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Recap of “Rethinking Art Authentication” at the New York City Bar

[Blog](#) The Art Law Report
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Last week the Art Law Committee of the New York City Bar Association hosted a terrific two-hour event. Entitled “Rethinking Art Authentication,” the discussion aimed to address a way forward from the problems of fakes, forgeries, and authentication lawsuits that have plagued the art market in recent years. It was a lively and fascinating evening.

The first notable aspect was the composition of the speakers. The panel consisted of legal practitioners, scholars, and scientists. This gave the discussion a balance that is often lacking in legal seminars. The chair of our committee, Dean Nicyper (Withers Bergman LLP), introduced the panel and gave the floor first to Colette Loll, president of Art Fraud Insights, LLC. Ms. Loll addressed conditions and patterns faced by artists foundations in particular. The process of authentication needs a paradigm shift, she suggested. Questions are met with fear and hostility, including whether works

sent out of the country may be seized. The market suffers from all this. In addition, opinions change over time, and foundations are besieged with requests and threats of lawsuits.

Catalogues raisonnées are a further complication. They are critical tools for provenance research. Scholarly process is always subject to error, however, and may not even be intended as comprehensive. The 1958 Ceroni catalogue raisonnée of Amadeo Modigliani is a perfect example: it only included works he saw and he never traveled to the United States. Gerhard Richter's recent disavowal of his recent work is another example, creating an odd category in the market.

Recent forgery scandals reveal the limitations of technological advances. The market continues to be vulnerable, exemplified by Knoedler and Beltracchi case. Beltracchi was savvy about using historical techniques and sources (he posed his wife in a staged "historical" photograph). Science ultimately caught up with him because he used a titanium white pigment that was anachronistic for the painting in which it was used, but it is still not known how many works he created. The **fictional Dada artist "Karl Waldmann"** scandal is another recent example. The market's desire to discover lost artists can blind it to proper scrutiny.

Lastly, global online art sales create another vulnerability point. A level of acceptable documentation is not commonly recognized.

Jennifer L. Mass, Senior Scientist and Director, Scientific Research and Analysis Laboratory, Winterthur Museum and President, Scientific Analysis of Fine Art, LLC, spoke next. Dr. Mass said she wanted to give a snapshot of the "arms race" of authenticity issues. She distinguished between bad fakes, good fakes, and excellent fakes. A good fake is something made with the intent to deceive, for example, **the recent claim that *La Bella Principessa* by Leonardo da Vinci is a super market check out girl** from the 1970s made using period materials. An excellent fake was exemplified by a Chinese porcelain example that used the right kinds of clay and overglaze from an earlier period.

To combat this, scientists like Dr. Mass check the iron composition of clay and compare it to the likelihood that someone had used the exact same source as a more recent source. Dr. Mass then showed an example of a supposed 19th century clock from Vermont. "Just really look" she exhorted the audience—this clock's pristine condition belied its supposed age. To corroborate that impression, a high energy X-ray was used to identify elements in the periodic table. Titanium paint—not available until the 20th century—was revealed, confirming it as a fake. If it is too good to be true, she suggested, it probably is. A harder example involved distinguishing between kinds of titanium white, which became available roughly 20 years apart. Hyperspectral imaging makes it much easier to understand what exactly the viewer is seeing. Even for undisputed authentic works, the condition

can be informed by looking beneath the surface, which may reveal conservation if not forgery. Reverse engineering paints from known works allows scientists to stay ahead of forgers as well.

Dr. Mass used Picasso's Blue Room as an example of new technology. Infrared showed a portrait underneath that would not have been visible 50 years ago. Multispectral analysis showed further the ability to identify the sitter to distinguish whether it was a self-portrait or a friend.

Are fakes and forgeries getting better? Yes, said Dr. Mass, but so are techniques to combat them, she suggested. She and Ms. Loll are currently working on analyzing known forger Elmyr de Hory's palette to try to identify other forgeries.

Rick Johnson, Jacobs' Fellow in Computational Arts and Humanities, Jacobs Technion-Cornell Institute, Cornell Tech (New York City), was next on the panel. Dr. Johnson addressed his use of technical algorithms. He also discussed some of his own experience in scientific analysis.

Professor Amy Adler of New York University addressed a very different and provocative question than the first three speakers. Specifically, Professor Adler questioned whether the focus on identifying unique originals was in fact worth all the trouble it causes.

She pointed to recent cases where no connoisseur or scholar could state definitively what the work is, which challenges our assumptions about authenticity. Notions of authenticity are under assault by contemporary artists.

First, Professor Adler identified what she called "fake by fiat." Artist Cady Noland sometimes questions her own previous work. *Cowboys Milking* was to be auctioned, and she didn't like what she saw. Noland disclaimed the work by objecting to some conservation. The Visual Artists Rights Act question never had to be answered by the court, but why does the art market care so much about the artist's imprimatur? Why should the artist have the power to disavow a work she clearly made and reduce its value to zero?

Ever since Duchamp transformed objects merely by calling them art (also recalling a Rauschenberg telegram that says "this is a portrait because I say so"), if an artist has the power to turn a lowly object into a work of art, the corollary is that she can turn a work of art into a lowly object.

Conceptual work and certificates is one way that the art market has tried to manage this problem. But there has been litigation over refusals to reissue certificates, without which a Dan Flavin work is just a light bulb. A more recent Flavin controversy involving "posthumous" works are not real Flavins because although he had imagined them, they were not done before he died.

To take another example: the Warhol anti-trust litigation involved multiple silk screen series, one of which the Warhol board considered authentic, one it did not. The latter involved an outside printer. Yet, as Professor Adler noted, correspondence from Warhol exists where he talks about a variety of people actually printing works even within his Factory (“ask my assistant, he did most of my paintings”)—works the Foundation considers authentic. Professor Adler suggests that the very question that the lawsuit posed is one that Warhol’s work renders a little bit absurd.

Recalling Plato, she asked: given two objects that look exactly alike, how is one a work of art and one not? Why is one worth \$100 million and one is valueless because of these determinations? Taking the absurdity a step further, Professor Adler showed a work imitating Warhol that the artist sent to the Foundation specifically to obtain a rejected stamp. All of this harkens back to Walter Benjamin’s seminal essay “The Work of Art in the Age of Mechanical Reproduction.” “Exhibition copies”—copies created for a show while the original is taken down elsewhere question what Professor Adler called the “fetishization” of the original or, as she ended with: “Maybe a little bit real and a little bit fake, maybe a ‘little bit pregnant’.”

Lastly, Mr. Nicyper discussed the pending authentication bill before the New York legislature, [the various iterations](#) of which [we have addressed before here](#). Most importantly, Mr. Nicyper explained the course of this year’s changes to the bill, its fate, and its prospects for the future.

Drafted with the impetus of the Art Law Committee, the original bill proposed two years ago would have made a number of changes, including requiring heightened pleading against authenticators, a clear and convincing evidence burden of proof, and a one-way fee shifting attorneys’ fees provision. That bill was opposed by the Trial Lawyers Association. This year, a revised bill was introduced that did away with the clear and convincing evidence standard. That bill passed the New York Senate, but no action was taken in the Assembly. According to Mr. Nicyper, certain lawmakers were opposed and prevented it coming to a vote.

Those lawmakers are no longer in the Assembly, however, according to Mr. Nicyper. Thus, the chances for passage in the next session actually look promising.
