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No more silence of the scholars

Law drafted to protect experts who fear being sued if they speak out

By Julia Halperin
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A bill introduced in the New York State Legislature last week seeks to protect art experts from what it describes as “frivolous” lawsuits. The proposed legislation aims to make it more difficult for owners, auctioneers and dealers to bring lawsuits against art historians simply because they do not like their opinions. Under the proposed law, claimants must be specific about what they believe the expert has done wrong, and must show that there is a significantly higher than 50% chance that the allegations contained in the lawsuit are true.

Scholarship crisis

Works of uncertain, or even puzzling, provenance often emerge in the art world, but there have been growing concerns that scholars are reluctant to give expert opinions for fear of being sued. For example, a conference that was due to be held in January 2012 at London’s Courtauld Institute of Art to discuss a large group of drawings that are, according to their owner, by Francis Bacon, was cancelled, partly over concerns about the legal repercussions.

The New York City Bar Association drafted the bill to encourage art historians to speak more freely. Judith Bresler, a lawyer with the firm Withers Worldwide, who co-authored the legislation with Dean Nicyper of Flemming Zulack Williamson Zauderer, says that authenticators are increasingly “speaking with silence”.

The bill would allow authenticators to recover their legal fees if they are vindicated: under current US law, they must pay these even if they win. “Being sued has always been a risk of giving opinions on authenticity,” says Katy Rogers, the president of the Catalogue Raisonné Scholars Association. “The rising cost and increased frequency of these lawsuits have driven scholars away.”

In the past month alone, a group of nine collectors have sued the Keith Haring Foundation for \$40m after it labeled their works as fakes; a Swiss dealer sued the estate of Alexander Calder for claiming that a \$1m sculpture he wanted to sell was merely a fragment of a larger work; and the sisters of Jean-Michel Basquiat sued to halt a sale of their brother’s work at Christie’s because they questioned the authenticity of some of the objects.

The New York State Assemblymember Linda Rosenthal, the bill’s sponsor, says the legislation offers authenticators “much needed protections”. “The role of the authenticator in the art world cannot be understated. Far from an exact science, the work done by the authenticator is art in and of itself and in today’s market, they operate completely at their own risk,” she says. “Unfortunately, in the modern art world, fraud and deception of the highest quality abound, and the authenticator is on the hook for even a good faith, yet incorrect opinion.”

Defence costs

In the 1960s, New York legislators considered but declined to adopt a similar law to protect scholars. But rising prices for art and the increased number of lawsuits may change their minds. “The current law is basically good: most authenticators ultimately win,” Bresler says. “The issue is that they’ve spent thousands of dollars and thousands of hours defending themselves.”



The New York City Bar Association began to work on the bill in 2012, after half a dozen artist's foundations, including those of Andy Warhol and Roy Lichtenstein, shut down their authentication boards, largely to avoid litigation. The chilling effect reached its peak as the scandal surrounding fake Abstract Expressionist works sold by the Knoedler gallery unfolded last year.

The authors hope that the bill, if it becomes law, will encourage scholars to speak up if they spot a forgery or misattributed work. Today's litigious atmosphere "gives people trying to peddle works that are not authentic an open field, and constrains communication so that scholars not only won't give an opinion, but also feel constrained about speaking to each other", says Jack Flam, the president of the Dedalus Foundation, which represents the estate of Robert Motherwell.

The legislation could also dramatically increase the number of works available to scholars for examination. "Right now, when art historians write articles about fakes, they are generally very careful to speak only about works in public collections," says Sharon Flescher, the executive director of the International Foundation for Art Research (Ifar).

Some worry, however, that the legislation might give authenticators too much authority. "The result will be to cement the power of groups that control the art market and insulate their authentication decisions from scrutiny or judicial oversight," says Seth Redniss, the lawyer who sued the Andy Warhol Foundation in 2007 and 2010 after its authentication board rejected two works purportedly by the Pop artist.

The bar association aims to have the bill signed into law by June.