Chapter Three

Museums and Museum Curators

Caught in the Cross-Hairs of Authenticity Disputes

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INTRODUCTION

A core function of a museum curator's job is to make scholarly assessments of the authenticity, authorship, and date of creation of works of art. Such assessments may be expressed in museum exhibits and catalogues, in scholarly publications, or in communications with owners, collectors, and art merchants. The correctness of the artwork's historical record is rightly viewed as an issue of public interest, even when the art at issue is privately owned. Recently, however, there has been increased attention to the legal risks associated with issuing opinions, which has had the unfortunate effect of causing some foundations and independent scholars to hesitate to state opinions on the record, and may lead to increased number of requests to museum curators. Therefore, this chapter outlines the circumstances in which authenticity issues arise, the legal background, and suggested best practices for museum professionals.

CIRCUMSTANCES UNDER WHICH ART AUTHENTICATION ISSUES ARISE

Art authenticity issues generally arise for museum curators in connection with retrospective exhibitions at universities, museums, or galleries. Nevertheless, to appreciate the distinct role of museums, it is essential to understand the range of other circumstances in which art authentication issues

arise, and the different commercial practices and legal issues that govern in those other contexts. These include when art scholars author catalogues raisonnés; when artist-established foundations, authentication boards, and individual experts respond to requests for authentication; when, under French law, the holder of the *droit moral*, or moral rights, asserts the right of attribution; when auction houses and other art merchants sell works of art; when appraisers determine the value of an artwork for gift or for income or estate tax purposes; and when scholars or other experts make an unsolicited public comment about a work of art.

Despite the importance of a correct historical record, some experts (including curators) are constrained in rendering scholarly opinions by worry over their legal liability to owners, sellers, and buyers. Some U.S. museums have policies prohibiting their curators from expressing opinions on objects not already owned by the museum. Scholars often decline to express an opinion when they do not (and sometimes even if they do) believe a work is authentic, or exclude the work, without comment, from an exhibition or publication, for fear of provoking a lawsuit in response to a negative opinion.

Authentication is a unique factual scenario in that experts are constrained from charging a fee that reflects their litigation risk, if their opinion is disputed or if they turn out to be incorrect. 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 modest fee of say $500 to $5,000, risk a million-dollar lawsuit for product disparagement or professional negligence from a disgruntled owner? Nevertheless, many experts are concerned about the accuracy of the art historical record and wish to be protective of the legacy of an artist. Accordingly, experts should be aware of the potential avenues to reduce their risk, including observing generally accepted procedures, obtaining contractual promises not to sue, securing insurance, and asserting constitutional protections for opinions.

THE AUTHENTICATION PROCESS—BACKGROUND AND GENERALLY ACCEPTED PROCEDURES

The authenticity of a work of art is *always* a critical issue. Whether the work is "real" or "original" is a perennial question in the art world and reflects 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.

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) 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.

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.[1] 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. Its goal is to assure that the object under study is the same one that left the artist's hand.

The College Art Association (CAA) has adopted standards and guidelines for authentications and attributions, updated most recently in 2009 (one of the authors of this chapter, Ronald D. Spencer, was part of the task force that submitted these guidelines).[2] Many of its recommendations are common-sense prescriptions, including detailed guidance on remaining within one's area of expertise, carefully examining the work of art, and consulting other experts as needed.

First and foremost, the CAA guidelines emphasize that curators employed by museums should consider (taking into account museum policy) whether to issue an opinion at all.

Many scholars require the object being attributed to be physically available for visual examination to the connoisseur or other expert, should the expert wish to inspect it.[3] It is also possible that a curator may be able to determine that a work is *not* authentic from an image, but might need to see the work in person to confirm that it is authentic.

Documentary research can be performed on "provenance," that is, 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 (1898–1976) mobile in which the judge did not fully comprehend the

attribution process or the experts' role.[4] An object, sold as a Calder mobile, had a well-documented ownership trail over twenty 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 twenty years. The judge of the federal district court, in deciding that the piece was authentic, relied largely 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.[5]

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. Conversely, repair or restoration work that is not obvious could, if inadvertently selected for materials testing, cause an object to be inaccurately found to be inauthentic.

AUTHENTICATION—SPECIAL ISSUES FOR VARIOUS CONTEXTS

Catalogue Raisonné

A "catalogue raisonné" is a definitive listing of the works of an artist. It identifies the artist's work (or one particular aspect, such as paintings, drawings, sculpture, or prints) and provides, for each work, an image, dimensions and date of creation, when and where it was exhibited or referred to in publications, and often, *some* ownership history—particularly if it has been owned by important collectors. An expert prepares the catalogue raisonné, often with involvement of a committee or foundation, which may include scholars, dealers, or members of the artist's family.

The basic decision to be made by the author of a catalogue raisonné is whether the artist created a work. If so, it is included. If not, generally it is not mentioned, though a minority of catalogues contain sections on false attributions or works for further study.[6] Inclusion or omission is generally understood to be a statement on the work's authenticity. When a catalogue is in progress, an author will sometimes respond to requests by an applicant for inclusion with the statement that the work "will" or "will not" appear in the forthcoming catalogue, which owners and others understand to be an expression of the author's *current* intention and opinion on the work's authenticity.

A reputable catalogue raisonné will usually gain acceptance in the industry as the authoritative source of information on an artist's oeuvre, and its

author is often regarded as the definitive expert on the artist. Given the investment of time and resources required to adequately research and inspect each and every work, there is typically only one catalogue raisonné for an artist's work, unless there is good reason to question the scholarship or reliability of a publication. Its author may be consulted for opinions during the years or decades that the catalogue raisonné is in progress, and in the years afterward, when there is any question about a work being offered for sale or exhibition.

Artist-Established Foundations and Authentication Boards

Since approximately the 1980s, artist-established foundations and authentication boards have also increasingly undertaken the task of defining an artist's oeuvre, either by publishing a catalogue raisonné or by responding on a case-by-case basis to owners' requests for opinions. Generally, the foundation will require the owner to provide all information known by the owner about the work's history and previous owners, will require the owner to expressly waive the right to sue the foundation, will reserve the right to revise an opinion if new information surfaces, will reserve the right not to issue an opinion if it cannot make a determination based on the information at hand, will require permission to disclose or publish its opinion, and in some cases will insist on the right to mark a work of art so that it is not resubmitted repeatedly.

Foundations almost uniformly state that they will issue an opinion, and are not issuing a warranty or guarantee, although owners and purchasers of art sometimes resist this distinction. For some artists, a positive opinion from the artist's foundation is required as a condition of sale, and is relied upon by art merchants and purchasers. However, the foundations typically charge a nominal fee, or no fee at all, and therefore cannot underwrite the risks associated with particular art sales that may be worth millions of dollars. In contrast, warranties are usually and properly issued as a matter of law, under the Uniform Commercial Code and other applicable law, by the owners and merchants selling artwork, who retain the proceeds of the sales. Indeed, the New York arts and cultural affairs law specifies that an art merchant that provides a certificate of authenticity is deemed to have made a warranty of the facts stated in that certificate.

Nevertheless, foundations have for decades been targets of lawsuits by owners, perhaps because artist-established foundations sometimes have substantial assets that make them attractive targets, even when owners voluntarily signed a written no-sue agreement. Certain legal theories seem to have a persistent appeal to owners, despite their general lack of success in litigation against experts. When foundations own artwork by the artist (as artist-established foundations often do), disgruntled owners have claimed that the foun-

dation was motivated to falsely deny an artwork's authenticity in order to increase the value of the foundation's own holdings, and have asserted (generally, far-fetched) allegations of fraud or antitrust or racketeering conspiracies.

Foundations (including the Basquiat and Calder foundations) have also been sued when they do *not* issue an opinion, either because they do not wish to evaluate a particular type of work, or because they cannot reach a decision based on the facts at hand. Some owners have asserted that by accepting the modest application fee, the foundation entered into a binding agreement to reach a decision. Foundations may also be reluctant to issue an opinion on notoriously controversial or disputed artworks. The work may be unsalable as authentic works of the artist without the foundation's (or a particular expert's) positive opinion, but a negative decision would at least allow the owner to assert a claim for damages for product disparagement to challenge the opinion in court and put the foundation's experts on trial. In any event, courts are hesitant to determine authenticity, and the art market is certainly *not* compelled to accept a court's determination, since in civil litigation, the general standard required to support a finding of fact is that it is "more likely than not" true. As a result, a court's decision that there is a 51 percent likelihood that a work is created by a named artist is far from sufficient to make art salable as such.

Suits against experts who give opinions that are not to the owner's liking are nothing new. In the famous case of *Hahn v. Duveen*,[7] Sir Joseph Duveen looked at a photograph of a supposed Leonardo da Vinci (1452–1519) painting owned by Mrs. Andrée Hahn, and told a newspaper reporter that it was only a copy, the "real one" being in the Louvre Museum. Mrs. Hahn sued Duveen, saying that because of Duveen's disparagement, she could no longer sell the painting for its real value. After a trial, and before the jury rendered its decision, Duveen settled out of court, paying Mrs. Hahn $60,000, "forever establishing in the minds of many people that opinions are dangerous things to give."[8]

Many foundations are extremely protective of the artist's legacy. Nevertheless, in response to the risk of litigation, even with no-sue agreements, some foundations have ceased evaluating the authenticity of artwork, especially after they have published a catalogue raisonné or otherwise evaluated the artist's known oeuvre. The works that surface for the first time, years after an artist's death, are more likely to be marginal or problematic. Instead of risking frivolous lawsuits over marginal works, many foundations opt to shift their focus to other activities to promote the visual arts. This has led to the ironic phenomenon of collectors who complain that the artist-established foundations (or the scholars who worked under their auspices) are abdicating their duty, since their previous opinions are considered authoritative. This leaves a void that museum curators may be asked to fill.

Professional Appraisers

Curators should understand the distinct and more limited findings typically made by an appraiser, especially since they are may arise in connection with gifts or bequests to a museum. Generally, though the Appraisers Association of America has a process for its appraisers to qualify to value works of a particular period, a professional appraiser of the value of art is most often not an art historian. This has led to the appraiser's practice, in many cases, of expressly assuming the authenticity of work, disclaiming an opinion on authenticity, and/or relying on an expert on the artist to render an opinion on authenticity. Museum curators may be asked to provide the opinion on authenticity, to complement the appraiser's work, especially when the work is proposed for a donation to the museum.

ISSUES FOR MUSEUM CURATORS

Often curators will, in effect, authenticate work owned by the museum, and in such cases the task is generally straightforward. In addition, curators express opinions about particular artworks in scholarly publications, essays, catalogues, and lectures.

Issues arise when owners of artwork seek the opinions of museum curators and independent scholars to fill the gap left by the lack of a catalogue raisonné or authentication committee for a particular artist. First, museum staff should consider whether they are being asked to express an opinion on their own or the museum's behalf, and, if the latter, whether they are authorized to do so. More likely than not the answer will be no, and the curators in such cases sometimes opt to issue off-the-record verbal opinions. Thus, owners may turn to independent scholars, who do not have these institutional constraints.

Despite strong legal defenses, curators and scholars have little interest in litigating these issues at their own expense, and sellers, auction houses, and dealers that benefit financially from art sales have thus far been unwilling to make it a general practice to fully indemnify experts they consult against any claims. Therefore, although scholars may care passionately about the accuracy of the record regarding an artist, and their reputations as experts on particular artists, they are increasingly reluctant to opine openly and on the record if they stand to gain little, yet risk litigation from deep-pocketed owners seeking damages or a humiliating retraction of the expert's opinion. Another unfortunate side effect of the fear of litigation is the increased likelihood that some experts will speak only off the record or in coded comments to the effect that they "like" or "don't like" a painting—a situation that is rife with potential for ambiguity and misunderstanding.

Safeguarding against the Risk of Litigation as a Result of Opinions

It is hoped that outlining the options for protecting scholarly opinion set forth below will encourage museum curators and independent scholars to speak on the record.

No-Sue Agreements

Scholars and curators issuing a formal opinion letter can obtain the same waivers that foundations require—such as a no-sue agreement and recognition that the opinion is not a warranty.

It is typical for art experts to obtain a written "no-sue" agreement from an owner/applicant. These agreements have been held legally enforceable since, at least, the year 2000, when the New York Supreme Court decided *Lariviere v. Thaw*.[9] (An owner who sues the expert in breach of a no-sue agreement would be liable for damages for breach of contract. The damages would be the expert's legal fees and costs in defending the owner's claim.) Some confusion and consternation, at least among nonlawyers, arose in 2009 when a federal district court in the case of *Joe Simon v. Andy Warhol Foundation for the Visual Arts et al.* allowed a lawsuit to proceed despite a no-sue agreement. In the *Simon* case (on a motion to dismiss, which procedurally, had to assume that everything the plaintiff alleged was true), the court merely held that the Warhol Foundation's no-sue agreement signed by plaintiff Simon might not be enforceable if the (otherwise legal and enforceable) agreement had facilitated an illegal antitrust conspiracy to manipulate prices in the market for Warhol paintings (which Simon alleged, but never proved).[10] The plaintiff later withdrew all his claims.

Thus, protection for expert opinion is unquestionably available by agreement (not to sue) with an art owner/applicant. The agreement should reserve the right *not* to issue an opinion at all, to *change* the opinion if new information becomes available, and to *publish* the opinion, and should state explicitly that the museum is entitled to attorneys' fees if the agreement is breached.

Insurance

Insurance against errors in authenticity opinions has become more available recently. For museums, this would generally be as a supplemental errors and omissions policy (older policies may include such coverage already). Galleries and scholars reviewing art for a fee would be covered by a professional services policy; there are also policies tailored to foundations.

Insurance is not a *substitute* for standardized, formal procedures and contractual agreements such as those discussed above. Rather, insurers will require such measures (and more), as a condition of the insurance coverage,

and may insist on vetting the authentication program and the experts involved before agreeing to coverage.

The principal benefit of insurance for authentication services is that it can provide the cost of a legal defense if the expert is sued. Damage awards are exceedingly rare. When art experts are sued, the most immediate concern is the cost of litigation, which can rapidly mount to tens or hundreds of thousands of dollars, and the fact that experts and museums will not want to incur any legal fees can be used by owners to pressure experts into silence (or ambiguous statements about the art).

But, insurance carriers will not cover museum curators who informally provide opinions to private collectors at no charge without informing or involving museum administrators. Insurance companies will require, as a condition of coverage, that museums undertake safeguards to manage risk, such as requiring formal, written agreements before issuing opinions about art.

Museums should work with their insurers to clarify any policy conditions that are open ended or vague. These may include recommendations such as "keeping written documentation of all activity," "participating in peer review," or "screening new clients carefully."[11] Clarification is critical because noncompliance with the policy conditions can be a basis for a denial of coverage for legal defense. Helpfully, some insurers will provide (or insist on) a thorough review of museum procedures before the policy is issued. This review may be particularly useful to smaller museums that do not have in-house legal departments able to devote time to these issues.

Museums may be concerned about the cost of insurance, since the College Art Association guidelines discourage experts from charging a fee for authentication. However, it is generally acknowledged that fear of litigation is deterring some experts from issuing any opinions at all. A fee that covers the cost of the insurance that makes it possible for experts to feel comfortable issuing opinions should be viewed as an acceptable, and ethical, practice. Moreover, the charging of a fee may be necessary for some insurers to regard authentication as a "professional service" that they will cover.

Proposed Statutory Reform

Proposed legislation has been introduced in 2014 to amend the New York arts and cultural affairs law to offer some protections to experts issuing opinions on art.[12]

The proposed statute would also increase the burden on plaintiffs disputing the expert's opinion, requiring them to state their allegations with "particularity" (meaning, the plaintiff will need to state specific facts, such as who said what and when), and requiring plaintiffs to prove their claims at trial by "clear and convincing" evidence rather than (as usual) a mere preponderance

of the evidence (i.e., that the claim is more likely than not true). The proposed new law does not categorically prohibit lawsuits over authentication of art. It also probably applies only to state-law claims such as product disparagement. A state statute may not be able to limit claims based on federal law, such as those for antitrust violations or racketeering.

If it becomes New York law, in its current form, it may deter *some* frivolous lawsuits, because it would allow "authenticators" who prevail in court to recover attorneys' fees. Nevertheless, many museums and independent scholars cannot afford to expend funds to take a case to trial in order to recover legal fees. In addition, if the plaintiff does not have the resources to pay a substantial judgment, the right to those fees will be a hollow victory.

The law does have some exceptions that disgruntled owners could take advantage of. The proposed law only applies to individuals who are "recognized in the visual arts community as having expertise regarding the artist or work of fine art" at issue or "recognized in the visual arts or scientific community as having expertise in uncovering facts that serve as a direct basis . . . for an opinion as to . . . authenticity." Scholars can therefore expect to be required to defend their credentials to obtain the protections of this proposed law, and less established experts may be vulnerable.

The proposed law applies only to authenticators who do not have a financial interest in the artwork in question other than to receive a fee for their authentication services. This may allow plaintiffs to persist in raising the argument that foundations or individual experts (whose opinion those owners sought) improperly seek to exclude competing works because they own other works by the same artist. The same (arguably frivolous) allegation could be made against a museum that happens to have other works by the same artist.

Finally, while there is a strong case to be made that opinions about art are in the public interest and contribute to the art market that is an important part of the state economy, it may be challenging to convince the legislature of New York (or any other states contemplating such statutes) that art scholars are uniquely entitled to protection for their opinions in a way that journalists, financial analysts, medical doctors, or other professionals are not. The example of opinions rendered by medical doctors is instructive. It is apparent that doctors rarely, if ever, render unqualified diagnostic opinions. Such opinions are usually and properly of the "it is probably or likely" variety. But as a practical matter in the art world, this kind of medical opinion is (usually) not acceptable from an expert art historian. An owner or buyer will not be satisfied with an opinion that "it is likely a Picasso but it could be by someone else"!

First Amendment Defenses

If, despite taking reasonable cautions, a curator or museum is faced with a lawsuit, a more promising defense is the First Amendment to the U.S. Constitution, since there is a well-established body of law concerning expressions of opinion generally, which is not limited to opinions concerning art. Courts have taken a variety of approaches, which provide some protection to scholars and curators. These decisions strongly suggest there is constitutional protection available for expert opinion if the expert is able and willing to set forth the factual information on which the expert relies for his or her opinion.

Taken together, the judicial decisions on this constitutional defense suggest that there is good reason for experts to make a reasonably full recitation of the facts upon which their opinion is based, including the major facts relied upon, following the usual three lines of inquiry: provenance, application of connoisseurship to the work's visual aspects, and the work's physical properties (that is, any available forensic analysis). Since many experts do not want to provide "road maps" for would-be forgers, providing "reasons" or facts to back up their private opinions is not common practice in art scholarship involving private opinions for owners. But, as discussed below, it appears that giving some "reasons" for their opinion is the procedure that will provide experts with the strongest First Amendment defense. In that circumstance, an unhappy owner would have the difficult task of proving that the expert did not believe his or her opinion or had no factual basis at all for his or her opinion.

It is the settled rule that expressions of an opinion "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions."[13] This principle was established by the U.S. Supreme Court in 1974 in *Gertz v. Robert Welch, Inc.*[14] and later clarified in *Milkovich v. Lorain Journal.*[15] As the Supreme Court explained in *Gertz,* if the statements are held to be expressions of opinion that *cannot* be proved true or false, they are entitled to absolute protection of the First Amendment to the U.S. Constitution because "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[16]

Of course, the challenge is that opinions about the authenticity of art are not "pure" opinion, but are, instead, "hybrid" statements that reflect the author's deductions or evaluations, but are laden with factual content.[17] A statement by an expert about the authenticity of a painting, even if preceded by the phrase "I think," "I believe," or "in my opinion," is not "pure opinion," but is at least "hybrid" opinion, in that it implicitly suggests the existence of specific underlying facts and conveys the author's judgment upon, or interpretation of, those facts. Of course, there often is also an intimation of

personal aesthetic taste with respect to the art, but there can be no question that the judgment is based, in large part, on express or implied facts that can be proven true or false (and being so provable, the stated judgment could be actionable as negligence, defamation, product disparagement, etc.). Thus, scholars and curators will need to do more than *state* that their opinions are opinions to assure themselves of a constitutional defense.

Thus, it is important to have a defense that applies even if the expert could be proved to be wrong about the art in question. The answer may come from recent lawsuits against the credit-rating agencies that faced investor claims for their ratings of bonds backed by residential real estate mortgage loans, which, as demonstrated by the recent financial crisis, turned out to be quite wrong. The rating agencies' defense was that their statements about the creditworthiness of the rated bonds were protected, as opinion about a "matter of public concern," by the First Amendment to the U.S. Constitution guaranteeing freedom of speech, and these decisions offer some lessons for scholars and curators.

One federal court of appeals took a very deferential approach to these opinions—it analyzed "the credit rating itself" as pure opinion, and held that even where a statement *was* provably false, the First Amendment protection for a statement about a matter of public concern means that a plaintiff must prove that the defendant rendered the opinion with actual knowledge of its falsity or with reckless disregard of its truth, to wit, the so-called (constitutional) "actual malice" standard—something that it is almost impossible to prove. Moreover, reckless disregard is "not measured by whether a reasonably prudent man would have published . . . or would have investigated before publishing" but by whether "the defendant in fact entertained serious doubts as to the truth of its publication."[18]

The protection afforded by the actual-malice standard for matters of public concern is difficult to overstate. If a statement is of public concern it can be unreasonable, false, or dead wrong (as the bond ratings in the years 2000–2007 were, in fact), and even negligent, but the agency rating opinion is not legally actionable. Application of this standard to opinions about the authenticity of art would virtually insulate those opinions from legal challenges.

However, not all courts have taken this deferential approach. In a 2012 decision, *Abu Dhabi Commercial Bank et al. v. Morgan Stanley & Co. Incorporated et al.,* the federal court for the Southern District of New York took up the question of whether credit ratings are opinions and, if so, what kind.[19] The *Abu Dhabi* court treated credit ratings as hybrid "fact-based opinion" because they are understood to be "statements of creditworthiness based on an analysis of underlying facts." Accordingly, these opinions were not afforded the absolute protection provided to "pure" opinions. The *Abu Dhabi* court required that a credit rating opinion be (1) supported by reasoned

analysis and (2) have a factual foundation or a basis in fact in order to receive First Amendment protection as nonactionable hybrid opinion. The lesson from this case for scholars and curators is that it can be helpful to set forth a reasoned basis for an opinion, in case a court evaluates the opinion under the "hybrid statement" standard.

Scholars and curators should also be aware of the distinction between "private" and "public" opinions—because opinions that are shared with only a select group have decreased constitutional protection. When the rating agency sent its report only to a select group of investors, and did not publicly disseminate its ratings report, courts have not required plaintiffs to demonstrate actual malice by the rating agency in order to prevail.[20] Curators and scholars should take note, because a private opinion is *precisely* what most art experts render to owners and buyers. By contrast, museum catalogues, lectures, and scholarly publications disseminated to the public would presumably be a matter of public concern, and therefore constitutionally protected.

There is also case law to suggest that "hybrid" opinions can be entitled to the protection typically afforded "pure" opinions, if the statement of the opinion is accompanied by a recitation of the facts on which it is based. New York's highest court, the Court of Appeals, explained its reasoning as follows:

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless be "pure opinion" if it does not imply that it is based upon undisclosed facts. . . . When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable.[21]

This reasoning is supported by Justice Brennan's dissenting opinion in *Milkovich*, noting that a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.

CONCLUSION

Issuing opinions on valuable artwork owned by others inevitably involves some legal risk. However, museum curators can significantly reduce that risk by being mindful of generally accepted professional standards of practice, requiring owners to execute a written no-sue agreement, and providing a reasoned statement of the facts supporting their opinions.

NOTES

1. See Ronald D. Spencer, editor, *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts* (New York: Oxford University Press, 2004).

2. College Art Association, "Standards and Guidelines, Authentications and Attributions," adopted October 25, 2009, available at www.collegeart.org/guidelines/authentications.

3. 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.

4. *Greenberg Gallery, Inc. v. Bauman*, 817 F.Supp. 167 (D.D.C. 1993), *aff'd.*, 36 F.3d U.S. (D.C. Cir. 1994).

5. 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 unsalable.

6. See Francis V. O'Connor and Eugene Victor Thaw, *Jackson Pollock: A Catalogue Raisonne of Paintings, Drawings, and Other Works* (New Haven, CT: Yale University Press, 1978).

7. *Hahn v. Duveen,* 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. N.Y. County 1929).

8. T. E. Stebbins, "Possible Tort Liability for Opinions Given by Art Expert," in Franklin Feldman and Stephen E. Weil, eds., *Art Law: Rights and Liabilities of Curators and Collectors*, vol. 2 (Boston: Little, Brown, 1986), p. 517.

9. *Lariviere v. Thaw,* Index No. 100627/99, 2000 N.Y. Misc. LEXIS 648 (Sup. Ct. N.Y. County June 26, 2000). Ronald D. Spencer represented the Pollock-Krasner Foundation in that case.

10. *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts et al.*, No. 07 Civ. 6423, 2009 WL 1457177 (S.D.N.Y. May 26, 2009) (Swain, J.). (The authors were among the attorneys representing the foundation and authentication board in this case.)

11. See, for example, Michael Fahlund, *Professional Liability Insurance for Art Authenticators,* CAA News, March 8, 2012, at www.collegeart.org/news/2012/03/08/professional-liability-insurance-for-art-authenticators/.

12. New York Senate Bill S06794, introduced March 11, 2014.

13. *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 286 (1986); see also *Immuno AG v. Moor-Jankowski,* 77 N.Y.2d 235 (1991) (applying *Milkovich* to determine whether a statement is actionable based on it being capable of objective verification).

14. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

15. *Milkovich v. Lorain Journal,* 497 U.S. 1 (1990). The constitutional doctrine referred to in *Milkovich* protects statements that cannot be proved false (which we might call "pure opinion") and statements that cannot be reasonably interpreted as stating actual facts, including name-calling, hyperbole, figurative language, and imaginative expression. *Milkovich* goes on to address how statements that can be proved false are protected by the actual-malice requirement.

16. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

17. *Ollman v. Evans and Novak,* 750 F. 2d 970, 1021–1022 (D.C. Cir. 1984).

18. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968).

19. *Abu Dhabi Commercial Bank et al. v. Morgan Stanley & Co. Incorporated et al.*, No. 08 Civ. 7508, 2012 WL 3584278 at 1 (S.D.N.Y. Aug. 17, 2012).

20. *Abu Dhabi Commercial Bank et al. v. Morgan Stanley & Co. Incorporated et al.*, 651 F. Supp.2d 155 (S.D.N.Y. 2009).

21. *Steinhilber,* 68 N.Y.2d at 289.