

# Northumbria Research Link

Citation: Brown, Jean (2016) The legalities of authenticity and contemporary art. In: Authenticity in Transition. Archetype Books, London, pp. 95-104. ISBN 9781909492363

Published by: Archetype Books

URL:

This version was downloaded from Northumbria Research Link:  
<http://nrl.northumbria.ac.uk/26640/>

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: <http://nrl.northumbria.ac.uk/policies.html>

This document may differ from the final, published version of the research and has been made available online in accordance with publisher policies. To read and/or cite from the published version of the research, please visit the publisher's website (a subscription may be required.)

[www.northumbria.ac.uk/nrl](http://www.northumbria.ac.uk/nrl)



# The legalities of authenticity and contemporary art

---

*Jean E. Brown*

**ABSTRACT** The legalities of authenticity and contemporary art are complex and made up of a combination of legislation and case histories. The introduction of new art forms such as multiple copies, appropriation, interventions and found art have introduced tensions, complexities and contradictions that impact on both the process of authentication and the moral rights of the artists. These frequently result in lengthy and costly litigation that the courts often struggle to resolve. The high price of much contemporary art has driven many cases into the courts at the point of sale as authenticity is challenged and the rights of the artist exerted. The moral right of the artist to disown work has an impact on the roles and responsibilities of the expert eyes, authentication boards, dealers, auction houses, collectors, galleries, curators and conservators. Care must be taken when proffering an opinion, advice or guidance or implementing preventive or interventive conservation procedures to ensure that the rights of the artist will not be infringed and the authenticity of the piece compromised. The establishment of a clear legal framework is like a chimera, something that we hope for but which is almost impossible to achieve as it twists and turns in a constant transition through the ever-changing landscape of contemporary art.

## Introduction

In this paper the term 'authentic' will be defined as 'of undisputed origin; genuine' (*Concise Oxford Dictionary* 1995: 83). In the legal and institutional context of contemporary art it will be understood as the correct identification of the creator of a work of art of undisputed origin and not a copy or forgery, and that provides an authentic experience. Authentication of a work of art can be complex and the terms upon which it is determined can vary according to period, country and culture. Authenticity often becomes critical when art becomes commercialised and a sale is being considered since it can have an enormous impact on the value of a work. Consequently many cases of disputed authentication end up in courts of law. However despite such cases costing large sums of money and often running over many years any decision

reached is not always accepted by the market. This is partly due to difficulties that a jury might have in evaluating expert opinions but also stems from the 51% standard in which there is little difference between one party losing and the other winning – the one with 51% wins and the one with 49% loses. Clearly this is not acceptable with regard to authenticity since it would result in an artwork being considered more or less by a specific artist which does nothing to underpin its authenticity with any real authority. This confusion and the lack of market conviction could be seen in the case of *Hahn v. Duveen*, which involved a work allegedly by Leonardo da Vinci. Although the law ruled that the work was authentic the market disagreed and it could not be sold for the value of an authentic piece (*Under Art Rule* 12 December 2007).

The authenticity of works that predate the modern and contemporary period was often

determined by an evaluation of the materials and how they had been used together with supporting provenance. All three would have to align if a work of art was to be considered an authentic piece by a specific artist. If there was a match regarding the materials and their age but not the style, it might be considered as 'follower of' or 'school of'. If there was a match with the style but not the materials and their age it might well be considered a forgery. In other words, if a material had been used that would not have been available at the time and place that the artist was working then it could not be considered genuine or authentic. This approach is very focused on the materiality of the artwork and the involvement of the artist in the creative process. Proving the authenticity of contemporary art is less straightforward since in most cases the materials are still readily available. In addition, the introduction of new practices such as the production of multiple copies, the use of technical collaborators, appropriation, interventions and found art have in many cases forced the process of authentication to abandon its traditional focus on the materiality of an artwork and recognise and try to enforce the moral rights of the artist, which are enshrined in the various acts governing copyright both in the US and the UK. This can be seen in a case involving Jasper Johns and another involving the Andy Warhol Foundation in which two pieces were made from identical materials but only one was considered authentic. In these cases the word of the artist and that of the foundation won the right to determine authenticity (*Wall Street Journal* 16 October 2014; *Art News* 4 January 2011). However the word of the artist is not always the deciding factor as was demonstrated when a judge decided that Balthus had an ulterior motive for denying authorship of what was in fact his own work (*New York Times* 5 August 2012).

The law is constantly challenged to find a balance between protecting the rights of artists to practise in the manner they choose while simultaneously protecting the rights of others whose work might be transgressed in the process, which is a frequent issue with appropriation, interventions and found art. This was

an issue picked up on by Emma Slais-Jones in her dissertation research ('Despite a widespread assumption that the copyright system is in place to protect the artist; the current copyright legislation in fact undermines the protection and the development of the modern visual arts') in which she argued that legislation designed to protect the artist does in fact compromise their practice (Slais-Jones 2006). In some instances, artists such as Jeff Koons can be seen to exploit this legal dilemma by insisting on his right to 'appropriate' and make 'fair use' of materials created by others while at the same time challenging those who he believes to have appropriated his own work as can be seen in the cases involving the *String of Puppies* and the *Balloon Dogs* (*San Francisco Weekly* 3 February 2011; *New York Times* 19 September 1991). These developments within the world of contemporary art have created contradictions and inevitable tensions as the rights of one person transgress the rights of another, and artists such as Koons can be seen to draw the legal dilemma deliberately into their critical practice.

The legal framework governing the authenticity of contemporary art has been built up over many years by legislation as well as case history, and is often driven by the changing practices of contemporary art in addition to the high prices that it commands. However the situation is far from black and white and the legislation continues to develop in a reflexive feedback process alongside various transgressive boundaries or 'inauthentic' strategies adopted by artists. In relation to the conference theme of 'authenticity in transition', we see that artists and their associates often confuse these issues as with Balthus, or conversely seek to place arbitrary limits on multiples commissioned from technical collaborators as happened with Johns.

The money at stake in authenticity cases is enormous and the net is being spread ever wider in the search for new targets for litigation. If an institution is considered to have limited resources or is in some way protected by legislation then its employees may become the new targets including the trustees, governors, director, curators and conservators

(Redmond-Cooper and Palmer 2011). The situation is made even more complex by the moral rights of artists, which enable them to disown a work of art should they believe that the integrity has been undermined as occurred with a piece by Anthony Caro belonging to Peterborough County Council in 2011 (*National Arts & Lifestyle* 14 March 2011). This is something that should be a very real concern for anyone involved with the care, conservation and display of a work of contemporary art.

What becomes clear is that in fact very little is clear for very long and that authenticity in the contemporary art market is in a constant state of transition as new art forms are developed and artists, collectors and experts wrestle within the judicial system in order to determine the authenticity of a piece. This paper provides an overview of these often complex developments as well as their impact on the experts, authentication boards, artists, galleries, collectors, curators and conservators in the US, where the process of litigation started, and in Europe. The focus is on works of art that have a tangible component since purely conceptual art introduces a very different range of issues not discussed in this paper.

### Copyright issues

The Berne Convention of 1886 was an agreement within which signatory countries aimed at establishing and recognising a shared approach to copyright legislation around the world. Part of the agreement required signatories to provide clarification on the standards governing their own copyright laws. All signatories are required to recognise the copyright of authors from signatory countries. However despite this, differences continue to exist between some of the signatory countries.

Copyright is a type of intellectual property that can be applied to a creative work and can be shared among multiple authors known as rights holders. Copyright is automatic and does not have to be asserted or registered. There is usually a time limit governing the period of

copyright and there may be limitations and exceptions according to the country of jurisdiction. Copyright protection is provided for a range of tangible artistic outputs and can provide control over reproduction, distribution, performances in public and derivations as well as moral rights. In the UK, copyright lasts for the lifetime of the artist and for 70 years after their death. The intention is that the author should have certain economic rights that provide a degree of control over their intellectual property and the ability to receive compensation through royalties should their intellectual property be used (*Guardian* 12 October 2014). The economic rights last for the same period of time as copyright. The drawback is that it is a voluntary system so if a person wishes to use someone else's intellectual property they are free to do so until such time as they are taken to court by the artist for infringement of copyright law, at which point the damage will often already have been done or the benefit achieved, making it a worthwhile risk. In 2006 the UK extended the legislation to include royalties not just on the first sale but on all future sales under the Artists' Resale Act, which had been developed from the 1972 European Communities Act (*Los Angeles Times* 17 December 2014). The Resale Act has yet to be agreed and implemented universally in the US.

The Copyright, Designs and Patents Act 1988 (also known as the 1988 Act) came into effect in 1989 and codifies copyright law in the UK including the idea of 'moral rights' (Intellectual Property Office 2015). These are given or can be given to the creators of certain types of literary, dramatic, musical, film or artistic works. A similar piece of legislation in the US is the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A. UK moral rights include the paternity right, the right of integrity, false attribution and the right of privacy

### *The right of paternity*

The right of paternity gives artists the right to be identified whenever their work is exhibited in a public place, published commercially or forms

part of a broadcast. It has the same duration as copyright but unlike copyright it is not automatic and must be registered. Infringement of paternity rights occurs when someone engages in the rights of the copyright holder without authorisation. This may impact on the whole or a small but significant part of an artistic work. Many cases of copyright infringement have been determined on whether the part that has been copied is considered significant or insignificant. Clearly the paternity right is likely to impact most frequently on art forms such as appropriation, interventions and found art whose very practice utilises artefacts made by others. Jeff Koons has been involved in numerous copyright infringement cases both as the litigant and the accused. In 2011 he claimed that a bookshop in San Francisco had stolen his idea of *Balloon Dogs* and made it into bookends (*San Francisco Weekly* 3 February 2011). His claim was not upheld when the lawyer for the defence stated, 'As virtually any clown can attest, no one owns the idea of making a balloon dog, and the shape created by twisting a balloon into a dog-like form is part of the public domain' (*San Francisco Weekly* 3 February 2011).

### ***The right of integrity***

The right of integrity gives artists the right to object in the event that they consider their work has been subjected to derogatory treatment. This right is automatic, does not have to be registered and lasts for the same period as copyright. It can have very powerful consequences, impacting on collectors, curators and conservators should they allow or carry out work that in the opinion of the artist is derogatory treatment of the work and undermines the integrity of the artist. In such an event, an artist has the right to disown the work. As such it is no longer considered authentic, would lose its original value and would likely result in litigation against whoever is perceived as responsible for the alleged changes. This should be a very serious concern for those caring for, conserving or displaying a piece of contemporary art. Consultation with the artist would be strongly advised irrespective of who owns the work.

In 2004 Tracy Emin was involved in a case involving a tapestry that she had created with a group of schoolchildren from Ecclesbourne Primary School in North London. They wanted to sell the piece to raise funds but she was 'so upset and depressed by the idea' that she threatened to disown the piece, which would have made it worthless. It was finally agreed that she would pay for it to be professionally framed and displayed at the school providing it was never sold (*Guardian* 30 March 2004).

In 2011, Anthony Caro disowned a sculpture known as *Lagoon* that was to be sold by Peterborough Council through Bonham's. In his opinion the piece infringed his moral rights because it had been attached to a plinth and displayed outside. He had very specific opinions regarding how his work should be displayed, which had been breached when it had been displayed on a plinth. The external display had caused irreversible damage to the surface finish so that it no longer represented his work (*Guardian* 8 March 2011).

In 2013, the artist Cady Noland disowned her work *Cowboys Milking* as it had been damaged prior to being sold at Sotheby's by the art dealer Marc Jancou. As a result it lost a huge amount of value and she was taken to court in New York by Jancou. Her rights of integrity were upheld by the court under the Visual Artists Rights Act (VARA), which empowers an artist to withhold the use of their name as the creator of a work of art if there has been some sort of alteration, distortion or modification that could impact on the reputation of the artist (*Observer Culture Magazine* 6 March 2013).

### ***The right of false attribution***

Through the right of false attribution, the artist has the right not to be identified as the creator of a work that has in fact been created by someone else. An objection to the false attribution of a work continues for 20 years after the death of the artist. False attribution can have far-reaching consequences under European legislation. In 1992, Mr Lang bought a painting

for £100,000 that he believed to be a Chagall. It came with a largely anecdotal provenance. In 2013, he decided to try to establish the provenance of his painting and the investigation was carried out by the BBC programme *Fake or Fortune*. After extensive but inconclusive research and analysis the painting was finally sent to the Chagall Committee in France who concluded that it was a forgery. Although this was disappointing news, worse was to follow when Mr Lang received a letter from the committee insisting that the painting would have to be destroyed. They argued that such action was the only way to reduce the vast number of forgeries in circulation. The BBC sought advice from a French lawyer, who suggested case law was on the side of the committee who had inherited the 'moral rights' from the artist, which included protection from 'false attribution' (*Telegraph* 5 November 2015).

### **The right of privacy**

The right of privacy provides protection for someone who has commissioned or created a work for their own use that is not to be copied, distributed or broadcast to the public. There have been comparatively few cases brought under the right of privacy in connection with contemporary art. However it might be used should an artist incorporate private photographs belonging to someone else into their work.

### **Exceptions to art copyright**

The previously mentioned dissertation by Emma Slais-Jones (2006) applies particularly to artists working with artefacts or materials created by others such as in appropriation, interventions and found art. In addition, since the majority of art copyright law is drawn from property law, it only covers tangible artefacts and leaves purely conceptual works unprotected. Consequently while tangible manifestations of a concept are protected by

copyright, the concept or idea is not, therefore there is no protection for conceptual, installation or performance art. These anomalies have resulted in a series of copyright infringement cases.

### **Fair use**

If copyright laws were applied absolutely the system would become rigid with requests for permission to use even the smallest part of someone else's work and result in stifling some forms of creative output. The concept of 'fair use' aimed to introduce an element of flexibility into the copyright situation by allowing specific types of usage such as for research and private study purposes; news reporting, criticism and review; pastiche, caricature or parody; and illustrative instruction. Appropriation, interventions and readymade art rely on reusing materials or artefacts that have been created by someone else. As such it can be argued that they have infringed the copyright of the original creator or manufacturer. Such cases often hinge on whether the elements that have been borrowed form a significant part of the new work, whether they have been transformed in the process and if the action has reduced the value of the original piece. In the 1992 case *Rogers v. Koons*, the US Court of Appeals upheld a judgment against Koons for his use of a photograph of puppies as the basis for a work, *String of Puppies*. The case was determined on the basis that there had been insufficient significant change from the original image that Koons had appropriated (*New York Times* 19 September 1991).

### **Establishing authenticity**

Analysis is an expensive and time-consuming process and is therefore not a routine procedure for the majority of art that is sold: only when concern is raised by an expert eye about the look of a piece and the value is significant will further procedures of scientific analysis

be considered. The expert eye or connoisseur is someone who has developed a clear understanding of the style, imagery, palette, materials and processes that are characteristic of a specific artist. They have a good visual memory and using visual examination can often develop a strong opinion as to whether or not a work of art is authentic. The validity of such opinions can be considerably strengthened if there is clear provenance that tracks back to the original artist. The term provenance comes from the French *provenir* ('to come from') and is a chronological record of the ownership, custody or location of a historical object. However provenance can also be forged, as happened in the Landis case in the US in 2008 when it was revealed that Mark Landis was not in fact a great philanthropist who donated to museums and galleries across the US but an art forger who had forged not only the works of art but also provided very persuasive provenance (*BBC World Service* 31 March 2015). Despite this Landis was not convicted because he had donated the works of art and had not defrauded the collections of any money.

Misattribution of older works of art can be difficult to resolve through analysis since artists working at the same time and place would often use similar materials that would have aged in an analogous manner. As a result analysis may not provide clear evidence of the original hand and the decision may rest once again upon the opinion of an expert eye.

Forgeries of older artworks are comparatively rare albeit certainly not unknown. It can be possible to provide clear evidence of the deception through analysis of the materials since it is difficult to source historic materials and simulate the natural ageing process in a manner that is visually convincing and which cannot be detected. Should a material be identified that was not available when the work was supposedly created or has not aged as would be expected then there is clear evidence that the work is not genuine.

Forging modern or contemporary works of art is much easier in that many materials are still readily available and therefore the deception cannot always be detected even if

analysis is carried out, and decisions may rely once again upon the opinion of the artist, the expert eye or an authentication board.

### The law versus the market

Since the world is largely governed by jurisdiction it would seem likely that the law rather than the art market would have the final word with regard to authentication but that is not always the case. In 1920 Mrs Hahn was planning to sell her painting *La Belle Ferroniere* allegedly by Leonardo da Vinci to the Kansas City Art Institute. Sir Joseph Duveen, a highly established art dealer at the time, was asked his opinion of the painting by the *New York World*. He pronounced that '*La Belle Ferroniere* in Kansas City is a copy and the original one is in the Louvre' and he added that 'Leonardo never made replicas of his works' (*Under Art Rule* 12 December 2007). Duveen also said that 'any expert who pronounced it genuine was not an expert' (*Under Art Rule* 12 December 2007). When the sale to the Kansas Art Institute fell through, Mrs Hahn sued Duveen for 'slander of title and unsolicited comment' stating that as a result she was no longer able to sell the work for its true value (*Under Art Rule* 12 December 2007). The case continued until 1929 when Duveen finally settled out of court, paying Mrs Hahn US \$60,000 and costs. Although a clear verdict had not been delivered there were indications that the court would have favoured Mrs Hahn's claim. However after the trial, the lawyer Peter R. Stern stated that 'A decision by a court in the United States that a work is authentic may or may not have any value – it's totally up to the market' (*Under Art Rule* 12 December 2007). The market was not convinced and the painting remained unsold for many years until it was finally sold catalogued as 'school of'. The case revealed the fundamental difficulty faced by a jury when asked to determine authenticity on the basis of opinion rather than hard evidence. This case made a key contribution to a process of litigation, case history, expert opinion and the influence of the art market that continues to

impact on the authenticity of contemporary art to this day (*Under Art Rule* 12 December 2007).

### Authentication by the artist

Since many contemporary artists are still living there is the potential to call upon them to provide evidence in authentication cases involving their work. This happened in 2013 in a case brought against Brian Ramnarine who owned a foundry in New York and had been accused of forging a Jasper Johns *Flag Sculpture* by using an original mould without authority (*Wall Street Journal* 16 October 2014). Johns had used the foundry to create multiple copies of his work and he was asked to testify. He stated that the additional piece had not been authorised by him and he had not provided a certificate of authenticity. Each copy in the series including the additional one cast by Ramnarine was materially similar, cast from the same mould and made by Ramnarine and therefore in theory equally 'authentic'. However its authenticity was determined by the artist who exerted his moral right to control and limit the authenticity of his own work. The court had accepted Johns' moral right regarding false attribution, which gave him the right not to be identified as the creator of a work if it is in fact 'created by someone else', which was ironic since he had not in fact cast any of the pieces. This was a very complex case that exposed the difficulties that can occur regarding authenticity when an artist uses technical collaborators since in this instance the 'someone else' who had created the additional piece had also produced the original multiple copies for Johns.

However, the word of the artist is not absolute. In an earlier case in 1995, a former wife of Balthus wanted to sell a painting by him called *Colette in Profile* but Balthus denied that the painting was his work (*New York Times* 5 August 2012). The case was heard in the New York Supreme Court Appellate Division where the judge ruled that even though Balthus had disowned the work, the painting was authentic. It was noted that Balthus had a record of

repudiating his work in order 'to punish former lovers or dealers with whom he had had disagreements'. It concluded that he seemed to be 'acting from personal animus against his former wife. In the court's view both the painting and the desire for revenge were authentic' (*New York Times* 5 August 2012). In this case the law prevailed and the market concurred.

### Art authentication boards

As a result of the escalating problem of forgeries flooding the market, many art foundations decided to set up their own authentication boards in order to safeguard the authenticity of artists' work. They were considered to be the experts on the work of a specific artist and their opinion had an enormous influence on the value of a piece. Some forgeries are very convincing as Ann Freedman, president of the Knoedler Art Gallery in New York, found to her cost in 2009 when she was forced to resign due to the sale of a number of forgeries through the gallery. During the 1990s an art dealer from Long Island called Glafira Rosales offered her a painting by Rothko (*New York Times* 2 May 2014). Ms Freedman was very impressed with the work and said 'it was immediately, from my eyes, a work of interest'. In fact she was so impressed and convinced by the authenticity of the piece that she bought the work herself and continued to purchase many more works from Rosales for the gallery. Many of these hitherto unknown works were authenticated by the respective authentication boards. However, despite the authentication provided by them, a number of experts began to question the authenticity of so many unseen works of art coming onto the market at the same time. Analysis was carried out on some of them and a number of forgeries were revealed, resulting in a full investigation. A series of court cases ensued from clients who claimed to have been mis-sold works of art by Knoedler.

The Dedalus Foundation set up by Robert Motherwell also brought a civil law suit against Ms Freedman for selling forged paintings by Motherwell. A testament of the quality of the

work was that the foundation had itself authenticated the work prior to the dispute developing. However when analysis was carried out and the forgeries were discovered it rescinded its authentication. Ms Freedman resigned in 2009 and in 2012, Knoedler, the gallery that had led the way in the collection of modern and contemporary art in the US, closed its doors after 165 years and in the face of the impending court cases (*New York Times* 2 May 2014).

Authentication boards were extremely powerful since their opinions would have a serious impact on the value of a work of art. Consequently when a board denied authenticity it was often taken to court for tort liability for fraud, defamation or disparagement. In the absence of any protective legislation many experts introduced a 'no sue' agreement into their contracts. These became legally enforceable from 2000 as a result of the case of *Lariviere v. Thaw*, which was decided by the Supreme Court in New York and in which damages were attached to the case since it was in breach of a 'no sue' clause (*Mondaq News Alerts*, 19 February 2013).

The 'no sue' clause held until 2007 when a case was brought by Simon Whelan who wished to sell a Warhol silk screen print that he had purchased. The print had previously been authenticated by Fred Hughes and Fremont, who had acted as executors of the Warhol Estate and who were considered the authorities on Warhol at the time. However, the Warhol Foundation refused to approve its authenticity and had stamped the term 'fake' on its verso. The Whelan print was printed from an original silk screen but the foundation claimed that it had not been part of the original edition. Therefore, although the materials were almost identical to those in the original edition, it was not considered authentic because it was not part of that edition. When the foundation refused to change its opinion regarding the status of the print, Whelan brought an anti-trust lawsuit stating that the Warhol Foundation had deliberately sought to enhance the value of its own collection by limiting the number of genuine works that it would authenticate. The case was allowed to proceed despite a 'no sue' clause because the

judge ruled that the Warhol Foundation would have been acting illegally if Whelan's claim was proved to be true. This was the first time a 'no sue' had been overridden and exposed the authentication boards once again to litigation.

Andrew Peck, the US district judge, dismissed the case but withheld the costs that the 'no sue' clause should have provided for the foundation. The defence had cost the Warhol Foundation almost US \$7 million and soon after the case it ceased to operate (*Art News* 4 January 2011). As a result of the risk of litigation many other authentication services closed their doors although some continue to operate supported by changes in the law.

### Legal protection for authentication in the US

In 2014 a new law designed to address the rights of authenticators and put some sort of a brake on the stream of litigation was ratified in the US (*Art Law Report* 30 April 2014). The law requires a litigant to provide highly specific details regarding guidance provided by the authenticator as well as how it impacted on the decisions that they subsequently made. This development takes the case to a higher level of jurisdiction. In a civil case a plaintiff need only demonstrate the 51% rule or that it is 'more than likely' that their claim is true. The new jurisdiction requires them to provide much more convincing evidence of the truthfulness of their claim. In the abovementioned *Whelan v. Warhol* case, despite a successful outcome, the Warhol Foundation was forced to close as a result of the cost of the legal fees. At the time the US legislation governing fees was very different to that in Europe, where the successful party is often awarded costs to be paid by the other party. The new legislation in the US comes closer to the European model in that if a litigant is unsuccessful in bringing a case against an authenticator they must pay the legal fees for the authenticator. However if they are successful the authenticator is still not required to pay the costs of the litigant (*Art Law Report* 30 April 2014).

### Freedom to not authenticate in Europe

The issues concerning authentication have not been confined to the US. In 2005 a dispute developed in France involving the owner of a painting he believed to be by Jean Metzinger. The owner needed a certificate of authenticity in order to sell the painting (*Financial Times* 21 February 2014). Bozena Nikiel is a well-known expert on Metzinger's body of work and was at the time writing the catalogue raisonné for Metzinger. She held the 'droit moral right' for Metzinger's work in France, which gave her the ability to attribute works of art to Metzinger. She refused to authenticate the work and the case went to court. Finally in 2014 the right of an art expert to refuse to authenticate a work was upheld by the High Court of Appeals in Paris. The case took nine years to reach its final outcome but it created case history and freed the art expert from the threat of litigation for expressing their opinion regarding the authenticity of a work. While the decision is confined to France, it will likely have a positive influence on similar disputes being challenged under the European Convention on Human Rights

### Institutional and personal liabilities

The money at stake in authenticity cases is enormous, so as soon as one target for litigation becomes protected or is perceived as a poor prospect it is inevitable that new targets will be identified. As previously mentioned, if an institution is considered to have limited resources or is in some way protected by legislation then its employees may become the new targets including the trustees, governors, director, curators and conservators (Redmond-Cooper and Palmer 2011).

Auction houses and dealers often provide a warranty with regard to the authenticity of a work of art. Sotheby's and Christie's offer a warranty for a period of five years but include specific limitations. If an attribution is challenged but the sale room can demonstrate that its catalogue entry at the point of sale was in

line with expert opinion at the time then the warranty would not be upheld. Similarly if the reattribution relied on analysis that was not a standard process, it would also fall outside the warranty. When such cases come to court they tend to focus on how the original attribution had been made and can become highly complex (Spencer 2010). In the event that a case is successful the contract can be rescinded. A rescission clause in a contract of sale allows an auction house the right to dissolve the contract for a sale that has taken place (Wallace 2010).

### Conclusion

The law surrounding the authenticity of contemporary art, liability and culpability is complex and in constant transition as new art forms are introduced, new cases decided and new legislation developed. The rising value of contemporary art will only intensify the pressure on authentication cases and the consequent search for someone from whom to seek compensation as a result of any subsequent loss in value. The establishment of a clear legal framework is like a chimera, something that we hope for but which is almost impossible to achieve as it twists and turns in a constant transition through the ever-changing landscape of contemporary art. This is likely to have an impact on the roles and responsibilities of the expert eyes, authentication boards, dealers, auction houses, collectors, galleries, curators and conservators, who must take care when proffering an opinion, advice or guidance, or implementing preventive or inter-ventive conservation procedures, to ensure that the rights of the artist will not be infringed and the authenticity of the piece compromised.

### References

- Art Law Report* (2014) 'Appraisal authentication: proposed amendment to New York arts and cultural affairs law would protect authenticators', N. O'Donnell. *Art Law Report* 30 April 2014.

- Art Newspaper* (2013) 'Court finds for artist who disowned work before auction', L. Gilbert. *Art Newspaper* 30 May 2013.
- BBC World Service* (2015) 'Magazine, America's most generous con artist', J. Caffrey. *BBC World Service* 31 March 2015.
- Concise Oxford Dictionary* (1995). Oxford University Press.
- Der Spiegel* (2012) 'Art forgery scandal: ringleader reveals he faked many more works', *Der Spiegel* 5 March 2012.
- Financial Times* (2014) 'Arts. The art market: French court victory for art specialists', G. Adam. *Financial Times* 21 February 2014.
- Guardian* (2004) 'Blanket refusal', *Guardian* 30 March 2004.
- Guardian* (2011) 'Sir Anthony Caro disowns "mutilated" sculpture'. *Guardian* 8 March 2011.
- Guardian* (2014) 'Art & design', D. Alberge. *Guardian* 12 October 2014.
- Intellectual Property Office (2015) *Copyright Law of the United Kingdom*, UK Government.
- Los Angeles Times* (2014) Article by M. Boehm. *Los Angeles Times* 17 December 2014.
- Mondaq News Alerts* (2013) 'Protection from legal claims for opinions about the authenticity of art', R.D. Spencer. *Mondaq News Alerts* 19 February 2013.
- Mondaq News Alerts* (2014) 'Ain't nothing like the real thing: despite forgery scandals, the fine art market is booming', M.R. Sheppard and L.L.P. Hampton. *Mondaq News Alerts* 24 February 2014.
- National Arts & Lifestyle* (2011) 'Artist Anthony Caro disowns his own sculpture', B. East. *National Arts & Lifestyle* 14 March 2011.
- New York Times* (1991) 'A picture, a sculpture and a lawsuit', C.L. Hays. *New York Times* 19 September 1991.
- New York Times* (2012) Article by P. Cohen. *New York Times* 5 August 2012.
- New York Times* (2014) 'Art & design', P. Cohen. *The New York Times*, 2 May 2014.
- Observer Culture Magazine* (2013) 'Court papers say Marc Jancou's disputed Cady Noland was damaged'. *Observer Culture Magazine* 6 March 2013.
- Redmond-Cooper, R. and Palmer, N. (eds) (2011) *Taking it Personally: The Individual Liability of Museum Personnel*, Institute of Art Law, November 2011.
- San Francisco Weekly* (2011) 'Jeff Koons drops lawsuit against San Francisco art Store: Balloon Dog bookends for sale', E. Sherbert. *San Francisco Weekly* 3 February 2011.
- Slais-Jones, E.L. (2006) 'Despite a widespread assumption that the copyright system is in place to protect the artist; the current copyright legislation in fact undermines the protection and the development of the modern visual arts.' Intellectual Property Law (LW566) dissertation, University of Kent. Available at: [www.kent.ac.uk/law/ip/IPdissertations.htm](http://www.kent.ac.uk/law/ip/IPdissertations.htm) (accessed 14 January 2016).
- Spencer R.D. (2010) 'When experts and scholars change their mind', *Spencer's Art Law Journal* 1(1).
- Telegraph* (2015) 'Family fights to save £100,000 "Chagall" from the furnace'. *Telegraph* 5 November 2015.
- Under Art Rule* (2007) 'Hahn v. Duveen', A. Pizzi. *Under Art Rule* 12 December 2007.
- Wallace, J. (2010) 'Your art sold at Christie's or Sotheby's auction: can the auctioneer undo your sale years later? Probably, yes', *Spencer's Art Law Journal* 1(1).

### Author's address

Jean E. Brown, Northumbria University. Newcastle, UK ([jean.brown@northumbria.ac.uk](mailto:jean.brown@northumbria.ac.uk)).