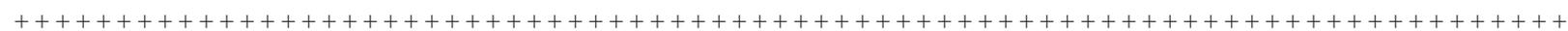


IS IT OR ISN'T IT?

Authentication is a major step toward protecting your artistic assets, although the process is rarely foolproof. Here's what you should know about establishing the authorship of a work. By Thomas and Charles Danziger



LIKE MANY ATTORNEYS, we love technology. Unfortunately, the feeling isn't mutual. Our firm's computers combust, our cell phones fry, and our PDAs are more perilous than a pistol-packing paralegal.

So when asked for advice in the tricky area of authenticating works of art, we are mindful of the limits of technology and technical analysis—methods that are increasingly gaining favor among collectors. Our advice to savvy clients: Start with connoisseurship and research, and end with scientific analysis, if necessary.

Connoisseurship—on which most authenticity decisions are still based—involves stylistic analysis coupled with an expert's simple intuition. In Malcolm Gladwell's book *Blink*, Thomas Hoving, former director of the Metropolitan Museum of Art, in New York, describes his instant reaction to the Getty kouros, a supposedly ancient Greek statue of a youth in the Getty collection that had been vetted by scientists but whose authenticity remains unresolved after years of debate: It "looked like it had been dipped in the very best caffe latte from Starbucks," says Hoving. As this suggests, an expert's "gut reaction" may be more compelling than a truckload of documentation.

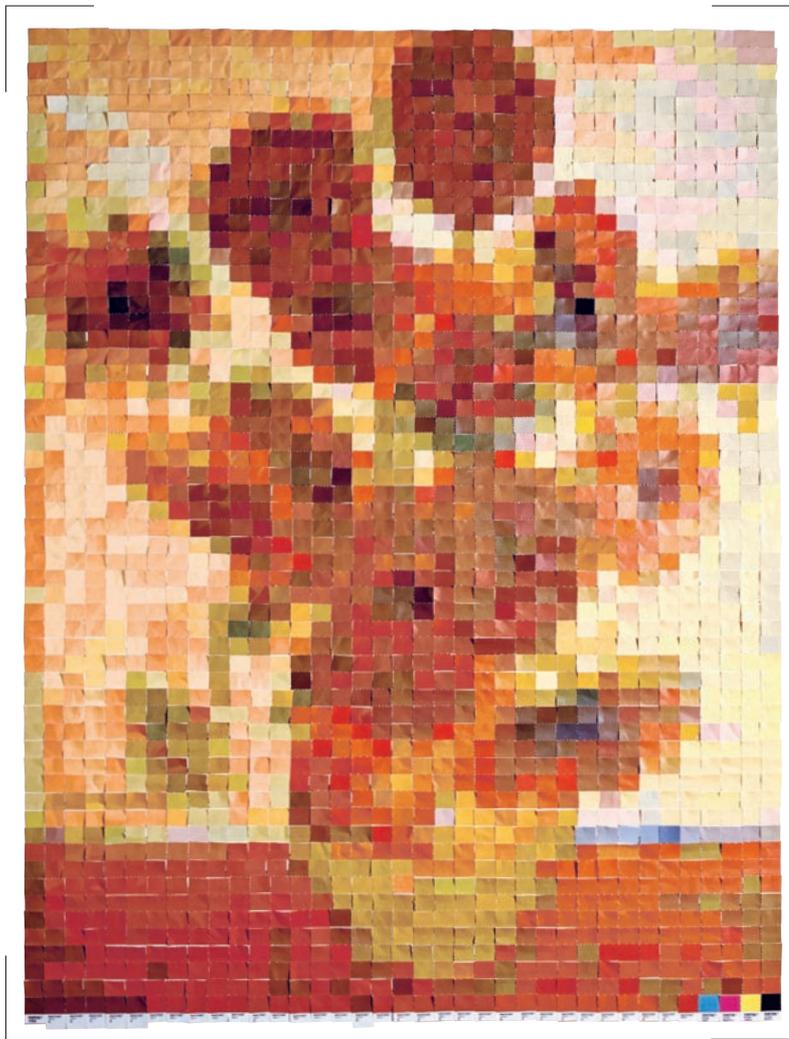
The problem collectors face is finding an unbiased expert to evaluate a work of art. We often suggest consulting with a local museum curator, who, at least theoretically, is more impartial than someone in the trade. However, many curators are overly cautious in authenticating works—suffering from "fake fever"—because

they realize just how easily works can be doctored. And museums, fearing legal liability, often have policies restricting their curators' participation in outside evaluations.

When dealing with contemporary art, checking with the artist is always a good start, although even this approach is not foolproof. One famous painter recently assured our clients that a piece in their collection was his but refused to authenticate it in writing because it was "just a student work." Other artists may not be candid about when their works were created. Giorgio De Chirico, for example, was famous for painting, and predating, replicas of originals created years earlier, when his pictures were in particular demand.

To authenticate an artwork in France, one might consult with the holder of the artist's so-called *droit moral* (moral right), which includes the right to attribute a piece as being by the artist. Of course, the holder of the right—usually the heir—may not have any particular expertise in authentication, and even a French court need not accept the holder's opinion as definitive. In our experience, sending art to France for evaluation can also be risky because some authenticating committees take a "destroy the work first, ask questions later" approach if authorship is even in question.

Authenticating committees in the U.S. usually ask for a firsthand look at a work and for background information relating to its ownership history, including publications that cite the piece. Skeptics observe that certain committees may have economic incentives to authenticate



After Van Gogh (Pictures of Color), 2001, is an authentic Vik Muniz and not, quite obviously, work by the Dutch-born Post-Impressionist.

or, perhaps more importantly, refuse to authenticate works—for example, the desire to limit the supply of "originals." Nonetheless, the decision by authenticating committees, such as those for Andy Warhol and Robert Mapplethorpe, not to recognize a work as by the artist can effectively render a piece unmarketable, a contention recently (and we believe correctly) made in a lawsuit seeking

damages against the Calder Foundation for its refusal to authenticate sculptures and other works allegedly created under the supervision of Alexander Calder.

Independent art experts are another valuable resource for the collector. However, Peter Sutton, director of the Bruce Museum, in Greenwich, Connecticut, where the exhibition "Fakes and Forgeries:

An ongoing problem is that opinions, especially on older works, may change over time, so today's "hand of the master" may be tomorrow's "done by a cousin."

The Art of Deception" is on view through September 9, cautions collectors to be wary of anyone who charges for an opinion, since experts who "get into the cottage industry of authenticating are tempted to give the object more credence."

Reputable dealers can also be invaluable in authenticating works and will usually stand behind the pieces they sell. Buyers at major "vetted" art fairs have an added level of comfort, since independent experts spend days before the opening examining objects, questioning attributions and often requiring the relabeling or removal of works.

An ongoing problem in this area is that opinions, especially on older works, may change over time as more information becomes available, so today's "hand of the master" may turn out to be tomorrow's "done by a cousin." This is where the four-year statute of limitations for breach of warranty (other than in the event of fraud) comes into play. Claims made after that date may be time barred.

When a dealer issues an invoice or bill of sale stating that a work is authentic, is this merely an opinion about authenticity or a warranty of fact? The laws in four U.S. states—New York, Michigan, Iowa and Florida—expressly protect the consumer by eliminating the distinction. The New York statute, for example, holds that when an arts merchant sells fine art to a non-arts mer-

chant and furnishes a certificate of authenticity or similar instrument, it "(a) shall be presumed to be part of the basis of the bargain; and (b) shall create an express warranty for the material facts stated as of the date of such sale or exchange." The warranty applies even if the merchant tries to waffle in the authenticity language used ("We believe the work to be authentic" versus "The work is authentic"). Buying at auction presents its own challenges, since, depending on the location of the sale, buyers may have limited time or opportunity to perform due diligence on a work. Hugo Weihe, Christie's international director of Asian art, suggests that would-be bidders handle a work of art, sleep on it (preferably not literally) and then look at it again. "It should be eternally fresh," he says. "If, on the second day, you don't feel the freshness, there may be a problem—or it may be just a poor work of art. Masterpieces speak to you again and again."

At Sotheby's and Christie's, warranties of authenticity run for a full year beyond the statutory four-year period and commence on the date of sale. Significantly, these warranties relate only to the authorship of the work and not to its provenance or condition. Smaller, regional auction houses may be less willing to guarantee authenticity or to provide an extended warranty period.

Research is necessary to evaluate authenticity, although documents can be faked as well



Reinstated as a Vermeer after 10 years of research, *Young Woman Seated at the Virginals*, above, sold at Sotheby's London in 2004 for £16.2 million (\$28.5 million). Below left: The Getty kouros, identified by the museum as either ancient Greek or a "modern forgery."

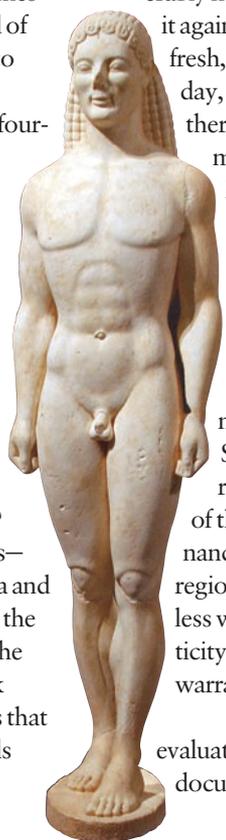
as works. For example, in a well-publicized 2006 controversy involving Costco's Web site and dealers working with the company, Maya Widmaier-Picasso, the artist's daughter and holder of Picasso's *droit moral*, claimed that the certificates of authenticity accompanying certain "Picasso" drawings were fakes. Some experts claim that the more documentation that comes with an unpublished work, the greater the likelihood that it's a fake.

One essential factor is the provenance, or ownership history, of the work. [For more on this topic, see our Brothers in Law column, December 2006.] New York attorney Ronald Spencer tells the cautionary tale of a client who wanted to buy an important piece and was given a list of its past owners neatly printed on the gallery's letterhead. After some digging, however, Spencer learned that the gallery had not independently verified the list. The moral: Whenever

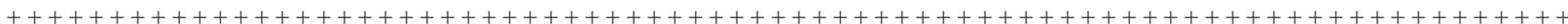
possible, do your own due diligence, or at the very least, ask who researched what and when.

Another obvious resource for authentication is the catalogue raisonné—a listing of all known works by a particular artist [see Brothers in Law, March 2006]. Since different scholars may create different catalogues raisonnés and no particular qualifications are necessary to write one, they may arrive at conflicting conclusions concerning authenticity. Nevertheless, if a major auction house consistently relies on a particular catalogue raisonné, it is more likely to be deemed authoritative.

Once connoisseurship and research suggest that a work is "right," the next step may be technical analysis, like radiocarbon and thermoluminescent (TL) dating. Such techniques are sometimes heralded as the wave of the future, but in our experience, they are more useful for disputing or disproving authorship >>



Tips on Authentication



- + Use your eyes. Inspect the work's condition, preferably using a black light, for hidden damage, repairs or restoration.
- + Consult experts such as museum curators, artist authentication committees, the International Foundation for Art Research (IFAR), reputable dealers and auction house specialists.
- + Sleep on it: Wait at least one day before purchasing to see if the piece still "speaks to you."
- + Ask the seller what independent due diligence he or she has done on the work's authenticity—and confirm this in writing.
- + If a connoisseur cannot authenticate the work, ask for a referral to someone who can. Major auction houses maintain lists of outside experts for particular artists.
- + Research the piece's ownership history, relevant documentation (including certificates of authenticity) and publications or exhibitions in which it has appeared.
- + Check whether the work has been included in the artist's catalogue raisonné, but bear in mind that almost no single volume is authoritative or conclusive. Determine which catalogue raisonné is used by the major auction houses and go to that one first.
- + Purchase from art fairs that are known to vet works in advance for authenticity.
- + Work with reputable sellers, and avoid those who try to disclaim warranties of authenticity.
- + If the seller doesn't authenticate, condition the purchase of the piece on authentication by an outside expert.
- + Remember that documentation, no matter how seemingly persuasive, can be faked.
- + Be wary of authentications based solely on photographs, especially if the work is three-dimensional.
- + Be suspicious of authentication experts who charge a percentage of the work's value.
- + Obtain a condition report from an experienced conservator.
- + Technical analysis, although useful, should not be viewed as absolute proof of authenticity.
- + When in doubt, err on the side of caution. A suspiciously low purchase price should be a red flag.
- + Consider periodically reauthenticating a work. Intervening research may change opinions on its genuineness.
- + When selling a work in France, remember to consult the holder of the artist's *droit moral*, usually the artist's heir.
- + If a problem arises, don't sleep on your rights. Consult with a good art attorney before the statute of limitations on a claim has expired.



than for actual authentication. Science can determine that an object is old but not that it is necessarily by a particular artist. For instance, most of the problems of Rembrandt attribution involve examples that were done during the artist's time, often by others in his studio.

Because authentication may

change as subsequent research is conducted, collectors should periodically check back with experts. Reauthentication is especially important when selling a work, to avoid possible legal problems with the buyer.

When all else fails, some authentication issues are resolved in courts of law. In the U.S. and England, expert witnesses are called by the parties, and the judge then rules on authenticity; French courts appoint their own experts. In our view, courts are among the worst places to rule on authenticity, since judges and lawyers tend to think in terms of clear rules and final judgments, quite inappropriate for an area where opinions are constantly changing.

After all, attorneys like us, who can't program their iPods, probably shouldn't be vetting Vermeers. ☐

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Above: Sotheby's pulled this photograph and one other from its May sale after artist Peter Beard said they were not his. Below: An entry in the Jackson Pollock catalogue raisonné.

