

US ARTS LAW UPDATE
NEW YORK LEGAL DECISION PROVIDES PROTECTION TO EXPERTS FOR ART
AUTHENTICATION OPINIONS

SUSAN B BRUNING¹

[53] In June 2000, a New York Supreme Court Justice found that The Pollock-Krasner Authentication Board and its individual members could not be sued by the owner of a painting for opining that the painting was not an authentic work by Jackson Pollock.² The Court found that the owner had signed the Authentication Board's application and agreement providing that the owner

agree[s] to hold the Authentication Board and its Directors and Officers in their representative and individual capacities harmless from any liability towards [the owner] or others because of its rendition of an opinion (or refusal to render an opinion).³

Based on the owner's agreement not to sue to the Board for its opinion, which the Court found 'by its terms, clearly bars this action',⁴ the Court found that, not only was the Plaintiff in breach of his contractual agreement not to sue the Defendants, but the Plaintiff and his lawyer were both subject to sanctions of \$1,000 each for bringing a frivolous claim.⁵ Part 130 of the New York Rules of Court provides for sanctions for frivolous conduct if the action brought was 'completely without merit in law or fact and cannot be supported by any reasonable argument for an extension, [54] modification or reversal of existing law.'⁶ Among the factors weighing against the Plaintiff's assertion of authenticity was the fact that the inscription on the back of the painting misspelled the names of both Pollock and the donee.⁷

¹ Attorney at Law, Dallas, Texas, and Adjunct Lecturer in Law, Southern Methodist University School of Law, Dallas, Texas.

² Spencer, 'A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity' [Spring 2000] 3 *IFAR Journal* 23, citing *Lariviere v EV Thaw, The Pollock-Krasner Authentication Board, et al* Supreme Court, New York Co, Decision, index no 100627/99, 26 June 2000; Emily Jane Goodman J.

³ *Ibid.*

⁴ *Ibid* 24, citing *Lariviere*, 6.

⁵ *Ibid* 25.

⁶ *Ibid* citing Rule 130.1(a)(i) of the Uniform Rules.

⁷ *Ibid.*

For the last 70 years the law of New York has left open the possibility that an expert opining on the authenticity of a work of art could be held liable for expressing a negative opinion about the work, perhaps under theories of defamation, product disparagement, negligence or breach of contract.⁸ The well known case of *Hahn v Duveen*,⁹ in which Sir Joseph Duveen paid Mrs. Hahn \$60,000 in 1929 to settle a claim based on Sir Duveen's stated opinion that Mrs. Hahn's purported Da Vinci painting was not authentic, spread a wariness among art experts who have been asked — or been inclined — to express their opinion about the authenticity of a work.¹⁰ There now appears to be a bit more comfort offered under New York law for an expert to render an authenticity opinion, if given within the context of having a written 'hold harmless' agreement with the requesting party that absolves the expert of liability for his service.

Schiele's *Portrait of Wally* no longer 'stolen' according to New York court: painting to be returned to Leopold Foundation subject to further government appeal

A portrait by Egon Schiele, titled *Portrait of Wally*, has been the subject of a legal tug of war between federal and New York prosecutors and an Austrian foundation, the Leopold Museum-Privatsiftung.¹¹ In 1997, the painting was loaned by the foundation to the Museum of Modern Art for exhibition in New York. While on exhibit at MOMA, the Bondi family, American heirs of Holocaust victims who once owned the works, asserted claims to the painting and to another Schiele work in the exhibit, *Dead City*. It was determined that at the end of World War II, the US Army took possession of the works, which had been in Nazi control, and attempted to return them to their proper owners. Mistakenly, however, the works were given to the wrong party and ultimately were purchased by the Leopold foundation.¹²

Three days after the MOMA exhibit closed, the New York District Attorney's Office issued a subpoena for the works in response to the Bondi family claims. The warrant

⁸ Ibid 23.

⁹ *Hahn v Duveen*, 234 NYS 185 (Sup Ct NYCo 1929).

¹⁰ Ibid 23.

¹¹ *United States of America v Portrait of Wally, a Painting by Egon Schiele*, QDS: 02762701. See US Arts Law Update in (1999) 5 *Media & Arts Law Review* 49, 50 for earlier discussion.

¹² Ibid.

was later quashed by the New York Court of Appeals¹³ based on s 12.03 of the *New York Arts and Cultural Affairs Law*, which prohibited the seizure of works of fine art while on exhibition by a non-resident exhibitor ‘under the auspices or supervision of any [New York] museum’.¹⁴ *Dead City* was thereafter returned to the foundation. However, before the return of *Portrait of Wally*, the US Attorney’s Office intervened, filing a civil forfeiture claim in federal court claiming that the work constituted stolen property and thus was imported into the United States in violation of the *National Stolen Property Act*.¹⁵ A seizure warrant was once more issued for the work. However, on 19 July 2000, a US District Judge dismissed the government’s forfeiture suit based on a finding that the painting was no longer considered ‘stolen.’¹⁶ The court applied the common law doctrine that ‘one cannot be convicted of receiving stolen goods if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent, including the police.’¹⁷ The court reasoned that the US Army acted as agent for the Bondi [55] family in taking possession of the painting from the Nazis. Thus, the work lost its status as a stolen work when the US Army took possession. Accordingly, the painting is not forfeitable to the US Government because it did not enter the US in violation of the *National Stolen Property Act*.¹⁸ Despite the dismissal of the government’s case, the judge left the seizure warrant in place pending a possible government appeal.

As a result of the Schiele debacle, New York amended its *Art and Cultural Affairs Law* to narrow the scope of immunity for loaned art works.¹⁹ As amended, the law protects works of fine art on loan to a New York museum only from seizure based on civil claims.²⁰ A loaned work of fine art subject to a criminal claim (as in the Schiele case) will no longer be shielded from action under New York law.

¹³ *The Matter of the Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 93 NY 2d 729; 697 NYS 2d 538 (1999).

¹⁴ *New York Arts and Cultural Affairs Law* s 12.03.

¹⁵ *National Stolen Property Act* 18 USC s 2314.

¹⁶ *United States v Portrait*, above n 11.

¹⁷ *Ibid* citing *United States v Muzii*, 676 F 2d 919, 923 (2d Cir 1982).

¹⁸ *Ibid*.

¹⁹ ‘New York Amends Law to Allow Criminal Seizure of Art on Loan to Museums’ [Spring 2000] 3 *IFAR Journal* 7, citing *New York Arts and Cultural Affairs Law* s 12.03.

²⁰ *Ibid*.

Former Azerbaijan prosecutor sentenced to federal prison in New York for dealing in stolen art

In June 2000, a federal court in New York sentenced a former Azerbaijan prosecutor, Natavan Aleskerova, to 11 months in prison for conspiracy and for possession and concealment of stolen property in connection with a multimillion dollar stolen art scheme.²¹ Works valued at more than \$10 million were stolen from a museum in Baku, Azerbaijan. In 1997, one of Aleskerova's co-conspirators showed some of the art to a museum curator in a Manhattan hotel. The curator, from the Bremen Museum in Germany from which the works were stolen at the end of World War II, notified the US Customs Service that the works were being offered for sale back to the museum. As a result, more than 200 works were seized from a Brooklyn apartment and held for ultimate return. Of Aleskerova's two co-conspirators, one is dead and one (her husband, Aydyn Ali Ibragimov) is a fugitive.²²

Reforms in the works for the Cultural Property Implementation Act

In the past year, Bills have been introduced in both houses of the US Congress²³ to amend the *Convention on Cultural Property Implementation Act* (CCPIA),²⁴ through which the US implemented its participation as a State Party to the 1970 *UNESCO Convention*.²⁵ The CCPIA sets forth the bases upon which the US will apply import restrictions on certain archaeological or ethnological items claimed to be illegally exported or stolen 'cultural patrimony' of another UNESCO State Party. To assist with reviews of import restriction requests, the US President is charged with appointing an 11 member Cultural Property Advisory Committee composed of members from various sectors of the community, as follows: two members representing the interests of museums; three members who are experts in the fields of archaeology, anthropology, ethnology, or related areas; three members who are experts in the international sale of cultural property; and three members representing the interests of the general public.²⁶

²¹ 'Prison Term for Conspirator in Bremen-Baku Art Case' [Spring 2000] 5 *IFAR Journal* 7.

²² *Ibid.*

²³ *Cultural Property Procedural Reform Act*, Senate Bill 1999 S 1696, 106th Congress, 1st Session; House Bill 2000 HR 4372; 106th Congress, 2d Session.

²⁴ 19 USC s 2601et seq. See US Arts Law Update in (1999) 5 *Media & Arts Law Review* 49, 50 for earlier discussion.

²⁵ *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*.

²⁶ 19 USC s 306.

[56] The stated goal of the Bills is to ‘improve the procedures for restricting imports of archaeological and ethnological material.’²⁷ Efforts to reform the CCPIA arose out of increasing concern that some State Parties were requesting protection for overbroad categories of ‘cultural patrimony.’²⁸ After the US granted broad import restrictions in response to several requests,²⁹ complaints began to surface about possible bias in the Committee toward expanded import controls and consequent impacts on free international trade. Section 303(f) of the CCPIA governs the procedures for the President to follow when considering the implementation or continuance of import restrictions. The current language of s 303(f) requires the President to publish notification of the request and to give the Committee the opportunity to review and recommend actions on the request. If amended, the President would also be required to provide interested parties with the opportunity to comment on the Committee’s findings and recommendations.³⁰ In addition, the amendments would require the Committee itself to provide the public with the opportunity to comment on the fact finding phase of the Committee actions.³¹ The amended language would also narrow the scope of valid requests by requiring a requesting State Party to show that ‘particular objects’ of its cultural patrimony were in jeopardy, and that more than mere ‘historical evidence’ of pillaging existed to justify the request.³²

During the last year, several import restriction requests have been initiated.³³ In December 1999, the US imposed restrictions on Khmer Stone archaeological materials from Cambodia. In March 2000, the US extended import restrictions on certain categories of archaeological materials from pre-Hispanic cultures of the Republic of El Salvador. Most recently, on 26 October 2000, the US Customs Service announced import restrictions on pre-Hispanic archaeological materials from Nicaragua. Pending

²⁷ Ibid 1999 s 1696, 2000 HR 2372.

²⁸ See ‘Reform will bring much needed transparency to the process of importing antiquities’ *Legal Times*, 31 July 2000.

²⁹ Ibid citing a near total ban on the import of Canadian Native American objects despite little evidence of looting, and Committee support for a request from Peru for blanket import restrictions covering its entire ‘cultural heritage.’

³⁰ Proposed s 303(f)(1)(C).

³¹ Proposed s 306(f)(1).

³² Proposed s 303(a)(1).

³³ US Department of State, Bureau of Educational and Cultural Affairs (as of Nov 2000). See <<http://exchanges.state.gov/education/culprop/whatsnew.html>>.

are requests for import restrictions submitted from Bolivia, Italy, Cambodia and Cyprus.³⁴

Seattle Museum obtains right to sue New York gallery for loss of Matisse

In a reversal of its 1999 decision,³⁵ a federal judge permitted the Seattle Art Museum to sue Knoedler & Co, a New York gallery, based on the Knoedler's 1954 sale of Matisse's *Odalisque* (also known as *Oriental Casaque Brodée*) to the late Prentice Bloedel.³⁶ The heirs of Paul Rosenberg successfully claimed the work, which was donated by Mr Bloedel to the museum in the early 1990s, as having been stolen from Rosenberg by the Nazis during World War II. The museum returned the work to the Rosenberg heirs in June of 1999 and then attempted to sue Knoedler on behalf of the Bloedel heirs, but the judge denied standing. Subsequently, the Bloedels formally transferred their legal claims in the painting to the museum, and the judge thereby reinstated the case.³⁷ The judge had earlier determined that the museum had gathered sufficient evidence of fraud to overcome a summary judgment motion filed by the gallery, if the museum could show standing to sue.³⁸ Nonetheless, the court ordered the museum to pay [57] \$143,000 in Knoedler's legal fees and expenses incurred due to the museum's failure to present evidence of ownership of the painting to the court in a timely fashion.³⁹

However, on 12 October 2000, the museum and Knoedler jointly announced a settlement of the highly publicised lawsuit on 'mutually satisfactory terms.'⁴⁰ As part of the settlement, the museum agreed to withdraw all of its allegations of fraud and negligent misrepresentation against Knoedler, in exchange for Knoedler's agreement to transfer to the museum one or more significant works of art, to be selected by the museum for its collection, or an equivalent amount in cash; reimburse the museum for its legal fees and expenses incurred in connection with the suit; and waive its right to

³⁴ Ibid.

³⁵ *Rosenberg v Seattle Art Museum*, 70 F Supp 2d 1163 (WD Wash, 1999). See US Arts Law Update in (1999) 5 *Media & Arts Law Review* 50 for earlier discussion.

³⁶ *The National Law Journal* 10 April 2000, A4.

³⁷ Ibid.

³⁸ [April 2000] 21 *Entertainment Law Reporter* 11.

³⁹ *Seattle Art Museum press release*, 12 October 2000.

⁴⁰ Ibid.

collect the \$143,000 in legal fees and costs awarded to it by the court, as mentioned above.

Brooklyn Museum and New York Mayor battle over ‘Sensation’ exhibit

The Brooklyn Museum successfully brought a declaratory action in federal court to prevent the City of New York, at the instigation of Mayor Giuliani, from evicting the Museum from its premises in retaliation for its exhibition of controversial art.⁴¹ The 1999 exhibition, titled ‘Sensation’, featuring some 90 works owned by Charles Saatchi, was brought to the Brooklyn Museum after its highly publicised exhibition in London. Many of the works were controversial, including a work by Chris Ofili titled *The Holy Virgin Mary* which included elephant dung and scattered photographs of female genitalia.⁴² After declaring that the Ofili work ‘offends’ him and ‘is sick,’ the Mayor instituted efforts to terminate city funding for the Museum as a whole,⁴³ arguing that ‘if you are a government subsidised enterprise then you can’t do things that desecrate the most personal and deeply held views of the people in society.’⁴⁴ The Mayor and other City officials vowed to ‘cut off all funding, including construction funding, to seek to replace the Board of Trustees, to cancel the Lease, and to assume possession of the Museum building, unless the Exhibit were canceled.’⁴⁵

In response, the Museum commenced a declaratory action in federal district court seeking to prevent the city from punishing it for displaying the exhibit, claiming that such punishment would violate the Museum’s rights of free expression under the First and Fourteenth Amendments of the US Constitution.⁴⁶ Thereafter, the city filed an action in state court seeking to eject the Museum from its premises.

The federal court first determined that it had proper jurisdiction over the parties’ issues, and that it could resolve both the state and federal claims.⁴⁷ The court then proceeded to find that the Museum had already suffered irreparable harm⁴⁸ and that that it had a

⁴¹ *The Brooklyn Institute of Arts and Sciences v The City of New York, et al*, 64 F Supp 2d 184 (EDNY 1999).

⁴² *Ibid* 191.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 192.

⁴⁷ *Ibid* 196.

⁴⁸ *Ibid* 198.

likelihood of success on the merits of its First Amendment claim,⁴⁹ both of which were necessary to justify granting a preliminary injunction against the city. Citing a US Supreme Court case, the court stated: 'If there is a [58] bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'⁵⁰ Even if the city were under no obligation to provide benefits to the Museum, it could not withhold them for the purpose of forcing the Museum to forgo exercising its First Amendment right of free expression.⁵¹ Consequently, the court granted the Museum's motion for a preliminary injunction against the city's actions,⁵² and the show proceeded as planned.

Settlement proposed in class action price fixing suit against Sotheby's and Christie's

On 27 November 2000, a proposed settlement was filed in the New York civil class action lawsuit by more than 100 customers against Christie's and Sotheby's based on pricefixing claims.⁵³ Pursuant to the proposal, the two auction houses would pay an astounding \$512,000 million to the plaintiffs. Of that amount, the auction houses have proposed offering \$50 million each in the form of discount certificates to be used by those wanting to sell works at future auctions.⁵⁴ The certificates would be issued to buyers who were deemed 'overcharged' up to seven years ago, and to sellers who were deemed 'overcharged' up to five years ago. Customers in both the US and Britain would be covered by the settlement. The certificates would be redeemable for five years. In addition, holders could transfer the certificates through a designated 'certificate administrator,' thereby establishing a secondary market.⁵⁵

The law firm of Boies, Schiller & Flexner, lead counsel for the class action suit, would receive \$26.75 million in legal fees and costs for reaching such a settlement. The award amount, which constitutes approximately 5 per cent of the amount recovered by the plaintiffs, is smaller than typical legal fees awarded in prominent anti-trust cases.⁵⁶ The

⁴⁹ Ibid.

⁵⁰ Ibid 198, citing *Texas v Johnson*, 491 US 397, 414; 105 L Ed 2d 342; 109 S Ct 2533 (1989).

⁵¹ Ibid 200.

⁵² Ibid 186.

⁵³ See *In Re Auction Houses Antitrust Litigation*, Master File 00 Civ 0648 (LAK), 193 FRD 162; 2000 US Dist LEXIS 5172; 2000-1 Trade Cas (CCH) P 72,881 (SDNY 2000).

⁵⁴ See *New York Times*, 28 November 2000.

⁵⁵ Ibid.

⁵⁶ Ibid.

court had established a bidding process for the selection of lead counsel in the case, in an effort to maximise the plaintiffs' recovery and control legal fees. The court set a fee structure whereby lead counsel would submit an estimated settlement or resolution amount, and the law firm would receive fees amounting to 25 per cent of any excess obtained over that amount. The Boies firm won the role of lead counsel with a bid amount of \$405 million. Thus, its 25 per cent share of the \$107 million settlement excess over the bid amount brings its award to \$26.75 million. A final hearing on the settlement was scheduled for 2 February 2000.⁵⁷

In the related criminal antitrust investigations against the two auction houses, on 5 October 2000, both Sotheby's and its former chief executive, Diana Brooks, pleaded guilty to conspiring to commit antitrust violations, with Ms Brooks agreeing to testify against Sotheby's former chairman and majority shareholder, A Alfred Taubman.⁵⁸ Taubman has maintained his innocence, although he has lost his position as chairman and has agreed to pay \$156 million of the \$256 million settlement approved by Sotheby's (constituting one half of the total \$512 million class action settlement amount to be paid by the two auction houses).⁵⁹ The criminal action is pending.

⁵⁷ Ibid. Details of the settlement can be found at two websites: <www.boies-schiller.com> and <www.auctionsettlement.com>.

⁵⁸ See *New York Times*, 6 December 2000; see also 'A Higher Power: Downed by the Law' [December 2000] *Art & Auction*, 110.

⁵⁹ See *Art & Auction*, above n 58, 112.