

## AUTHENTICATION IN ART

Firstly we hope that you all have had a good summer and that you were able to get some rest in the sun. Now that August has passed and September has come it is time to put the workload on full throttle again.

In this Newsletter we would like to present to you the announcement speech of the Mediation Board at the Art Market Business Conference. The reception of the announcement was immense and received a standing ovation by the crowd. Read the speech below and we hope that it will fill you with the same amount of enthusiasm.

### **The Art Market Business Conference Speech**

I would like to begin by thanking the organization for their work and effort put into 'The Art Business Conference' – 2014.

Today we're gathered to talk about the art market, or as I like to call it: the art industry. The art world has grown explosively over the last decades, both in quantity and value. This is the result of an expanding market due to globalization, but also a result of the rise of art as an asset. The growth over the last decades has brought wealth to the art market. Sadly, it has also brought a downside: more and more lawsuits on forgeries. Due to the immense value of art, the rise of forgeries, misattributions and other manipulations of the truth subsequently increased. This negative phenomenon has cast a veil of doubt over art works in general. When buyers suspect they have bought one of the above-mentioned types of art, it often leads to disputes that reach as far as courts. We have seen this, for example, in the Odalisque case here in London, the Knoedler forgery case in the USA, the Beltracchi case in Germany and the Dutch Groninger Ploeg case that ran for more than 20 years in court.

Of course some forgery cases fall under criminal law, because the level of fraud is so immense that this seems the only right path of justice. An example is one of the biggest international forgery cases in history, that still has to become fully public. At this very moment it is under preparation of the Prosecution Service of the Criminal Law Department in Germany. This case covers more than seventy French, German and Russian major artists and around 3000-3500 works of art in paintings and drawings. This scam ran for over twenty years, perpetrated by an international chain of forgers, spotters and dealers. They could do their work at relative peace and make over 3,5 Billion Euros. This calculation is known to us due to the fact that some (not all) of the account books are under investigation. So it is likely that the height of the financial side of this fraud will increase.

Apart from the bigger cases, the 'average' lawsuits are also often long and expensive, a situation where no one benefits, with the possible exception of some lawyers. One thing is certain: losers at all sides – seller and buyer alike.

These problems, alongside other difficulties that authentication may bring forward constituted the topic of the Authentication in Art Congress in The Hague last May. The Congress was a huge success and brought a lot of new insights and even guidelines as a result. Today I wish to speak to you about two of the most important results of the Congress. Firstly, I will address the guidelines brought forth by our Workgroup Art & Law. Secondly, I would like to announce the international 'Authentication in Art - Mediation Board', which we are working on at this very instance.

I will start of with the Guidelines brought forward by the AiAs' Art & Law workgroup. We have seen that much friction exists between the legal experts and the art experts. Legal experts often have difficulties using the evidence brought forth by the art experts, as a result of the strongly divergent fields of work, but also due to different working methods and protocols (if there are any at all). Consequently, we often see that in legal cases involving art, the case is decided not based on the art-based evidence, but mostly on the rules of law. It is therefore that our workgroup has set up guidelines for making art-based evidence reports, from art-historical insights to technical analyses. I quote from a part of the statement of intent:

*"It is further the intention of the AiA Congress that in those instances where this issue of fact must be resolved by courts or other legal tribunals, the framework which these guidelines establish will enable courts and tribunals to assess the admissibility of expert reports under the applicable rules of evidence and law; and that credence be given not only to the report but also to establish better rules of law and findings of fact in court and judicial proceedings on liability or non-liability, of experts rendering opinions that are inconsistent with, or consistent with, these promulgated guidelines."*

I will not go through all of the guidelines, because you can find them on our website [www.authenticationinart.org](http://www.authenticationinart.org). What I do want to talk about are the consequences of these guidelines for courts of law and for the various art experts.

For art experts, which in the guidelines are named as observers, these guidelines can become an insurance against liability claims. When an expert presents his evidence in an ordered and clearly motivated way, the chances of him being liable will strongly decrease. The law doesn't forbid to make mistakes or hold a different view, the law forbids negligence and fraudulent work. When an expert can account for his findings and the choices he made, he can never be held liable. That is, if he has handled to the best of his capacities and his findings are based on his sincerest beliefs. These findings don't have to be the right ones or the most commonly held. They have, as mentioned before, had to be formed in a proper way and the way they are formed has to be properly documented. This is what the guidelines aim to assist. When an expert formulates his findings and choices in the form provided by the guidelines, it will give the judicial professionals a clear view of what the expert has done. If it is clear what the art expert has done and why, they can never hold the expert liable. The consequence of this working method is that the number of liability suits might decrease, because lawyers see that the chances of success are very slim. And if for any reason a liability suit is filed, the chances of a successful defence will have been raised significantly.

Another important consequence of using these guidelines in a structured manner is the admissibility of art-based evidence. If the expert opinions of art-based experts are built up in a consequent and ordered manner – which makes it clear to the judge or arbiter in what way the opinion or evidence of the expert has been constituted – it enables the judge to use the evidence for his ruling. Some extra explanation on the way judges look at their evidence might be in place here. As said in an English case from 2000

concerning a van Dyck, I quote:

*A judge is not bound by expert opinion. A judge may presume to find that an expert's final opinion is based on illogical or even irrational reasoning and reject it. But a judge should not himself assume an expertise he does not possess.(...) However I may regard my own taste or appreciation of things artistic, I must not presume to have an expert's "eye" for a van Dyck.*

What the judge is saying here is that it is not his job to judge the object, it is his job to judge the experts view of the object, the expert opinion. A judge does this by looking at the internal logic of the opinion and the way it was formed. This is what makes the AiA guidelines so important. If an expert has written his opinion down in a standardized organized way, a judge will be able to look at the internal logic and thus come to his conclusion about the given opinion. The opinion may be the truth, but if a judge thinks it is too chaotic or unclear, he will dismiss the opinion. It is therefore of the utmost importance that it is written down in an orderly manner. The guidelines can therefore be seen as a vital tool in accomplishing this goal. This concludes the first part of my talk, which mainly concerns the art-based expert side of the problem. The second part will be focused on the judicial side of the problem.

As we have seen, judges and other arbiters have a hard time evaluating the cases that revolve around works of art. A more consistent and structured way of delivering by experts only solves one part of the problem. It is not to be expected from a judge that he can understand the many technicalities and specific aspects of art authentication. Consequently, the Authentication in Art Foundation is proud to present the upcoming establishment of an international mediation board with the sole subject of paintings.

The courts worldwide often have difficulties with the highly expert subject matters involved in authentication cases. This often leads to long trials with unsatisfactory outcomes for all parties. Because of this, the demand for an expert mediation board is increasing. The 'Authentication in Art Mediation Board' is to provide legal substitution for the courts through alternative dispute resolution. The mediation board was established to fill the gap mentioned above between the courtrooms and the art industry. We are currently working on the preliminary structures and questions that the establishment brings along. The mediation board will be seated in the City of Peace and Justice, The Hague. As we are still in the preliminary phases of establishment, I will not go into the specifics of the structure and functioning of the board, but I will address the reason why we should have an international mediation board and what ideas and concepts lie behind it.

The mediation board will constitute of art-based experts and legal experts with experience in the field of art and the authentication of art. This will result in swifter and more satisfactory handling of cases, with the possibility of absolute discretion. The parties involved in the mediation board will be a mix of universities, research centers and market players depending on the needs of each case. With the help of the AiA network, over 2500 connections in the professional field will be created, along with a list of independent experts and judges who will handle the actual cases.

Another important factor is to keep in mind is that these experts will be completely independent and funded by the AiA mediation board. This not only guarantees that the final verdict won't be bias but also creates a layer between the private parties and the experts, which may be even more important. As, for example, Professor dr Martin Kemp has said, a major fear of art-based experts is that they will become involved with private parties, which could result in liability on the one hand and on the other being

contractually tied to a certain party, which results in their research being withheld for strategic purposes. By employing the experts directly to the mediation board and not to one of the parties of interest, the experts firstly lose their liability risk and secondly, they are not tied to any party except the board. The mediation board creates a safe working environment for the experts, which means that experts may once again give opinions freely or within the compounds of the board, ensuring an open and safe gathering of evidence and knowledge. Parties that want to submit their works of art, will have to sign a contract which firstly states that whatever the outcome of the mediation, they will uphold the verdict of the board and secondly, they will have to waive their rights of liability suits, except of course in cases of gross negligence. The mediation board is thus enabled to provide a safe and trustworthy work environment and can therefore restore confidence to the somewhat tarnished international art industry.

I hope I have given you a good view of the intentions by AiA concerning the authentication of art works. Furthermore, we aim for a culture where opinions can be given freely again, without the fear of liability suits or things being swept under the carpet. As for the mediation board, please keep visiting our site or subscribe the AiA's Newsletter or other social media. We will make sure to post any developments on the project as well as developments in the field. The mediation board must be up and running at the end of this year. We will start with one test-case that will be published in close collaboration with the international media.

Lastly, we seek for your support. Ideas are always welcome. The success of the AiA mediation board and the continuity of stable art industry is in our own hands. If we want an improved working environment, we have to start straight away and we have to work as a combined field.

On behalf of the Authentication in Art Foundation -  
Milko den Leeuw – The Art Business Conference - London - September 4th 2014

“Authenticity of art is something we are destined by evolution”  
The Art Instinct, Denis Dutton

