

Law and Order in the Art World

The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts

Edited by Ronald D. Spencer

Oxford University Press, 2004, xviii + 241 pp. Hardbound, \$35 (include \$5.25 S/H) from Oxford University Press, Order Dept., 2001 Evans Road, Cary, NC 27513; (800) 451-7556; (www.oup.com/us).

by Jeanne Schinto

Despite the long history of art, catalogues raisonnés have only recently become a primary research tool of art authenticators. Renoir's work still lacks a complete one. Mary Cassatt's was published in 1970 but is now being revised by a team directed by former auction house specialist Jay Cantor. There are some 60 other American artists whose "reasoned" lists of works (the literal French translation) are underway. So it's a young form, and a controversial one. Indeed, since acquiring its powerful role in the authentication process, its very nature has begun to be debated. Who should be allowed to write catalogues raisonnés? Who should pay for them? (They're extremely expensive to produce.) What standards should be applied to them? And who should set those standards?

The controversy will undoubtedly rage for years. In the meantime, a more immediate problem begs for a resolution: How can experts protect themselves from the lawsuits arising from the decisions they make about which works belong in their catalogues raisonnés and which don't? New York City attorney Ronald D. Spencer's disquieting new book addresses this issue. More broadly, its subject is the myriad legal troubles that the authentication process inspires today.

Contributors of essays include experts from Sotheby's and Christie's; curators at The Frick Collection and the Bruce Museum of Arts and Science; and academics, dealers, and technicians (an art conservator and a forensic graphologist). The huge prices currently being paid for artworks in a society with a weakness for lawsuits put these kinds of experts in an unenviable situation. Both the threat and number of suits have risen as dramatically as the market. (To read about two recent cases, see *M.A.D.*, March 2005, p. 13-A.)

So how do we better protect art experts and their institutions? How do we ensure that art scholarship can flourish—and false attributions don't? Spencer has a plan, and publication of this book is part of it. While he urges all collectors to educate themselves about how authentication decisions are made, he more urgently wants judges to be better informed and lawyers better able to advise their clients.

There's perhaps nothing more sobering in this debate than the idea that someone in a black robe—or a jury of ordinary citizens—would be asked to determine whether a painting is right or wrong, when even the experts disagree. Spencer cites "several unfortunate court decisions" in which the courts did not fully comprehend the attribution process or the expert's role. Another contributor to the book puts it even more bluntly. Independent art historian Francis V. O'Connor, who has spent years editing the Jackson Pollock catalogue raisonné, deplors some of the recent "cockeyed connoisseurship imposed by the courts in a crunch."

Part I of *The Expert versus the Object* is, therefore, a primer. Patricia Siegel, a handwriting expert who has testified in U.S. federal and state courts, explains in her essay the complex process of signature identification. "Although experts do not, in practice (and for good reason), place much weight on a signature on a work," Spencer notes in another part of the book, "any signature should be addressed with special care because the courts, at least, *do* place substantial weight here."

Another essay, by Rustin S. Levenson, a painting conservator with private studios in New York and Miami, deconstructs the techniques and materials of painters, layer by layer, bottom to top, from the artist's choice of support (wood, textile, metal) to choice of varnish. Levenson next provides a short survey of techniques and scientific tools, including ultraviolet light, infrared imaging, radiography, magnification, microchemical testing and polarized light microscopy, scanning and transmission electron microscopy, and autoradiography.

Unfortunately, even the latest technology available to art world scientists still does not produce irrefutable results. A measurable, scientific conclusion is often less certain than a connoisseur's. Whistler dismissed an alleged Velázquez at a glance, according to the famous story, because he hadn't swooned. "I always swoon when I see a Velázquez," he said. An expert's polished eye may rarely fail, it is true, but good luck trying to make a legal argument based on it.

Some of the contributors to Spencer's book want the art world to standardize the authentication process. Francis O'Connor urges a process that would be "rigorous, accountable, systematic, comprehensive, and comprehensible." Without standards, he writes, experts leave themselves open to challenge—legal challenge. These advocates also believe that authentication is best accomplished by committees, not individuals. O'Connor's example of a successful committee is the Pollock-Krasner Authentication Board, on which he serves.

Sharon Flescher, in another essay, offers as a model the anonymous authentication service of her own organization, the International Foundation for Art Research (IFAR). It's significant that IFAR was founded in the late 1960's to be a "legal and administrative framework wherein the world's greatest scholars could render opinions on authenticity without fear of liability."

Many readers know that Theodore E. Stebbins Jr. is the art world's undisputed expert on Martin Johnson Heade. What may surprise them is that he spent three years as a student at Harvard Law School. The author of two Heade catalogues raisonnés is more sanguine about the threat of lawsuits than other contributors to this book. ("The art expert who acts responsibly and honestly is generally protected when giving an opinion," he writes, "and courts increasingly recognize that this serves the public interest.") But he acknowledges the risks and quotes Abigail Booth Gerds, director of the Winslow Homer catalogue raisonné project: "'The stakes are just too high. I believe that we should all get out of the opinion-giving business.'" (See the *M.A.D.* article cited above for the reason why even keeping mum may get you into legal trouble.)

In Part II Spencer discusses the elements of the six most likely legal claims against art experts. The first is "Failure to exercise reasonable care," which roughly translates into "Missing a sleeper." Second is "Product disparagement," perhaps self-explanatory. "Breach of contract," the third, sounds simple but isn't; eight cases are summarized. The other three are "Common law fraud and negligent misrepresentation," "False 'advertising' under state consumer protection laws and the U.S. Lanham Act," and "Claims of defamation." This chapter is densely written, but it needs to be. That's the nature of lawsuits.

Even more than Ted Stebbins, who after all gave up the law for art scholarship, Spencer has faith in the legal system. He ends his book on a hopeful note, citing the decision in *Lariviere v. E.V. Thaw*, the Pollock-Krasner Authentication Board, et al., in which the court held that an owner of an alleged Jackson Pollock could not sue a group of experts whose organization was specifically founded to render opinions on Pollocks. Significantly, the court ordered the plaintiff to pay the defendants' legal defense; it also ruled that the suit was frivolous.

In addition to its practical information, the book offers many snippets of history, fact, and opinion. Art dealer and connoisseur Eugene Thaw, named in the suit above (and the writer of Spencer's introduction to this book), is quoted as saying that Pollock is one of the two most difficult artists to fake. Piet Mondrian is the other. It does seem counterintuitive. Wouldn't they be among the easiest? Read the book to discover Thaw's logic.

Finally, we should mention that Thaw alone raises that prickliest of philosophical questions about art: "If experts can't tell the difference, isn't the fake just as good as the real work of art?" Eventually, writes Thaw, that question must be answered or "in some way disposed of."