

# Art & Cultural Heritage Law Newsletter

*A Publication of the Art & Cultural Heritage Law Committee*

The Art & Cultural Heritage Law Committee is a committee of the American Bar Association Section of International Law.

## COMMITTEE CO-CHAIRS

Peter Tompa  
Anne-Sophie Nardon

## IMMEDIATE PAST CO-CHAIR

Birgit Kurtz

## SENIOR ADVISORS

David Bright  
Michael McCullough

## VICE CHAIRS

Tess Davis  
Diego Figueroa  
Kevin Ray  
Betina Schlossberg  
Armen Vartian

## NEWSLETTER EDITORS

Armen Vartian  
Laura Tiemstra

## NEWSLETTER CONTRIBUTORS

Nanne Dekking  
William Feugère  
Dr. Sharon Hecker  
Birgit Kurtz  
Dr. Jennifer L. Mass  
Racheal Muldoon  
Dr. Lynn Rother  
Peter Tompa  
Elaine Wood

## DESIGNER

Laura Tiemstra

*Views contained in the newsletter are those of the authors only and do not represent the official position of the Committee or the American Bar Association.*

*All graphics, images, photographs, and text appearing in this newsletter may be protected by copyright. Commercial use of copyrighted material is prohibited without express written permission of the copyright owner.*

## Art at the Laundromat – Is Cryptocurrency a Solution or Part of the Problem?

The following is an edited transcript of a Panel discussion presented on May 12, 2021 by the ABA International Law Section, Art & Cultural Heritage Law Committee, and co-sponsored by the International Law Section's International Anti-Money Laundering Committee, International Finance and Securities Committee, Export Controls & Economic Sanctions Committee, and the Mexico Committee.

The Moderators were Peter Tompa, co-Chair of the Art & Cultural Heritage Law Committee, and Birgit Kurtz, the Committee's Immediate Past Co-Chair. The Panel consisted of Nanne Dekking (Artory, New York/Berlin), William Feugère (Feugère Avocats, Paris), Racheal Muldoon (The 36 Group, London), and Elaine Wood (Charles River Associates, New York).

### 1. What are the advantages of cryptocurrency and blockchain technology for the international art and cultural property sectors?

Nenne Dekking: ... I really want everyone to understand that blockchain as such and digital currency are connected but can also be separate. You can use blockchain for recording of information timestamps, and that ability is really important and can help such a marketplace that is at least by outsiders perceived as being extremely opaque to create more confidence in the marketplace. Cryptocurrency in a way is a currency. Anyway, I have to say that about the positives and the negatives. But I want to make sure that people really understand if there's blockchain technology that doesn't necessarily mean that you have to pay in cryptocurrency, for example.

William Feugère: Yeah, I totally agree you have to make a difference between blockchain and cryptocurrencies even if they are linked. I think the first advantage is that there are new ways of creating art with the NFT, I think it's very interesting, the blockchain because art is, you have the possibility to create new things and a new vision of art. And the second thing I had is an answer for the cryptocurrencies themselves. I think it makes art interesting for geeks. For people who are not interested, and all of sudden they can buy art with cryptocurrency. So, people who like bitcoins and use bitcoins, they have access to the art market. It's quite new. They're new customers and I think it's good.

Nenne Dekking: They are new customers, William, and what I really like about it is they are also new customers who will ask new questions. The days are over when I was an art dealer, I was told that I could really trust the dealer where I was dealing with because he had lunch with his mother every day. I mean we can do so much better than that, no? That's the beauty of this, if everybody understands, there is information that can be tracked. It's not out in the open necessarily. There are all kinds of ways to track that information and make it permission based. Ultimately, there is a track record. If you don't like that,

*"So, people who like bitcoins and use bitcoins, they have access to the art market. It's quite new. They're new customers and I think it's good."*

*"what I really like about it is they are also new customers who will ask new questions."*

there is something wrong you know.... If you really want to believe information because you fell in love with an artwork and not all

things are clear, then there is something wrong. And I come from the art world market and I believe if 99.5 percent of the people there are actually doing an awful lot of due diligence which is important, it can be captured and should be captured. But it should be paper graphically signed off upon to create that ability. I think that this technology and even the bitcoin or the cryptocurrency come completely together when you talk about an NFT.

### 2. What are the disadvantages?

Racheal Muldoon: Right, if I might play devil advocate. What do we know? Well, we know in a

report last year from Chainalysis, they reported that the criminal share of cryptocurrency related crime fell to 0.3 percent on their records. So, also as of February of this year, they say only 270 addresses are responsible for 55 percent of all crypto-related money laundering. Do we think we're overstating the nature of the problem here or not?

William Feugere: Very interesting question, I think cryptocurrencies are really useful in our future, it's like facing a wave. The wave exists and it won't change, you either surf on it or drown. But the wave exists and has benefits, it's very interesting and the dark sides are still enough that the most important one, I understand that we as lawyers try to prevent the dark sides of, try to investigate them, but still, the positive ones are more important.

Elaine Wood: I hate to agree with you, William, because I'm supposed to represent the dark side. I think what we need to advise is a risk-based approach. It is really the same idea with the financial institutions handling money transactions. A bank is not supposed to be an auditor, it's not supposed to be the FBI, when you stand in the government shoes, that's when you look more closely at the dark side and that part of my background would tell you it looks limited because we haven't found all the crime that is there. But the other piece of this historically is I think that was a much more prevalent element much earlier on and the idea of financial fraud and criminal activity is it doesn't really sit still. It reinvents itself over and over again. So, the more that the cryptocurrencies sort of come into the mainstream and the more we take advantage of the wave, as William talks about, the more some of this common sense and risk-based approach will come to the front, 5 years from now we'll read about a new wave of criminal activity and something that hasn't been invented yet.

Nenne Dekking: I see a question popping up that is really important for all of us. Actual data stored through NFT's actually is very little and in fact most data is stored in real contracts. I think that's a very important element, for all of us here. And I think especially for lawyers. With my engagement with auction houses, for example, they will ask us to consult on NFT's, I'm actually surprised by the lack of understanding of what an NFT is and that there should actually be a legal team. They are all compliance teams involved to understand the underlying contractual agreement should be the starting point of the whole affair because everything can be captured here. The other thing is, the smart contract as such by itself should not be enough, in those, that's just code that trigger things and people start to confuse it even people in compliance teams start to confuse that a smart contract is not the actual contract. The boring contract done by your compliance team if you're an auction house or anyone else who wants to engage with NFT's can be stored and can be part of

*"The boring contract done by your compliance team if you're an auction house or anyone else who wants to engage with NFT's can be stored and can be part of the NFT and will be stored using blockchain technology, so that gives the real security."*

the NFT and will be stored using blockchain technology, so that gives the real security. So, I think asking questions when you engage with NFT's or with blockchain is the technology as such is never enough. There's just common sense and ask the questions that you're afraid to ask an art dealer because they're such a unique group of people in the eyes of many, even myself. I need to be in a really good mood to go to

ly out of the terrorist financing because there were terrorists, ISIS and Al Qaeda, were robbing historical antiquities and using them as a source of funding. So, there was a sort of outwardly event that happened. When I was at the U.S. Attorney's office almost 20 years ago, there was a huge spike in literally organized crime, buying these incredible Picassos and Warhols that you found in the home of the



Chelsea because I feel that I'm looked upon as someone who will not understand the art on the wall and this has been my profession for a long time. So, great with these new technologies, you don't have to fret, you don't have to be imposed, just ask the questions and make sure that everything is captured because the technology is now there.

### **3. Is cryptocurrency the preserve of criminals looking to launder the proceeds of their crime ?**

Elaine Wood: So, one of the issues that came up was sort of the... maybe the fear or hysteria over money laundering and the antiquities or a Russian oligarch and buying art as money laundering. These things, in what

percentage of that, you know as a prosecutor, I know that these things are happening but I also know it is always a small percentage. That the majority of art purchases, antiquity purchases, are legitimate. Antiquities became an issue real-

crime person when you prosecuted them. That creates a reaction by the Government because we have a huge case and a big spike so you rush to sort of remediate the issue that has come up. And I think that is one of the first focuses on antiquities and once that interest is aroused, you look to stop that hole or that gap if you will. It doesn't mean that the majority of antiquities is a good way to steal money or that that is rampant across the art and antiquities market.

Nenne Dukking: You're talking about physical assets, the only information about the physical assets that someone has acquired is stored in the blockchain. That gives you secure information. Not right information because we don't know that, but at least secure information and stored information, that already will solve a lot of problems because then if you engage with clients, you make sure that whatever you say, whatever you think you know is actually correct because very often people don't do enough due diligence because they're so enthusiastic to really wanting things. It's wanting to believe that it's authentic and you can do something a little deeper with clients who are going to spend

a lot of money on these kinds of physical assets.

Elaine: Well, and you said the due diligence is captured in the blockchain.

Nenne Dekking: It is, yes.

**4. What is the regulatory position concerning cryptocurrency transactions in your respective countries? Do you consider this regulatory oversight adequate to protect artists and investors and the reputation of the international art market?**

Elaine Wood: There are certain cryptocurrencies going to different geographies. And in the United States you have those at the federal government and all the state governments. So, a cryptocurrency is one piece of the puzzle, the cryptocurrency exchange is another piece of the puzzle where you've got regulations that vary from state to state. The US is behind France and the EU in many of these items and really just coming to try to grapple with what questions can be asked, how you ask this, and particularly in regard to cryptocurrency. We're also just coming to grips with how to ask money laundering questions and AML know your customer questions for the antiquities and art market as a whole. So, all this is evolving now, it's a ripe landscape for discussion.

William Feugere: In France they are very concerned about the cryptocurrencies, mostly I think because many people, members of the authorities do not understand them and think it's new and they don't dominate it and control it, it's dangerous and something they absolutely fear. They put more fear and danger in it than there actually is. The numbers that you've mentioned about the reality of the crimes of cryptocurrencies, they show that there are many positive aspects that the authorities don't take into account. But still, it's one of the main concerns and they start to get a definition and to impose the same controls as a sales KYC too because we can control the date and the reality of the transaction, it's more difficult to control the people behind. I would say it's the same as paying with coins and bills. You have more proof in the blockchain of the date of the transactions than if you use coins and bills. The numbers of coins and bills controls the amount of something that's not limited and it's the same for cryptocurrencies. It worries the government, they try to create new legislation and it's difficult because there's all these new things, these new tools. You have the feeling that the authorities are running after the creativity of the geeks and maybe on the dark side of it criminals are more creative and active and fast than the authorities.

**5. Can art market professionals draw confidence from the hugely successful US float of cryptocurrency exchange, Coinbase, last**

**month, or is cryptocurrency far too volatile to be a viable part of art business models?**

Elaine Wood: I would echo William's point about fear, this is looking at cryptocurrencies as an investment and there's a certain risk with that and there is volatility. You probably want to figure out whether Janet [Yellen] is going to speak that week or not before you trade depending on which side of the transaction you are on because it really did have an effect on the value of the coins. But, on the other hand we all wish that we had invested in bitcoin 10 years ago and we might not be on this panel at this point. I think that you have to be a smart investor, you have to be sophisticated about this level of risk. You have to be an accredited investor if it's a security and high risk. So, the warning label should be out there, it is going to change and value much more rapidly than the U.S. dollar but it's still viable.

Nenne Dukking: Yeah, and it is interesting how digital currency is turned now into digital assets by people buying an NFT, right?

William Feugere: I would add maybe that the questions were asked for usual currencies throughout history they feel extremely volatile and we don't remember that but there's been really huge changes of the change of dollar, of the British pound, French Franc and it was a way for governments to try to stimulate the economy that has changed the rate of their money. And, the confidence is the confidence you can have with the authorities and it's a real strong matter of the confidence in the Federal Reserve Bank, the confidence in the European bank, etc. has been created after decades and decades. Cryptocurrencies are quite new and let's give it time, let's wait a little bit to have more confidence in them. Well, I regret, I would have loved to buy bitcoins a few years ago and would have loved my parents to invest decades ago in Apple because I would be extremely rich, it's the same I think, it's the same with the stock market. It's just a matter of time and we'll see what happens.

**6. It was reported by ArtNews last month that the Ethereum Blockchain alone is responsible for over 96M tons of CO2 emissions. Should the international art market reject conventional cryptocurrencies, such as Ether, at the expense of profit now, and embrace greener alternatives, or not?**

Nenne Dekking: May I start with saying that at least they really understand that this is not sustainable and that they're working really hard to look at alternatives. And maybe one additional thing I would like to bring up is can people please stop securing information on the blockchain that doesn't need any kind of security?

Because it is not ... why would I create my own records of ownership of an artwork with my own information and get a certificate of authentication that I basically created myself through companies that will do it for you? Do we really need to populate the blockchain with that? You know let's also look at use cases, which by the way, cryptocurrency really needs the blockchain. But William, I'm sure you're aware of all these initiatives now to turn cryptocurrency "greener" so to say.

William Feugere: I don't know, I had thought of an answer which was did we really see how much does it cost to bring forward pieces of art and to organize exhibitions all over the world? I think we had a huge exhibition from Egypt in Paris before the pandemic so how much did it cost? In terms of energy of planes, et cetera, how much does it cost to create new bills and to transport them and to destroy them when they are too used? But at the same time, it's true that it costs a lot of energy and it's not really green, cryptocurrencies, because of the computers,

*“how much does it cost to bring forward pieces of art and to organize exhibitions all over the world? I think we had a huge exhibition from Egypt in Paris before the pandemic so how much did it cost? In terms of energy of planes, et cetera, how much does it cost to create new bills and to transport them and to destroy them when they are too used?”*

because of the processors, the electricity that is needed. But I think the technology will try to create new systems that will be greener so maybe it's a matter of time, a matter of years. It should have, let's say, greener preprocessors and more powerful ones.

Elaine Wood: I think also this is a challenge that is facing many, many industries, not only cryptocurrency. I think cryptocurrency makes a big splash in this regard because of the spikes that we see and because it captures your imagination. But there are many industries that use coal and electricity that really need to face the same sort of ESG challenge that should be front and center in our world.

William Feugere: Even our webinar using Zoom costs a lot of energy and it's not really green.

Elaine Wood: Not this one, William.

William Feugere: Not this one, this one is an exception because it's an ABA, I agree.

**7. What are the Differences Between the U.S. and Europe concerning Taxation and Regulation of Cryptocurrency Transactions?**

Racheal Muldoon : Certainly, from a UK perspective, I can say that March this year our revenue and customs issued guidance on cryptocurrency assets, that cryptocurrency is not considered a currency in the UK in a conventional sense. So, you are subject to taxation whether it's for personal use on the basis of capital gains or business use on the basis of income tax rules. But certainly, the regulators are catching up here. How about in France, William?

William Feugere: I'm not specialized in tax but I would say that the taxation does not depend on the currency used but on the value of the asset. So, you have exchange and it's easy to have the

exchange rate versus Euro and Bitcoin. And that's what you have to declare in the taxes.

Elaine Wood: In the US, you have to pay capital gains and that's an issue and that's another issue with transactions that are going through a medium where there is no government visibility as to what is taking place.

**8. Are cryptocurrencies similar to the time when there were different banks before there was the central system and what about the attempt of the government to make international cryptocurrency governing?**

William Feugere: I think that may be a danger. What people like in cryptocurrencies is that it's controlled by a network and it's a new vision of authority in society. Which is horizontal, based on network, and not vertical. So, if we're too vertical about it and use the old system, the old vision, I think it won't work. People will find another way to create cryptocurrencies to escape this central control that they're really opposed to. I think it's a philosophical question, they don't want a centralized and vertical way. So, it would be a very bad idea. By using the old system and use it to try to create new ways to control it and not vertical and not the same.

Peter Tompa: The Economist, actually this week, is doing a story about digital currencies run by governments, because China is certainly talking about it. Related question I have is that in the United States, before there was a national monetary system in terms of paper money, different banks would issue their own paper money. But when the United States government started issuing paper money that kind of just disappeared. So, my question is do you see this disappearing if China gets into it, if the EU gets into it and if the US starts issuing digital currency?

William Feugere: The difference with these times is it was difficult to have confidence in the system, and the currency was from one bank for instance. Here, the confidence comes from the number of people in the network. So, you don't need authority to give the confidence in the system. People do it themselves, horizontally, not vertically. It's different philosophies, different thinking. So, I wouldn't compare it to the whole of history.

Racheal Muldoon: So, is it the case that crypto assets, cryptocurrency are to be subject to more stringent to KYC and AML compliance than the conventional banks? Why is that?

Elaine Wood: In my view, there isn't this control right now. For example, KYC is getting behind the anonymity and the pseudonyms to verify something that when new transactions in other currencies, you are trying to verify over a certain threshold of dollars. So it's some KYC's, some source of wealth, the issue is what the government would be looking at and

maybe that's something that is there with the exchange when you cash in and cash out but that's just converting it into regular currency.

Racheal Muldoon: Do you think that cryptocurrencies should be subject to more stringent AML compliance?

Elaine Wood: No, I don't. I think they should be subjected to some, that there should be some ability. And again, you have to look at, banks are not the FBI or investigative agencies, they are not charged with audit responsibilities but there is a global agreement of trying to have some information that is shared to try to go after international terrorist crime or global money laundering.

William Feugere: I would add that it is provocative but why more stringent? The mainstream banks, are they more secure as the blockchain? The blockchain adds security so maybe KYC to the identity of people, yes, but there are parts of the system that maybe more secure than the traditional. So, more stringent, certainly not.

Racheal Muldoon: Are NFT marketplaces super rare? Beholden to KYC policy? Are the traditional auction houses who are accepting bitcoins in payment beholden to the same protocols of physical work?

Nenne Dukking: These are exactly the questions you should ask yourself when you start to engage with nontraditional trading platforms in the art market. I am actually quite surprised to engage with trading platforms to see that certain things are really taken care of very well that don't even exist in the traditional art market. And others where there's actually not a lot of protection. There's a lot of confusion here as well, an NFT living on the gateway where at least the digital representation of the image was stolen between two brackets is seen as a flaw of the whole NFT system. The only thing you can say is most likely the platform was not well protective enough to protect the NFT in the platform and can you blame anyone? The prices went up so much, so fast that I'm sure they're looking and they don't need any advice on that. They're looking themselves and how can we secure our platform better, but it doesn't mean that an NFT is hacked or that the blockchain is all of a sudden not functioning anymore. Getting right answers from whatever platform you're engaged with is the next step. The security of certain types of technologically innovative products doesn't mean that all of a sudden all of the problems are gone.

*“Are NFT marketplaces super rare? Beholden to KYC policy? Are the traditional auction houses who are accepting bitcoins in payment beholden to the same protocols of physical work?”*

*“These are exactly the questions you should ask yourself when you start to engage with nontraditional trading platforms in the art market.”*

Rachel Muldoon: So, does the answer lie in a private commission blockchain as opposed to a public blockchain?

Nenne Dukking: The beauty of the blockchain is the people who start to engage with the permis-

sion-based blockchain have obviously asked themselves enough questions to engage with a different kind of blockchain channel. That's already a huge plus. I also believe that the owners of the artwork will be known. Of course, we know that not everything should be visible, for example, the next step of when these artworks were transported or will be shown, can be traced and made visible. Permission-based blockchain is ideal where you give permission to the stakeholders of that event. It can be the curator of the museum who creates a new block in the chain that the next event will add value to that artwork.

Elaine Wood: I would add that the other piece of this is the market operator as well because you can put the due diligence on the blockchain and you can also identify yourself and have a robust description of who you are, what the due diligence is, and that may encourage more transactions with the cryptocurrencies and that those transactions that have that due diligence around them and the people clearly identify, will transact more easily, that will be more valued, you know you might be able to bid more easily at an auction then if you come with the bitcoin and your identification.

Nenne Dukking: The artwork will be certified but now the players will be certified as well. You can be a certified buyer, which will allow those people not to have to go through all these procedures that are extremely painful for the market because the market is now responsible, the art dealer has to do all these checks. They have definitely not been as stringent as the new procedures.

*“The artwork will be certified but now the players will be certified as well.”*

William Feugere: I totally agree about the know your customer rules for cryptocurrencies and to a certain degree of control. But just a certain degree. Because, if you seek a complete transparency, to me it is a danger for privacy for our everyday life. So, there has to be a limit. So, yes for KYC but no to complete transparency. It's something that really worries me as a lawyer and a citizen.

Elaine Wood: There also has to be a cost to that right? One of the simple benefits that I find exciting is that there is the taxi driver in New York that can send money home to mom across borders without having to pay half of that in transfer fees and transaction fees through the existing financial system. ♦

## The Benefits and Challenges of Expert Witnesses for Art Law Cases and the CAfA Expert Witness Pool

Sharon Hecker, Jennifer Mass, Lynn Rother

**Dr. Sharon Hecker** is an art historian and curator, Professor in the Arts Management Program at the Università Cattolica in Milan and founder of The Hecker Standard® of Due Diligence for art. She is the Coordinator of the CAfA Expert Pool Selection Committee.

**Dr. Jennifer L. Mass** is the President and Founder of Scientific Analysis of Fine Art, LLC, the Andrew W. Mellon Professor of Cultural Heritage Science at Bard Graduate Center, and part of the CAfA Expert Pool Selection Committee for forensic scientists.

**Dr. Lynn Rother** is the Lichtenberg-Professor for Provenance Studies at Leuphana University, formerly Senior Provenance Specialist at The Museum of Modern Art, and part of the CAfA Expert Pool Selection Committee for provenance.

### Part I. Sharon Hecker: Expert Witnesses and the CAfA Expert Witness Pool

Although art law cases require their own form of specialized expertise, the path for choosing qualified experts can be challenging for judges and lawyers. While in some countries, the legal system allows for experts to be freely chosen by each side, in others experts can only be chosen from pre-selected witness pools. Whether one chooses freely or from a witness pool, there are currently no standards for who qualifies as an art expert, what qualifies as expertise and how experts are chosen.

Other problems can arise for expert witnesses in art law cases. Art historians and conservation scientists are scholars and researchers and may not be familiar with relevant legal and market issues. They also may not feel safe from lawsuits in expressing their opinions. Experts may have conflicts of interest, such as a professional investment in the market or a personal friendship with one of the parties. Additionally, during a trial, some experts may feel they must defend their initial positions at all costs, even when new information emerges during the discovery process. Finally, some experts may

not be recognized by their peers as specialists. Consequently, legal decisions stemming from such expertise may have no effect on the market or on art history.

Using qualified expert witnesses as well as art-experienced lawyers and arbitrators, the newly formed Court of Arbitration for Art (CAfA) seeks to improve the precision of court decisions and market legitimacy of the results. Insofar as expert witnesses, the three of us were appointed as the Selection Committee to form a vetted international pool of witnesses for two categories: provenance research and conservation science/material analysis. In a CAfA case, experts for these two categories must be chosen from the witness pool. Working together, we created a rigorous application process according to formal selection criteria. This includes academic education, degrees, quality of scientific publications, peer-to-peer reputation, absence of commercial or other conflicts of interest, and experience with testifying or consulting on art law cases. By choosing experts who are known and respected in their fields, CAfA hopes to

inspire confidence and credibility in the results.

An additional category in a CAfA trial would include connoisseurs and outside experts. These can be appointed separately for each case. Both parties must strive to agree on one specialist who is appropriate for the case. If the parties cannot agree on a joint expert, they can revert to having a separate expert for each party. CAfA has also created the position of Technical Process Advisor (TPA), a person familiar with the art world who serves as advisor to the court, clients, and lawyers. The TPA can be nominated to collect, share, coordinate and explain the relevance of the evidence.

CAfA has implemented several other new rules. To mitigate the risk of a witness defending an original position at all costs, CAfA experts are obliged to correct their positions as new information emerges. Additionally, witnesses are protected by hold harmless clauses so that they do not feel vulnerable expressing their expert opinions. ♦

### Part II. Jennifer Mass: Expert Witnesses on Conservation Science/ Material Analysis

While the scientific study of cultural heritage objects has its origins in the nineteenth century with Prof. Dr. Friedrich Rathgen's laboratory in Berlin<sup>1</sup>, the acceptance of scientific evidence for art disputes has been inconsistent.

The first example of scientific evidence versus connoisseurship in a court of law is the 1921 trial of Joseph Duveen for slander over *La Belle Ferronière* (which was attributed to Leonardo da Vinci). Duveen dismissed a version of *La Belle Ferronière* owned by the American Harry Hahn as a copy of the work owned by the Louvre without having seen the Hahn painting in person, and Hahn sued Duveen for

slander<sup>2</sup>. Duveen and his colleagues argued that they had an innate eye, and they were hostile to an x-ray being admitted as evidence (which they considered to be not genteel practice). Hahn prevailed over Duveen, but the Hahn painting was not accepted by the art market in the long run.

There is a long history of the art market ignoring court rulings in which the expert witness testimony is given by someone not considered by the market makers to be an appropriate choice. However, scientific evidence has recently been central to both the Knoedler forgery trial and the Wolfgang Beltracchi trial. While the

level of sophistication of the Beltracchi forgeries was arguably higher, ultimately the use of anachronistic materials and techniques provided definitive evidence of fraud. The identification of appropriate scientific experts for these cases has proved challenging – cultural heritage scientists tend to be highly specialized and are typically focused on museum collections. Chemists and materials engineers who do not have any art expertise will sometimes try to do this work, but they lack the requisite context to interpret their data and typically provide unsuccessful testimony.

In building CAfA's scientific expert pool, we

are working to identify experienced cultural heritage scientists with a broad range of expertise both with respect to scientific analysis tools and to different periods of cultural heritage. These candidates will not only best serve the court but help to construct a solid founda-

tion of legal decisions to uphold both artists' legacies and a functional art market. ♦

<sup>1</sup> Mark Gilberg, "Friedrich Rathgen: The Father of Modern Archaeological Conserva-

tion," *Journal of the American Institute for Conservation* 26, no. 2 (1987): 105–20.

<sup>2</sup> John Brewer, *The American Leonardo: A Tale of Obsession, Art, and Money*, Oxford University Press, New York, 2009.

### Part III. Lynn Rother: Expert Witnesses on Provenance

In the resolution of art and antiquities disputes today, the importance of provenance knowledge cannot be overstated. The information on an object's ownership and location history is used together with connoisseurship and material analysis as a tool to verify (or indeed fake) the authenticity and attribution of a work. Moreover, provenance has become key for title disputes providing the legal basis for a party to demand, or for that matter, defend the return, restitution, or repatriation of works of art. The information that is needed to evaluate such disputes can be obtained from a variety of sources, including, but not limited to, any archival or documentary evidence (deeds, invoices, export certificates, or photographs) as well as material information that can be gleaned from the object itself (inscriptions, stamps, or labels). Ideally, owners hold all documentary evidence for all previous changes of ownership and possession for each of their artworks from its moment of creation to the present. The reality, however, is very different.

As provenance had not the same importance and served different goals until relatively recently, provenance information and its supporting documentation, even if it has survived, does not necessarily live with the object nor does it necessarily align with the kinds of scientific expectations that we have now. Reconstructing a provenance today usually entails identifying, locating and gaining access to sources and archives as well as interpreting historical signs and documents which can be fragmentary, decontextualized and difficult to understand. This work requires experts and, in fact, for disputed title claims it requires specialists in specific provenance areas and related fields because questions connected to illegal excavations and exports, forced sales and confiscations during the Nazi era, tax confiscations in the GDR, or military-accompanied looting in colonially occupied territories all require a very different set of expertise.

To assign experts best qualified for a particular case, applicants for CAFA's provenance expert pool provide detailed information through a questionnaire on their skills, qualifications, and experiences. The provenance expert pool is open to a wide range of experts from different fields and academic backgrounds to address

the complexity of provenance—unique in the field of art and antiquities disputes. ♦



To get involved with the Committee, contact Peter Tompa or Anne-Sophie Nardon, Committee Co-Chairs for Membership, at [pkt@pktcounsel.com](mailto:pkt@pktcounsel.com) or [asn@borgnese-associes.fr](mailto:asn@borgnese-associes.fr)  
For newsletter subscriptions and submissions, contact Armen Vartian, Committee Vice Chair for Publications, at [armen@vartianlaw.com](mailto:armen@vartianlaw.com)