

AUTHENTICATION IN ART

Addendum Interview

Recently an auction house in Dorset (UK) was fined by the Magistar Court for offering a fake for sale, as they breached 8 unfair trading regulations, including false advertisement. How will this - to our knowledge - first charge ever of false advertisement for the mere offering of a fake work for sale influence the art world? Furthermore do you see a place for the AiA ADR Tribunal for simmlar cases? (addendum to the interview below d.d. 17-11-2017)

The questions of duties of diligence as between a seller and a buyer, and the associated issue of which party should bear the risk of loss when fake art is sold, is one of the key legal issues involved in these kinds of cases. And different international jurisdictions may view this issue differently. The UK court's imposition of liability on an auction house for false advertising reflects a sensibility that dealers should bear more of the burdens of diligence and possible loss than should buyers.

The AiA ADR/MB Tribunal is being created and constituted with these very kinds of disputes squarely in mind. Particularly with regard to arbitrations, the concept is to enable parties to present their legal claims and legal arguments before arbitrators who understand these issues very well, and to couple their legal decision-making with expert analysis of the facts (*i.e.*, the characteristics of the artwork at issue) that is geared less towards advocating for a particular side, and more towards getting the answer right.



Milko den Leeuw of Authentication in Art interviewing William Charron, Litigator at Pryor Cashman and chair of the AiA Workgroup Art & Law

Could you please give us an introduction of yourself and your work?

I am a litigator and co-chair of Pryor Cashman's Art Law practice where I represent institutional and individual clients in a wide range of art authenticity, title and other matters. I also have extensive experience handling intellectual property litigation involving copyright, trademark, right of publicity, and defamation matters. Additionally, I frequently speak and write on issues impacting the art world, such as authenticity disputes, World War II restitution cases, artist royalty rights, and procedural law issues.

I am an advisory board member of AiA and Chair of its Art & Law Workgroup. I am also a founding board member of the Professional Advisors to the International Art Market (PAIAM) in New York, and a member of the New York City Bar Association's Art Law Committee. I have been named a New York "Super Lawyer" in intellectual property litigation every year since 2013.

The Workgroup Art & Law, over which you preside, is currently helping to develop the AiA Alternative Dispute Resolution Board that is to be launched at the 2018 AiA Congress. AiA followed and analyzed many authenticity lawsuits over the last few years. It has become perfectly clear that there is a need for a specialized tribunal. Where will AiA make the difference?

AiA will help to "flatten the learning curve" that can often accompany art authenticity disputes, thereby hopefully giving greater comfort to the market about the accuracy and reliability of the results. In the U.S., for instance, you see courts openly acknowledge that they are not the appropriate places to decide authenticity disputes – because they are not properly equipped to do so. Courts are reactive bodies that are charged with weighing the evidence that is gathered by the parties and presented to them on an adversarial basis. In the U.S., courts will generally decide whether the evidence presented "more likely than not" supports a conclusion that a work is genuine or fake. But in that context you can see courts struggle to weigh opinions by experts, particularly in cases of connoisseurs. Consequently, you can easily have a dynamic where a court may find that a work may be authentic based on all of the evidence presented, even though a leading connoisseur of the kind of art at issue – or even the artist him/herself – rejects or disavows the work as a fake. The market is made no better off by such outcomes.

In addition, where generalized (i.e., non-specialized) courts are not particularly conversant in art authenticity disputes, the costs and lengths of time to resolve such cases can become unnecessarily inflated as the courts err on the side of allowing parties to conduct discovery exercises that may be cumulative or not really helpful.

The goal of the AiA ADR/MB Tribunal is to empanel decision-makers who are experienced and well-versed in these kinds of cases (i.e., lawyers who regularly practice in the field of art law), and are thus better equipped to evaluate and weigh the evidence presented. That should make the process considerably more efficient, cost-effective, and reliable. Moreover, the Tribunal will employ a relatively unique expert apparatus that is designed to give further reliability and comfort to the decision-making process and the decisions themselves. The Tribunal will have panels of special masters who will aid the arbitrators in fashioning appropriate discovery plans for each particular case. The Tribunal will also have panels of experts among the forensic science and art history/provenance researcher communities who will serve as experts "to the Arbitrators," thereby avoiding many of the problems inherent in a more classic adversarial system where competing experts duel and effectively advocate for their side. The parties as

well as the arbitrators will be able to cross-examine the Tribunal's experts, and the experts will be permitted to revise or supplement their work if any omissions or failings are revealed by such examinations. The goal, again, is to get the answer right, and not merely to give credit to the side that appears to have a stronger presentation relative to its adversary.

The Tribunal will also endeavor to work with the relevant communities of connoisseurs and scholars of particular artists on a case-by-case basis, with full protections and indemnifications, so that those experts will feel comfortable to render their opinions without fear of being sued.

Decisions from the ADR Tribunal will also be reasoned and published (although with party names concealed) in order to provide transparency and further comfort to the market that the result reached is sound and correct.

Do you think there will be positive impact with a specialized AiA ADR/MB Board on art cases?

I think the ADR/MB Tribunal could be game-changing for art authenticity disputes. Because parties must agree in their contracts to arbitrate or mediate such disputes, it will be important to educate and incentivize major institutions to include "AiA" arbitration and/or mediation provisions in their standard contracts. We look forward to approaching and working with institutions and associations such as artist foundations, auction houses, dealers, appraisers, consultants and professional advisors, and museums. The objective is to make "AiA Arbitration/Mediation" a standard art contract term and a market norm, thereby dramatically improving the efficiency of resolution of these types of specialized disputes.

At this very moment the AiA Art & Law Workgroup is preparing the rules of procedure and several requirements for having the AiA ADR/MB Board up and working. Technical innovations will play an important role. It seems to me that the worlds of many modern IT applications are coming together. Do you see that we make there an important step forward in making lawsuits also learning moments for the art community?

The Workgroup has focused on two primary audiences: litigating parties, and the art community at large, including potential future dealers and buyers of challenged art. We think the publication of decisions, coupled with the rigorous and institutionally unbiased analyses of the Tribunal's experts, should significantly aid the knowledge of the art community.

In multiple legal disputes, for example in the cases of the Knoedler Gallery forgeries, we have seen conflicts of interests play a role, especially when concerning the experts. How can/will the AiA ADR/MB Board prevent these conflicts of interests in its procedures?

By having special masters and experts to the "Tribunal," rather than having a competition among advocating experts, potential conflicts of interest are substantially reduced if not eliminated outright. The AiA ADR/MB environment should promote candor by and among experts and equally promote an objective of reaching the right result.

William, thank you so much for your time and patience in answering questions for AiA.

Oliver Spapens, thank you for your assistance.

Congress Program

The Authentication in Art Foundation announces the Congress Program of
the Authentication in Art Congress 2018 'Towards Solutions'.

To see the Program please visit:

<http://authenticationinart.org/congress-2018/congress-program-2018/>

Over the course of the coming week more details will be published on the speakers and the content of their presentations.

The AiA Congress will be held on Thursday 7th and Friday 8th of June 2018 at the Louwman Museum in The Hague, The Netherlands. The Topics of the 2018 AiA Congress will be: Technical Art History, The Center of it all: The Object and the AiA/NAI Alternative Dispute Resolution Board (Art & Law). The registration for the Congress will open mid-November.

Call For Papers

There are still two submitted paper slots available. AiA has extended the paper submission deadline for these slots to 30 November 2017.

The proposal needs to be 500–700 words (up to 3000 characters) for oral presentations, to be given at the AiA Congress. The congress language is English.

Please submit your proposal to info@authenticationinart.org

For more information please visit:

<http://authenticationinart.org/congress-2018/call-for-papers/>

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