



# What's in a Name?

Purchasers have limited legal protections when the authenticity of a work is challenged

By Thomas and Charles Danziger

IT'S POSSIBLE THAT our client Boris was, as he claimed, just a small-time florist from Moscow—but we had our suspicions. How many Russian florists own a Gulfstream G650? Boris also had a thorny legal problem: His insurance company had just determined that five expensive paintings he had bought from Madame Chardon, an elderly French dealer, might be fakes.

At our suggestion, Boris sent one of the paintings, purportedly by a modern American master, to the artist's New York foundation, which promptly declared it “wrong.” On this basis we then asked Chardon to refund Boris's money.

“Impossible!” snapped Chardon. “Boris didn't check with the foundation before buying it, so I'm not legally responsible for his negligence.” Chardon was not only old but prickly as a cactus—and apparently had the ethics of a house cat.

“She must be wrong!” Boris blustered in response.

Unfortunately, the answer wasn't that clear. In the 2013 federal case *ACA Galleries v. Kinney*, ACA inspected a painting supposedly by Milton Avery, paid \$200,000 for it, and only afterward checked with the Milton and Sally Avery Arts Foundation, which declared it a fake. Joseph Kinney refused to refund the money, and ACA sued, claiming there was a “mutual mistake” regarding the authenticity. However, the court held for Kinney, reasoning that “ACA's failure to take advantage of its opportunity to consult the Avery Foundation before buying the painting precludes it from claiming mutual mistake.”

Nevertheless, we told Boris, earlier cases involving mutual mistake have gone the other way. For instance, in the 1992 New York Supreme Court case *Feigen v. Weil*, dealer Richard Feigen paid the collector Frank Weil \$100,000 for a drawing signed “H. Matisse '47,” allegedly without making an in-depth inquiry into its authenticity. After Feigen sold the drawing for \$165,000, the Matisse estate deemed it a forgery. Feigen refunded the money to the buyer, but Weil refused to return Feigen's \$100,000. When Feigen then sued Weil, Weil argued

that Feigen could have easily checked with the Matisse estate before buying the drawing, but the court held for Feigen on the grounds that “it is unfair to enforce a contract that neither party intended to make.”

A second painting Boris had purchased from Chardon was by another famous American artist—or so he thought. On closer examination, he realized the signature misspelled the name. In our experience, this is not a good sign.

When we confronted Chardon, she replied: “Check the invoice, *mon chéri*. I said it was ‘attributed’ to the artist, not ‘by’ him. And besides, Boris bought it 10 years ago, so if there were a warranty, it has long expired.”

Boris was not pleased with her response. “How many years do warranties run?” he asked.

“In New York, four years from the sale,” we replied, “but this can be changed by contract.” For example, major auction houses like Christie's and Sotheby's extend their warranties of authenticity to five years.

In our view, Boris could still sue Chardon for fraud, and this action might not have been time-barred. In New York, such suits can be brought six years from the offense or two years from the time the fraud was discovered or could have been discovered with reasonable diligence. But fraud is often difficult to prove. And while a glaringly phony signature might be obvious evidence, it would also raise the question of why it took so long for Boris to spot it.

In fact, just this past December a case alleging fraud and involving a faked signature was filed in New Jersey. Collectors Barry and Isabel Knispel sued Gallery 63 Antiques and the estate of the couple's deceased appraiser for having sold them a “guaranteed” Norman Rockwell painting in 1994 for \$347,437. Twenty years later, the work was determined by the New York Fine Art Appraisers to be not a genuine Rockwell oil, but merely an illustration for an ad campaign by a lesser-known artist valued at only \$20,000. According to the complaint, the Rockwell signature was painted over (*continued on page 119*)

Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice.

the real artist's signature in a way that was "open and obvious." But in June, the New Jersey Superior Court dismissed the plaintiffs' claims as barred by the statute of limitations.

A third painting Boris had bought was said to be by an artist who lived in Santa Fe. Boris sent the artist a JPEG of the work, and while she wouldn't confirm or deny that she had painted it, she explicitly forbade Boris from attributing it to her. "Can she just disclaim the work?" asked Boris.

The answer was yes, both as a practical matter and under the Visual Artists Rights Act.

Boris tried to have a fourth painting authenticated by the artist's foundation. But it feared potential liability and declined to say whether it was real or not. "Can an artist's foundation do this?" asked Boris.

Yes, we said, referring him to the 2009 New York Supreme Court case *Thome v. Alexander & Louisa Calder Foundation*. Joel Thome, the owner of stage sets designed by Alexander Calder, had sued to compel the Calder Foundation to authenticate the sets so he could sell them. The court rejected Thome's claim, observing that a determination that the sets are authentic compelled through judicial action is meaningless because the "inability to sell the sets is a function of the marketplace."

A fifth and final painting that Boris had purchased from Chardon was by an obscure 19th-century French artist. The artist's great-grandniece now held the right under French law to authenticate her relative's work, and after seeing an image of the painting said it was (surprise!) a fake.

"But this woman is a hairdresser in Lyon and knows nothing about art," complained our client. "She can't have the right to declare my work a fake!" We explained that, under French law, she indeed has this authority if she inherited the artist's "moral right," which includes the right to disclaim authorship. Moreover, unlike in the United States, in France this right is not limited to the life of the artist and may pass to nonexperts.

For example, in the 1995 U.S. federal case *Greenwood v. Koven*, the court ruled that Christie's acted in good faith when it rescinded the sale of a Georges Braque pastel with excellent provenance because the owner of Braque's moral right—Claude Laurens—allowed his son, Quentin Laurens, to refuse to authenticate it.

Boris was growing desperate. "If I present enough evidence, can't I force the great-grandniece to declare my painting authentic?"

The answer was no.

In 2014 the Paris high court of appeals ruled in favor of art expert Bozena Nikiel and made clear that an authenticator is free to declare a work fake without fear of legal liability, citing freedom of thought and expression. A bill that would similarly protect authenticators from unsubstantiated lawsuits by disgruntled owners was approved in June by the New York State Senate. Not as sweeping as the French ruling, the bill raises the pleading standards for plaintiffs bringing actions against authenticators and offers other limits on penalties.

We tried to console Boris. "Just be grateful the French foundation didn't destroy it," we told him.

In June of 2013, in *Lotz v. A.D.O.M.* an Austrian named Andreas Lotz bought a watercolor signed "Miró" from an American dealer and brought it to the association holding Miró's moral right, the Association pour la Défense de l'œuvre de Joan Miró. A.D.O.M. declared it a forgery, had it seized by the police, and asked a court to destroy it—which the court agreed to do. The Court of Appeals affirmed the decision, noting that the only way to ensure that the forgery would not reappear in the market was to destroy it. The court even ordered Lotz to pay the cost of his appeal.

Although we thought Boris had a good case against Chardon, he ultimately didn't want to spend the time or money on litigation. Happily, our story didn't end there, for a year later Chardon was convicted of fraud in another case. Boris the florist took us out for a celebratory glass of rosé. ☺