

AUTHENTICATION IN ART

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EXPERT OPINION: A U-TURN BY THE FRENCH SUPREME COURT

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French courtrooms are no strangers to disputes over the authenticity of artworks. Over the past 15 years, the French judiciary has repeatedly been called upon to adjudicate lawsuits brought against authors of catalogue raisonnés, artists' foundations, and connoisseurs recognised by the art market as the 'leading experts' on a given artist. These lawsuits, usually brought by aggrieved art owners, have one fundamental objective: challenging the experts' refusal to acknowledge the authenticity of the artwork.

In authenticity disputes, French Courts like to rely on court-appointed experts. Supported by their own experts, French judges have gone as far as overruling the artist's 'leading' market expert. In some cases, the acknowledged market expert was ordered by the Court to authenticate a given artwork, and occasionally, the expert's refusal to acknowledge the authenticity of an artwork was found to have been negligent, giving rise to the expert's liability in damages. In a recent case, the French Supreme Court has adopted a less controlling approach.

Expert opinion in the French Courts

In France, experts have sought to protect themselves against such claims by invoking their right to freedom of expression. Alternatively, they have declined to offer an opinion altogether, or argued that by refusing to include an artwork in a catalogue raisonné, there were not expressing a view on the authenticity of the artwork. French courts have been unimpressed by these arguments. In a claim brought against the Paris-based Wildenstein Association following its refusal to include a painting known as *Hiver à Cannes* in the forthcoming catalogue raisonné of Kees van Dongen, the expert appointed by the Paris High Court concluded that the painting was an original work by van Dongen. The claimants (who owned the painting) proceeded to seek damages from the Wildenstein Association for rejecting the painting. The case went to the Paris Court of Appeal, which in 2007, ruled that whilst the author of the catalogue raisonné might not have declared that the painting was a fake, a refusal to include it in her catalogue raisonné had a significant impact on its marketability as an original work by the artist. The Court found that the Wildenstein Association's rejection of the painting without giving reasons had been negligent. Accordingly, the Court found against the Wildenstein Association, by holding it liable in damages (€2,000) and costs. By then the Wildenstein Association had agreed to include the painting in van Dongen's catalogue raisonné, which the Court acknowledged.

In 2008, the French Supreme Court sought to find a compromise between the freedom of expression of the author of a catalogue raisonné on the one hand, and the fact that a court-appointed expert had authenticated a painting rejected by the author of the catalogue raisonné on the other. In a long-running dispute between the owner of a painting and Jacques Polieri, the author of artist Jean-Michel Atlan's catalogue raisonné, the Supreme Court ordered Polieri to include the work in the next editions of his catalogue raisonné with the annotation "judicially authenticated". The annotation, said the Court, had the merit of recording the painting as an original work by the artist in a comprehensive catalogue of his work, whilst making it clear that the author of the catalogue did not endorse the authenticity of the work. The Supreme Court adopted the same approach in 2011, in another dispute involving the authenticity of works by Atlan.

The Metzinger case: a judicial U-turn?

On 22 January 2014, the Supreme Court delivered a judgment at odds with the previous line of cases.

The dispute concerned a painting attributed to French Cubist painter Jean Metzinger known as *La Maison Blanche*. Its owner, Laurent Alexandre, sought a certificate of authenticity from Bozena Nikiel, the author of the artist's forthcoming catalogue raisonné. Nikiel disputed its authenticity. Alexandre took Nikiel to court, and the court-appointed expert concluded that the painting was an original work by Metzinger. Nikiel was ordered not only to include the work in her catalogue raisonné, but to pay Alexandre damages in the sum of €21,000. On appeal in 2012, the Court increased the amount payable in damages to €30,000, unless she granted Alexandre a certificate of authenticity within a month of the decision.

Refusing to let go, Nikiel appealed the decision to the French Supreme Court. She fiercely contested the credentials of the court-appointed expert. She argued that his research should have led him to consider the authenticity of the work as "doubtful". Nikiel's insistence on an indisputable authenticity finding sheds light on the differing standards of proof applied by the courts and the art market when considering the authenticity of an artwork. On the one hand, the standard of proof applied by the courts is the "balance of probability". By contrast, the market applies a higher standard. If doubts are cast over the authorship of an artwork, it is generally un-saleable (as a work by the artist).

In the end, the Supreme Court found for Nikiel. It overturned the decision of the Court of Appeal by recognising that Nikiel's refusal to authenticate the painting was as a result of her "intimate conviction". By finding her liable in damages because she held the opinion she did, the Court of Appeal had breached her right to freedom of expression under the European Convention of Human Rights.

The decision is striking as it is the first time that France's highest court has ruled that the expert's freedom of expression is an absolute right, trumping other obligations. It contradicts earlier decisions on authenticity (many of which were decided by the Supreme Court itself) that the freedom of expression must be *qualified* by an imperative requirement to "objectively" record the full body of an artist's works. In a departure

from earlier decisions, the Supreme Court declined to engage in a balancing exercise of the differing expert opinions, leaving it to the market to follow its course.

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