

REPORT ON LEGISLATION BY THE ART LAW COMMITTEE

**A.107
S.7536**

**M. of A. L. Rosenthal
Sen. Serrano**

AN ACT to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship both of works of fine art and visual art multiples.

THIS BILL IS APPROVED

This report is respectfully submitted by the Art Law Committee of the New York City Bar Association in support of A.107/S.7536 (the “Bill”), which would restore integrity to art transactions conducted in New York by re-incentivizing authenticators to render independent, good-faith opinions about the authenticity, attribution, and authorship of works of fine art. The Association is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the Art Law Committee address legal issues relating to works of art.

The Committee supports the Bill because it addresses certain deficiencies in provisions of the New York Arts and Cultural Affairs Law (“NYACAL”): namely, the absence of protections under the law for the valuable work of authenticators in rendering independent, good-faith opinions about the authenticity, attribution and authorship of works of fine art and of visual art multiples. Specifically, the Bill in Article 11 adds “Authenticator” as a defined term, including within its coverage authors of catalogues raisonné or other scholarly texts as well as other persons or entities recognized in the visual arts community as having expertise regarding the artist, work of fine art, or visual art multiple with respect to which the authenticator renders an opinion as to authenticity, attribution or authorship. “Authenticator” also includes persons or entities recognized in the visual arts or scientific community who have expertise in uncovering facts (such as forensic scientists) that serve as a direct basis for an authenticity or authorship opinion regarding a work of fine art or visual art multiple. The definition of “authenticator” expressly excludes any person or entity with a financial interest in the work of fine art or visual art multiple being evaluated, other than to be compensated for the rendering of the opinion. Additionally, the Bill adds a section 15.12 to Article 15 of the NYACAL requiring a claimant, in any civil action brought against an authenticator for the authenticator’s opinion or information concerning a visual art multiple or work of fine art, to specify in the complaint facts sufficient to support each element of each claim asserted. The Bill also includes a fee-shifting provision designed to enable authenticators to continue rendering their opinions freely in order to maintain the integrity of art transactions conducted in, arguably, the nation’s center of art commerce: New York State.

While there is, at present, no other state law speaking to the circumstances addressed by the Bill, the Committee is hopeful that New York State, which is the locus for the flag-ship branches of international auction houses and art galleries and home to many of the nation's best-known museums as well as to a multitude of regional museums, will approve the Bill, rendering it the prototype for such legislation in other states. The Committee's support is also informed by various lawsuits which had been lodged against artists' foundations such as The Andy Warhol Foundation, the Pollock-Krasner Foundation, The Calder Foundation, the Basquiat Authentication Committee and the Dedalus Foundation (dedicated to preserving the artistic legacy of Robert Motherwell), causing The Andy Warhol Foundation for the Visual Arts, The Pollock-Krasner Foundation, The Calder Foundation, The Basquiat Authentication Committee, the Dedalus Foundation, and the Roy Lichtenstein Foundation to cease their authenticating activities – to the detriment of the artists' legacies, and to the art market, as discussed below. Moreover, the Committee has determined that enactment of the Bill is made all the more timely by the closing in 2011 of Knoedler & Company which, at the time, was New York's oldest art gallery. Knoedler was forced to close its doors in the wake of an F.B.I. investigation that resulted in indictments and the filing against the gallery of six lawsuits alleging the sale of forged works of fine art, including works claimed to have been created by Jackson Pollock, Robert Motherwell and many others, as will also be addressed below.

BACKGROUND

The art market is peculiarly vulnerable in that the value of works of art is dependent upon their authenticity. Although authenticity is in large part the driver in art transactions, authenticity can be difficult to determine. Where a party spends six, seven, eight or even nine figures on a work of art, for example a painting by Picasso, the buyer wants confirmation that he or she is buying, in terms of authorship, what the artwork is purported to be, whether the buyer is acquiring it from a private individual, a gallery or an auction house. Whatever the source, a buyer may have no interest at all if there is no reliable opinion regarding the work of art's authenticity. When a work of art is lent to a museum, the museum, as a nonprofit institution essentially educational and aesthetic in purpose, requires assurance that what it will be exhibiting is, in terms of authorship, what it is described to be. When a work of art is donated to a museum, the appropriateness of any tax deduction for the donor's charitable donation requires a qualified appraisal from a qualified appraiser which of necessity relies on a reliable authenticity opinion. Estates that include works of art require authenticity determinations to affix a dollar value to those works of art. Moreover, reliable authenticity opinions reduce the likelihood that fakes and forgeries will flood the marketplace. These principles apply to all art transactions throughout the state, whether or not money changes hands and whether or not the entities involved are for-profit or not-for-profit.

It should be noted here that authenticity opinions encompass more than uncovering fakes and forgeries: often, authenticity issues arise because a legitimate work of art has been misattributed to a particular artist. For example, the question of whether a painting was authored by Sir Joshua Reynolds, a distinguished 18th century English portrait painter, or by Tilly Kettle, a lesser contemporary, was the subject of a lawsuit in the 1980's, *Travis v. Sotheby Parke Bernet*.

Artwork is generally authenticated by (1) documentation, (2) stylistic inquiry, and (3) scientific verification, and each of these three methods has its uncertainties.

Documentation of the history of ownership and public exposure of a work of art is sometimes unavailable, and documentation itself can be, on occasion, either forged or missing entirely.

Stylistic inquiry is subjective: an expert examines the work and, on the basis of his or her knowledge, experience and intuition, determines its authenticity. The results of stylistic inquiry may vary from expert to expert. For example, in November 2016, a set of 65 newly-revealed Van Gogh drawings, verified as authentic and collated by two renowned Van Gogh scholars, were published internationally in a book entitled *Vincent Van Gogh: The Lost Arles Sketchbook*. However, the Van Gogh Museum -- which has the sole power to officially authenticate works attributed to Van Gogh, and which has repeatedly dismissed the sketches as “imitations” -- released, on the same day publication of the book was announced, a detailed statement disputing the drawings’ attribution (based on both stylistic analysis and ownership history) in what has been termed by a number of Van Gogh experts, an “unprecedented” faceoff among scholars. And, even the opinion of any given expert may change over time.

Scientific verification, including such techniques as radio carbon dating and thermoluminescent analysis which are useful in determining the age of art objects, frequently used in conjunction with stylistic inquiry, employs objective procedures, thereby permitting the accuracy of the results to be tested by other scientists. However, scientific verification is more useful in uncovering a fake, rather than in confirming authorship. In one recent example, Sotheby’s, New York, which, in 2011 brokered a private sale to an art collector for about \$10.8 million dollars of *Portrait of a Man*, considered by leading scholars to be an undiscovered masterwork by Frans Hals, declared the painting a “modern forgery” in October 2016, rescinded the sale and reimbursed the buyer. Sotheby’s opinion was based on an in-depth scientific analysis of the “Hals” that determined it contained traces of 20th century materials, and therefore could not have been painted in the 17th century.

Not surprisingly, in view of the inherent imperfections of authentication processes, authenticators must practice their profession at their own risk. They have been sued in the course of rendering opinions in good faith about the authenticity, attribution or authorship of artworks on a variety of theories, to wit: negligence, negligent misrepresentation, fraud, product disparagement, defamation, as well as on antitrust grounds.¹ Although usually, under the law, experts have prevailed, the costs of vindication have been too great: thousands of hours and dollars spent on legal defense rather than on the practice of their profession has increasingly forced experts to speak with silence, causing fakes and forgeries of a valuable commodity to flood the marketplace.

Consider, now, the state of artists’ foundations and authentication boards. If an artist has a resale market, the artist or his estate often creates a foundation to preserve the artist’s legacy. That foundation will often publish a catalogue raisonné, that is, a definitive text of the artist’s work and a primary reference for the art market. Inclusion of a work in a catalogue raisonné –

¹ See generally R. Lerner and J. Bresler, “Art Law, The Guide for Collectors, Investors, Dealers, and Artists,” 4th Ed., Vol. I, p. 491-562 (2012).

particularly one affiliated with the artist's foundation – constitutes an imprimatur of the work's authenticity; if a work is excluded from such a catalogue raisonné, it may well be unsalable. If a work purportedly by an artist is *not* in the artist's catalogue raisonné, an interested party may seek validation of the work's authenticity through an artist's authentication board, which is frequently created by the artist's foundation. An authentication board generally includes people with scholarly knowledge of the artist's work, people with direct experience working with the artist, relatives of the artist, and/or people familiar with the artist's work as a result of being officers of the artist's foundation. Unlike the process of preparing a catalogue raisonné, an authentication board only reviews artwork submitted to it and its process of evaluation is, of necessity, generally secretive since transparency can enable art forgers to readily ascertain "hallmarks" of a work actually authored by the artist and incorporate them into fakes. Perhaps predictably, artists' foundations and authentication boards have been sued on alleged conspiracy theories directed at their rendering of opinions about the authenticity, attribution or authorship of a work of art. One such artist foundation, The Pollock-Krasner Foundation, established an authentication board to examine and make authenticity determinations on works of art purportedly by the artist Jackson Pollock. The board, in operation for six years (1990-1996) and during that period having evaluated hundreds of hitherto unknown works and certifying for entry into the catalogue raisonné only a few of them, dissolved after the Pollock catalogue raisonné was completed. The Pollock-Krasner Foundation, however, has continued to receive legal challenges based on its authenticity determinations.

More recently, The Andy Warhol Foundation for the Visual Arts dissolved the Andy Warhol Art Authentication Board in 2012 following its rendering of authenticity decisions, including the double denial of validation of a silk-screened Warhol self-portrait prepared by a silk-screen factory which may or may not have been created at Warhol's direction. This decision by the Warhol authentication board resulted in a lengthy lawsuit, *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts* commenced in 2007, involving an array of claims, including antitrust claims, lodged against the Foundation by the owner of the purported Warhol. The legal defense for that one case alone cost the Foundation more than \$6 million dollars. Consequently, after having evaluated approximately 6,000 works of art over a fifteen-year period, the Foundation determined that, in the current legal climate, it should dissolve its authentication board and concentrate its resources on its grant-making and its other charitable activities. Other artist's entities, such as the Roy Lichtenstein Foundation and the Jean-Michel Basquiat Estate, have also ceased authenticating works of art in the face of the potential legal exposure.

When authenticators are silenced, the results can be graphic. In 2011, the Knoedler Gallery, a distinguished art gallery in Manhattan which had been in business for 165 years, closed its doors and has been subsequently sued, to date, by six different clients on various charges, including fraud, for selling allegedly forged paintings: two forged Jackson Pollocks; one forged Clyfford Still; one forged William de Kooning; and two forged Mark Rothkos. A seventh client commenced legal proceedings on being sold a forged Jackson Pollock. That case ultimately resulted in a confidential settlement. The Knoedler Gallery acquired the "Modernist masterpieces" from a little known art dealer on Long Island, New York, named Glafira Rosales, who apparently sold some 63 works to Knoedler and one other art dealer between 1994 and 2009. The works were all new to the market and it is alleged that Ms. Rosales was not forthcoming about the cache of works' ownership history. It has been claimed that no experts challenged the authenticity of the

works while they were in Knoedler's hands. After many of the works had been sold, the F.B.I. commenced an investigation based on the opinions of several experts who, when works that were the subjects of lawsuits had been submitted for a determination of authenticity after they were sold, either questioned their authorship or denounced the works as fake. If the experts that did come forward after the sales had been too wary of potential liability to opine, the investigation that ultimately uncovered the fraud would have been substantially impeded. The art dealer on Long Island who was Knoedler Gallery's source for the paintings, Ms. Glafira Rosales, was indicted in May 2013 for tax fraud and pled guilty. The original complaint against her alleged that several of the works of art "have been conclusively determined by authorities experienced in the field of art, art history and materials science not to be by the hand of the artists that Rosales represented." The alleged forger later was discovered -- a superseding indictment alleges that a person residing in Queens, New York created the 63 fake works of art. Ms. Rosales' husband also was arrested. Ms. Rosales allegedly was paid \$33.2 million for the fakes, and the galleries allegedly sold them into the stream of commerce for \$80.7 million.²

² In this litigious environment, the trend of art authenticators has been either to 1) entirely dissolve their authentication boards – (for example, The Pollock-Krasner Foundation, The Andy Warhol Foundation for the Visual Arts, the Roy Lichtenstein Foundation, the Estate of Jean-Michel Basquiat) or 2) substantially increase their liability insurance. For example, The Richard Diebenkorn Foundation expects to protect its authentication board's seven experts with a multi-million dollar insurance policy when Diebenkorn's catalogue raisonné is published in two-to-three years. See "Fear of litigation is hobbling the art market," *The Economist*, Nov. 24, 2012, *available at* <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers> (last visited Nov. 15, 2019). However, carrying liability insurance (which can be particularly burdensome to an individual authenticator) does not guarantee protection. For example, in 2007-2009 when the Andy Warhol Foundation was sued by Joe Simon-Whelan as part of a class action, and later named in a similar class action suit, the Philadelphia Indemnity Insurance Company (PIIC) initially denied coverage but ultimately agreed to pay the full limit of \$2 million of defense fees under its E&O policy – but nothing under its Directors & Officers policy. This resulted in even further litigation.

Note also, that a provider of liability protection can require the art professional to establish and maintain a loss-prevention program to help minimize the chance of a professional liability claim being brought in the first place. Elements of such a loss-prevention program can include the following:

- Establishing the fees and/or billing practices at the beginning of a client relationship
- Using engagement letters, contracts, and other means to precisely identify the scope of services to be performed
- Keeping written documentation of all activity, including telephone calls, billing calculations, and the like
- Participating in peer reviews, when feasible
- Avoiding situations that present conflicts of interest
- Obtaining appropriate credentials and certifications and taking continuing-education courses to remain current regarding developments in the profession
- Screening new clients carefully and keeping existing clients informed at all times
- Avoiding giving specific warranties and similar performance guarantees

Adherence to all of these elements can be burdensome to authenticators – particularly those such as scholars with modest incomes who practice their profession solo. Moreover, alleged non-compliance with even one of the above elements might cause an insurance carrier to "justify" withholding compensation payments. Therefore, while liability coverage for the art authenticator may be advisable, it is not a substitute for the Bill. Such insurance, however, will work well in conjunction with the Bill.

SUMMARY OF PROPOSED BILL

Article 11 of NYACAL

To define the group of art experts that the Bill is intended to incentivize to continue rendering authenticity opinions for the benefit of both legitimate commerce and the artists' legacy, the Bill amends Article 11 ("Definitions") to include a definition of "Authenticator." An authenticator includes a person or entity recognized in the visual arts community as having expertise regarding the artist, work of fine art or visual art multiple to be evaluated, or a person or entity similarly recognized in the visual arts or scientific communities as having expertise in uncovering facts (such as, for example, a forensic scientist) that serve as a basis for an opinion regarding the authenticity, attribution or authorship of a work of fine art or visual art multiple.³ Expressly excluded from the definition is any person or entity having a financial interest in the work of fine art or visual art multiple to be evaluated, other than to be compensated for the rendering of the expert opinion.⁴ The Bill then creates a mechanism to enable an authenticator to render more freely opinions in good faith about the authenticity, attribution or authorship of works of fine art or visual art multiples that are the subject of transactions conducted in New York State, thereby promoting the integrity of such transactions in this key national and international art market capital.

Article 15 of NYACAL

Having defined in Article 11 the group to be covered by the Bill, amendments to Article 15 ("Sale of Visual Art Objects and Sculptures Produced in Multiples") are proposed to incentivize an authenticator to continue to practice his or her profession to maintain the integrity of the New York art market in a more hospitable legal climate. Accordingly, this Bill creates the following:

³ The standard requiring recognition in a particular community or industry has been used in various other legal contexts. For example, certain councils created by the New York State Legislature may only appoint members who are "recognized for their expertise." New York Executive Law § 941.1; New York Mental Hygiene Law § 80.05(c)(i). Similarly, the U.S. Congress requires members of the National Council on the Arts to be "widely recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts." 20 U.S.C. §955(b)(1)(C)(i)(I). In a related context, one of the standards in the Visual Artists Rights Act ("VARA") requires a work of art to be "of recognized stature." 17 U.S.C. §106A(a)(2)(b). The Committee anticipates that courts will determine whether a person giving an authenticity opinion qualifies as an "Authenticator," using a process similar to that for qualifying an expert. Various factors may include some or all of the following: the extent to which the Authenticator is known in the art or scientific community to have expertise concerning the artist, the artist's works of art or the scientific technique employed; whether the Authenticator has authored scholarly texts or articles concerning the artist or the artist's works of art; whether the Authenticator has personal knowledge of the creation of the work of art or the artist sufficient to be material to a determination of authenticity; etc.

⁴ If there is a dispute concerning whether a person qualified as an Authenticator "has a financial interest in the work of fine art or visual art multiple for which such opinion is rendered or in any transaction concerning such work of fine art or visual art multiple for which the opinion is rendered," the Committee anticipates that a determination in that regard would be made by the finder of fact or, under applicable summary judgment or motion to dismiss standards, by the court.

- A new Section 15.12 (“Authentication of works of fine art and visual art multiples”) which requires that the complaint specify with particularity facts sufficient to support each element of each claim asserted. This particularity requirement parallels similar requirements in Rule 3016 of New York’s Civil Practice Law and Rules and Rule 9(b) of the Federal Rules of Civil Procedure.
- Subdivision 4 of Section 15.15 is amended to create a Subdivision 4(a), Subdivision 4(b), and Subdivision 4(c). Subdivision 4(a) refers to the already-existing discretion of the court to permit an award of court costs and fees to a prevailing purchaser of works of art under Article 15. Subdivision 4(b) permits this same discretion to the court with respect to a prevailing authenticator in an action arising from an authenticator’s authenticity opinion regarding a visual art multiple or work of fine art, subject to the proviso that such costs and fees may only be awarded if the court finds good and just cause for the award, as specified in a written finding. Subdivision 4(c) merely makes it clear that the already-existing discretion of the court to permit an award of court costs and fees to an art merchant where the court determines that an action under Article 15 was brought in bad faith, does not extend to actions brought against an art authenticator with respect to the authenticator's opinion or information regarding a visual art multiple or work of fine art.

CONCLUSION

Acknowledging authenticity’s unique role as a driver in the art market, the vulnerability of that market to fakes and forgeries flooding the stream of commerce and its effect on the State of New York as a center for all manner of art transactions and considering the non-meritorious litigation exposure⁵ of authenticators who practice their profession in good faith, this Bill defines with clarity that segment of the art market that should be incentivized to practice its profession in order to uphold and enhance the integrity of art transactions conducted in New York State, thereby encouraging even more such transactions involving a valuable commodity. Passage of this Bill would also promote economic activity throughout New York State by preserving artists’ legacies and by encouraging the creation of more educational institutions for prospective authenticators who would now be incentivized to render their good-faith opinions more freely.

For these reasons, the Committee supports the Bill and urges its enactment into law.

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⁵ *Seltzer v. Morton*, 336 Mont. 225, 154 P.3d 561 (2007) (Montana Supreme Court upheld punitive damages against a law firm representing a collector who filed a lawsuit against an authenticator, stating that the law firm’s “use of the judicial system amounts to legal thuggery”).