

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.

Like so 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 we 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 authentication 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 coffee 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 their 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

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evaluation can also be risky because some authenticating committees take a “destroy the work first, ask questions latter” approach if authorship is even in question.

Authenticating committees in the U.S. usually ask for a firsthand look at the work and for background information relating to ownership history, including publications that cite the piece. Skeptics observe that certain committees may have economic incentives to authenticate 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: 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 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 “hands 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 law in four U.S. states- New York, Michigan, Iowa and Florida - expressly protect the customer by eliminating the distinction. The New York statute, for example, holds that when an arts merchant sells fine art to a non-arts merchant 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 sales 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 bidder 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 that same freshness, there may be a problem-or it may just be 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 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 as works. For example, in a well-published 2006 controversy involving Costco’s Web site and dealers working with the company, Maya Windmaier-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 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 out 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 raisonnée listing of all known works by a particular artist [see Brother’s in Law, March 2006]. Since different scholars may create different catalogues raisonnée 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 catalogues raisonnée, it is more likely to be deemed authoritative.

Once connoisseurship and research suggests 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 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 a 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 buyers.

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 judgment, quite inappropriate for an era where opinions are constantly changing.

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

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 raisonnée, but bear in mind that almost no single volume is authoritative or conclusive. Determine which catalogue raisonnée 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 authenticity by an outside expert.
- Remember that documentation, no matter how seemingly persuasive, can be faked.

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- 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 conditional 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.