



Article scientifique

Article

2015

Published version

Public access

This is the published version of the publication, made available in accordance with the publisher's policy.

Fake or Fortune? Art Authentication Rules in the Art Market and at Court

Bandle, Anne Laure

How to cite

BANDLE, Anne Laure. Fake or Fortune? Art Authentication Rules in the Art Market and at Court. In: International Journal of Cultural Property, 2015, vol. 22, n° 2-3, p. 379–399. doi: 10.1017/S0940739115000107

This publication URL: <https://archive-ouverte.unige.ch/unige:101377>

Publication DOI: [10.1017/S0940739115000107](https://doi.org/10.1017/S0940739115000107)

© The author(s). This work is licensed under a Backfiles purchase (National Licenses Project)

<https://www.unige.ch/biblio/aou/fr/guide/info/references/licences/>

Last deposit update in Archive ouverte UNIGE on 15.03.2023 08:44

Fake or Fortune? Art Authentication Rules in the Art Market and at Court

Anne Laure Bandle*

Abstract: This article analyzes the dichotomy between the practices of the art market and of court judges when it comes to the authentication of works of art. While judges very much rely on experts acting in the art market, they may not necessarily pursue the same examination methods and conclusions, which can have serious repercussions on the art object and for its owner. The dichotomy unavoidably leads to the questions of what the correct assessment is and whether court judges should be conducting such examinations.

Taking account of the difficulties judges and legislators face in attempting to interfere with established art market practices, it is suggested that courts are not an adequate forum to resolve authenticity disputes. Instead, scholars and art market actors should adopt improved authentication standards and, in the event of a dispute, refer to alternative means of dispute resolution.

INTRODUCTION

The authenticity of an artwork or an artifact has a fundamental impact on our aesthetic and economic appreciation of the art object. The correct identification and attribution of art objects play an imperative role in various contexts, including sales, loans, inheritance, insurance, and tax. While an art object's valuation may

*Art-Law Centre, University of Geneva, and London School of Economics and Political Science (LSE).
Email: abandle@lse.ac.uk

ACKNOWLEDGMENTS: The author is most grateful for the enriching insights provided by the participants of two round table discussions: the first on “Art authentication—Diverging rules in the art market and at court?” at the LSE, 15 May 2014 with Professor Tatiana Flessas, Stefanie Berloff-Spadafora, Sarah Charles, Roland Foord, Professor Martin Kemp, and Professor Norman Palmer; and the second on “Developing due diligence, expert interaction and quality impulses in the art market” at the First All Art and Cultural Heritage Law Conference, University of Geneva, 13–14 June 2014 with Dr. Friederike Gräfin von Brühl, Corinne Hershkovitch, Professor Norman Palmer, and Lucian Simmons.

differ according to the purpose of the appraisal, an art object's attribution in principle remains the same regardless of the context.

In particular, the art trade depends very much on experts and their authentication services. Indeed, the market for artworks and artifacts only functions if these objects have a proper attribution to a specific creator or location of origin, date or period, and provenance. Most dealers wish to ensure they sell only authentic art and therefore seek an expert's opinion on the art object's attribution. Should a leading expert cast the slightest doubt on an object's authenticity, it may well become—to the greatest dismay of its owner—unsalable. Needless to say, a work of art declared to be a fake will dramatically decline in value. The stakes are high. Art owners have, therefore, not refrained from initiating lawsuits against merchants and experts that hit the headlines.

As a result, the process of identifying and authenticating works of art preoccupies not only art historians and scientists, but also judges. In fact, when disputes about the liability of an art merchant or an authenticating expert is taken to court, judges are asked to decide whether the seller's authenticity warranty applies and if the expert has examined the art object with due care and skill.

Given that the law has generally not been specifically designed for art-related issues, courts are confronted with the challenge of finding a legal solution that fits the specifications of the art world. In doing so, they have departed from the practices of the art market when it comes to authentication in several respects.

This article analyzes the dichotomy between the practices of the art market and those of court judges when it comes to the authentication of works of art. While judges very much rely on experts acting in the art market, they may not necessarily pursue the same examination methods and conclusions, which can have serious repercussions on the art object and for its owner. The dichotomy unavoidably leads to the questions of what the correct assessment is and whether court judges should be conducting such examinations. In a first section, this article examines the authentication methods of art historians and connoisseurs and emphasizes the risk in the phenomenon of expert authorities that prevails in the art market. The second section focuses on the art auction trade and the authentication mechanisms and guarantees auction houses have established. The third section of this article addresses the court rules of authentication once an art object's disputed authenticity is subject to legal proceedings. The last section explores the divergence between the market and the courts in establishing art authenticity. In particular, the section reflects on the impact of the dichotomy between the market and the legal world on the art object itself and on the involved actors and decision makers.

I. CONNOISSEURS AND EXPERT AUTHORITIES

In order to authenticate artworks and antiques, experts generally refer to three main attribution tools: connoisseurship or judgment by eye, historical documentation or provenance, and scientific analysis.¹ Since an expert's ability to perceive

the rightness of an attribution usually precedes the need for the lab or the archive, connoisseurship or judgment by eye is crucial to authentication.² None of these tools is sufficient in and of itself. Instead, they complement each other. Hence, a connoisseur's opinion-based result should be supported by archival evidence or scientific reports.

When assessing an art object's authenticity, art historians generally strive to undertake exhaustive research to establish whether the art object is by a specific artist or not. The expert's statement is commonly straightforward in the sense that the expert does not relativize his statement with probability values.³ In order to nuance the attribution to a given artist, and to acknowledge the involvement of third party artists, an expert may use formulations such as "by," "studio of," "circle of," "after," "attributed to," "signed," or "follower of."⁴ In offering a conclusive statement of authenticity, experts meet the market's need to trade art with a clear and definite attribution. Therefore, the art market depends on the experts' authenticity opinion. In practice, experts often refer to existing certificates, expertise reports, or catalogues. For example, a catalogue *raisonné* records all works its author, based on his connoisseurship, believes to be by a specific creator.

While the title of "art expert" is not legally regulated, the art market has established its own rules to recognize only the opinion of certain individuals or expert groups.⁵ Accordingly, the art market differentiates with regard to the person who made or supports the attribution. Only professionally acclaimed experts for specific creators may provide a definite and globally recognized answer as to an art object's attribution. In the art market, the works of certain creators must have that expert authority's endorsement in order to be regarded as an authentic work.⁶ As a result, an expert authority prevails over any other expert's opinion.⁷ Likewise, a catalogue *raisonné* receives great consideration on the market when its author is considered to be the authority for the given artist. The art market's system of a dominating expert authority creates a seeming universal consensus over the attribution of a given work, even though it overrides any other expert's dissenting opinion.⁸

The system of a single expert authority accommodates art dealers, as it clearly establishes a unique reference in the art market for the validation of a work's authenticity. Instead of referring to several scholars, dealers must consult with the prevailing authority only. However, the system comes with considerable drawbacks.

To begin with, the reliance on a single expert gives expert authorities enormous power as they decide works that are of cultural significance and those that are not.⁹ Their decision on an art object's authenticity enormously impacts the work's aura and economic value on the market. If a reputable expert expresses any doubts on an art object's authenticity, the market price for the work is very likely to fall considerably.¹⁰ Collectors criticize authorities for abusing their power, and have brought legal action against these experts.¹¹ An authority's dominant position is particularly subject to discontent when the expert renders an opinion with a poor or no justification for the reached conclusion. In fact, if an authority's opinion

lacks a recitation of the facts upon which it is based, owners and sellers are likely to consider the opinion arbitrary and unfounded.

Moreover, potential conflicts of interest exist when the expert has a financial interest in the art object being authenticated or in any transaction concerning the work other than to be compensated for the rendering of authentication services.¹² In such event, authenticators may give an opinion influenced by their financial interest in the work's authenticity. In the opaque art market, an expert's underlying interests in a specific attribution are difficult to establish. Several codes of ethics draw the attention of authenticators to potential conflicts of interest and encourage them to desist from providing an opinion should they have any financial interest in the work or its authenticity.¹³

Finally, the art market's reliance on a single authority undermines any critical assessment of an art object's attribution. The discouragement of a scholarly debate is particularly worrying in the event an authority enjoys such a position despite lacking superior expertise and experience in the specific creator's oeuvre and in its authentication.

In short, the perilous phenomenon of expert authorities affords the advantage of creating some structure in a market that otherwise tends to lack thereof. Sellers and collectors know who to refer to for a recognized statement on a work's authenticity. At the same time, the phenomenon places a lot of pressure on the single authority, and gives a single expert enormous power regardless of any potential conflicts of interest that an authority may have in providing an authenticity opinion. Instead of sustaining the power of expert authorities, the art market would gain in quality from a critical debate among multiple experts and a real consensus on attributions. Hence, scholarly debate needs to be promoted as much as an exchange of expert knowledge on creators and objects.¹⁴

II. ATTRIBUTIONS IN AUCTION SALE CATALOGUES

Before each sale, auction houses compile a sale catalogue which lists all objects offered for sale including their specific attribution to a creator or location of origin, date or period, and provenance. Mostly, auction house catalogue attributions are based on judgment by eye and art historical documentation. Auction houses conduct technical analysis to assess a lot's attribution only occasionally.

Since auction houses are art market actors, they play along with the market's rules of authentication. Hence, auction houses generally go along with the expert authority system by consulting the authority for the specific creator on a consigned work's authenticity before offering the work for sale. Most major auction houses formulate this approach in their conditions of sale. More specifically, auction houses arrange an authenticity guarantee for purchasers that corresponds to the "generally accepted opinion of scholars or experts."¹⁵ When auction houses refer to outside experts to assess consigned property, the sale catalogue sometimes mentions the expert's endorsement of the stipulated attribution. Experts' identities

are not systematically revealed in the sale catalogue or to clients. Instead, an auction house may wish to protect the expert from a potential lawsuit by keeping his or her name confidential.¹⁶

In the absence of an expert authority for the consigned property, an auction house's own expert usually verifies the property's attribution. When attributing art, auction houses rely on information the consignor can provide, such as authenticity certificates, expertise reports, and provenance supporting documents.

Moreover, auction houses usually stipulate in their conditions of sale that the established attributions are only an expression of their opinion. They do not conduct exhaustive research on the consigned property, but encourage consignors and purchasers to seek their own advice. The information auction houses publish is intended to promote the lots and their sale. The terms used to describe the consigned property are carefully selected for strategic and marketing purposes and to limit the risks of liability.¹⁷

Within certain limits and to purchasers only, major auction houses guarantee the property's authenticity. According to such guarantees, authenticity is only warranted to the extent that the established attribution "corresponded to the generally accepted opinion of scholars or experts at the date of the sale or fairly indicated that there was a conflict of opinions."¹⁸ Furthermore, authenticity is confined to the results generally accepted means of authentication may bring, as well as to authentication processes that are reasonably affordable and practical and do not cause any damage to the property.¹⁹ Therefore, when auction houses authenticate art, they do so to the extent of their authenticity guarantee's scope. In this respect, their practice of authenticating consigned property is limited. Unlike art historians, auction houses do not seek to establish absolute and definite attributions.

Auction houses authenticate art for the purpose of their sales and to the extent of their authenticity guarantees for buyers. In doing so, they adopt art market standards, despite the drawbacks of the prevailing expert authority phenomenon. Overall, auction houses adopt a practical approach in authentication which is conducted on a daily basis as part of its business. The law takes into account the practical reality in establishing an auction house's liability for misattribution. However, the legal standard in authentication differs from the practice of auction houses and the market.

III. AUTHENTICATION AT COURT

A. Causes

Authenticity disputes preoccupy not only scholars and dealers, but also judges.²⁰ Liability for the inaccurate attribution of an art object in the context of art sales arises within two principal relationships.²¹ The first relationship is that of a sale between a seller and a buyer. The second relationship is that of a professional appraiser and his client, who seeks advice on an art object's authenticity in view

of a sale transaction. Both types of relationships may concern a private treaty sale or an auction sale. The main difference in liability between the expert-vendor and the expert-adviser is that the seller is strictly liable when offending statutory provisions, whereas the adviser is liable only for failing to act with reasonable care and skill.²²

1. Contracts of sale

For misattributions under a contract of sale, a buyer may seek a remedy against the seller under different causes of action.²³ Firstly, a buyer may file a claim against the seller for *breach of warranty of quality* and for *defects* that materially or legally negate or substantially reduce the value of the object or its designated purpose.²⁴ Such claims require courts to determine whether the sold art object has a default or is absent of a warranted quality. National laws differ on the point as to whether authenticity statements are contractual terms and hence whether buyers are entitled to seek damages for breach of these terms. As far as the contract of sale is concluded at auction, the buyer's remedies are less clear than for private treaty sales.

For auction sales, the question arises as to whether the buyer may seek redress from the auction house for misattribution despite the fact that the auction house is not a party to the contract of sale it has organized on the consignor's behalf.²⁵ In offering buyers an authenticity guarantee, auction houses have a contractual obligation to buyers, independent of the sale contract, to buy back a forgery. Buyers may bring an action for breach of warranty against the auction house if its authenticity guarantee applies. For misattributions that do not fall under an auction house's guarantee of authenticity, the buyer may argue that the auction house failed to comply with its duty of care.²⁶ However, auction houses generally exclude in their sale terms any liability for misattributions. Courts will uphold such disclaimers to the extent that they comply with the restrictions imposed by statutory law.²⁷

Secondly, under English and United States law, a buyer may assert that he has been induced to enter the sale agreement after the seller or auctioneer has made a *misrepresentation* to him on the art object's authenticity. A claim's requirements and the remedies available to the buyer depend on whether the misrepresentation is fraudulent, negligent, or innocent. A claim for negligent misrepresentation requires a special relationship of trust between the buyer and the auctioneer or the seller. Unlike case law in the United States, English case law has approved that such a special relationship exists between auction houses and buyers. Under a misrepresentation claim, the court has to determine whether the expert's authenticity statement is objectively false and not simply disputable.

Thirdly, for both negligent and fraudulent misrepresentations, a buyer may bring an action in *tort*. Again, since such an action in tort requires a misrepresentation, courts may be asked to determine whether the expert or seller has indeed misattributed the art object.

Fourthly, the buyer of a forgery can rescind the sale contract for *mistake*, subject to the differing requirements of national laws. Under Swiss law, a claim for

mistake is available to misattributions as long as they are both objectively and subjectively “a necessary basis for the contract” for the party acting in error.²⁸ The sale of a forgery is a typical example of a fundamental error that qualifies for a mistake claim.²⁹ The contracting party must establish that the description of the object at sale became part of the contract and differs from what the object actually is.³⁰ However, if the buyer should have known about the incorrect attribution, the court will likely reject his claim for mistake.

The mistake claim under English law is only available to errors on the essence or identity of the subject matter. Another difference to the Swiss regime is that both parties must have mistaken on the same material fact. As long as the parties have reached a sale agreement on the same terms of that same specific picture, the mistake claim will not void the contract of sale.³¹

Under United States law, a mistake must generally also be mutual to void the sale contract. Also, relief is only appropriate where the mistake “has such a material effect on the agreed exchange of performances as to upset the very basis for the contract.”³² Furthermore, a mistake claim requires a disparity between the parties’ erroneous belief and the expert consensus on the sale date. Therefore, a court is likely to dismiss a mistake claim if a generally accepted attribution became subject to post-sale fluctuations.³³

2. Professional attributions

An action may be based upon contract if the expert’s opinion of authenticity is a contractual performance. The most common action is a claim for breach of agency duties. Alternatively, a wrong statement on an artwork’s authenticity may give rise to an action in tort.

When experts authenticate works of art as part of a contractual obligation,³⁴ they generally have an express contractual duty to perform the agreed authentication and an implied duty to act with skill and care. If the expert performs the authentication negligently, he risks inviting a claim for breach of that duty. A duty of skill and care arises in different situations. A typical example is the agency relationship between an auction house and a consignor.³⁵ An agency relationship may also exist between a professional authenticator and a client.³⁶

The success of a negligence claim is contingent upon the proof of a misattribution and resulting loss.³⁷ Instead of aiming to establish whether an expert opinion is accurate, the court will assess negligence based on a *standard of care*. The standard seeks to determine whether the seller or the auction house has diligently conducted the authentication, or if he negligently failed to consider certain information or to make an appropriate conclusion. The level of due care is defined according to what the parties have agreed upon and the diligence and skill that may be expected from a competent professional acting under the same circumstances.³⁸ Therefore, the court must first establish the level of required diligence in taking into account the specific circumstances of the case. For example, the level of care differs according to whether the attribution was made by an international auction house or a local auction house.

Then, establishing an expert's diligence requires the courts to determine whether the expert had reasonable grounds for holding the disputed attribution. Furthermore, a court will determine the expert's or merchant's diligence and care based on the information and analysis that was reasonably available to him at the time of the misattribution. (For instance in *Trasteco Ltd v. Kunsthaus Lempertz KG*,³⁹ the court emphasized the fact that the auction house had expressed no doubts on the painting's attribution despite flawed provenance and lack of an illustration of the painting.) Also, the required standard of care and proficiency may vary according to the conduct of the claimant's own advisor.⁴⁰

Consequently, the art object's authenticity is not of primary concern. However, authenticity plays an important role in the assessment of *financial loss*. In fact, a court may have to evaluate a plaintiff's loss, which requires a clear determination of a work's attribution. The proof of loss is essential as a finding of liability may be worthless without solid evidence of damages.⁴¹ Accordingly, the plaintiff must prove that, on a balance of probabilities, the expert's attribution is incorrect.

Under English law and United States law, an expert may be answerable in *tort for negligent misrepresentation*, if the expert possesses a special skill and in the exercise of which the plaintiff trusted. Also, the expert must have had the knowledge that the plaintiff would act on his statement of authenticity and be bound by some special relation of trust or duty of care to the plaintiff.⁴² In principle, duties of care in tort can be excluded by contract.⁴³

Finally, under the jurisdictions of Switzerland, England, and the United States, a plaintiff may bring a claim against an authenticator for *fraud* or *fraudulent misrepresentation*, in which event the claimant must show that the expert knew that the attribution on which the claimant relied was wrong, or recklessly disregarded certain facts which could have revealed the misattribution.⁴⁴

B. Rules of procedure and evidence

Authentication at court is subordinate to questions of law.⁴⁵ Courts apply the *rules of procedure and evidence* to the dispute, and not those of the art historian. A judge will only consider evidence that is filed in accordance with the civil procedure rules, such as those concerning the admissibility of evidence, the qualification of expert witnesses, the parties' burden of proof and applicable presumptions.

Generally, authenticity disputes involve different experts who provide all sorts of evidence, such as on the work's attribution based on connoisseurship, provenance, or scientific testing, and on the art market or auctioneering practice. Courts will usually judge an expert opinion upon the specific conditions of the analysis conducted including method, arguments, and the dedicated amount of time. Case law suggests that the reputation of the testifying expert plays a secondary role.⁴⁶ The process of admitting expert testimony at court differs according to national civil procedure laws.

In civil court proceedings in England and the United States, each party supports its allegations with the help of the experts they call to testify in court.⁴⁷

During these adversarial proceedings, the lawyers of either party can call into question the knowledge and findings of the opposing party's expert.⁴⁸ Ultimately, the court closely examines these expert reports.

In the United States, federal courts abide by the Federal Rules of Evidence. Pursuant to these rules, trial courts must assess whether an expert's knowledge is helpful and the expert's testimony is reliable (Rule 702).⁴⁹ In order to evaluate the reliability of expert evidence, case law established the *Daubert* standard.⁵⁰ In particular, courts assess the admissibility and reliability of an expert's testimony according to whether the testifying expert has used recognized appraisal techniques.⁵¹ The *Daubert* standard only applies in federal courts, unless the State has adopted it. State courts have developed other standards, such as the Frye test which applies in the state of New York. Under the test set forth in *Frye v. United States*,⁵² "expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field."⁵³ The *Frye* test is applied pre-trial.⁵⁴

In England, civil cases in county courts, the High Court, and the Court of Appeal are subject to the Civil Procedure Rules (CPR). Pursuant to these Rules, courts may restrict expert evidence "to that which is reasonably required to resolve the proceedings" (Rule 35.1 CPR).⁵⁵ Therefore, courts will carefully observe the costs of the proposed expert evidence and identify the fields in which such evidence is required and, where practicable, the expert in that field on whose evidence a party wishes to rely (Rule 35.4 CPR). More specifically, courts must determine "how cogent the proposed expert evidence will be; how helpful it will be in resolving any of the issues in the case; and how much it will cost and the relationship of that cost to the sums at stake."⁵⁶ Overall, a court will only accept evidence that is based on a recognized discipline, that is reasonably required to resolve the issues at dispute, and that is proportionate.

Under Swiss civil procedure law, courts have a greater involvement in the process of collecting evidence than the courts in both common law jurisdictions. The Swiss Civil Procedure Code (CPC) has unified civil procedure law for all Swiss cantons since its entry into force on 1 January 2011. According to the CPC, courts issue the necessary rulings which specify the admissible evidence and the party which bears the burden of proof or counter-proof (Article 154). Also, courts can commission expert reports and instruct experts to respond to a set of questions. The questions are submitted by the judge, and can be modified and supplemented by the parties (Article 185). The parties may also submit expert reports, which are different to court mandated expert reports: the latter reports qualify as piece of evidence, while the former reports are factual submissions of the parties.⁵⁷ As a result, the judge is free to assess the evidence the parties have submitted (Article 157) based on the rules of evidence.⁵⁸ Similar to the civil procedure laws in England and the United States, admissible evidence under the CPC must prove legally relevant and disputed facts (Article 150).

As a result of the rules of procedure and evidence, the search for truth—the art object's authenticity—is limited in civil proceedings. The courts can only establish

authenticity to the extent shown by available evidence. Moreover, a court ruling is subject to the parties' claims and their timeliness. Indeed, a court may dismiss an action for being argued inappropriately or filed untimely. The subsumption of an art object's authenticity to procedural and evidence rules shows that courts treat authenticity no different from any other legal issue tried at court.

C. Probative force of the different types of evidence

Civil procedure rules generally provide no guidance on the probative force of the three attribution tools. The courts have accepted the importance of these three tools. However, case law shows that certain types of evidence have a much higher probative value than others.

In *Trasteco Ltd v. Kunsthaus Lempertz KG*, the Regional Court of Cologne held that the auction house should not have made an attribution without reservation solely based on the painting's art historical examination. Instead, a diligent auctioneer would have mentioned that the attribution was the result of an art historical assessment only, or conducted scientific analysis.⁵⁹ When the respective painting was consigned with the auction house, it lacked reliable information on its authenticity and provenance. Moreover, the auctioneer's in-house experts, who verified the painting's authenticity, were biased in that they had an interest in the painting's authenticity and its successful sale. Under these circumstances, the court considered that an art historical assessment was of limited value, and would not allow establishing the painting's attribution with sufficient accuracy and objectivity.⁶⁰

In *Avrora Fine Arts Investment Ltd v. Christie, Manson & Woods Ltd*, J. Newey found connoisseurship to be the key evidence and effectively discounted all the scientific evidence and provenance that had been produced.⁶¹ In doing so, the judge relied on J. Buckley's opinion in *Drake v. Thos Agnew & Sons Ltd*.⁶² In *Drake*, J. Buckley acknowledged that connoisseurship or judgment by eye requires sensitivity that can be developed to some extent and is rather born in the given expert. Accordingly, if the proper authentication of a work of art is based on connoisseurship, a judge cannot make his own conclusions, except for "find[ing] that an expert's final opinion is based on illogical or even irrational reasoning."⁶³

J. Buckley also explained that a judge should not assume to possess the requisite skills or the "eye" for the resolution of a disagreement over an artwork's attribution.⁶⁴ In fact, court judges have repeatedly expressed that the determination of an artwork's proper attribution is a complex and highly subjective exercise.⁶⁵ In particular, as J. Buckley and other judges have explicitly confessed, an expert's approach of judgment by eye goes beyond the judges' competence.⁶⁶ Hence, when ruling on authenticity disputes, judges strongly rely on expert evidence. Moreover, the judge's lack of connoisseurship means that the authenticating expert will have to support and document evidence based on judgment by eye. Otherwise, a judge is likely to dismiss such evidence for being unsupported and unreliable.⁶⁷

Courts have also considered provenance to be a weighty factor supporting an attribution. In a case concerning the authenticity of a mobile allegedly by Alexander Calder, the court approvingly quoted an expert, who stated that the mobile's provenance "is the best proof of authenticity I can think of."⁶⁸ Case law shows that courts have repeatedly taken into account a work's provenance in order to determine its authenticity.⁶⁹ While an impeccable provenance is no guarantee of authenticity, as a work may have been substituted or damaged, "its absence will be one more reason for a court to doubt a work's authenticity."⁷⁰

Overall, the probative value of connoisseurship, provenance, or scientific analysis will depend on the circumstances of the case. While there are no clear rules on the probative force of the different attribution tools, some may be more feasible to a judge's understanding than others.

D. Degree of proof

In authenticity disputes, courts do not aim to exhaustively determine the art object's actual attribution nor render a decision that is historically endorsed. Instead, they decide on the issue of attribution by using the civil standard of balance of probabilities. Accordingly, a court has to determine whether an attribution is accurate based on a preponderance standard: "[a] predominant degree of probability exists if according to objective factors significant grounds prevail over what might be other reasonably conceivable options."⁷¹ Under the preponderance standard, "if the court considers that a disputed fact is 50 per cent likely to have occurred then it will proceed on the basis that the something in question is in fact not true, whereas if the court considers that a disputed fact is 51 per cent likely to have occurred, it will proceed on the basis that it is true."⁷² The preponderance standard discards any other options which might be plausible and yet do not surpass the benchmark of a 51% likelihood. As a result, courts will produce a decision according to the attribution that they consider "more likely than not" accurate, based on the experiences of life and objective factors.

Under United States law, the court in *Dawson v. Malina* established a standard of proof for breach of warranty of authenticity claims that courts have adopted in subsequent decisions.⁷³ Pursuant to the standard, the plaintiff must not prove that the art object is a forgery, but that the authenticator's representations had no "reasonable basis in fact" at the time they were made.⁷⁴ Courts measure such reasonable basis by the expert testimony provided at trial on a preponderance basis.⁷⁵

Swiss case law established for civil proceedings that "courts must depart from a relatively low degree of proof for facts which are considered to be material or outcome-determinative and which however by their nature cannot be established with absolute certainty."⁷⁶ A typical example of such facts is an artwork's authenticity.

The preponderance standard facilitates a court's task to rule on authenticity, as it does not seek to establish absolute truth. Moreover, it takes into account that an attribution is a relative statement and often based on the opinion of very few

experts. Also, the preponderance standard fits all fact-related issues and evidence based on which courts must decide on a work's authenticity. Where the market lacks in a leading expert for a type of art object, the courts can instead of relying on the authority system, use the preponderance standard with regard to the available evidence. The preponderance standard exemplifies one of the differences in authentication at court and in the market.

IV. A DISCONNECT BETWEEN THE CULTURE OF COMMERCE AND THE COURTS?

When it comes to determining an art object's authenticity, there is an obvious gap between the judicial and the academic sphere, as J Morison expressed in *De Balkany v. Christie, Manson & Woods Ltd*: "I shall return to the issues which arise for determination later in this Judgment. But it will be seen that one of the issues I must rule upon is whether the painting may properly be attributed to Schiele. That is a matter which has given rise to considerable dispute in the art world. I do not pretend that what I have to say will impress the scholars who take a different view. I remind myself, and them, that this is a judicial decision based upon the evidence and it is not, and it does not purport to be, a contribution to the academic debate, in which I am not qualified to participate."⁷⁷

The authentication gap between art scholars and court judges extends further to the art market, since the scholars' opinion is transcribed into commerce by the labeling of art offered for sale. The art market trades with artworks and antiques that are authenticated by specific experts. The divergence in authentication between the market and the courts exists on several levels, in particular having regard to applied methods and rules, language, and outcome of the authenticating process.

Firstly, scholars and the market have developed authentication standards and practices that are different from those prevailing in a courtroom. As articulated above, judicial proceedings are governed by procedural and evidence rules which also apply to art authenticity issues.⁷⁸ Rules on the admissibility and presentation of evidence, the qualification of expert witnesses and the burden of proof are peculiar to legal proceedings. Moreover, courts refer to a preponderance standard when deciding whether a presented fact is true or not. Instead of these rules, the market resorts to the expert authority for the specific artist, provided that such an authority exists.

While a court may decide on a merchant's or expert's diligence in taking into account the *market's practices*, the court is not bound by such practices and may instead depart from them. In *Trasteco*, the Regional Court of Cologne made it clear that the standard of due diligence was higher than the one actually performed by the auction house.⁷⁹ The auction house's argument that it desisted from conducting scientific analysis because doing so was not a common auction practice did not convince the court. Instead, the court focused on what the purchaser in question was reasonably entitled to expect from an auction house of the given standard. As a

result, the court differentiated between the authentication practices auction houses customarily adopt and the legally required standard in holding that the art historical assessment by the auction house's expert was insufficient.

Secondly, art scholars and lawyers use different *language and verbal strategies* in making a statement on a work's authenticity. The vocabulary specific to art historians and the art industry may be "as alien to the lawyer as the formal procedures and jargon of the legal profession to the painter. The lexicon and techniques of art are exclusory in the same manner that the language of law is guarded and controlled by a professional class."⁸⁰ The divergence in communication and reasoning challenges both lawyers and scholars and can lead to confusion and misunderstandings.

Furthermore, a lawyer's argumentation at court is usually led by rhetoric and strategy. Lawyers attempt to convince the judge that the opposite party's case is not strong enough. Judges also employ specific legal method, formula, and reasoning to arrive at correct decisions. The legal and rhetoric language contrasts the reports of connoisseurs and experts which are articulated honestly and directly about an art object's attribution.⁸¹ A trial encompasses both artistic and legal judgment when expert witnesses are asked to write an authenticity report or are called to give oral evidence. The use of expert reports and witnesses in civil proceedings makes the divergence in the lawyers' and the art scholars' language most apparent.

Thirdly, the authentication process in commerce and in legal proceedings differs with respect to its *outcome*. When courts decide on an art object's authenticity, their assessment is limited by the case's circumstances, the parties' claims, and civil procedure and evidence rules. Such barriers are particular to court proceedings and do not concern authentication in the art market.

Also, courts establish authenticity with a *predominant degree of probability*, whereas auction catalogues and experts' authentication reports usually make a clear statement on the art object's authenticity—or lack thereof. In *Greenberg*, the judge expressly ruled on the art object's "more likely" attribution, based on a preponderance of evidence and not on the opinion of the expert authority for Alexander Calder works. The judge underlined the dichotomy in stipulating that "[t]his is not the market, however, but a court of law, in which the trier of fact must make a decision based upon a preponderance of the evidence [...] I conclude that it is more likely than not that the mobile is not a forgery but the original Rio Nero which has been misassembled and abused [...]"⁸² However, an attribution made with a "predominant degree of probability" is generally insufficient for the art object to be traded on the market. It is not surprising that after the court's ruling, the Calder mobile did not find a buyer on the market.⁸³

Also, a connoisseur's authentication is different from a court decision on authenticity, because of the *momentariness in scholarship*. An artwork's attribution by art experts is subject to the circularity and contingency of scholarship, whereas court decisions are generally final. The momentariness in scholarship is due to the fact that except for scientific analysis, an art expert's authenticity statement cannot be attained with exact knowledge: "the question of authenticity or attribution of

a work of art cannot be known, but only opined. The judgment of the expert is, in essence, a matter of persuasion, not proof, and is always subject to change and contradiction by other experts.”⁸⁴ Courts halt the circularity in attribution when making a decision on an artwork’s likely authenticity.

Moreover, when determining an expert’s diligence in authenticating a work, court judges turn back the clock in order to establish the scholars’ generally accepted opinion that prevailed at the date of the attribution. The legal standard of due diligence seeks to establish the degree of care and skill that an art expert should have applied when authenticating the art object. It does not seek to establish the object’s accurate attribution.

Despite the many contrasts in authentication between the scholars’ and the lawyers’ sphere, art and law *converge* in that neither can produce absolute truth outside the realm of scientific analysis.⁸⁵ Moreover, both spheres correlate with each other insofar as lawyers and judges limit their competence in judging art and appoint experts in order to assist in the making of authenticity decisions. In this respect, “[t]he law retains the authority of final judgment but delegates the finding of facts and evidence to a society of art experts during the trial.”⁸⁶

Not only courts but also legislators refer to *art market standards* in authentication irrespective of the risks that are associated with these standards. For example, a new bill was introduced in the New York State Assembly to amend the New York Arts and Cultural Affairs Law. The amendment seeks “to protect art authenticators from frivolous or malicious suits brought by art owners” in response to negative authenticity opinions.⁸⁷ The pending law expressly refers to the market’s authentication system of expert authorities, by offering protection to individuals and committees “recognized in the visual arts community as having expertise regarding the artist” in respect to whose works the authority is rendering an opinion. Thereby, the new law encourages the monopolistic position in the market of expert authorities.⁸⁸ Except where an authority has a financial interest in the transaction for which he is providing an authenticity report in good faith, the authority is protected from frivolous legal action. For example, if the authority has a financial interest in the sale of an authenticated work, the authority’s authenticity opinion is much likely to be biased. However, conflicts of interest may also arise when an authority has a financial interest not directly in the transaction, but in works by the same artist. The proposed law does not specifically address and prevent such conflicts of interest, which generally exist where the expert or committee owns a considerable number of works by the same artist.⁸⁹

The interplay between the culture of commerce and the courts is complex and can be detrimental to the parties, experts, and art objects involved in the dispute, as much as to the art market’s health. On the one hand, if a court decides a work’s authenticity in disobedience of art market standards, the market is very unlikely to accept that authenticity ruling. On the other hand, if a court adheres to art market practices, it may interpret and apply them wrongly, and validate those practices that are detrimental to a healthy market.

CONCLUSIVE REMARKS

The disadvantages and detrimental impact of judicial authentication for the parties and the market speaks against the courts' authority of final judgment. Law and courts should not regulate art authentication standards, as they are ill equipped to decide such disputes.⁹⁰ Instead, the current situation advocates for a change that comes from within the market: scholars and art market actors should standardize due diligence in authentication by strictly adhering to reasonable ethical and practice guidelines.⁹¹ These guidelines should encourage a scholarly discourse and exchange of information on an art object's attribution, and undermine the expert authorities' imposing power. Through the education and promotion of alternative scholars and enhanced access to their expertise and knowledge, the quality in authentication is likely to increase and conflicts of interest avoided.

If disputes over an art object's authenticity nonetheless arise, the parties should refer to mechanisms of dispute resolution that are alternative to court proceedings, such as mediation and arbitration. In alternative dispute resolution, the parties may choose an expert to act as intermediary or arbiter who is acquainted with art historical methodology and the market's dynamics, and not lead by procedural court rules.⁹² Thereby, the parties may avoid the risks court litigation entail and overcome the disconnect between the cultures of commerce and the courts.

ENDNOTES

1. See *Jornod* 2007, 13; *O'Connor* 2004, 6. See also *Avrora Fine Arts Investment Ltd v. Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch), para. 36.

2. See *O'Connor* 2004, 6.

3. However, increasingly experts are using vague formulations and disclaimers in their authenticity opinions and reports to protect themselves from any possible lawsuit; cf. *Jornod* 2007, 16.

4. For an explanation of these formulations, see *Duret-Robert* 2007, 30.

5. See *Ringe* 2007, 136.

6. A single expert does generally not dominate the authentication market for certain kinds of works, such as collectibles.

7. *Thaw* 2004.

8. *Bandle* 2014b, 2.

9. See *ibid.*, 1.

10. See *von Brühl* 2008, 47.

11. For example, *Kramer v. Pollock-Krasner Foundation*, 890 F.Supp. 250, 257 (S.D.N.Y. 1994); *Vitale v. Marlborough Gallery et al.*, 32 U.S.P.Q. 2d (BNA) 1283, 1994 US Dist. LEXIS9006 (S.D.N.Y.).

12. Cf. definition of "authenticator" in the proposed amendment to the Arts and Cultural Affairs Law of the state of New York, Bill no. S06794, in Senate of the State of New York, http://assembly.state.ny.us/leg/?default_fld=&bn=S06794&term=2013&Summary=Y&Actions=Y&Text=Y (accessed 27 December 2014).

13. Authentication in Art, Art and Law Work Group 2014, para. 3.B.; Art Dealers Association of America (ADAA), Code of Ethics and Professional Practices, paras. IV. and V.

14. More detailed in *Bandle* 2014b, 9.

15. See Christie's Conditions of Sale, para. 5 i "Limited Warranty"; Sotheby's Authenticity Guarantee, para. (i); Bonhams Conditions of Sale for Buyers, Appendix 2 – Buyer's agreement, para. 9.3.1.

16. In fact, should doubts arise before or after the sale of the consigned property's attribution, the harmed party is likely to pursue legal action against the expert and the auction house.

17. See Duret-Robert 2007, 30.

18. Christie's Conditions of Sale, para. 5 i "Limited Warranty"; cf. Sotheby's Authenticity Guarantee, para. (i); Bonhams Conditions of Sale for Buyers, Appendix 2 – Buyer's agreement, para. 9.3.1.

19. Christie's Conditions of Sale, para. 5 i "Limited Warranty"; Sotheby's Authenticity Guarantee, para. ii. The extent of the reasonably affordable and practical technical analysis was disputed in *Thwaytes v. Sotheby's*, a case before the Royal Court of Justice, [2015] EWHC 36 (Ch). In this recent case, the consignor claimed that Sotheby's should have carried out further infra-red or pigment analysis in addition to the x-ray the auction house made before the sale. Sotheby's rejected the assertion on the basis that such additional technical analysis is not accepted practice for works which experts declare to be anonymous copies.

20. For reasons of simplicity, this article does not specifically distinguish between a jury and a judge when discussing the decision process at court under United States law.

21. An art object's misattribution can be a criminal offence. The analysis in this article is limited to private law provisions.

22. See Palmer 1992, 29; Honsell 2012, 3.

23. This section provides a brief overview of the main causes of actions for misattributions. For a detailed analysis, see Bandle 2014a, 42–72.

24. Under Swiss law, the buyer may file a claim for breach of warranty of quality and for any defects, Article 197 Code of Obligations (Federal Act on the Amendment of the Swiss Civil Code – Part Five: The Code of Obligations of 30 March 1911). Under English law, the buyer may bring action either for breach of a contractual term or for breach of warranty, see *Leaf v. International Galleries* (1950) 2 KB 86, at 89–90, and 93; Section 61 (1) "warranty" Sale of Goods Act 1979.

25. We should note here that the contractual qualification under Swiss law of most auction sales results in a sale relationship between the purchaser and the auction house, not the consignor, see Becker 2011.

26. In *Hoos v. Weber* [1974] 232 Estates Gazette 1379, Lord Denning MR accepted that Sotheby's owed the purchaser a duty of care in making its attribution.

27. In particular, statutory law restricts disclaimers for contracts concluded with consumers and for contract terms that are unreasonable and misleading. Further restrictions apply based on statutory sales law. Detailed in Bandle 2014a, 67–72.

28. Article 24 (4) Code of Obligations; Federal Court Ruling 5A_337/2013 of October 23, 2013, para. 5.2.2.

29. Federal Court Rulings 82 II 411, at 424, and 114 II 131, at 139–140.

30. At auction, the purchaser's right to bring a mistake claim is usually limited by the major auction houses' sale conditions, according to which the auction houses must agree to the sale's cancellation. See Becker 2011, n. 503.

31. See in particular *Leaf v. International Galleries* (1950) 2 KB 86, 89.

32. Restatement (Second) of Contracts, para. 152.

33. See *Firestone & Parson, Inc. v. Union League of Philadelphia*, 672 F.Supp. 819 (E.D.P.A. 1987).

34. On the difficult question as to whether a statement on an artwork's authenticity is subject to contract and not simply the expression of an opinion, see Bandle 2014a, 44. In summary, the question has been determined differently in Switzerland than in England and the United States. Under Swiss law, expert opinions are generally considered a contractual performance, except in limited cases where no intent to enter such a contract may be established through the circumstances by which the opinion was given. In England and the United States, there is much reliance on the idea that an expert's authenticity statement is simply an expression of opinion, unless the circumstances allow attachment of contractual force to the statement.

35. The concept of "agency" differs according to its understanding under the laws of Switzerland, England, and the United States. Under Swiss law, agency is a type of contractual relationship. Under both common law jurisdictions, agency is a consensual relationship that may be created when the agent simply performs a service the principal requested.

36. Swiss law characterizes certain authentication contracts as a contract for work and services, under which the authenticating expert incurs strict liability for the attained result. Such a contractual scheme applies especially where objective criteria may verify the correctness of the result. For example, scientific analysis establishing the age of a pigment a painter used may be subject to a contract for work and services. Cf. Article 367 et seqq. Code of Obligations; Federal Court Ruling 127 III 328, 330–331; Chappuis 2007, 52.

37. Under Swiss law, agency is a contractual relationship. Therefore, the agent has a contractual obligation towards his principal to act with skill and care. Should the expert fail to attend to his statutory duties, the principal can file a claim for breach of agency contract, cf. Article 398 Code of Obligations.

38. Federal Court Ruling 115 II 62, 64; see also Thévenoz 1992, 43.

39. *Trasteco Ltd v. Kunsthaus Lempertz KG*, LG Köln, 28 September 2012, 2 O 457/08, at p. 17; *Luxmoore-May and another v. Messenger-May Baverstock (a firm)*, Court of Appeal, Civil Division, [1990] 1 All ER 1067, [1990] 1 WLR 1009 (CA 1989).

40. *Drake v. Agnew's* [2002] EWHC 294 (QB).

41. *Ojeh v. Vincent and Galerie Moderne* (unreported, 1998) (noted by Hudson 1999, 247).

42. Under N.Y. State law, *Kimmell v. Schaffer*, 89 N.Y.2d at 263, 652 N.Y.S.2d at 718–19; *United Safety of Am., Inc. v. Consolidated Edison Co.*, 213 A.D.2d 283, 623 N.Y.S.2d 591 (1st Dept. 1995). The N.Y. Supreme Court negated a special relationship between an auction house visitor and the auction house, in *Ravenna v. Christie's, Inc.*, Index No 121367-00 (N.Y. Sup. Ct., 2001, unpublished) *aff'd*, 289 A.D.2d 15, 734 N.Y.S.2d 21, 2001 N.Y. Slip Op. 09730 (1st Dept. 2001). Under English law, *Hedley Byrne v. Heller* [1964] AC 465, at 486, 502 and 514; *Struna v. Wolf*, 126 Misc. 2d (1031), 484 N.Y.S.2d 392 (Sup. Ct. 1985).

43. *De Balkany v. Christie, Manson & Woods Ltd* (1997) 16 Tr LR 163; *Avrora Fine Arts Investment Ltd v. Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch) (27 July 2012); *Lariviere v. Thaw et al.*, 2000 WL 33965732 (N.Y. Sup.), 2000 N.Y. Slip. Op. 50000(U).

44. Under Swiss law, “wilful deceit” is regulated in Article 28 Code of Obligations. For the tort of deceit under English law, see *Derry v. Peek* (1889) LR 14 App Cas 337. In the United States, each State has its own civil procedure rules. The requirements of a fraud claim under the laws of the state of New York are stipulated in *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995); *Shea v. Hambros PLC*, 244 A.D.2d 39, 673 N.Y.S.2d 369 (1st Dept. 1998).

45. *Kendall* 1997, 325.

46. See *Spencer* 2004b, 194–195, 205, referring to a French case (Cour de cassation, 28.11.1995, pourvoi no. 93-16478, unpublished) where the court decided that the opinion of the moral rights holder did not correctly decide on a work's authenticity. See also *Greenberg Gallery v. Bauman*, 817 F.Supp. 167, 174–175 (D.C. 1993) *aff'd* without opinion, D.C. Cir. 194 U.S. App LEXIS 27175.

47. See *Reeves* 2007, 42; *Hodgkinson* 1990, 79.

48. See *Reeves* 2007, 42; *Hodgkinson* 1990, 112. In civil cases, the burden of proof lies with the plaintiff, see *Spencer* 2004a, 144.

49. The Advisory Committee notes to Rule 702 Federal Rules of Evidence specify the notion of “helpful”: “[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute,” quoting *Ladd* 1952, 418.

50. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* the court established a reliability test for expert evidence, 509 U.S. 579 (1993). According to the *Daubert* standard, expert evidence can be tested by means of 5 factors: “(1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community,” Advisory Committee notes to 2000 Amendment of Rule 702 Federal Rules of Evidence.

51. Cf. *David Welsh v. Newman International Transport, Inc*, n. 2:10-cv-582-FtM-SPC, 2011 WL 3958452 (M.D. Fla., September 8, 2011).
52. 293 F. 1013 (D.C. Cir. 1923).
53. *Lipschitz v. Stein*, 65 A.D.3d 573, 575, 884 N.Y.S.2d 442, 444 (2d Dept. 2009) (quotations omitted). The *Frye* standard became a generally accepted standard in the courts of the state of New York, see *Marino* 2011, 4.
54. *Nussberg v. Tatintisian*, 2014 N.Y. Slip. Op 31593 (U) June 20, 2014 Sup Ct, New York County Docket Number: 650741/2009, 3.
55. Also in civil cases in England, the burden of proof is borne by the party asserting and not denying, i.e. the claimant, cf. *McKeown* 2014, 28.
56. *Mann v. Messrs Chetty & Patel (a firm)* [2000] EWCA Civ 267.
57. See *Senn* 2013, 172.
58. Art.150 et seqq. CPC; see *Senn* 2013, 172.
59. *Trasteco Ltd v. Kunsthaus Lempertz KG*, LG Köln, 28 September 2012, 2 O 457/08, 15.
60. *Ibid.*, 17.
61. *Avrora Fine Arts Investment Ltd v. Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch) (27 July 2012), para. 38.
62. *Drake v. Thos Agnew & Sons Ltd* [2002] EWHC 294 (QB).
63. *Ibid.*, para. 43, per Buckley J.
64. *Ibid.*
65. For example: *Dawson v. Malina*, 463 F.Supp. 461, 467 (S.D.N.Y., 1978); *Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 99, 890 N.Y.S.2d 16, 23 (1st Dept. 2009) leave to appeal denied, 15 N.Y.3d 703, 933 N.E.2d 216 (2010); *Hahn v. Duveen*, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929), 874.
66. As another example, see *De Balkany v. Christie, Manson & Woods Ltd* [1997] 16 Trading Law Reports 163 per J Morison (quote in section IV below). See also *Spencer* 2004b, 200.
67. In *Hatfield v. Child*, the judge expressly dismissed an expert's evidence on the authenticity of a Novel Morrisseau painting because it lacked support and reliability, 2013 O.N.S.C. 7801, Div. Ct. No. 209/13 (17 December 2013), para. 18.
68. *Greenberg Gallery v. Bauman*, 817 F.Supp. 167, 173 (D.C. 1993) aff'd without opinion, D.C. Cir. 194 U.S. App LEXIS 27175.
69. *De Balkany v. Christie, Manson & Woods Ltd.* [1997] 16 Trading Law Reports 163; *Greenwood v. Koven*, 1993 U.S. Dist. LEXIS 18272 (S.D.N.Y. 1993), 3; *Herstand & Co. v. Gallery*, 211 A.D.2d 77, 80 (1995).
70. *Spencer* 2004b, 200.
71. *Bandle* 2015, 225.
72. *Holland* 2012, 368, referring to *Miller v. Minister of Pensions* [1947] 2 All ER 372; for United States law, see *Spencer* 2004a; for Swiss law: Federal Court Rulings 123 III 715, 720 (para. 3.1) and 128 III 271, 276 (para. 2b/aa).
73. See *Spencer* 2010, referring to *Balog v. Center Art Gallery-Hawaii*, 745 F.Supp. 1556 (D.Haw. 1990); *Levin v. Gallery 63 Assoc*, Docket No. 04-CV-1504, 2006 U.S. Dist. LEXIS 70184 (S.D.N.Y. Sept. 28, 2006); *Levin v. Dalva Bros*, 459 F.3d 68 (1st Cir. 2006); *Christie's Inc v. SWCA*, 867 N.Y.S.2d 650 (N.Y. Sup. Ct. N.Y. County 2008).
74. *Dawson v. Malina*, 463 F.Supp. 461, 467 (S.D.N.Y., 1978).
75. The *Dawson* court summarised the issue as follows: "Since the plaintiff has the burden of proof on the issue of breach of warranty, the issue presented here, when reduced to its simplest terms, is whether plaintiff *Dawson* has established by a fair preponderance of the evidence that the representations made by *Malina* were without a reasonable basis in fact at the time that these representations were made." *Ibid.*
76. *Bandle* 2015, 225, fn. 1310, referring to Federal Court Ruling 130 III 321, 324 (para. 3.2).
77. *De Balkany v. Christie, Manson & Woods Ltd.* [1997] 16 Trading Law Reports 163.
78. See sections III B. and D above.
79. LG Köln 2 O 457/08, 28 September 2012, 17.
80. *Martinez* 2007, 119.

81. See *ibid.*, 111, who notes that “the immediacy of the artist’s judgment contrasts with the lawyer’s verbalising intentions and rhetorical strategies”. However, authenticating experts may have a financial interest in the work’s authenticity and hence not give an honest opinion. On the issue of conflicts of interest for experts authenticating art, see section I above.

82. *Greenberg Gallery v. Bauman*, 817 F.Supp. 167, 174–175 (D.C. 1993) *aff’d* without opinion, D.C. Cir. 194 U.S. App LEXIS 27175.

83. See Spencer 2004b, 189.

84. Martinez 2007, 120.

85. *Ibid.*, 122.

86. McClean and Avanesian 2007, 53.

87. A.9016 (Rosenthal)/Bill No. S06794 (Senator Little), proposed amendment to the Arts and Cultural Affairs Law of the state of New York, Bill no. S06794, in Senate of the state of New York, http://assembly.state.ny.us/leg/?default_fld=&bn=S06794&term=2013&Summary=Y&Actions=Y&Text=Y (accessed 27 December 2014).

88. On the competition law aspects of authentication committees and experts, see Von Brühl 2008, and Ringe 2007, 135–147.

89. See Tarsis 2014. See also *Simon-Whelan v. Andy Warhol Foundation*, No. 07 Civ. 6423 (LTS) (S.D.N.Y. May 26, 2009), 2009 US Dist. LEXIS44242; Gerstenblith 2012, 321, 343–44.

90. As the court admitted in *Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 99, 890 N.Y.S.2d 16, 23 (1st Dept. 2009) leave to appeal denied, 15 N.Y.3d 703, 933 N.E.2d 216 (2010).

91. For example those of the Authentication in Art, Art and Law Work Group 2014; see also the guidelines provided by the Basel Institute of Governance, “Basel Art Trade Guidelines,” in Christ and von Selle 2012.

92. See Bandle 2015, 256–57.

BIBLIOGRAPHY

Authentication in Art, Art and Law Work Group. 2014. “The Technical Requirements for Valid Written Expert Opinion Reports on the Authenticity of Paintings for Use by the International Art Community Privately and in Judicial Proceedings Determining the Authenticity of Paintings as a Matter of Law,” http://www.authenticationinart.org/wp-content/uploads/2012/11/Authentication-In-Art-Congress-May-2014_Recommendations-of-Art-and-Law-Work-Group_Official-Release.pdf (accessed 27 December 2014).

Bandle, Anne Laure. 2015. “Sleepers—The Sale of Misattributed Artworks and Antiques at Auction.” PhD diss., University of Geneva.

———. 2014a. “Arbiters of Value—The Complexity and Dealers’ Liability in Pricing Art”. In *L’art a t-il un prix? The Art of Pricing the Priceless*, Studies in Art Law, Vol. 25, edited by Pierre Gabus and Anne Laure Bandle, 29–76. Geneva et al.: Schulthess.

———. 2014b. “Fakes, Fears, and Findings—Disputes over the Authenticity of Artworks.” *Transnational Dispute Management* 2, <http://www.transnational-dispute-management.com/article.asp?key=2100> (accessed 4 November 2014).

Becker, Joëlle. 2011. *La vente aux enchères d’objets d’art en droit privé suisse: représentation, relations contractuelles et responsabilité*, Studies in Art Law, Vol. 21. Geneva et al.: Schulthess.

Chappuis, Christine. 2007. “L’authentification d’œuvres d’art: responsabilité de l’expert et qualification du contrat en droit Suisse.” In *L’expertise et l’authentification des œuvres d’art*, Studies in Art Law, Vol. 19, edited by Marc-André Renold, Pierre Gabus, and Jacques de Werra, 47–74. Geneva et al.: Schulthess.

- Christ, Thomas, and Claudia von Selle. 2012. "Basel Art Trading Guidelines. Intermediary report of a self-regulation initiative." *Working Paper Series* 12, http://www.collective-action.com/sites/collective.localhost/files/publications/basel_art_trade_guidelines.pdf.
- Duret-Robert, François. 2007. "L'authenticité des œuvres d'art dans la pratique du marché de l'art." In *L'expertise et l'authentification des œuvres d'art*, Studies in Art Law, Vol. 19, edited by Marc-André Renold, Pierre Gabus, and Jacques de Werra, 30–37. Geneva et al.: Schulthess.
- Gerstenblith, Patty. 2012. "Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works." *The Columbia Journal of Law & the Arts* 35, no. 3: 321–56.
- Hodgkinson, Tristram. 1990. *Expert Evidence: Law and Practice*. London: Sweet and Maxwell.
- Holland, Jordan. 2012. "The Approach of the English Court to Connoisseurship, Provenance and Technical Analysis." *Art Antiquity and Law* 17, no. 4: 365–75.
- Honsell, Heinrich. 2012. "Gutachterhaftung in der Schweiz." Conference paper presented at the Kunst & Recht Conference, Haftung von Gutachtern im Kunstrecht, Europainstitut, University of Zurich (27 November).
- Hudson, Anthony H. 1999. "Limited Liability and the Director's Warranties—Ojeh v. Waller and Galerie Moderne." *Art Antiquity and Law* 4, no. 3: 247–49.
- Jornod, Jean-Pierre. 2007. "L'expert et son rôle." In *L'expertise et l'authentification des œuvres d'art*, Studies in Art Law, Vol. 19, edited by Marc-André Renold, Pierre Gabus, and Jacques de Werra, 13–27. Geneva et al.: Schulthess.
- Kendall, John. 1997. "Expert Determination: Its Use in Resolving Art and Antiquity Disputes." *Art Antiquity and Law* 2 no. 4: 325–30.
- Ladd, Mason. 1952. "Expert Testimony." *Vanderbilt Law Review* 5: 414–31.
- Marino, Thomas V. 2011. "Cross-Examination of Experts." New York County Lawyers' Association Fourth Annual Art Litigation and Dispute Resolution Institute course material, http://www.nycla.org/index.cfm?section=CLE&page=CLE_Detail&itemID=2553&dateID=20111118.
- Martinez, Cristina S. 2007. "The Painter's Eye and the Lawyer's Tongue: The Artist as a Witness." In *The Trials of Art*, edited by Daniel McClean, 105–133. London: Ridinghouse.
- McClean, Daniel and Armen Avanesian. 2007. "Trials of the Title: The Trials of Brancusi and Veronese." In *The Trials of Art*, edited by Daniel McClean, 37–63. London: Ridinghouse.
- McKeown, Paul, ed. 2014. *Evidence*. 17th ed. Oxford: Oxford University Press.
- O'Connor, Francis V. 2004. "Authenticating the Attribution of Art—Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attribution." In *The Expert versus the Object—Judging Fakes and False Attributions in the Visual Arts*, edited by Ronald D. Spencer, 3–27. New York: Oxford University Press.
- Palmer, Norman. 1992. "The Civil Liability of the Professional Appraiser or Attributer of Works of Art under English Domestic Law." In *L'expertise dans la vente d'objets d'art—Aspects juridiques et pratiques*, Studies in Art Law, Vol. 1, edited by Quentin Byrne-Sutton and Marc-André Renold, 19–36. Zurich: Schulthess.

Reeves, Van Kirk. 2007. "L'expertise devant les tribunaux : expériences en France et aux USA." In *L'expertise et l'authentification des œuvres d'art*, Studies in Art Law, Vol. 19, edited by Marc-André Renold, Pierre Gabus, and Jacques de Werra, 39–44. Geneva et al.: Schulthess.

Ringe, Friederike J. 2007. "Le pouvoir de l'expert face au droit de la concurrence." In *L'expertise et l'authentification des œuvres d'art*, Studies in Art Law Vol. 19, edited by Marc-André Renold, Pierre Gabus, and Jacques de Werra, 135–147. Geneva et al.: Schulthess.

Senn, Mischa. 2013. "Kunstexperte und Kunstrichter—Das Gutachten der Experten im Urteil der Richter." *KUR* 6: 171–75.

Spencer, Ronald D. 2010. "When Experts and Art Scholars Change Their Minds." *Spencer's Art Law Journal* 1, no. 1, <http://www.artnet.com/magazine/news/spencer/spencers-art-law-journal6-25-10.asp#spencer>.

———. 2004a. "The Risk of Legal Liability for Attributions of Visual Art." In *The Expert versus the Object—Judging Fakes and False Attributions in the Visual Arts*, edited by Ronald D. Spencer, 143–87. New York: Oxford University Press.

———. 2004b. "Authentication in Court: Factors Considered and Standards Proposed." In *The Expert versus the Object—Judging Fakes and False Attributions in the Visual Arts*, edited by Ronald D. Spencer, 189–215. New York: Oxford University Press.

Tarsis, Irina. 2014. "The Shifting Sands of Art Authentication: As Calder Foundation finds itself in court again who will have the last word regarding authentication?" Center for Art Law blog, 23 April, <http://itsartlaw.com/2014/04/23/shifty-art-authentication/> (accessed 27 December 2014).

Thaw, Eugene Victor. 2004. Interviewed by Ronald D. Spencer. "The Authentic Will Win Out." In *The Expert versus the Object—Judging Fakes and False Attributions in the Visual Arts*, edited by Ronald D. Spencer, 73–77. New York: Oxford University Press.

Thévenoz, Luc. 1992. "La responsabilité de l'expert en objets d'art selon le droit suisse." In *L'expertise dans la vente d'objets d'art: Aspects juridiques et pratiques*, Studies in Art Law Vol. 1, edited by Quentin Byrne-Sutton and Marc-André Renold, 37–65. Geneva et al.: Schulthess.

Von Brühl (born Ringe), Friederike Gräfin. 2008. "Marktmacht von Kunstexperten als Rechtsproblem: Der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis." PhD diss., University of Lausanne.