

AUTHENTICATION IN ART

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It's time the art market got tough on fakes

Players in the trade acknowledge the problem, but disagreement over how to address it has resulted in a gridlock that helps to keep forgeries in circulation

by LAURA GILBERT, BILL GLASS | 2 February 2017



In a court sketch from March 2016, the Knoedler legal team confers before announcing a settlement in the case brought by the collectors Domenico and Eleanore De Sole against the gallery. The De Soles had sought \$25m, alleging that the gallery's director,

With the Knoedler trial still fresh in people's minds and an Old Master forgery scandal linked to works attributed to Cranach and Hals among others recently uncovered, the question of how to reduce the number of fakes—of everything from Ming vases to post-war paintings—circulating on the market is more urgent than ever. At the annual art-crime symposium held in November at New York University, participants agreed that the culprit was the market's notorious secrecy. But discussions revealed deep divisions about what should be done. Insurers, auction houses, dealers and other players each have their own interests to protect in a market where, as one participant remarked, the "level of greed... is so great".

"Information is the currency of the art market," said lawyer Steven Thomas, the head of the art law practice at the Los Angeles law firm Irell & Manella. He offered an example showing how information was withheld in trying to close a sale. When one of his clients learned that an Impressionist painting he was interested in had been restored so extensively it was no longer considered authentic, he confronted the dealer, a prominent New York gallerist. "Oh, you found out," was the cavalier response. Such is the attitude in a market where the burden of due diligence as a practical matter may fall on the buyer.

Mr X

But even simple provenance research may be impossible when a dealer or an agent mediates on behalf of an anonymous seller. The Knoedler scandal, of course, highlighted the problem of non-disclosure writ large, with buyers handing over a total of nearly \$70m for more than 30 paintings from the collection of a mysterious Mr X. As was revealed at trial, although some experts told the gallery they doubted the paintings' authenticity, Knoedler did not pass on that information to the sellers. Further, Knoedler never actually knew Mr X's identity. But the buyers assumed it did, having only been told by the gallery that the owner preferred the usual industry practice of anonymity. Had Knoedler disclosed these facts, the plaintiffs said, they never would have bought the paintings. When a potential purchaser presented gallery director Ann Freedman with a contract requiring her to state, among other things, that the gallery did not know anything putting the work's authenticity into question, she refused: that just was not how the art market worked.



The Knoedler gallery sold this painting, purportedly by Jackson Pollock, to the collector Pierre Lagrange for \$17m in 2007. In this system, dealers are not the only ones who benefit by keeping silent. Judd Grossman, the chair of the New York County Lawyers' Association Art Law Committee, spoke of a Jackson Pollock expert who admitted that he "sees forgeries all the time but doesn't do anything about it". After all, scholars have their own interests to protect; they may stay silent because they are afraid of being sued on an expanding array of grounds, from disparagement to professional negligence. Even if the authenticity of a work is called into question, a spooked seller may dump it without disclosing the compromising evidence. No one tells an owner his Franz Kline is faux. The result, the art consultant Martha Parrish told *The Art Newspaper*, is that "all the fakes are roaming around and coming to market again".

To regulate or not?

So what is to be done? With art market participants unwilling to proffer critical information voluntarily, Christiane Fischer, the chief executive of AXA Art Americas, suggested that the government should require it: “It’s better for everyone if there’s more regulation.” But “when the government does it, it’s ham-handed,” objected Christopher Marinello, the chief executive of the Art Recovery Group, which maintains a database of stolen and fake art. He cited US regulations intended to curb the illegal slaughter of elephants by banning the sale of items with even a sliver of ivory. “It’s so over-regulated...that it’s difficult to sell and affects the value of the work,” he said.

And who would enforce the regulations? Attorney Lawrence Kaye, the co-chair of the Art Law Group at Herrick, pointed out that there is no dedicated enforcement agency in the US and it “would be very hard to get a regulator” that could enforce laws around the world. That is if those laws can get passed at all. In New York, a proposal to encourage scholars to sound the alarm by protecting them from frivolous lawsuits has been stalled in the state legislature for nearly three years.

Insurance companies could be a powerful force in keeping fakes out of the market, Marinello suggested. If buyers cannot get insurance, they might be more careful before they buy and sellers might be forced to step out of the shadows. “When you buy property, you have a survey done or you can’t get a mortgage. Banks control the market. Why don’t insurers refuse to insure unless you have good due diligence?” he asked. Ron Fiamma, the global head of private collections at AIG, which insures 52% of the people on ArtNews’ Top 200 Collectors List, had a simple answer. Insurers “don’t push for documents because it’s a competitive business,” he said. Companies like his would be at a disadvantage unless everyone did it.

Some suggested that the market should police itself. But competing interests make self-regulation a mirage. There is no “cohesive alliance”, said Sherri Cohen, a director at Bonhams’ trusts and estates department, who noted that she sees art crime “daily”. Further muddying the waters, some of the most active buyers are also sellers. “Big collectors control the market, so they prefer to see it go on as business as usual,” noted one panellist.

Risky business

Given the impasse, Steven Thomas suggested an alternative. Attention should be focused not on due diligence but rather on who should bear the risk that a work is fake. He had no doubt it should be the sellers: they put the work on the market, get the money and control the information shared.

Thomas notes that market is already regulated, just inadequately. He cites two New York statutes designed to protect buyers and reduce the number of questionable works in circulation. Under one, when a dealer or auctioneer writes on an invoice that a work is by a particular artist, the invoice serves as a four-year guaranty that it is by that artist. The other statute applies only to multiples, theoretically at greater risk of unauthorised duplication. If a multiple is proven to be a fake, the dealer must refund the purchase price with interest, and if the buyer proves the seller was deceptive, the seller has to pay the buyer’s legal fees—a protection, Thomas suggested, that could be extended to unique works as well.

At the very least, he says, the statute of limitations for each scenario is too short. Most owners do not discover they own a fake until they try to sell it – typically after more than four years. Contrary to the statutes’ purpose, the risk of loss is then shifted back to the buyer. Thomas supports amending both laws so that the statute of limitations begins not on the date the buyer purchased the work but on the date they discover (or should have discovered) that it is fake.

Even this step to bring the law’s effect back in line with its intent might meet resistance. Auction houses and dealers would likely have strong objections to a revision or expansion of the statute of limitations, said Gregory Clarick, of Clarick Gueron Reisbaum, who represented some of the Knoedler plaintiffs in their claims against the gallery. In his experience, sellers think four years is long enough to be held liable. “They want that finality,” he said. Clarick believes the judgments supporting the Knoedler buyers’ claims of fraud are “the starting point to regulate the industry” because they “require honest and frank disclosure about works a dealer is selling”. Marinello, though, doubts that relying on the courts is a suitable answer. “Judges are on the same level as criminals when it comes to fine art,” he said. “They don’t know much.”

Legislation against frivolous lawsuits

The worth of a work of art hinges on its authenticity, so experts who render opinions are in everyone's crosshairs. A proposal to protect them from frivolous lawsuits was introduced by Senator Betty Little and Assemblywoman Linda Rosenthal in New York in 2014.

Initially, the twin bills said that if a lawsuit against an authenticator was unsuccessful, the plaintiff must pay the defendant's legal fees. The costs can be steep: the Andy Warhol Foundation paid nearly \$7m to defend itself in one lawsuit and later disbanded its authentication board. The bills do not protect any person or entity with a financial interest in the work of art—such as a dealer who represents an artist's estate.

It was hoped the prospect of paying the other side's fees would discourage nuisance suits. However, in yet another instance of competing interests impeding change, the New York State Trial Lawyers Association lobbied for adjustments; as amended, the judge would decide whether the losing plaintiff has to pay. Even in its revised form, the law has not been passed. It will be reintroduced in early 2017, says Dean Nicyper, the lawyer spearheading the proposal.

Whose job is it anyway? what the experts say



Martha Parrish (Photo: © Patrick McMullan)
"All the fakes are roaming around and coming to market again." Martha Parrish, art consultant

Christopher Marinello, Art Recovery Group (Image: courtesy Art Recovery International)

"Why don't insurers refuse to insure unless you have good due diligence?..." Christopher Marinello, Art Recovery Group





Gregory Clarick (Image: courtesy Clarick Gueron Reisbaum LLP)
The courts are "the starting point to regulate the industry." **Gregory Clarick, Clarick Gueron Reisbaum**

Ron Fiamma, AIG (Image: courtesy AIG)
"... Because insurance is a competitive business." **Ron Fiamma, AIG**

