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*Legal Problems and Issues Relating to  
Authentication, Attribution and Provenance*

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*Introduction*

- The authentication and attribution of a work of art are critical to the valuation of the work. They should be the object of carefully crafted representations and warranties in any well-considered contract for the purchase and sale of art.
- They are also a source of potential liability both to a seller who breaches these representations and warranties and to an expert who is responsible for a misattribution.
- Until recently, the process of authentication and attribution have not been critically examined in a way that is meaningful both to lawyers and to art market professionals. This presentation is the result of my review of an important recently published book in the field of art law and of my own experience as a lawyer practicing in the field. *Copy of review attached.*
- Note: it's always a sobering experience to subject your recent advice to clients to the acid test of a newly-released book in

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which some of the world's leading experts definitively consider the kinds of matters you've recently handled.

- The book is titled, *The Expert versus the Object--Judging Fakes and False Attributions in the Visual Arts*, edited by Ronald D. Spencer.<sup>2</sup>
- The book is important because lawyers and courts now perform a crucial function in the art world in avoiding and in resolving disputes regarding the authenticity and attribution of works of art. In so doing, lawyers and judges would be remiss if they failed to understand better the concerns and perspectives of the collectors, dealers, curators, art historians and auction houses that constitute the art market. By the same token, art market professionals would be well-advised to understand better the legal framework within which they operate, in order to avoid any legal liability that can result from the attribution process.
- The book considers in depth two issues that are crucial to the valuation of a work of art.
- **Authentication**—Is the work of art by the named artist? If not, is it (i) a work of art created with intent to deceive (that is, a fake) or (ii) simply misattributed?
- P.S.: There is such a thing as a real fake.
- **Attribution (and Authorship)**—Who created the work?
  - If the identity of the author is certain, the work is said to be a “Gainsborough”. If the author’s identity is less certain the work is attributed, by degrees, “to Gainsborough” or “to Gainsborough-Dupont” or “School of the Artist.”

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<sup>2</sup> Oxford University Press, Inc., New York, N.Y., 2004, 241 pages. Ronald Spencer is counsel to Carter Ledyard & Millburn, LLP, New York, N.Y. and represents, among others, the Andy Warhol Art Authentication Board and The Pollock—Krasner Foundation.

- The terms “authentication” and “attribution” are sometimes used interchangeably. For example, Spencer writes: “Authentication is the process by which art experts—academic or independent art historians, museum or collection curators, art dealers or auction house experts—attribute a work of visual art to a particular artist or specific culture or era.”
- The book includes 13 essays by leading art experts, which examine “the history, nature and practical application of authentication and connoisseurship [and] are intended to provide the legal community with ... industry knowledge” of the authentication process from the connoisseur’s perspective.

### *Authentication and Connoisseurship*

- Mr. Spencer writes that “by connoisseurship we mean that sensitivity of visual perception, historical training, technical awareness, and empirical experience needed by the expert to attribute the object.”
- According to Theodore Stebbins, Jr., curator of American art at Harvard’s Fogg Museum, “The art market is tricky, unorganized and unregulated and in this market it pays very well for people to sell objects that aren’t what they purport to be. An American modernist picture that cost \$2,500 in the 1960s might be valued at \$3 million or \$5 million today. The only thing that stands between the dealers and the collectors are some of the professors and curators who are willing to give opinions.” *Copy of Harvard Magazine article attached.*
- In short, the expert, *i.e.*, the connoisseur, is both judge and jury of art historical truth and its offspring, market value. And yet the expertise and judgment that the connoisseur brings to bear can be inherently subjective and subject to revision and dispute.
- Francis V. O’Connor, an art historian, discusses the three major tools used by experts in authenticating a work of art: (i) provenance (the historical documentation that, ideally, traces the ownership of an object from the time it leaves the artist’s

studio to the present owner); (ii) visual inspection by the connoisseur; and (iii) scientific analysis. To Mr. O'Connor, the connoisseur can best evaluate an artist's *form* (the "characteristics and strategies that comprise an artist's visual temperament"), *facture* (the "way the artist's hand expresses its possessor's temperament"); and *style* (something characteristic of but less fundamental to the work, such as the lost paint on ancient sculpture or the original color of the Sistine Chapel ceiling). Too ephemeral? Not after Mr. O'Connor explains the technical differences between fake and real Goyas and Pollocks in a way that makes the differences seem obvious. *Photos and text attached.* (Note: The full page image is not a close-up of the fake Pollock but a copy of a painting done by my daughter in 1<sup>st</sup> grade.)

- Mr. Stebbins writes that, "Provenance or purported provenance—the former whereabouts of an object—is often of little value, proving only that a thing was not made yesterday. A bad piece can have a good provenance, and documents attesting to who owned what can be faked. Technical analysis can usefully probe the physical makeup of objects with x-ray, infrared, or ultraviolet examination, for instance, and detect all sorts of repairs and subsurface peculiarities." But Mr. Stebbins believes that technical analysis leads to definitive conclusions less often than not. The best way to judge right and wrong, he asserts, is "educated, experienced, and very close looking—connoisseurship."
- Peter Sutton, a museum specialist, continues with a discussion of the evolution of Rembrandt scholarship and how, over the years, the size of the accepted *oeuvre* has varied between 600 and 45 paintings.
- Max Friedlander (a great 19<sup>th</sup> century art historian) observes that, in examining forgeries, "the connoisseur becomes a criminologist" and that "confusion of styles and disharmony are typical of a forgery even more than of a copy."
- John Tancock, of Sotheby's, Michael Findlay, of Acquavella Galleries, and Peter Kraus, an antiquarian book dealer, evaluate

the role and evolution of the *catalogue raisonne*, which, one concludes, can purport to be authoritative without necessarily being definitive.

- (Sante Fe's own) Eugene Thaw emphasizes that, in the long term, the art market has a built-in "self-correcting" mechanism as each generation of scholars examines and reexamines attributions and the evidence on which they are based.
- Other essays relate to signature identification (upon which too much emphasis can be placed by courts; after all, a signature can be more easily forged than an entire painting); technical analysis (dendrochronology!) and conservation of contemporary works (sculptural installations made with dead fish tend to become maggot-infested).

#### *Authentication, Attribution and the Law*

- What kinds of legal claims may result from a (mis) attribution?
- Causes of action most commonly asserted against art market professionals who authenticate works of visual art:
  - failure to exercise reasonable care
  - breach of contract (including breach of express and implied warranties (UCC))
  - negligent misrepresentation
  - product disparagement
  - false advertising
  - defamation

Real World Example 1: *The Putative Gainsborough*. US client inherited a "Gainsborough" owned by her family for generations. She took it to one of the major auction houses for examination with a view to possible consignment. The auction house expert reviewed the standard reference work on Gainsborough, in which the painting did not appear, and attributed the work to "Gainsborough-Dupont," a nephew of Gainsborough to whom paintings "in the style of" Gainsborough are commonly attributed.

The auction estimate dropped from \$300,000 to \$30,000. The Client signed a consignment agreement, with customary blanket disclaimers of liability for misattribution and authenticity. The painting was sold at auction to a UK dealer who resold the painting in the UK as a long lost colonial treasure by Gainsborough for \$300,000. The Client's relative in the UK read about the sale in the UK press and notified the Client. *Copies of standard Auction House Consignment Agreements and Terms and Conditions attached.*

- Were there possible claims by the Client against the auction house?
- Tort claims?
- “Negligent misrepresentation?” Requires a duty to the consignor by the auction house. Duty created by contractual privity created by execution of consignment agreement.
- Negligence? Hard to establish. Was the auction house attribution obviously incorrect? (No). Was the UK dealer obviously correct? (No). Was the UK dealer less than forthright? (No comment). Did the auction house satisfy its duty of care simply by referring to the standard reference work or could it/should it have done more to verify the attribution? Would technical testing have helped?
- Breach of contract? Contract claims seem to be foreclosed by enforceable disclaimers in the auction house consignment agreement.

My sense is that given the high volume of objects considered by the major auction houses for consignment, on the whole, their experts do a very good job. On the other hand, a highly-regarded restorer that I know says “they make those mistakes all the time.”

Real World Example 2: The “Faux van Gogh”—a Real Fake.

A Texas-based promoter purchased for less than \$10,000 a “pastiche” in the style of van Gogh, that might have been “of the period.” (No testing was done to determine the date of the canvas, the paint or the frame). The painting bore the forged signature “Vincent.” On the basis of a false provenance and false attributions, the promoter sold nearly \$1 million in partial interests in the painting to investors. *Copy of redacted memorandum attached.*

The sales pitch was that the painting was an authentic but undiscovered van Gogh and that a purchaser had committed to purchase the painting for more than \$20 million, subject only to authentication, which would surely follow. The scheme unraveled when attribution was denied by The Van Gogh Museum in Holland, the definitive expert on van Gogh’s *oeuvre*. The promoter was subsequently convicted. *See, United States v. Holbert*, Case No. 04-cr-00025-ALL (N.D. Tex. Filed Mar. 25, 2004). The Client, a trustee for the bankruptcy estate of one of the investors, was left to recover what he could by selling the painting. The Client’s attempts to sell the painting, including an auction sale on eBay including a court-approved disclaimer, yielded no takers.

The “Court-Approved Disclaimer Regarding Lack of Authenticity and Attribution of Forged Painting” is an artful and instructive document. It states in part as follows:

- The van Gogh Museum (Amsterdam, Holland), the definitive authority on van Gogh, wrote in April 2002, that “in our opinion” the Painting “is not to be attributed to the artist Vincent van Gogh. The differences in style between this work and the oeuvre of van Gogh support our opinion.” A leading art appraiser wrote in April 2004 that “The [P]ainting cannot be considered to be an authentic work by the hand of Vincent van Gogh, nor can it be sold as such without authorization from the van Gogh authentication panel in Amsterdam. It is, in our opinion, a *pastiche* work, composed of references to elements in other works by [van Gogh].”

- The Disclaimer also provided that, pursuant to court order, the “Disclaimer must be (i) given to any and all persons purchasing, or considering a purchase of the Painting or any interest therein in connection with the Sale or otherwise, and (ii) prominently displayed and included in any advertising or marketing efforts of or with respect to the Painting in connection with the Sale or otherwise.” *Copies of a Photo of the Fake van Gogh, the eBay Listing and the Court-Approved Disclaimer are attached.*

Several experts objected to the proposed sale of the fake, on the grounds that it should not be reintroduced into the stream of commerce and potentially resold in the future by a future owner who may ignore the disclaimer. They suggested that at least we should paint a permanent disclaimer on the painting in white lead (which can be read by x-rays through overpaint).

At the time (and at present), there is little legal guidance as to how one might sell a fake without liability. Some guidance was given by the following cases.

- *Stein*. The New York Attorney General was denied its motion to enjoin the sale by a gallery of 68 paintings by David Stein. Stein was a convicted counterfeiter of post-impressionist paintings. The Gallery promoted the sale as “Forgeries by Stein” and “Master Forger David Stein presents Braque, Klee, Miro, Chagall, Matisse, Picasso.” The paintings were signed by Stein and were sold as being “in the style of” the various artists. *State v. Wright Hepburn Webster Gallery, Ltd.*, 315 N.Y.S.2d 661 (N.Y. Sup. Sept. 28, 1970), *aff’d*, 323 N.Y.S.2d 389 (N.Y.A.D. 1 Dep’t June 24, 1971).
- *Dali*. Sales of forged Dali prints were allowed by the U.S. Bankruptcy Court in Hawaii so long as the prints bore a tiny disclaimer. Allegedly original Dali lithographs were in reality “inexpensive calendar quality photomechanical reproductions.” Fraud sustained by victims was conservatively estimated to total approximately \$50 million. *United States v. Center Art Galleries—Hawaii, Inc.*, 991 F. 2d 804 (9<sup>th</sup> Cir. 1993), *cert.*

*denied*, 511 U.S. 1032 (1994), *denial of habeas corpus aff'd sub nom.*, *United States v. Mett*, 65 F.3d 1531 (9<sup>th</sup> Cir. 1995).

- *Diebenkorn*. In the Summer of 2004, three individuals were sentenced in a California court on various counts of money laundering, and mail and wire fraud in connection with their sale on eBay of a fake painting that they claimed to be the work of the abstract artist Richard Diebenkorn. The individuals utilized more than 40 online aliases on eBay to falsely drive up the bidding on the painting, which was sold to a Dutch purchaser for approximately \$135,000. The painting looked like a Diebenkorn and bore the forged initials “RD52” (the initials used by Diebenkorn). The painting was bought in a junk shop and may have been made by an art student “in the style of” Diebenkorn.” Absent the forged initials, and shill bidding, a sale of the painting would have been unobjectionable. *United States v. Fetterman, et al.*, 01-cr-00105-LKK-ALL (D. Cal. Filed March 8, 2001).

### Real World Example 3: A Fresh Cache of Original Dali's

Dali prints are notoriously unreliable, as, towards the end of his career, the artist simply signed blank sheets of paper, which turned up on the market as unauthorized prints. Our client became aware of an estate sale of a significant private collection of original Dali bronzes, prints and oils, which had not previously been seen on the market. Any qualms about authenticity were eliminated by a thorough appraisal of the collection by a leading Sante Fe-based appraiser. A more vexing concern was the absence of any meaningful provenance, as all of the works had been acquired by the decedent from one U.S.-based dealer and there was virtually no record or documentary evidence (such as bills of sale) of prior ownership. One issue was whether the Estate would have given an unqualified representation as to title, or insist on a “knowledge” exception regarding title. The deal ultimately fell apart for other reasons.

## *Authentication and the Courts*

What happens when the experts disagree?

- Spencer writes that: “Where connoisseurs disagree judges sometimes look beyond the credibility of the connoisseur in the art world to such factors as the degree of care and time spent by the expert in analyzing the work in question, whether the expert looked at photographs or made a visual examination of the work or some other methodology or procedural standard. In addition, courts have relied to a much greater extent than the art world, on signature evidence.”
- *The Calder case.* A group of art dealers bought what they believed was an Alexander Calder mobile, Rio Nero. After unsuccessfully trying to make it hang properly, they decided it was a fake, and sued the seller to recover their \$500,000 purchase price. The seller could establish a flawless provenance, which favored a finding of authenticity. Nevertheless, the dealers were convinced that somewhere along the line a fake Rio Nero had been substituted for the real one. At trial, connoisseurship evidence was introduced.

The buyers produced the testimony of Klaus Perls, Calder’s exclusive American dealer for 20 years and a recognized expert, to establish that the mobile was a forgery. The court found that, “Perls examined the mobile for a maximum of ten minutes and looked at it again for a ‘couple of minutes’ before his deposition, and on both occasions Perl’s examination was limited to comparing a few of the mobile’s blades to his gallery’s archival photograph.” At trial, Perls testified that it would be “very difficult for someone who is not as familiar as I am with Calder mobiles to authenticate a work using the archival photograph. Nevertheless, the archival photograph makes the exact shape of the blade ‘quite clear.’” The court was more favorably impressed by the care and time taken by seller’s expert, Linda Silverman, a dealer in Impressionist and 20<sup>th</sup> century art who had formerly been Director of Sotheby’s Contemporary Art Department. (Perls was said to have sold “hundreds” of Calder paintings and sculptures and seen “several

thousand” Calders. Silverman had examined “hundreds and hundreds” of Calders and appraised or authenticated approximately 50.) Silverman examined the mobile for an hour and a half, “checking quality of paint, connecting rods, and every blade, joint, and wire meticulously,” refusing to rely on the archival photograph. Of great importance to the court was Silverman’s uncontradicted testimony that the signature was “absolutely accurate.” The court noted that “although Perls’ credentials for an opinion ... are vastly superior to Silverman’s,” Perls “conspicuously did not address the signature.” The judge concluded that the mobile was not a forgery. The seller kept the purchase price and the mobile reportedly now sits in a dealer’s basement, excluded from the *catalogue raisonne*. *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.C. Cir. 1993) *aff’d without opinion*, 36 F.3d 127 (D.C. Cir. 1994).

- *Recent Controversies – Discovery of 32 Drip Paintings Alleged to be the Works of Jackson Pollock*. In a New York Times article published in May of this year, it was announced that in 2003, 32 drip paintings, alleged to be the works of Jackson Pollock, were discovered by Alex Matter, the son of the graphic artist and photographer Herbert Matter and the painter Mercedes Matter, who were good friends of Pollock and his wife, the artist Lee Krasner. Since the news of the works’ existence was announced, a dispute has arisen among the leading Pollock experts, including primarily, Eugene Thaw and Ellen Landau, a professor at Case Western Reserve University in Cleveland and the author of a well-regarded 1989 Pollock biography. Dr. Landau believes the works to be authentic, citing the relationship between Pollock and Herbert Matter, and other factors, including that many of the paintings are painted on artists’ drawing boards – the type that Dr. Landau had found in Pollock’s studio on Long Island. Mr. Thaw argues that the artists’ boards work against a Pollock attribution, noting among other things, that none of Pollock’s other works were on such boards. The dispute has surprised some observers given that Dr. Landau, Mr. Thaw, Mr. O’Connor and others worked as a team for several years on the Pollock-Krasner Authentication Board. No lawsuit has yet been commenced, but it appears that

should one be filed, there will be a battle of the experts in connection with these works. Until then, the authenticity of the 32 drip paintings will remain unresolved. *Copy of New York Times article attached.*

### *Restoration*

- A Buyer bought a painting from Christies in London described in the auction catalogue as by Egon Schiele. Six years later she sued Christies for her purchase price claiming the painting was a forgery. The court agreed. The court was satisfied that the original painting (i.e., the underpainting) was by Schiele. However, the court found that 94% of the surface area had been overpainted. Christies argued that no amount of overpainting could make the painting a forgery if the overpainter followed the design of the original artist and reproduced the original colors as best he could. However, the restorer had overpainted Schiele's mauve monogram, an entwined monogram "ES" in black and then added blue E and S initials in opposite corners of the painting. The court held that the restorer intended to deceive the viewer into thinking that the new initials were painted by Schiele and thus that the painting was a forgery. *De Balkany v. Christie Manson Woods Limited*, High Court of Justice, Queens Bench Division D no. 1089.
- Real World Example 4. Client bought an American Old Master painting from a prestigious New York gallery, then tried to sell it to the White House. The White House restorer subjected the painting to technical analysis and concluded that the painting had been so heavily restored and overpainted that it was impossible to agree with the gallery's attribution. The matter was settled privately between the gallery and the collector.

### *Expert Liability (appraisers, auction houses)*

- Mr. Stebbins writes that the "art expert who acts responsibly and honestly is generally protected when giving an opinion, and courts increasingly recognize that this serves the public interest." He observes, however, that "today's art experts seem

just as nervous about potential liability as their predecessors in the early 1960s, and their fear ... is not entirely unreasonable.”

- “I ask people to sign a disclaimer saying that they’ve asked for an opinion, they realize it’s just an opinion, and they promise not to sue me or Harvard as a result of it.”
- *Lariviere v. Thaw, et al.* – The court held that the owner of a painting, alleged to be by Jackson Pollock, could not sue a group of experts who denied the attribution and excluded the painting from the *catalogue raisonne*. The experts formed an authentication board (the Pollock-Krasner Authentication Board, Inc.) to render opinions on the authenticity of works said to be by Pollock. The owner had signed the Board’s application, which contained an agreement not to sue the experts for their opinion (or refusal to opine). The court also ordered the plaintiff to pay the costs of the experts’ legal defense and ordered financial sanctions against the plaintiff and his lawyer for bringing a frivolous claim. *Lariviere v. Thaw*, Index No. 100627/99, slip op. 50000(U), 2000 WL 33965732 (N.Y. Sup. Ct. June 26, 2000).

#### *Droit moral (The authoritative non-expert)*

French law confers on a single person the right to authenticate works by the artist. The holder of the right, although typically an artist’s heir or dealer, may not be the best qualified expert. Suffice it to say, the *droit moral* has been the source of much confusion and controversy in the art world.

#### *Provenance*

- Provenance is the third critical component of value and source of potential liability.
- Provenance—Who owned it, where did it come from, what is the exhibition history, what is the chain of title? In this discussion, provenance has been treated as an indicium of attribution. However, provenance is properly treated as a separate subject(s) in its own right.

