



AiA Art News-service



Five Legal Cases Changing the Art Market as We Know It

How is the law changing the art market and what are the key problems to watch for in 2016? Here we've considered five of the most significant issues for collectors and industry professionals alike.

ARTSY EDITORIAL
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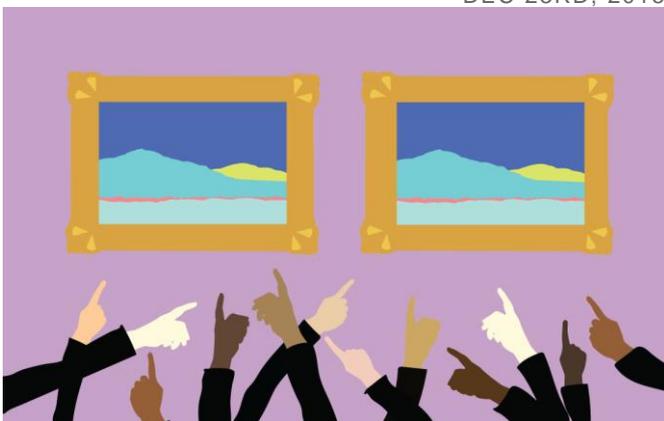


Illustration by Lydia Epp Schmidt for Artsy.

Will legislation bring authenticators back?

Opinions of authenticity are crucial to the art market— purchasers want to know they're buying the genuine article and everyone benefits from weeding out fakes. But experts often keep mum for fear of being sued. It's not so much a lawsuit's outcome they fear (they rarely lose), it's that the costs of a legal defense are astronomical: the Andy Warhol Foundation spent \$7 million vindicating itself in one lawsuit before shuttering its authentication board.

To remedy the crisis, the New York City Bar Association drafted legislation to protect experts by requiring the plaintiff to pay the authenticator's legal fees if the plaintiff lost in court. The proposed law also made it harder for the plaintiff to prevail. It proposed requiring plaintiffs to prove their cases, not by the usual "preponderance of evidence" (needing 51% on his or her side) required in civil cases, but by the more daunting standard of "clear and convincing evidence."

That bill failed in 2014 because the New York State Trial Lawyers Association opposed it. "They were concerned about any obstacles to filing lawsuits," says Dean Nicyper, who's leading the bar association's effort. So it was redrafted. Gone were the heightened standard of proof and the mandate that a losing plaintiff pay the expert's legal fees; such fee-shifting would now be up to the judge. But in 2015 this revised bill also failed to pass, because the staff of then-Speaker Sheldon Silver objected. Nicyper is optimistic about the revised bill's chances in 2016. "We have new leadership," he notes; Silver was recently found guilty on federal corruption charges.

THE TAKEAWAY:

If the bill passes in its present form, authenticators still face the risk of paying their own legal fees, even if they win, which is what sidelined them to begin with. Whether the *possibility* that a losing plaintiff will have to pay their fees will provide enough reassurance for authenticators to once again re-enter the market remains to be seen.

A potential game-changer for “sophisticated” purchasers

Do wealthy collectors with art advisors have a duty to investigate authenticity and research provenance, or can they do what they’ve always done and rely on what a reputable gallery tells them?

That issue will be decided in the trial of a high-profile lawsuit against the Knoedler Gallery and its former director Ann Freedman scheduled to begin on January 25th. They are alleged to have knowingly sold some \$60 million in fake Abstract Expressionist paintings in a massive scandal that shook the art world. It’s undisputed that Knoedler sold fakes, but the defendants deny wrongdoing; they say they too were duped.

Knoedler and Freedman contend that since the collectors—Domenico and Eleanore De Sole—are sophisticated, they were obliged to perform their own due diligence and could have learned the works were fake with minimal effort. (Domenico De Sole later became chairman at Sotheby’s.)

The De Soles counter that because of Knoedler’s prestige, they were justified in relying on what Freedman told them, which included what proved to be a fabricated provenance. In October, Manhattan federal judge Paul Gardephe, in denying the defendants’ motions to dismiss the lawsuits, found the collectors’ argument credible: “Plaintiffs do not operate art galleries...[T]hey are consumers who relied on representations made by one of the most reputable...galleries in New York City.” But because there was evidence supporting both sides, Gardephe ruled this was ultimately a question for the jury.

THE TAKEAWAY:

If the jury decides against the De Soles, collectors may be burdened with new obligations to investigate authenticity, overturning long-standing industry practice.



Illustration by Lydia Epp Schmidt for Artsy.

The specter of Cady Noland

Under the Visual Artists Rights Act an artist can take his or her name off a work that's been modified in a way that's "prejudicial" to the artist's reputation. But as dealer Marc Jancou discovered, without an artist's name attached, an artwork can lose all value overnight.

Jancou consigned Cady Noland's silkscreen-on-aluminum *Cowboys Milking* (1990) to Sotheby's in 2011. Sotheby's withdrew it from the scheduled auction when Noland, invoking VARA, said that because it was damaged she no longer considered the work hers. When Jancou sued Sotheby's and Noland, the court dismissed the case because the consignment contract permitted Sotheby's to withdraw a work if it doubted its attribution, and Noland had said it could no longer be attributed to her. *Cowboys Milking* suddenly had no resale value.

The court didn't address whether Noland had correctly invoked VARA—under that law, an artist can't disclaim a work just because it's been conserved, for example. And there's little case law defining VARA's parameters.

That may change with a lawsuit filed in Manhattan federal court in June.

The suit concerns a sculpture by Noland, *Log Cabin* (1990), which Scott Mueller purchased from the Galerie Michael Janssen for \$1.4 million. Under the sales contract, Mueller could demand Janssen buy back the work if Noland refused to acknowledge it or invoked her VARA rights (thus revoking approval of the work) within a year of the sale. Mueller says he's entitled to get his money back because that's exactly what Noland did. Shortly after the sale Noland said that she “does not approve of the work” and sent Mueller a fax stating, “This is not an artwork,” according to Mueller's complaint. A Janssen spokesperson, though, says Noland “did not disavow her work,” she merely wanted it “depreciated.”

THE TAKEAWAY:

What's a legitimate disavowal under VARA? Who determines whether modifications are “prejudicial” to an artist's reputation? The court may provide collectors much-needed clarity for evaluating the risk of total loss when an artwork's condition has changed.

A gallery isn't obliged to act in the buyer's interest.

It's a cautionary tale for any collector who mistakes a dealer's longtime friendship as a promise to act in the collector's interest.

In a bitter dispute involving four lawsuits, Richard McKenzie alleged that New York's Forum Gallery and its owners, Robert and Cheryl Fishko, orally agreed to sell him art at terms favorable to him: the works by artists Forum handled would be sold to him at a 20% discount, and works Forum found in the secondary market would be sold at cost plus a 5% commission. Instead,

McKenzie alleged, they sold him some \$11.8 million of art at much higher rates, breaching the agreement.

McKenzie also claimed he had a special, fiduciary relationship with the defendants, including trips to Europe, that required them to act in his best interests. The Fishkos “manufactured this personal relationship...[to] foster a false sense of trust...that a personal friend would not take advantage of me,” his papers say. The defendants breached their fiduciary duties, he claimed, when they acted in their interests instead of his.

In February Manhattan federal judge Laura Taylor Swain ruled against him on both claims. The unwritten agreement was too vague to be called a contract, she said, and “even a longstanding relationship of 50 years is insufficient to establish a fiduciary relationship.”

THE TAKEAWAY:

Put all agreements in writing. Friendship doesn't create a fiduciary relationship between dealer and client. A gallery ordinarily isn't obligated to act in the buyer's interest.



Illustration by Lydia Epp Schmidt for Artsy.

Art advisors and conflicts of interest

In the notoriously opaque art market, art advisors are sometimes paid by both sides, with buyer or seller none the wiser. That's what Michael Schulhof, former Sony Corporation of America chief, is alleging in his lawsuit against art advisor Lisa Jacobs. Schulhof alleges that Jacobs committed fraud and breach of contract when she was asked to find a buyer for a Jean-Michel Basquiat painting owned by his mother, Hannelore Schulhof, who later died in 2012. Jacobs denies the allegations.

According to the complaint, Jacobs told Mrs. Schulhof the best price she could get was \$5.5 million when in fact she had found someone who would pay \$6.5 million. Mrs. Schulhof paid Jacobs a \$50,000 fee on the sale, the complaint continues, but Jacobs structured the sale to get \$1 million from the buyer as well.

Jacobs told Mrs. Schulhof she didn't want to reveal the purchaser's name, the complaint says, so Jacobs requested the transaction be structured so she would buy the Basquiat from Mrs. Schulhof and then sell it to the buyer herself. Mrs. Schulhof agreed. The buyer wired Jacobs \$6.5 million, and

Jacobs then paid Mrs. Schulhof \$5.5 million, pocketing the difference, the complaint charges. The court papers indicate the discrepancy was discovered only when an assistant district attorney subpoenaed Jacobs's bank records as part of a routine examination of everyone who had access to art stolen from the Schulhof home. (Jacobs had no involvement in the theft.)

The New York State judge in the case said Jacobs's actions, if proved, were so egregious she might have to pay substantial punitive damages.

Such conflicts of interest—hired by one side but paid by both—are more common than one might think. In one of the Knoedler lawsuits, for example, John Howard paid \$4 million for a fake Willem de Kooning. Howard's art advisor Jaime Frankfurt handled the transaction. Knoedler's invoice to Frankfurt required him to pass on only \$3.5 million of Howard's money, so Knoedler effectively paid Frankfurt a \$500,000 commission. (Frankfurt refunded Howard's money and denied wrongdoing.)

THE TAKEAWAY:

Buyers and sellers would do well to contract with their art advisors to disclose all documents related to a transaction.

—Laura Gilbert