

AUTHENTICATION IN ART



Milko den Leeuw of Authentication in Art interviewing Ronald D. Spencer, Chairman of the Art Law Group at the law firm of Carter Ledyard & Milburn LLP in New York City.

Can you please give a short introduction of yourself?

Mr. Spencer is Chairman and Chief Executive Officer of The Pollock-Krasner Foundation, the largest American private foundation devoted solely to aiding needy and worthy visual artists. He has also been legal counsel to several committees of art authentication experts, such as The Pollock-Krasner Authentication Board and the Andy Warhol Art Authentication Board. He is expert in the legal aspects of art authentication issues, advising, collectors, buyers and sellers of art, as well as art scholars and authors of catalogues raisonnés such as the Yves Tanguy catalog raisonné project. He has edited and authored *The Expert Versus The Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford University Press 2004; co-published in Spanish by Marcial Pons, Madrid and the Salvador Dali Foundation, Figueres, Spain 2010). Mr. Spencer is the Editor of *Spencer's Art Law Journal*, published on *Artnet* and *The Art Newspaper*, dealing with legal issues of practical significance for collectors, dealers, scholars and the art-minded public. Mr. Spencer is co-author of an essay, *Museums and Museum Curators: Caught in the Cross-Hairs of Authenticity Disputes* published in *The Legal Guide for Museum Professionals* (Rowan & Littlefield, 2015). He was co-director of a European museum symposium on authentication in Cadaques, Spain (June 2011) sponsored by the Salvador Dali Foundation.

Over the last decade we have seen an increasing amount of litigation involving the authenticity of art works. Large scale disputes, such as Thwaytes vs Sotheby's and the various Knoedler trials, are becoming public, but also 'smaller' cases on authenticity seem to have increased. What do you think is causing this increasing amount of litigation? Is it solely the result of increased values of artworks or is there more to this?

Increased litigation over authenticity in the visual arts is not a result "solely" or even, primarily, of increased prices. The issue of authenticity has always been a major issue, but most often the buyer would rely on the expertise/opinion of the selling gallery. As buyers and their advisors have become more sophisticated, buyers want greater certainty than can be had simply from the seller's contractual warranty. In general, the art world has become more aware of authenticity issues and from there litigation will tend to follow.

During these major disputes we see the important role of expert-witnesses. For example in one of the Knoedler cases we saw that, self-assigned, 'experts' were attacking each other's competence. Evaluating the validity of expert's statements was and is extremely difficult for judges and juries because of the lack of transparency and standardization. How do you think courts should evaluate evidence in these cases?

At least in the U.S., courts do not dig deeply into the qualification of an art expert in the works of a particular artist. Once the judge decides the witness is an "expert", generally courts don't decide whether one expert is more qualified than another. The court's focus is then on support for the expert's opinion.

You have written extensively on the protection of experts such as writers of catalogue raisonnés, artist estates and other scholars. Litigation has led to many experts refusing to provide opinions and artists estates closing down their authentication services. The current reluctance is not only hurting the art market, but research and scholarship as a whole. What do you think needs to be done to protect these experts from litigation or, at a bare minimum, provide them with enough reassurance that they feel comfortable issuing opinions again?

General legislation reducing liability for experts is not a useful avenue to protect these art experts, but experts can more easily protect themselves, on an individual basis, by having the party asking for the expert opinion sign a "no-sue agreement" and, the same party should also agree to indemnify the expert if a third party sues the expert. A no-sue agreement, plus an indemnification for third party claims should substantially reduce the expert's liability.

The market and academic world has always been related in a stressful relation to each other. Time, financial resources and access are partly covered by scholars working for art market parties. But the situation is far from ideal or transparent as we learned. What do you see as an ideal form to approach this relation?

The dealer requesting the expert opinion needs to contractually indemnify (similar to insurance) the expert from third party claims based on the expert's opinion.

During the Authentication in Art 2018 Congress the Court of Arbitration for Art (CAfA) was launched. There are two important distinguishing features between CAfA and regular courts. The first being that arbitrators will have a background in art law. Secondly that the arbiters will have access to a pool of experts. Experts from this pool will serve as independent advisors and provide them with assistance during the evaluation of evidence. Do you think that this approach will be more efficient in leading to satisfactory verdicts?

It is useful (but not necessary) that arbitrators have a background in art law. More important, is the pool of experts who will serve as "independent advisors". If the advisor pool could be made to work, it could be very helpful. It might be difficult to get experts to serve in the pool (the only two motivating factors would be money and prestige). But, assuming such a pool could be formed, this structure could tend to produce better results than the current litigation process where each side picks their own experts.

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

Oliver, thank you for your assistance.

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