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Art Law Experts Explain the Highly Confusing Peter Doig Authentication Case

'Everyone understands that Doig has the last word in the art market,' says one expert.

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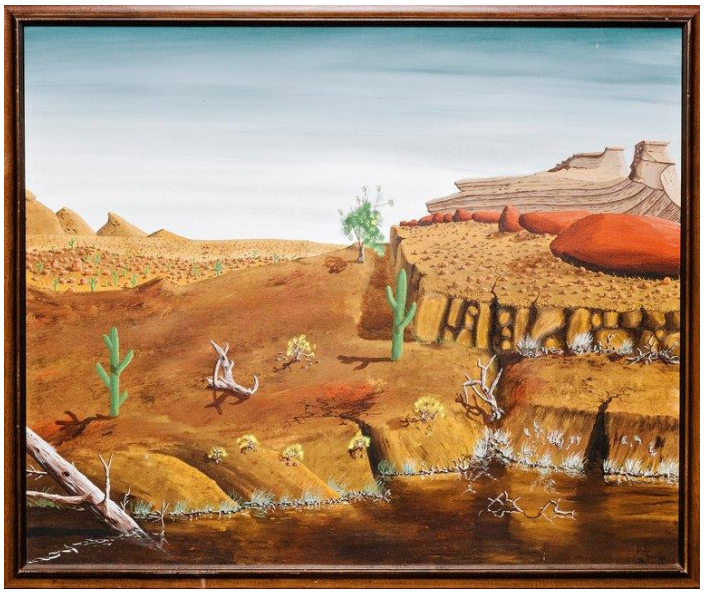
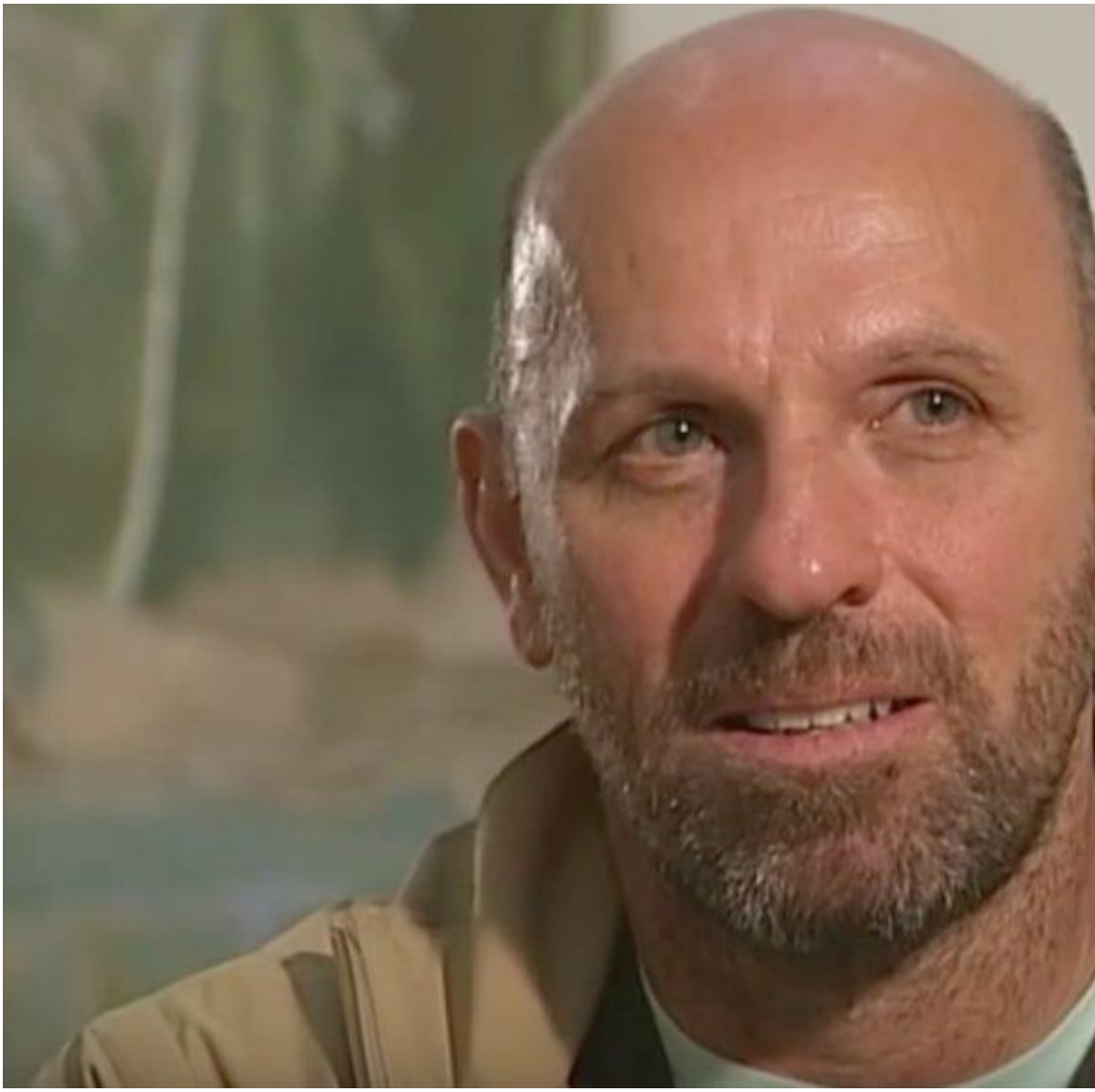


The painting in question depicts a desert landscape. Photo: ARIS Title @ARIS_ArgoGroup via Twitter.

This week saw the dramatic close to a bizarre, lengthy legal saga in which Scottish-born artist Peter Doig was called upon in court to defend his rejection of a work that a Canadian collector wanted attributed to him.

Related: Peter Doig Wins Bizarre Authentication Trial

Former corrections officer Robert Fletcher and Chicago dealer Peter Bartlow sued Doig, with Fletcher insisting that Doig painted a landscape in 1975 while the artist-to-be was supposedly serving time as a young inmate at the Thunder Bay Correctional Center in Northwestern Ontario. Doig maintains that the work is not his, that he was never incarcerated, and that he's never even been to Thunder Bay. What's more, the work was curiously signed Peter Doige (with an "e"). In the end, Judge Gary Feinerman, of the US District Court for the Northern District of Illinois, decided that the painting was not by Doig.



Peter Doig insists that he didn't paint the painting in question. Photo: film still via YouTube.

Could the decision set a precedent with consequences for the art market and the courts in years ahead? To find out more, we spoke to four prominent art lawyers and legal experts. They brought up two previous cases they say are relevant to, or comparable to, the Doig trial. For instance, the Appellate Division of the New York Supreme Court ruled against the artist Balthus in 1995 after he denied that a painting was by him; the court ruled that he wanted to drive the work's value down, since it was in his ex-wife's hands. And Gerhard Richter has disavowed some of his early works, apparently simply because he doesn't think they're up to snuff.

As for the case of Fletcher v. Doig and what it means, here's what our lawyers and experts said.

Related: Everything You Need To Know About Peter Doig's Authentication Trial

John Cahill of Cahill Partners LLP

It's unfortunate that this artist was forced to defend himself based on the wishful thinking of a man who claimed to have found the art equivalent of a winning lottery ticket.

Artists, like scholars and other experts, are—and should be—able to express their opinions about the authenticity of art works without fear of being sued—and, if they are sued, without having to mount an expensive defense that includes a full-blown trial.

The extremely limited exception to that rule arises only in cases of intentional, egregious misconduct by artists. The only cases that I am aware of have happened in a VARA [Visual Artists Rights Act] context, de Chirico's "back-dating" paintings, and a case in which it appeared that Balthusdisavowed his authentic work out of spite towards his ex-wife. (In that case, the judge pointed out in his conclusion that a Metropolitan Museum of Art curator believed that Balthus was "acting from personal animus against his former wife. He suggests that Balthus has repudiated some of his works in the past "to punish former lovers or dealers with which he has had disagreements.")

The evidence was thin to nonexistent in this case, with the only "expert" opinion being offered by someone with a financial stake in the outcome—not exactly an indicia of reliability.

The judge's determination that Doig "absolutely did not" paint the work is likely little more than codification of what the art market would have determined given the artist's disavowal of it.

Amy Adler, law professor, New York University

While many people are shocked that this case went to trial in the first place, the reason it did is that the judge thought there was an actual factual question about whether Doig had made the painting. People might wonder whether the Visual Arts Rights Act, which artists like Cady Noland invoked to disavow works even she says she made, comes into play, but that law doesn't apply to works made before its effective date, which was 1990; the work in question was painted long before that.

For most of us this seems galling because we all assume that an artist has the last word about whether a work is his. Even if the judge had declared the work authentic, the art market would have disregarded the court. Everyone understands that Doig has the last word in the art market, and the market will never treat it as a Doig. The law is, in a sense, irrelevant here. Oddly, that's something that a lot of lawyers don't understand. That's the fundamental disconnect that this case exposes—there are

different understandings of what authenticity means in the art world and the legal world.

But let's say Doig had lied. I don't think VARA gives you a right to disavow a work you actually created, unless it's been significantly modified. In defense of the theory of the lawsuit, there may be circumstances where an artist does lie and could with one word wipe out $10 million of value; what recourse does an owner have under those circumstances? We might be sympathetic to a plaintiff in the case of a different set of facts.

In terms of what precedent this sets, you might wish Doig could get his legal fees covered, in order to discourage other cases like this from coming to trial, because what feels so galling about this case is that it creates the potential for a nightmarish scenario in which artists feel vulnerable to being sued and having to defend themselves against anyone who wants to misattribute a painting to them. But it's hard to get attorney's fees covered. Many people have been unfairly sued and had to spend a lot of money defending themselves. Doig isn't the first.

Virginia Rutledge, art historian and attorney
This outcome is of no help to artists, generally. Basically the case highlights a surprisingly murky situation: the fact that there is very little art-specific law around questions of authenticity and attribution. This may seem counterintuitive given that the name of the artist is fundamental to much of our understanding of aesthetic meaning and value.

This case got so weird because it played out almost exclusively in the realm of the marketplace, and the question of economic value dominated the discussion. But the ultimate stakes are even higher—the right of the artist to "own" or disclaim a work. And, remember, the reputations of two artists were involved here, although only one had his say, so to speak.

These are fascinating questions, and actually many of them have been raised by early conceptual art makers.

Robert Morris's *Document* (1963) is a statement by the artist intended to withdraw "all aesthetic quality and content" of a previous work he'd sold to architect and collector Philip Johnson, for which Morris hadn't been paid in a timely way. Then, over 50 years ago, even when there was some dispute about appropriate behaviors, the status of the artist allowed him to negate the value of his own work, and because the transaction occurred within—I'd propose—a much smaller art world, there wasn't even a market problem. Of course Johnson was going to accept Morris' gesture; and Morris' follow-on

gesture allowed Johnson to recoup both aesthetic and market value, if you will, because Johnson was able to acquire the statement, too.

In today's very different art world/market, we can't count on everyone sharing the same values.

Flash forward to Cady Noland and the controversy over the artist's ability to withdraw her name from work she determined had been compromised. That right to disclaim has limited legal protection in the US. Many otherwise savvy artists and collectors are unaware for example that the Visual Artists Rights Act, which covers rights of attribution and integrity, wouldn't even apply in this case. And should a law that only affects works created after a certain date control such rights? That seems very arbitrary.

The legal gray area is signaled by the plaintiffs' request for "declaratory judgment," essentially asking in advance for legal guidance when it's not entirely clear whether one has the right to do something. But we didn't get an answer here as to what would have happened if the judge had found the painting was a "Peter Doig," but the artist wished to erase his signature.

This is an area where it looks like it has become appropriate to expect the law to provide more certainty. How would we do this? It could come from articulating and then legislating a more robust attribution right, possibly as an expansion of VARA, which technically is connected to copyright. That itself raises issues. Who should get to exercise rights of attribution and authentication, and for how long? VARA can be invoked only by the artist, and only under certain conditions. Is the right of attribution so personal that we let it die with the artist, or should we allow artists to bequeath the right of attribution just as they can bequeath copyright ownership, typically for another 70 years after the artist's death?

Do we care that the market may end up valuing work even when a dead artist might be rolling in his grave ("What? That's the wrong light fixture/video monitor/color of paint!")? Are heirs any better authenticators than anyone else other than the artist? There's no art-specific law regulating this.

There are many more questions here, and few certain legal answers.

Any right of attribution should in my opinion come with some responsibilities for the artist, too, so that if an artist frivolously withdraws his name from an artwork just to spite someone—and this is not a hypothetical scenario—there should be some cost. When can an artist make such a gesture, and when does the artist have to be very careful about repudiating work that someone invested money in, someone who feels their investment should be protected?

How often will this kind of case happen? It could happen any time someone thinks there is money to be made. And in hot markets, it may begin to happen more often. Recently I've had two very successful artists ask whether they can be compelled to authenticate works circulating outside their studios. The stake are clear, the legal remedy—on other side of the question—is not.