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ART AUTHENTICATION: A GAME OF MONOPOLY?

SOMMARIO: 1. Art Authentication - 1.1. Case law

1. Art Authentication.

To authenticate a work of art is to establish the existence of a certain link between the artwork and the artist. The need for this certificate originated with the beginning of the “authenticity culture” in the 19th century when, as Leo Tolstoy said in his work “What is Art?”, the artistic value is achieved only when an artwork expresses the authentic value of its maker.¹

Authentication must be distinguished from provenance analysis, which consists of re-constructing the entire chain of ownership from the original artist to the present owner. In the art world providing info as to the provenance is considered to be “persuasive evidence of authenticity”, so provenance supports the authenticity of a work, enhancing its value, despite the distinction between authenticity and provenance is often blurred by the Courts.² Another distinction concerns the concept of appraisal, which is only an informed opinion of the value of an artwork, which does not confirm provenance or

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¹ L. Tolstoy “*What is Art?*”, Paperback, 2008.

² *Jafari v. Wally Findlay Galleries*, 741 F. Supp. 64, 65 (S.D.N.Y. 1990).

authenticity.³ On the contrary, authenticity is the factor that mostly determines the value of an artwork.

Few art historical issues are as contentious, or have as dramatic and immediate effects in the marketplace, as those of attribution and authentication. Authenticity has a great importance since it affects the market value and its availability to provide insights into artists and their time.

To this regard, contemporary art is bought and sold on two basic markets: the primary market for newly created works of living artists, and the secondary market for works that have already been sold on the primary market. Authentication supports both markets but, particularly, the secondary art market.

If a work of art is not listed in a *catalogue raisonné*, secondary market actors may turn to authenticate boards, which are often created within the artist's foundations and made up of relatives of the artist and scholars. While, technically, authentication is but a mere opinion, nevertheless the rejection of authentication can dramatically affect the market value of an artwork, since many auction houses – as well as major art galleries – will not sell an alleged masterpiece without a board authentication or if the painting was excluded from the *catalogue raisonné*.

The editing of the *catalogue raisonné* constitutes a separate, parallel process of authentication made by authorized boards that are in place especially for 20th-century artists and that were sued frequently during the last two decades, since authentication boards often represent a "monopoly" in issuing certificates of authentication. The issue of the legal standing of art foundation to issue authentication certificates, by the way, is in itself very controversial and different solutions may apply under the laws of different countries: this complex matter, however, is beyond the scope of this article.

³ An appraisal by itself is not a warranty of authenticity, see *Rosen v. Spanierman*, 894 F.2d 28 (2d Cir. 1990).

2. Case law.

With reference to case law, a first example can be the Pollock-Krasner Foundation and its Authentication Board, set up by the Foundation and responsible, from 1990 to 1996, for authenticating works by Jackson Pollock and his wife, Lee Krasner. In the mid-1990's, two plaintiffs brought antitrust claims against the Pollock-Krasner Foundation and the Pollock-Krasner Authentication Board, but both failed. The first case was dismissed on statute of limitations grounds⁴, whereas in the second one the judge did not accept the plaintiff's claim that the Board was trying to monopolize the market.⁵

Another analogous example is the Alexander Calder Foundation, run by Calder's grandson, Alexander Rower, which also authenticates works for the purpose of inclusion in the *catalogue raisonné*. In *Thome v. Alexander & Louisa Calder Foundation* case, the Court found that the Calder Foundation had no duty to the plaintiff to authenticate the work and that the individual officers of the charity, who were sued, enjoyed immunity from suit.⁶ The fact that the Calder Foundation might own Calder works and thus might enhance their value by restricting the market was not enough to survive dismissal.

To this purpose, one of the most interesting and recent cases in the art world is *Joe Simon-Whelan et al. v. the Andy Warhol Foundation for the Visual Arts, Inc., et al.* This antitrust lawsuit against an authentication board was the first dispute that was able to survive the defendant's motion to dismiss, since the other aforementioned disputes did not overcome the defendant's preliminary objections.

⁴ *Vitale v. Marlborough Gallery, The Pollock-Krasner Foundation et al*, 32 U.S.P.Q. 2d 1283, (S.D.N.Y. 5.7.1994).

⁵ *Kramer v. The Pollock-Krasner Foundation et al*, 890 Fed Supp 250, (S.D.N.Y. 1995).

⁶ *Thome v. The Alexander & Louisa Calder Foundation*, 890 N.Y.S.2d 16 (First Dept. 2009).

The dispute concerned an Andy Warhol self-portrait “*Red Self portrait*”, one of the ten identical self-portrait that Warhol made in August 1965, whose authentication was denied by the Art Authentication Board of the Andy Warhol Foundation. The owner submitted his US\$ 195,000 painting for authentication, but the Board stamped “denied” on his painting. However, this painting had been already authenticated – before the creation of the Board - both by the Andy Warhol Foundation and by the Warhol Estate. Lawsuits are so common in this field that many experts require owners to sign a statement promising not to sue before they will even look at a work and offer an opinion. Among those who require such a signed statement is also the Andy Warhol Art Authentication Board, which was created in 1995 by the Andy Warhol Foundation for the Visual Arts.

Such a statement signed in favor of Andy Warhol Art Authentication Board did not prevent Simon-Whelan to challenge not only the authenticity opinion, but also to seek damages and injunctive relief alleging anti-trust violations, collusion and fraud. He asserted that the rejection was denied in order to limit the number of authentic works sold in the art market, as leverage in the market, acting as a monopolization and market restraint.

The plaintiff alleged collusion between the Foundation that sold Warhol artworks, and the Board that authenticated Warhol artworks: the Foundation would have used the Board in order to remove competing Warhol artworks from the market to raise the value of the Foundation’s art collection.

The plaintiff walked away in November 2010 from this lawsuit with a settlement agreement in which he declares that there is no real evidence that the defendants have ever been involved in any conspiracy or anticompetitive acts linked to the authentication of Warhol artwork. The other terms of such settlement, however, are not known.

Notwithstanding the above, lawsuits concerning the rejection of Warhol artworks by the Art Authentication Board haven't finished yet: last year a US collector, Susan Shaer, sued the Board concerning her Andy Warhol self-portrait made in 1965 and the dispute is still pending. In her writ, the plaintiff claimed that the Andy Warhol Art Authentication Board routinely rejects authentic Warhol artworks with a "denied" stamp, thereby creating "artificial scarcity" and inflating the value of the art owned by the foundation.

These lawsuits show clearly the power of art authentication boards, which are in fact often sued. Therefore, many of them are devising very sophisticated strategies, such as not denying expressly the authenticity of a work but rather responding that "based on the info known so far, this board is unable to include the work in the artist catalogue" or something alike.

In any case, antitrust issues deriving from refusing certification of authentication can certainly be raised by disgruntled owners of artworks whose authenticity was denied.

Finally, organization authenticating artwork should certainly avoid conflicts of interest or perceived conflicts by ensuring, at least, that no one involved in authentication sells potentially competing artworks.

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