

Artist's Foundations: The Dominant Influence and the Frustration of the Collector

Dialogue between Sharon Hecker, art historian, and Giuseppe Calabi, art lawyer

Prologue

A recent judgment by the Court of Appeals of Milan decided that a collector has no standing in bringing a claim for the sole purpose of ascertaining the authenticity of an artwork that was denied by the artist's foundation or archive. Therefore, any claim made for this purpose must be declared inadmissible.

The Court of Appeals overturned a judgment of the Tribunal of Milan in a case brought by the widow of a collector who, claiming to be the owner of a work by Lucio Fontana purchased by her husband directly from the artist, had applied to the Lucio Fontana Foundation to obtain the work's inclusion as part of Fontana's works, subject to verification of its authenticity. The Foundation expressed a negative opinion on the work's authenticity, leading the collector to sue the Foundation and to ask the Tribunal to ascertain the authenticity of the work, thereby ordering the Foundation to return the work to the owner and to express a positive opinion on its authenticity. Two expert witnesses were appointed by the court, one to ascertain the date of the work and the other, a handwriting expert, to study the signature on the painting, including the text written on the back of the painting. During the proceedings, the Foundation returned the work to the owner, who abandoned the claim aimed at obtaining from the Foundation the release of an authenticity certificate. At the end of the trial, the widow's claim was, therefore, limited to obtaining a declaratory judgment on the authenticity of the work.

While the Tribunal declared the work to be authentic based on the evidence gathered during the proceedings, the Court of Appeals overturned the judgement, denying that in the Italian legal system a Court can be asked to ascertain the authenticity of a painting: "our legal system does not allow for a general action aimed at verifying the traceability of an artistic work to the author's hand."

The reasoning of the judge in the second instance is technical: the declaratory judgment promoted by the collector's widow was not justified by an interest of the plaintiff to initiate a proceeding, which is a condition of the judicial action: the declaratory judgement could not provide the collector with an "additional use" compared to the situation of uncertainty existing before the case: is the work false or authentic?

The assessment of a judge, in fact, would have been added to the assessment expressed by others (besides the owner and the Foundation), maybe even to the assessment of a scholar of the artist who has been universally accredited by the scientific community and by the market. In addition, a declaratory judgment on authenticity would in any case be limited to the parties involved and would have no influence outside the proceeding.

For the Milan appellate judges, it is one thing to ask a judge in a case concerning the fulfilment of a contract of sale of a work between a seller and a buyer to ascertain incidentally the falsity of the work, in order to obtain the termination of the contract and the payment of damages from the seller. It is quite another thing, however, to ask the judge to pronounce a declaratory judgment on the authenticity of an artwork. In this second case, the judge must take a step back and declare the claim to be inadmissible.

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The judgment of the Court of Appeals did not surprise art law scholars, as it is perfectly in line with the Court of Cassation's holding in the judgment no. 28821/2017, in a case in which the object of the ascertainment was the authenticity of a tapestry by Alighiero Boetti: in that case, too, the Court clearly affirmed that a declaratory judgment on the authenticity of an artwork is not permitted.

However, the Court of Appeals of Milan introduced interesting arguments to the discussion: what is the use, and above all, who needs a judicial pronouncement of authenticity of a work of art? What "additional use" could the judgment provide to the owner of the work? The judgment is binding only upon the parties and anyone else can express an opinion different from that of the judge. The Court underlined with rational pessimism that "the intrinsic subjectivity of which every evaluation of an artwork - including the one relating to its authorship - appears to be inextricably permeated."

Personally, I would also have doubts that the owner of a work whose authenticity has been ascertained by a judge would be able to convince an international auction house that the work could be safely sold as authentic, against the opinion expressed by the artist's Foundation.

The only exception to the principle affirmed by the Court of Appeals is a declaratory judgment sought by the artist or, after their death, by their closest family members based on moral rights (articles 20 and 23 of the LDA). Under Italian law no moral right belongs to a collector, or to the Foundation set up by the artist (or their heirs).

The collector asserted that the refusal by the Foundation to include the artwork in its archive as authentic infringed upon her right of ownership. The argument was dismissed by the appellate judge: nobody can contest the right of ownership of the work of art of the collector, but this "does not automatically extend to its (alleged) authenticity".

However, it can hardly be contested that the economic value of the work of an artist that the Foundation has "rejected" is zero and the only possible reaction of the owner is - in some limited circumstances - to seek an indemnity from those who sold it to the owners.

Using language borrowed from antitrust law, the Court stated that they know that artist foundations can exercise a "significant influence in the reference market, susceptible to frustrate the economic expectations of the owners of works that do not obtain their endorsement of authenticity."

The only limit set by the judge is that the opinion must be expressed based on an adequate evaluation and must not be a merely emulative act aimed at consciously damaging the applicant.

In other words: apart from malice, no protection can be usefully invoked in court by the owner.

The words of Justice Holmes, judge of the American Supreme Court, in the case *Bleistein v. Donaldson Lithographing Company* (1903) are authoritative and topical: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

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What recourse does a collector have when a foundation decides not to authenticate a work of art? This question remains unanswered for modern and contemporary art, whereas the problem does not exist for art made before the nineteenth century, for which there are no foundations.

I agree that judges and lawyers have no specialized training to decide on authenticity and that they would do well to refuse involvement in this type of art historical controversy. Court-appointed expert witnesses may not be specialized in the work of the artist in question and their opinions may carry no weight among the international community of scholars. But how does the problem arise in the first place? Sometimes, collectors may not accept a foundation's negative response when they do not receive an adequate explanation of why a work is not considered authentic. Because there are no codified standards or legal requirements for foundations when performing authentications, their decisions may appear subjective and made according to criteria that are not easily understood or logical. The soundness of the arguments and the reliability of the people making the arguments are the two fundamental parameters used in any field of scientific inquiry. Therefore, I believe that the foundations least at risk of lawsuits are those that are transparent about their methods, processes, reasoning, and decisions.

Second opinions from specialists outside of foundations are not typically required in the process of authentication of art, even though a plurality of opinions is encouraged today in many other fields. To use examples from other fields, there is not one single orthopedist, cardiologist, or law firm that can give an unquestionable opinion on a matter set before them. If a foundation believes that its opinion is well-reasoned and sound, then it should not need to worry about whether collectors seek a second opinion. The strength of the opinion should lie in the clarity of the reasoning rather than in any inherent power of a foundation or expert.

If, however, a foundation provides a collector with reliable and valid evidence-based reasoning about a work's lack of authenticity, then it is important for the collector to accept that reasoning. Sometimes collectors are so invested in supporting the authenticity of their work that even the best reasoned objections are not accepted. In those cases, it is difficult to manage the collector's expectations and disappointments. Insisting through expensive lawsuits and believing that a judge will overturn a foundation's decision can sometimes only delay the inevitable conclusion that the work is truly not authentic.

Finally, we must not forget the gray area, i.e., artworks that might be thought to be authentic but lack sufficient information for a foundation to decide. In these cases, it would be prudent for the collector to wait for more information to emerge. I suggest that foundations might contemplate a third way: the possibility of 'deciding not to decide' by informing the collector that there is currently insufficient information available to make a positive or negative decision about a work's authenticity. Despite the all-too-human desire for a clear answer, and the hope that the law might provide support, sometimes in art—as in life—the question goes beyond a definitive yes or no.