Editor’s Note

This is Volume 1, Issue No. 3 of Spencer’s Art Law Journal. This issue contains four essays, which will become available on ARTNET, starting December 2010.

As noted in Issue numbers 1 and 2 of this Journal, the legal structure we call art law (an amalgam of personal property law, contract, estate, tax and intellectual property law) supporting the acquisition, retention and disposition of fine art, often fits uneasily with art market custom and practice. The result is that 21st century art market participants are frequently unsure of their legal rights and obligations.

The goal of this Journal is to promote discussion of art law legal issues for lawyers and nonlawyers alike, so as to provide greater transparency, stability and predictability.

The three essays in this Winter Issue continue to deal with two core issues for ownership of visual art -- authenticity and title (who created it and who owns it?). The first essay looks at the ownership risk involved in entrusting your art to a third party for sale, conservation, framing, etc., and the coverage of your fine arts insurance policy for an “entrustment” loss of title. The second essay deals with the difficult process of valuing art for tax purposes. The last essay addresses protection for the art buyer against post-sale changes in expert consensus on attribution.

Three times a year issues of this Journal will address legal issues of practical significance to collectors, dealers, scholars and the general art-minded public.

--- RDS
ENTRUSTMENT, THE HIDDEN TITLE RISK OF LEAVING YOUR ARTWORK IN THE CARE OR POSSESSION OF OTHERS -- WILL YOUR FINE ART INSURANCE COVER YOUR LOSS? PROBABLY NOT.

Elizabeth C. Black

This essay is about the risk of losing your artwork after entrusting it to an art merchant (dealer, restorer, framer, etc.) who then sells the artwork, without your permission, to an unsuspecting buyer. You will likely not be able to recover the artwork from the buyer and your fine arts insurance policy will probably not cover your loss. -- RDS

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Imagine a young woman walking down Madison Avenue in New York City, casually window shopping the neighborhood’s galleries. A painting catches her eye and she steps into the gallery to inquire. She might ask some questions about the artist, the style, and the price. But is she going to ask whether the painting is actually owned by the gallery, or by a consignor to the gallery, or whether the painting has any encumbrances or UCC filings against it? Almost certainly not, and of course this would not be required or expected of a potential buyer -- but why?

Assume the woman purchases the painting. A few days later she takes it to a framer, who also happens to sell some paintings and other artwork at his shop. She leaves the painting with him to be framed, but when she comes back to retrieve it a few weeks later, he tells her he sold it to someone else. Now what? Can she get her painting back?

In the United States, the Uniform Commercial Code (“UCC”), adopted by all U.S. states, governs the sale of tangible personal property such as art. The purpose of the UCC is to facilitate commerce and, in general, the free trade of goods. To achieve this goal, the UCC is generally very protective of good faith purchasers. For example, under the Code’s “entrustment doctrine,” when an owner of property entrusts goods to a merchant, defined by the UCC as someone “who deals in goods of that kind” (e.g., an art dealer), the dealer can transfer all of the owner’s rights -- even if the owner did not authorize such a transfer -- to a “buyer in the ordinary course of business.” UCC § 2-403(2). A buyer qualifies as a buyer in the ordinary course if he can show that he acted “in good faith and without knowledge that the sale to him [was] in violation of the ownership rights” of a third party, and that the transaction was made “in ordinary course, from a person in the business of selling goods of that kind.” UCC § 1-201(9). This is not a hard standard to meet.

“Entrusting” is also defined broadly to include “any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods [has] been such as to be larcenous under the criminal law.” UCC § 2-403(3). The reason for the entrustment to the dealer is irrelevant to the analysis -- any time an owner leaves goods in the possession of a dealer, for any reason, the entrustment doctrine applies. This is true even if the owner did not know at the time of the entrustment that the dealer was in fact a dealer. UCC § 2-403(3).
A classic example of the operation of the entrustment doctrine occurs where an owner consigns a painting for sale at a gallery, instructing the gallery that the painting should not be sold for less than a certain amount, and the gallery then sells the painting for less than the owner had instructed. Although the owner has a claim for breach of his contract against the gallery, the owner does not have any recourse against the buyer to reclaim his painting (even if it was sold in clear breach of the agreement between the owner and the gallery).\(^4\)

Most cases are not this simple, however, and the entrustment doctrine can appear where one least expects it. “Entrustment” generally includes any kind of delivery or acquiescence in a merchant or dealer’s possession of goods. Collectors often leave artwork in the possession of others -- to be appraised or restored, for display, or for general safe keeping, all of which may qualify as “entrustment” under the UCC. If the recipient of the artwork is also a part- or full-time dealer, the entrustment doctrine will come into play. For example, an owner might deliver a painting to a conservator for conservation. If the conservator also happens to be a dealer who regularly sells paintings, the entrustment doctrine will likely apply. Under such circumstances, the owner would not have a claim against the buyer for return of his painting (but, of course, would have a claim for damages against the conservator for breach of contract).

Owners of artwork also often choose to display their artwork at galleries, museums, or in private collections. This too can be considered an entrustment in cases where the entrustee is also a dealer or occasionally sells artwork. For example, in one case from Rhode Island, a corporate owner of several paintings had left them on display at an artist’s home. The artist subsequently sold the paintings to a third party without the owner’s knowledge or permission. Because the artist was “well-known” as an artist, collector, and part-time dealer, and because the good-faith purchaser was not on notice of the paintings’ true provenance, the court held that the paintings’ owner could not recover the painting or monetary damages from the third-party purchaser.\(^5\)

The primary exception to the entrustment doctrine’s rule giving title to the buyer is that under U.S. law a buyer cannot obtain good title from a thief. The difficulty in establishing this exception is that the owner will likely have to prove that the art was stolen from him; where an owner has voluntarily left his goods in the possession of another this will be difficult. Consider, however, the recent New York case of Alexander v. Spainierman Gallery LLC et al.,\(^6\) in which the owner of a Degas sculpture left the sculpture with an antiques dealer for authentication. Without authorization, the dealer then sold the sculpture to a third party. The court ultimately held that the entrustment doctrine was inapplicable, its analysis turning on the fact that the dealer had pled guilty to the theft of the sculpture, and thus could not convey good title to the sculpture. Had the dealer not pled guilty to theft, this court almost certainly would have reached a different outcome and the owner would have lost the painting.

“Conversion,” however, is defined specifically under the law and differs from other non-criminal acts such as “conversion,” which is any act that deprives someone of his property without his consent. Even in cases of conversion, the entrustment doctrine is very generous to good-faith purchasers. As an owner, having a written consignment, repair, or appraisal agreement is important, but a written agreement alone is generally not sufficient to protect the owner’s rights to a work. If a gallery sells artwork in violation of a consignment agreement, the original owner will have a claim for breach of contract against the gallery, but will not be able to recover the artwork from the buyer. Of course most owners of fine art have insurance policies, often so called “fine arts” policies. With no recourse against the buyer and assuming, as is often the case, that the gallery is insolvent or bankrupt (such that the contract claim against the gallery would not make the owner whole), the owner turns to her fine arts insurance policy. Unfortunately for the owner, she will likely not have insurance coverage for the loss, even under “all risk” policies.

Some insurance policies expressly deny coverage based on conversion or losses stemming from entrustment. The typical so-called “dishonest acts” exclusion excludes coverage for dishonest acts by the insured and “anyone entrusted with the property.” Even those policies that do not have a dishonest acts/entrustment exclusion may not cover title to art that has been lost following an entrustment.

In a 2007 case from an Illinois District Court, Frigon v. Pacific Indemnity Co., the court held, probably erroneously, that an “all risk” insurance policy did in fact cover an owner’s claim for loss where the owner had consigned several paintings to an art gallery and the gallery had sold them for less than the consignment agreements specified, then failed to pay the owners.\(^7\) Because the gallery was insolvent, the Frigons sought compensation from their insurer. In concluding that the insurance policy in question covered losses from
conversion, the court found that “As far as plaintiffs are concerned …. the conduct of the Gallery toward their
paintings is no different than had the Gallery taken the paintings on consignment and destroyed them. The fact
that the Gallery may owe plaintiffs the value of the lost paintings is no more significant than the fact that a thief
would owe the victim of his theft the value of stolen property.”

The Frigon holding likely goes too far -- while the Frigons had a breach of contract claim against the gallery, it is
not clear that the court was correct in its conclusion that the gallery “converted” the paintings. Conversion is
broadly defined by state law such that a party who properly receives possession of property, for example through
a loan of the property, may lose the right to continue to hold the property when the lender demands its return. But
in a situation such as that presented by Frigon, the new owner, as a buyer from a merchant entrusted with the
property, is certainly not liable for conversion. Prior to any demand for the property’s return, the UCC gives a
dealer the right to pass title to property voluntarily delivered to him for sale on consignment. The only possible
“conversion” in this scenario is the dealer’s improper retention of the proceeds of a legal sale, but even that makes
no sense. The insured property itself was not converted by the dealer. And if we say the dealer converted the
proceeds, how is that different from the original owner selling her art directly (without a consignment or entrustee
involved) to a buyer who does not pay -- clearly a business bad debt, not a conversion? Frigon thus represents an
ordinary breach of contract claim, reflecting the common scenario where an item is sold on credit and the buyer
does not pay the agreed-upon price. Most insurance policies, including “all risk” policies, would probably not
cover such a claim.

This issue came up again in a 2009 case from New York, Zurich Am. Ins. Co. v. Felipe Grimberg Fine Art. There,
the Second Circuit Court of Appeals held that an insurance policy did not cover a Botero painting that an
owner had delivered to a dealer with the intent to sell it to that dealer. The dealer never paid for the work and
subsequently disappeared with the painting. The court held under UCC section 2-401 that title had passed to the
dealer at the time of physical delivery and, similarly, under the insurance policy, the painting did not fall under
the definition of “property insured” because “‘the seller’s insurable interest in goods usually ends with their
delivery to the buyer no later than the time of delivery.’”

A similar issue is currently pending in Philadelphia Museum of Art v. AXA, a case in which the Philadelphia
Museum of Art is challenging its insurer’s refusal to cover the loss of paintings that the Museum agreed to sell on
consignment, but for which the Museum never received any payment from the (subsequently bankrupt) consignee
gallery. The insurer refused to cover the loss because the Museum had “voluntarily parted” with the paintings and
“the gallery’s failure to remit any proceeds . . . or their failure to return the consigned artworks represents a breach
of contract,” which is not a “fortuitous” physical loss that would be covered, but rather “a financial loss resulting
from the breach of contract.”

Thus, a fine arts policy insurance claim for lost title due to an entrustment may result in a denial of coverage.
You should be sure you always know the location of your artwork, who has possession of it, and whether or how
it is being displayed (e.g., is it listed for sale?). Consignment agreements often run for years and artwork may be
moved between various locations as a series of consignments from your dealer to other dealers (whose identity is
not known to you) over the course of several years. The more informed you are about these re-consignments, the
more likely you will be able to protect your interests.

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The UCC defines a “merchant” as “a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.” UCC § 2-104(1).

“Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.” UCC § 2-403(2).

The entrustment doctrine does not apply, however, where the entrustee is not a merchant. See Porter v. Wertz, 53 N.Y.2d 696, 698 (1981) (noting that the UCC entrustment provision is “designed to enhance the reliability of commercial sales by merchants … while shifting the risk of loss through fraudulent transfer to the owner of the goods, who can select the merchant to whom he entrusts the property. It protects only those who purchase from the merchant to whom the property was entrusted in the ordinary course of the merchant’s business”).


DeWeldon, Ltd. v. McKeon, 125 F.3d 24 (1st Cir. 1997).

Alexander v. Spainierman Gallery LLC et al., 64 A.D.3d 487 (1st Dep’t 2009).


Id. at *4.


Id. at *2-*3 (quoting In re Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir. 1990)).


Id., Complaint Exhibit C (August 24, 2009 letter from AXA to Philadelphia Museum of Art), at 3.
TROUBLE VALUING DONATED ART FOR TAX PURPOSES

Ronald D. Spencer

This essay is about the difficult process of valuing art for tax purposes. The most important factor for intrinsic value is the authenticity of the art. Yet appraisers are not, and do not claim to be, experts on authentication. This essay describes the resulting problems.- RDS

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A federal income tax deduction for your contribution of art valued at more than $20,000 must be supported by a written appraisal of value by a qualified art appraiser. IRS Publication 561 (April 2007) states:

Authenticity. The authenticity of the donated art must be determined by the appraiser.

But, it’s not as easy to determine as it should be. Blame the IRS, the courts and experts’ fear of liability. The authenticity of a work of art is a critical factor in determining its value for tax purposes. But each of the players in this determination, the Internal Revenue Service, the art historian, the art appraiser and the courts, have their own impediments to arriving at a decision on authenticity.

The IRS is saddled with two revenue procedures that appear to give little specific thought to the determination of authenticity and what the IRS expects to see by way of support for the taxpayer’s assertion of authenticity. The art historian, often a connoisseur of the works of the artist in question, is concerned that he will be sued for his opinion on the authenticity of the work in question. (Ever since the famous art dealer, Sir Joseph Duveen, was sued in 1929 by the owner of a painting Duveen publicly declared was a copy—and had to pay $60,000, 1929 dollars in settlement—art experts have considered that opinions are dangerous things to give.) The art appraiser is not usually an art historian and almost never an expert on the artist in question, and hence must look to the reluctant art historian. And the judge, when called upon to make the final determination of value, does not have the visual training to see what the art historian is describing. Their exchange is often as fruitless as if the historian were a radiologist trying to show a patient the subtle readings of the patient’s x-ray.

This tragicomedy with four players is enacted against a background of some public skepticism and no small amount of public misunderstanding concerning the process of authentication in the visual arts. The public (and judges, when not deciding the case, are themselves part of this public) is looking for “objective,” scientific evidence, and regards connoisseurship as “subjective”, meaning (only or primarily) personal taste and (perhaps) unsubstantiated opinion. This public skepticism and experts’ concern about legal liability for expressing their opinions have combined to inhibit freedom of scholarly opinion and thereby produce fertile ground in which fakes and false or mistaken (negligent or not) attributions flourish—making supportable valuations for tax purposes difficult to obtain.

Muddled IRS Rules

The visual arts become professionally important to tax advisers and estate planners chiefly as an issue of valuation for income, gift and estate tax purposes. Art appraisals will, of course, take into account public sales of comparable works of art by the same artist—comparable in terms of size, medium, subject matter, condition, time period of creation in the artist’s career (later van Goghs, for example, are generally more valuable than earlier
works). However, missing from this enumeration of factors to be considered in an appraisal of value is one that has the greatest impact on value: whether the art was in fact made by the artist named as its creator. And, indeed, appraisal and authentication of art are two very distinct processes, resulting, on the one hand, in an opinion on monetary value, and on the other, in an opinion on authorship or historical accuracy.\(^1\)

While the applicable IRS revenue procedures do not confuse authentication and appraisal, there is a glaring lack of clarity as to the nature and relative importance of the factors important to proving authenticity. Rev. Proc. 66-49\(^2\), “[a] procedure to be used as a guideline by all persons making appraisals of donated property for Federal income tax purposes” states that an appraisal report should contain, *inter alia*, a complete description of the object, indicating the size, the subject matter, the medium, the name of the artist, approximate date created…A history of the item including proof of authenticity such as a certificate of authentication if such exists.

In 1996, the IRS modified this revenue procedure by issuing a new procedure (Rev. Proc. 96-15) for works valued at $50,000 or more, for requesting a statement of value from the IRS that could be used to substantiate the value of art for estate, gift or income tax purposes, and could “be relied upon in completing the federal estate, gift or income tax return that reports the transfers of art.” The request for a statement of value from the IRS must include an appraisal which itself must include, *inter alia*,

…the history (provenance) of the item, including proof of authenticity if that information is available… [and] a record of any exhibitions at which the item was displayed…and the physical condition of the item.\(^3\)

**Provenance**

First, it should be noted, that a “history of the item,” more usually called “provenance,” is a documented chain of title and possession from the artist’s hand to the present owner. Provenance is important to (but not the same as) proving the authenticity of a work. A public exhibition record is, itself, part of the provenance of a work. Second, certificates of authenticity are only as relevant as the qualifications of the author of the certificate and the art historical research supporting the certificate. Further, as a practical matter, certificates of authenticity are looked upon with suspicion by art market professionals, in part because of their abuse during the 1920s and 1930s in Europe when financially pressed scholars would issue certificates privately for a substantial fee but avoid publicly publishing their opinion contained in the certificate. Indeed, it was often said that the more certificates a piece had, the more likely it was to be fake.

Under current IRS procedure, any taxpayer’s appraisal of a single work with a claimed value of $20,000 more must be referred by the local IRS office for review by the Commissioner’s Art Advisory Panel and Art Appraisal Services. The Art Advisory Panel consists of approximately 19 volunteers who are nationally prominent art museum directors, curators, scholars, art dealers, auction house representatives, and appraisers who aid the Service in the review of IRS-selected cases involving taxpayer valuations of art objects. The Panel members, after reviewing photographs or color transparencies, along with relevant documentation provided by the taxpayer and research by IRS staff appraisers, make recommendations on the acceptability of the taxpayer-claimed values. If unacceptable, the panelists may make alternate value recommendations. Such Panel recommendations are advisory only, but, after review and acceptance by the Office of Art Appraisal Services, these Panel recommendations become the IRS’s position.

Rev. Proc. 96-15 left unmodified the burden of proof set out by the 1966 revenue procedure, to wit:

While the Service is responsible for reviewing appraisals, it is not responsible for making appraisals; the burden of supporting the fair market value listed on a return is the taxpayer’s.

Because the taxpayer has this burden, it is important to examine the process—and the inherent difficulties—of authentication of art and antiquities.\(^4\)
Authentication - the Process

The authenticity of a work of art is always a critical issue. Is it “real” or “original” is a perennial question in the art world reflecting an underlying intellectual respect for what is true and real and a rejection of what is not. Authentication is the process by which experts—art historians, museum curators, archaeologists, art conservators, and others—attribute a work of art to a particular artist or specific culture, era or origin.

Three lines of inquiry are basic to determining authenticity: (1) a connoisseur’s opinion, (2) historical documentation or provenance and (3) technical or scientific testing of the physical components of the work. A connoisseur is an expert who evaluates the “rightness” of a work based on having looked hard and carefully at many works of the artist, combined with knowing the artist’s usual manner of working and materials utilized during a particular time period of the artist’s career. Thus, “connoisseurship,” is the sensitivity of visual perception, historical training, technical awareness and empirical experience needed by the expert to attribute the object. To determine an object’s provenance, a researcher traces the physical object from the artist, culture or geographic location (or all three) through a chain of ownership or possession (not necessarily the same thing) to the current owner or possessor. That’s a simple enough concept, assuming the documentation is not faked or inaccurate. It’s goal is to assure that the object under study is the same one that left the artist’s hand.

Technical or scientific testing for age, structure, material and method of manufacture is often longer on promise than result. Dating paint or wood samples, for example, can show that the painting was made in Rembrandt’s lifetime, but cannot prove that it is by Rembrandt’s hand. And, at a more technical level, testing of ancient pottery to determine the date of kiln firing assumes that the sample or samples tested are representative of the entire object.

Fakes distort our understanding of an artist’s work as well as our understanding of an era or a culture, and thereby the historical record itself. One important distortion is that many fakes (as well as malicious, fraudulent, negligent or simply mistaken attributions) very often contain current era-specific characteristics. Notwithstanding the common use of the word “forgery,” a fake—a work created with intent to deceive—is but one facet of authenticity issues. The larger, more important and more frequent problem is the work of unknown or wrongly attributed authorship or origin.

Obviously, the object being attributed must be physically available for examination to the connoisseur or other expert. Not necessarily so, one might say with respect to provenance research or the historical chain of title, possession, ownership and exhibition. But the most careful analysis of this provenance documentation is not helpful in attributing an object unless the expert can be reasonably sure that the documentation being examined is for the specific object in hand. So here again we are led back to the object itself. This point is illustrated by a 1993 litigation involving an Alexander Calder mobile in which the judge did not fully comprehend the attribution process or the experts’ role. An object, sold as a Calder mobile, had a well-documented ownership trail over 20 years from the artist to the current owner/seller. But, because the mobile could not be made to hang as Calder intended, the buyer became convinced (probably correctly) that a fake had been substituted for the real mobile sometime during those 20 years. The judge of the federal district court, in deciding that the piece was authentic, placed unreasonable weight on the apparently faultless provenance of the piece and heavily discounted the testimony of the leading expert on Calder, Klaus Perls, that the piece was a fake.

Art Scholars

And what of these connoisseurs and other experts? Many are constrained in rendering scholarly opinions by worry over their legal liability to owners, sellers and buyers. As a result, there are no false attribution sections in most catalogues raisonnés of artists’ work. Similarly, many U.S. museums have policies prohibiting or discouraging their curators from expressing opinions on objects not already owned by the museum. Also, an art scholar authenticating a work may not ethically charge a fee related to the value of the art. So why would an expert, for a fee of, say $500, risk a million-dollar lawsuit for product disparagement or professional negligence?
The Professional Appraiser

The third player in our tragicomedy is the professional appraiser of the value of art who is not often an art historian. Even more rarely does the appraiser have expert qualifications with respect to the artist whose work is being valued. This has led to the appraiser’s practice of expressly assuming the authenticity of work and expressly disclaiming any opinion on authenticity, while attempting to find someone who is an expert on the artist to render an opinion on authenticity. Small wonder that this process leads us directly to court decisions where the IRS challenges the appraisal based on a lack of authenticity, and the Tax Court is left with the difficult and perplexing task, aided only by competing experts for the IRS and the taxpayer, of deciding whether doubts about authenticity of the work depress its value, and, if so, by how much.

Courts Reluctant to Decide Authenticity

Courts treat authenticity as a critical factor in the valuation of a work of art. While the U.S. Tax Court usually avoids deciding questions of authenticity, it uniformly holds that serious doubts or disputes about authenticity reduce the value of a work.\(^\text{10}\)

However, the Tax Court will venture into this territory and expressly decide authenticity where it is a matter, not of subjective quality or style, but of restoration or overpainting. In the 1981 case of \textit{Monaghan v Comm’r}, for example, the Tax Court designated a painting inauthentic because restoration had made it so that “only 40% of the paint of the original artist remains on the canvas.”\(^\text{11}\) Indeed, the Tax Court noted in the 1989 case of \textit{Ferrari v. Comm’r},

\[\text{[A]t some point, excessive restoration takes a piece of this art out of the category of an original and turns it into a reproduction. For example, it would certainly be misleading to sell as pre-Columbian art an object which consists of less than 25 percent original material. That dividing line may in fact be too low without full disclosure to the customer.}\]

However, one British court expressed the opposite view in a 1993 case where an unknown restorer of an Egon Schiele painting had overpainted the original surface to the extent of 94 percent of the surface area. No amount of overpainting could make the painting a forgery if the overpainter simply followed the design of the original artist and reproduced as best he could the original colors used by the artist, said the High Court of Justice, Queens Bench Division, in \textit{De Balkany v. Christie’s}.\(^\text{13}\)

But Courts Do Decide that Serious Doubts about Authenticity Affect Value

Two points should be noted about these court decisions and others like them. First, while the U.S. Tax Court states that it is not deciding authenticity, the decision process articulated by the Tax Court reads as though the court is doing just that. Thus, the Tax Court uses such facts as--a painting is not listed in the standard reference work, a theme was very common and frequently copied, a work is of insufficient quality, or a subject matter not characteristic of the artist--to determine that doubt exists as to the work’s authenticity and its value is thereby reduced.
And Substitute Their Opinion for Expert Opinion

Second, it’s clear that, while the Tax Court carefully considers expert opinion offered in court, it feels free to ignore the experts.—as the Tax Court did in Ferrari, (and as the Calder Court did) repeatedly emphasizing:

We are not bound by the opinion of any expert witness when that opinion is contrary to our own judgment… We may embrace or reject expert testimony, whichever, in our best judgment, is appropriate… We are not restricted to choose one valuation over the other, but may extract relevant findings from each in drawing our conclusions.14

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NOTES
4 While this essay often references painting and other works of visual art by specific artists, the concepts discussed (connoisseurship, for example) are usually equally applicable to more general determinations of cultures, eras and origins.
6 As Max J. Friedländer (1867-1958), the renowned expert on northern renaissance and baroque painting wrote in his book, On Art & Connoisseurship: “A forgery done by a contemporary is not infrequently successful from being pleasant and plausible, precisely because something in it responds to our natural habit of vision; because the forger has understood, and misunderstood, the Old Master in the same way as ourselves. Here is, say, a “Jan van Eyck” —thus the great venerable name, and yet something that has attractiveness in conformity with taste linked up with our own time: how could it fail to gain applause under such circumstances? To many lovers of art a false Memling is the first Memling that gave pleasure.” Max J. Friedländer, On Art and Connoisseurship, Chap. XXXXVI (Bruno Caisirer, London) 1942, at p. 262.
7 As obvious as that may be, though, difficulties of physical access by reason of distance, expense or other impediments to direct visual examination by the expert result in many evaluations being based only on photographs, written descriptions and measurements.
9 The art market did not agree with the judge and voted with its checkbook; the piece sits today in the New York City basement of the gallery/buyer, quite unsaleable.
10 Disagreement between two of the foremost experts on an artist as to the work’s authenticity prompted the Tax Court to speak of the “shadow cast by a question of authenticity” and to hold that the fair market value of the work was “adversely affected” by their dispute. Doherty v. Comm’r, T.C. Memo 1992-98; 63 T.C.M. 2112, at p. 2115 (1992).
13 De Balkany v. Christie’s, High Court of Justice, Queens Bench Division, 1993 D no.1089.
BUYER’S RESCISSION RIGHTS FOR HIGH VALUE ART PURCHASES-SPREADING THE RISK

Ronald D. Spencer

This essay is about protection for an art buyer against a post-sale change in expert consensus on attribution. In this circumstance, a contractual warranty of authenticity or a claim by buyer that both buyer and seller were mistaken about the authenticity of the purchased art does not offer the buyer legal protection. A contract provision providing for rescission of the sale may help the disappointed buyer. - RDS

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Attributions of visual art usually result from consensus opinion among art scholars and other experts. Like all opinion, expert opinion can change over time as new facts emerge or the list of experts expands or contracts.

A buyer of fine art in the circumstance where expert opinion has changed post-sale, or where buyer and seller were both mistaken about the consensus of expert opinion at time of sale, has two legal claims, a claim for breach of warranty of authenticity or a claim of mutual mistake-of-fact. The elements of each of these two claims are discussed in this essay. If a buyer brings a breach of warranty or mutual mistake-of-fact claim against the seller, courts look to the consensus of art scholars on the sale date. If the buyer and seller were both mistaken about the expert consensus on the sale date, the buyer can probably recover on a mutual mistake-of-fact claim. If expert consensus agreed with the belief of buyer and seller on the sale date, neither a mutual mistake-of-fact nor a warranty claim will be successful. If the facts will not support one or the other of these two claims the buyer would have been well served to have negotiated a rescission right in addition to the standard contractual warranty of authenticity. It may be possible for buyers of high value art to negotiate a reasonable rescission clause for a limited post-sale time period that could help protect them when expert opinion changes after sale.

Breach of Warranty: Dawson-Malina Standard

Dawson v. Malina held that the standard for determining whether an art seller was “liable for breach of warranty of authenticity is whether the representations furnished…can be said to have had a reasonable basis in fact, at the time that these representations were made.”¹ Dawson has been adopted as the standard for breach of warranty claims in art cases.²

Mutual Mistake-of-Fact: Feigen

Buyers may also argue a mutual mistake-of-fact theory when a piece of art is determined to be inauthentic. A mutual mistake-of-fact argument was successful in Feigen v. Weil.³ Both parties mistakenly believed the drawing was by Henri Matisse, although it was, in fact, a forgery.⁴ The buyer and seller were mistaken, but not the experts, who would have identified a forgery had they been consulted on the sale date.

Expert opinion about a painting changed several years after sale in Firestone & Parson, Inc. v. Union League of Philadelphia.⁵ In Firestone the buyer had purchased a painting which expert opinion believed it to be by Albert Bierstadt.⁶ Five years later an article appeared in an art journal which called into question the painting’s attribution, and this view became prevailing expert opinion.⁷ The court said that “[p]ost-sale fluctuations in generally accepted attributions do not necessarily establish that there was a mutual mistake-of-fact at the time of
the sale. If both parties correctly believed at that time that the painting was generally believed to be a Bierstadt, and in fact it was then generally regarded as a Bierstadt, it seems unlikely that the plaintiff could show that there was a mutual mistake-of-fact. 8

Even where a seller had a reasonable basis in fact for his warranty of authenticity, a mutual mistake-of-fact claim by the buyer might prevail. Thus, for example, when a paint test at the sale date would have revealed anachronistic paint, a buyer could successfully bring a mutual mistake-of-fact claim because expert opinion (had it been consulted) would have disagreed with the contracting parties on the sale date. But, so long as the test was not one which was performed regularly or commonly by art sellers, the seller probably would be able to successfully argue that he had a reasonable basis in fact, and thus defeat a claim based on seller’s warranty of authenticity. However, if the technology for the paint test was developed only post-sale, so that it was impossible (by means of paint testing) to have known about the mistaken attribution on the sale date, the buyer could not establish a mutual mistake-of-fact.

Currently Unprotected

Neither a reasonable basis in fact standard nor a mutual mistake-of-fact claim protect a buyer from a post-sale change in expert opinion. In order for the buyer to prevail under either standard, expert consensus on the sale date must have been contrary to buyer’s and seller’s. How to give buyers reasonable protection? Buyer protection could come in the form of a clause in the sale contract allowing a buyer to rescind the sale if certain conditions are met.

The major auction houses include broad rescission clauses in their consignment agreements for art. The standard language allows rescission when the auction house “in [its] sole judgment determines that the offering for sale of any Property has subjected or may subject [Auction House] and/or Consignor to any liability, including liability under warranty of authenticity or title.” 9

Although an individual art buyer might be able to negotiate a rescission clause, it will be much more limited (because of bargaining strengths of the parties) than those included in the auction house contracts. A buyer could suggest that, in the event of a dispute concerning authenticity, both buyer and seller would be entitled to consult two experts who would opine as to the artwork’s authenticity, with a “tie” broken by a third expert picked by the two. Such provisions would give the seller some protection and would ensure that the rescission clause is only available to the buyer when there has been a true post-sale shift in expert consensus, rather than non-serious buyer worries or simply vague art market concerns about authenticity.

If the chosen experts agree that the piece is “probably” but not certainly, by the named artist, there will need to be some consideration given to the degree of “probability” required in rescission clause. The standard of proof in civil cases in court is simply, “more likely than not” - not a very high bar for determining authenticity. But it is hard to imagine that absolute “certainty” should be required. Perhaps, it should be by the hand of the named artist with a high degree of probability.

The standard rescission clause for auction houses is also lacking a time limit, conceivably allowing the auction house to rescind the sale many years after the sale. An individual buyer should include a time period in the rescission clause. The time period needs to strike a reasonable balance between protecting the buyer’s investment, while respecting the finality of sale for the seller and the inherent risk involved in purchasing art. A period of two years might be reasonable as it protects the buyer from changes in expert opinion that might have been foreseeable, or in any event, occurring relatively soon after the sale.

Drafting a rescission clause between an individual buyer and seller will require balancing their competing interests. By including a rescission clause the buyer is essentially buying insurance from the seller against the risk of future deattribution. A buyer might need to pay a premium for the security of a rescission clause, especially if the art is considered to be at high risk of reattribution. Because the buyer is shifting the risk associated with a change in expert opinion from himself onto the seller (at least for a short period of time), it is likely that the seller will insist on compensation for the added future risk.
If a seller is understandably reluctant to agree to rescind the sale if the artwork is deattributed, the risk of such an event might be shared. The seller might refund a portion of the sale price upon a post-sale change in expert opinion within, say, two years of sale.

**Conclusion**

Current law only protects buyers when expert doubts about the artwork’s authenticity could have been or were known on the sale date. In order to protect themselves in a high value (or high risk) transaction buyers might negotiate rescission clauses in contracts for sale of art, just as major auction houses have done. However, buyers should be prepared to pay a premium for the extra security and recognize that a rescission clause in an individual contract will require a much finer balancing of competing interests between buyer and seller than the clauses that are currently in place for auction houses. Buyers in strong negotiating positions on a major work of art may be able to insist on reasonable clauses that at least partially protect them from post-sale shifts of expert opinion.

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**NOTES**

4 Id. at 4.
6 Id. at 820.
7 Id. at 820-21.
8 Id. at 823.