sup>22</sup> Liability is therefore mostly based on the breach of the expert's duty of care, the extent of which is determined according to the clauses of the contract, the diligence to be expected from a competent professional in the same circumstances, and the special skill and knowledge of the authenticator.<sup>23</sup> Whether the expertise contract may protect third party buyers has not been decided so far,<sup>24</sup> but in the event the

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market-collectors-artists-and-lawyers> accessed 5 March 2013; Georgina Adam and Riah Pryor, 'The Law vs Scholarship' *The Art Newspaper* (8 December 2011) <<http://www.theartnewspaper.com/articles/The-law-vs-scholarship/25155>> accessed 5 March 2013; Meaghan Wilson-Anastasios, 'Expertise Goes down the Drain' *Sydney Morning Herald* (29 December 2012) <<http://www.smh.com.au/entertainment/art-and-design/expertise-goes-down-the-drain-20121228-2bz8y.html>> accessed 5 March 2013; *Lagrange v Knoedler*, No11-8757 (SDNY, settled in October 2012)

<sup>18</sup> Pierre Valentin 'Panel 2: The Rights and Responsibilities of Authenticating Art' (2012) *Colum J L & Arts* 35, 393, 405; Luke Harris, 'The Liability of Experts for the Misattribution of Works of Art', Conference paper, *Kunst und Recht – Haftung von Gutachtern im Kunstrecht*, EuropaInstitut, Zürich (27 November 2012) 83

<sup>19</sup> The judge must determine whether the parties intended for the statement to be a contractual term; *Drake v Thos Agnew & Sons Ltd* [2002] EWHC294 (QB)

<sup>20</sup> Major auction houses generally provide a contractual authenticity warranty to buyers in their agreements; *De Balkany v Christie Manson & Woods Ltd* (1997) 16 TrLR163

<sup>21</sup> If a false expert statement was addressed to the plaintiff who, as a result, has been induced to enter into a contract, the expert may be liable for misrepresentation if he acted negligently; s 2(1) of the 1967 Misrepresentation Act; *Thomson v Christie Manson & Woods Ltd and others* [2005] EWCACiv555

<sup>22</sup> For instance if the authentication was given incidentally and gratuitously as a gesture (Federal Court Ruling 112II347; Luc Thévenoz, 'La responsabilité de l'expert en objets d'art selon le droit suisse' in Quentin Byrne-Sutton and Marc-André Renold (eds), *L'expertise dans la vente d'objets d'art: Aspects juridiques et pratiques, Studies in Art Law Vol 1* (Schulthess 1992) 37, 54

<sup>23</sup> Article 398 Swiss Code of Obligations

<sup>24</sup> Christine Chappuis, 'L'authentification d'œuvres d'art: responsabilité de l'expert et qualification du contrat en droit suisse' in Marc-André Renold, Pierre Gabus and Jacques de Werra (eds), *L'expertise et l'authentification des œuvres d'art, Studies in Art Law Vol 19* (Schulthess 2007) 47, 69

opinion was issued with no reserve as to its receptors,<sup>25</sup> third parties may assert the contractual rights derived therefrom.<sup>26</sup>

In the absence of a contract, a grossly negligent or intentional misattribution may give rise to liability in tort.<sup>27</sup> The expert who has adequate knowledge and information on an artwork's attribution must – if she decides to do so – authenticate truthfully and diligently, to the extent to which the implications of her opinion for the requester were recognizable to her.<sup>28</sup> Furthermore, liability may be based on trust if the expert has given rise to legitimate expectations as to the artwork's authenticity that were not fulfilled, and whereupon damage incurred to a third person to whom she stands in a special relationship<sup>29</sup>.

In the United States, where most of the lawsuits against experts have occurred, several causes of action have been advanced by the plaintiffs.<sup>30</sup> Provided the plaintiff has a (contractual) relationship with the authenticator such that the latter owes a duty to possess and exercise ordinary skill and knowledge, breach of that duty may result in a claim for professional malpractice or negligence.<sup>31</sup> The extent of the standard of care in a given case is defined by the express or implied agreement of the parties, and by the qualifications of the expert.<sup>32</sup> In particular, the expert's responsibilities include any special skills or knowledge he claims to have.<sup>33</sup> If no representation was made, the standard departs from the skill and knowledge normally possessed by an expert of the same kind.<sup>34</sup> Several professional organisations have issued codes of ethics and professional conduct by which its members are expected to abide and thanks to which the plaintiff may use as evidence regarding the standard of care.<sup>35</sup> In *Travis v. Sotheby Parke Bernet Inc.*,<sup>36</sup> the judge ruled that Sotheby's expert went beyond the required standard of care by consulting with the authority for the alleged artist of the painting presented to the auction house for evaluation purposes.

In parallel to pure negligence claims, attribution errors in the context of sale transactions may be subject to claims for negligent misrepresentation,<sup>37</sup> if the expert made false material representation without reasonable belief that the representation was true. The expert's statement must be objectively false and not simply disputable,<sup>38</sup> which may be very difficult to prove given the subjectivity

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<sup>25</sup> By means of a formulation such as "to whom it may concern"; Thévenoz (n 22) 48

<sup>26</sup> Federal Court Ruling 115II62, 3a

<sup>27</sup> Federal Court Ruling 111III474

<sup>28</sup> Thévenoz (n 22) 54-55 quoting *ibid*

<sup>29</sup> Chappuis (n 24) 69-71

<sup>30</sup> For the claims of defamation and fraud, see Ronald D Spencer, 'The Risk of Legal Liability for Attributions of Visual Art' in Ronald D Spencer (ed) *The Expert versus the Object – Judging Fakes and False Attributions in the Visual Arts* (OUP 2004) 167 et seqq; for a defense under American constitutional law, Ronald D Spencer, 'Opinions About the Authenticity of Art' (2011) 2 *Spencer's Art Law Journal* 2-6

<sup>31</sup> Art experts acting as agents of a client in dealing with third persons generally have a fiduciary duty towards their client; Roy S Kaufman (ed), *Art Law Handbook* (Aspen Law & Business 2000) 870, 872

<sup>32</sup> Ralph E Lerner and Judith Bresler, *Art Law – The Guide for Collectors, Investors, Dealers & Artists* (4th ed Practising Law Institute 2012) 517

<sup>33</sup> *Ibid* 517; Kaufman (n 31) 870

<sup>34</sup> Lerner and Bresler (n 32) 517

<sup>35</sup> Kaufman (n 31) 870

<sup>36</sup> No4290179 (NYSupCt1982)

<sup>37</sup> Restatement (Second) of Torts § 528

<sup>38</sup> Peter H Karlen, 'Fakes, Forgeries, and Expert Opinions' (1986) 16 *J Arts Mgt L* 5, 8

and lack of conclusiveness in authentication.<sup>39</sup> Opinions are protected if they were in accordance with the prevailing scholarly viewpoint at the time they were made.

Negligent misrepresentation necessitates a relation of trust and confidence between the parties entitling the plaintiff to rely upon the defendant's representations.<sup>40</sup> The existence of a special relationship depends very much on the circumstances under which the services are provided.<sup>41</sup> It often arises "out of a contract where the defendant was specifically employed for the purpose of rendering an appraisal to the plaintiff knowing that the plaintiff intended to rely on it".<sup>42</sup> For instance, a special relationship has been admitted for consignment agreements as a result of the fiduciary duty owed by auctioneers to consignors, but not between the auctioneer and the buyer.<sup>43</sup>

Expert-sellers are bound by existing warranties<sup>44</sup> and must comply with the duty to exercise ordinary skill and care in carrying out the contractual responsibility.<sup>45</sup> The plaintiff may also seek the rescission of the sale contract based on a mutual mistake-of-fact claim.<sup>46</sup> Sellers and experts should only engage in attribution activities with due care and within the specified scope of expertise.

For negative opinions on authenticity and for refusing to include artworks in catalogue *raisonnés*, plaintiffs have claimed remedies for disparagement to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality their property.<sup>47</sup> The plaintiff must show that the expert's statement was false, published to a third party, expressed with malice and has caused special damages in terms of marketability.<sup>48</sup>

Experts should avoid giving unsolicited opinions to third parties, such as in *Hahn v. Duveen*,<sup>49</sup> as they may act in disparagement of the owner's property. The case involved Andrée Hahn, owner of a painting allegedly by Leonardo da Vinci and the influential art dealer Joseph Duveen. Based on a photograph of the painting, Duveen pronounced to a newspaper reporter that it was a copy and that

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<sup>39</sup> Ibid 16

<sup>40</sup> *Foxley v Sotheby's*, 983FSupp1224, 1229 (SDNY1995)

<sup>41</sup> Ibid; *Ravenna v Christie's Inc*, No121367-00 (NYSupCt2001, unpublished) aff'd 289AD2d15, 734NYS2d21 (1stDep2001)

<sup>42</sup> *Struna v Wolf*, 126Misc2d (1031), 484NYS2d392 (SupCt1985); Karlen (n 38) 12-13 on expert liability towards third parties relying upon the opinion

<sup>43</sup> *Mickle v Christie's Inc*, 207FSupp2d237, 244 (SDNY2002); *Cristallina SA v Christie Manson & Woods Int'l , Inc*, 117AD2d284, 292, 502NYS2d165, 171 (1986); *Nacht v Sotheby's Holdings*, NYSupCt, No100938-98 (1999); *Ravenna* (n 41)

<sup>44</sup> *Dawson v Malina*, 463FSupp461 (SDNY1978); see Uniform Commercial Code s 2-313 and New York's Arts and Cultural Affairs Law s 13-03

<sup>45</sup> Kaufman (n 40) 871

<sup>46</sup> *Feigen v Weil*, No13935-90 (NYSup1992), aff'd 595NYS2d68; *Firestone & Parson v Union League of Philadelphia*, 672FSupp819, 823 (1987); Marc Weber, 'Liability for the Acquisition of Faked or Wrongly Attributed Works of Art in US Law' in Kerstin Odendahl and Peter Johannes Weber (eds), *Kulturgüterschutz – Kunstrecht – Kulturrecht* (Nomos 2010) 409, 415

<sup>47</sup> *Thome v The Alexander & Louisa Calder Foundation*, 70AD3d88, 890NYS2d16, 23 (2009); *Kirby v Wildenstein et al*. 784FSupp1112, 1115 (SDNY1992)

<sup>48</sup> *Thome* (n 47) 23; *Kirby* (n 47) 1115; Jeffrey Orenstein, 'Show Me the Monet: The Suitability of Product Disparagement to Art Experts' (2005) 13 Geo Mason L Rev 905, 918

<sup>49</sup> *Hahn v Duveen*, 133Misc871, 234NYS185 (NYSupCt1929)

the genuine version was displayed at the Louvre. Hahn brought suit for disparagement of her property during which the painting's creatorship was the subject of such a battle between experts that the court was rendered unable to reach a verdict.<sup>50</sup> The parties finally settled for \$60,000.<sup>51</sup> Auction houses rarely publish such information as they generally directly deal with the consignor or an agent of the consignor.<sup>52</sup>

Experts are deemed to be malicious when unnecessarily intermeddling with the affairs of others despite being wholly unconcerned by them.<sup>53</sup> Further, voluntary statements "recklessly made" are considered malice.<sup>54</sup> Pursuant to case law, malice has been determined based on the expert's actual state of mind.<sup>55</sup>

In order to determine whether a statement on authenticity was false, judges generally follow a "preponderance standard",<sup>56</sup> according to which they must be convinced that the artwork "is at least marginally more likely than not"<sup>57</sup> authentic. The plaintiff must also prove that the expert's statement has inflicted special damages with regards to the work's market value, quality, and condition.<sup>58</sup>

After all, expert opinions may be privileged on two grounds: if the plaintiff has consented to the publication of the statement, knowing that it might disparage his property, hence not applying to potential purchasers; and if the publishing of the disparaging statement was necessary to protect the other from loss, also applying to potential purchasers. In the event of the latter, the expert must prove that he had a legal duty to protect the person or acted according to "generally accepted standards of decent conduct".<sup>59</sup> In particular, if the statement has been made upon the request of the person, the expert has a "moral duty to answer honestly".<sup>60</sup> As seen in *Hahn*, it may be very difficult to protect an expert who spontaneously makes a statement on an artwork's authenticity to a third party.<sup>61</sup>

Experts should be careful not to refuse authentication requests if they are the authority on the market. Given their irreplaceable value of their reputation, they may be reproached for singularly dominating or monopolising the market.<sup>62</sup> Potential conflicts of interest especially abound when the authenticating authority owns a significant amount of artworks by the given artist.<sup>63</sup> By denying

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<sup>50</sup> Ibid 193 and 195

<sup>51</sup> Orenstein (n 48) 909

<sup>52</sup> Ibid 913, one exception being *Kirby* (n 47)

<sup>53</sup> *Hahn* (n 49) 873; *Travis v Sotheby Parke Bernet Inc*, No4290179 (NYSupCt1982) excerpted in Henry Merryman and Albert E Elsen (eds), *Law Ethics and the Visual Arts* (5th ed, KLI 2007) 1085, 1087

<sup>54</sup> Merryman and Elsen (n 53) 1087

<sup>55</sup> Orenstein (n 48) 911

<sup>56</sup> Spencer, 'Legal Liability' (n 30) 143

<sup>57</sup> Orenstein (n 48) 909

<sup>58</sup> *Kirby* (n 47) 1118

<sup>59</sup> Theodore E Stebbins, 'Possible Tort Liability for Opinions Given by Art Experts' in Franklin Feldman and Stephen E Weil (eds), *Art Law: Rights and Liabilities of Creators and Collectors* (Little, Brown and Company 1986) 517, 525

<sup>60</sup> Ibid 526

<sup>61</sup> Ibid

<sup>62</sup> *Kramer v Pollock-Krasner Foundation*, 890FSupp250, 257 (SDNY1994); *Vitale v Marlborough Gallery et al*. 32USPQ2d (BNA) 1283, 1994USDistLEXIS9006 (SDNY)

<sup>63</sup> Patty Gerstenblith, 'Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works' (2012) *Colum J L & Arts* 321, 343-44



the authenticity of presented artworks, they may be accused of creating a scarcity in the market for works by the artist and thereby artificially inflating prices.<sup>64</sup> However, no court decision hitherto successfully adjudged such antitrust liability.

Finally, when authoring catalogues *raisonnés*, experts have a duty to consider inclusion proposals by owners of eligible works, but are not legally required to comply with such requests.<sup>65</sup>

### 3. Findings – Authenticity Disputed in Courts

Despite being a remote threat, the risk of liability has a “freezing effect on scholarship”,<sup>66</sup> the reasons for which may also be found in the judicial dispute resolution process. In fact, when deciding over authenticity disputes, the courtroom showed itself to be detrimental to experts on several counts.

Primarily, lawsuits are very time and cost consuming. All causes of action mentioned above require proof that the artwork in dispute is either authentic or not.<sup>67</sup> The plaintiff must provide evidence that the expert’s statement on authenticity was false, whereas the expert has to defend himself by showing that he complied with his duty of care in reaching the opinion. For breach of warranty claims, the judge has to assess whether the expert undertook “sufficient investigation to substantiate the authenticity of the art object in question”<sup>68</sup> and may be thus held personally responsible for the misattribution.

Even where the plaintiff’s claim is without any merit, experts may well have to expend substantial resources to defend against the accusations.<sup>69</sup> Furthermore, although experts have no financial interest in the outcome of the dispute, they do have a reputation to lose, which may further dissuade them against getting involved in the first place.<sup>70</sup>

The art market has its own unwritten rules - the esteem with which “authorities” are held being one of them - which lawyers find difficult to appreciate. The gap between the law and the art market standards is such that verdicts which are not consistent with these standards are disregarded. At court, judges may not follow the opinion of the authority for the given artist and instead rule in accordance with the competing expert testimony.<sup>71</sup> On the art market, however, that ruling receives no consideration as long as it contradicts the authority’s statement. Instead, court decisions on authenticity may have a damaging impact on artworks and their owners, who find themselves with a

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<sup>64</sup> *Simon-Whelan v Andy Warhol Foundation*, No07Civ6423, 2009USDistLEXIS44242, 1-2

<sup>65</sup> *Thome* (n 47)

<sup>66</sup> *Adam and Pryor* (n 17)

<sup>67</sup> *Spencer*, ‘Legal Liability’ (n 30) 144

<sup>68</sup> *Pritzker v Krishna Gallery of Asian Arts*, 1995USDistLEXIS8778, 53-54 (NDIII1995) as reported in Brenna Adler, ‘The International Art Auction Industry: Has Competition Tarnished Its Finish’ (2003) 23 Nw J Int’l L & Bus 433, 446

<sup>69</sup> *Lariviere* (n 17)

<sup>70</sup> *Brady v Lynes et al*, 2008WL2276518 (SDNY); *Reeves* (n 12) 22

<sup>71</sup> *Greenberg Gallery, Inc v Bauman and Entwistle*, 817FSupp167, 172 (1993)

work whose attribution has been cast into doubt during the lawsuit and has not been settled according to the rules of the market.<sup>72</sup>

As held by the court in *Thome*, “disputes concerning authenticity are particularly ill-suited to resolution by declaratory judgment. The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive”.<sup>73</sup> A court decision may only bind the parties to the dispute, but may not be imposed on the art market.

Simply put, both collectors and experts have often not been provided with any comfort by the court decisions on authenticity. In view of the risks of liability and burdens of legal proceedings weighing on experts, it comes as no surprise that they are increasingly refraining from advancing their opinions. But then again, the art market greatly depends on the willingness of authorities and experts to “establish the credibility of works of art”.<sup>74</sup> New standards need to be implemented from within the art market, whereby these may obtain greater acceptance by market actors than when imposed by lawyers.

## 4. Solutions to Explore

First, scholarly debate needs to be promoted as much as access to artworks to develop connoisseurship on the artist.<sup>75</sup> The art world gains enormously from scholars exchanging knowledge and information on attributions in a critical manner. If an attribution concurs with the opinion of other experts, thereby reaching a consensus, the authenticator may not be blamed. In order to ensure that scholarly discussions are upheld, expert opinions may be protected by means of well-drafted agreements. Therewith, experts may circumscribe their liability and specify their area of expertise and stipulate the dissemination of the opinion to third parties.<sup>76</sup> An exculpatory agreement was upheld by the court in *Lariviere v. Thaw et al.*, and thus barred the action for breach of contract filed by the owner of a painting purportedly by Jackson Pollock submitted to the Pollock-Krasner Authentication Board which had refused to authenticate.<sup>77</sup>

Exculpatory clauses are not valid if only aimed at manipulating the market, which limits the power of authorities.<sup>78</sup> Furthermore, they may not shield experts from liability for “wilful or grossly negligent acts, or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual”.<sup>79</sup> Notwithstanding any disclaimers, the contractual relationship requires the expert to act with care, ensuring a certain standard of quality in authentication.

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<sup>72</sup> Butt (n 13) 75

<sup>73</sup> *Thome* (n 47) 23

<sup>74</sup> Reeves (n 12) 21

<sup>75</sup> Ibid

<sup>76</sup> Karlen (n 38) 15; signing a release is also recommended by the College of Art Association 2009 Standards and Guidelines of Authentication and Attributions (no 7 and 10) <<http://www.collegeart.org/guidelines/authentications>> accessed 5 March 2013

<sup>77</sup> *Lariviere* (n 17)

<sup>78</sup> *Simon-Whelan* (n 64) 13

<sup>79</sup> *Lariviere* (n 17) 3

Alternative dispute resolution (ADR) mechanisms may outweigh the disadvantages of judicial proceedings in particular with regard to art authentication claims, as they allow the parties to reach an agreement in a more flexible, time- and cost-efficient way as well as opening the possibility of selecting one or several qualified specialists who may act as independent mediators, arbitrators or experts.<sup>80</sup> If recognized experts are involved, the decision on authenticity is likely to find acceptance on the art market. Otherwise, initial authentication may be revised during the ADR process, thereby inciting experts to act diligently and reducing their control of the market's authentication process of the given artist.

In view of the confidentiality of ADR, a denial of authenticity is likely to remain undisclosed like the rest of the amicable settlement. In order to avoid that the artworks reappear on the market and cause further damage, the parties should foresee the publication of their settlement or arbitral decision.

In the middle term, a certain quality in the execution of an expertise may be secured by inciting experts to make a reasonable full recitation of the facts upon which their opinion is based. Art experts generally rely on their "sixth sense", a reasoning which may only be communicated with great difficulty.<sup>81</sup> While experienced sensibility may be of great guidance in the attribution process, attributions should be justified by detailing the elements upon which they were established for their apprehension by non-connoisseurs. Given the disparity between the art market and the law, the practice of detailed opinions is most likely to be accepted by scholars if stipulated from within the market, such as in ethical standards and guidelines of professional associations of art practitioners and scholars, or non-governmental associations.

Finally, real change may only be achieved through a full reconsideration of the currently prevailing standards. The art market needs more well qualified experts who examine artworks based on their own knowledge and skills, put previous attributions into question based on their own research, and do not solely refer to the expertise of other experts. Furthermore, these well qualified specialists have to be recognized by the art market and replace the concept of a single "authority". The proliferation of respected experts would lead to reduction in the pressure on the few leading authenticators – thereby exposing them to skilled competition and, all in all, promoting scholarly debate.

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<sup>80</sup> Anne Laure Bandle and Sarah Theurich, 'Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre' (2011) 6 JILTC 28, 30 <<http://www.jilc.com/index.php/jilc/article/view/124>> accessed 5 March 2013; the Pollock-Krasner Authentication Board's agreement contained an arbitration clause, *Larivière* (n 17) 2

<sup>81</sup> Rachel Cohen, 'The Art World – Priceless' *The New Yorker* (8 October 2012) 71