Foreword

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What, at first sight, could be more unlike than art and law? Is art not all about sensitivity, freedom and imagination, while law evokes cold rigour and automatism? And yet increasingly we see them linked. More proof that nothing escapes the clutches of legal rules: no sooner does an activity take on commercial value than it becomes necessary to put order on it by establishing rights and obligations.

And art, in all its forms, has now acquired a commercial value, to the point where it has resulted in an actual market: first, among true lovers of art because, since they share their appreciation of beauty with others, they must agree to pay what it takes to buy the ownership of and exclusive rights to a work of art; and secondly, for investors (who may be art lovers but are not necessarily so), because some works have acquired (sometimes considerable) market value, representing as they do a more stable – and often more discreet – investment than others.

This is the background to the study published here. The author is primarily a lawyer: she acquired the first part of her legal training at the Faculty of Law of the University of Fribourg, where at the time I was lecturing on private law. Reading her work shows me that my colleagues and I succeeded in passing on solid legal foundations to her. But my main contribution then, of which I am not a little proud, is that I managed to persuade her to incorporate her love of art into the remainder of her training. Because she is not only a lawyer: she is also, fundamentally, a lover of art. This quite naturally led her to the Art-Law Centre at Geneva University where her director, Professor Marc-André Renold, not only gladly took her on as his assistant, but also supervised her in writing her doctoral thesis. After taking this first step she has already made headway among the specialists, as she has already been called on to give lectures and courses, in particular at the London School of Economics – at the invitation of Professor Tatiana Flessas, who joined the first reporter in supervising the research published here.

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This book focuses on “sleepers” and, through them, the issue of the “Sale of Misattributed Artworks and Antiques at Auction,” under Swiss, English and United States Law. As is right and proper, the title clearly indicates the subject of the research.

The subject: “sleepers.” The term is evocative and can initially mean nothing to anyone who is not an art market specialist. It refers to works of art that are unrecognised, whose true nature has not yet been revealed, which are in a sense “dormant.” As will be clear by now, what is asleep is not in fact the work as such, since it will not change on awakening – it is its market value. The work will continue to be what it is – painting, sculpture, antique – but it will suddenly be realised that its creator or its origin had been unrecognised and that its true identity, now revealed, gives it an increased, hitherto unsuspected, market value. It had been taken for the work of a pupil or a copy; but now, after more thorough research, everything points to its being in fact the work of the master himself. The sleeper itself has not changed, but it has opened its eyes and has suddenly been recognised as having a commercial parentage which gives it greater recognition and therefore greater value; the painting was bought for a few hundred pounds, and it subsequently turns out that its estimated price is ten or a hundred times higher. It is the opposite of a forgery, which had been taken to be authentic: there too, while the work itself does not change, its market value does. Proof again that the price of a work of art is determined not so much by what it is, but by its attribution on the market.

The issue: the mistake. The awakening may be a painful one, at least for the consignor, who needs to know what legal recourse is open to him. It raises classic questions of the law on the sale of goods, in which it must be decided what happens if it subsequently turns out that an object sold does not correspond to what had been agreed by the parties. Here we plunge headlong into the realm of error, with its delicate nuances. In trading on the grand scale, however, the question takes on an additional dimension when the transaction is conducted through the intermediary of an auction house.

The context: auctions. This is precisely the kind of situation on which the author (rightly) focuses her research. Disputes of this kind arise mainly in large-scale art trading, which in practice is carried out through the major auction houses. The issue is a tricky one and concerns what liability these auctioneers may have to assume in their capacity as specialists. As such, are they not under an obligation to satisfy themselves as to the real value of an object, and therefore to guarantee its authenticity? Moreover, it is often to them that the parties turn if they have a problem.

The legal foundations: Swiss, English and United States law. In the event of a conflict between the consignor and the auctioneer, the decision

will be made by the courts. The author has judiciously chosen to examine the solution under the laws of three countries in which this type of market plays an important role and which apparently take substantially different approaches to the matter.

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The research examines three main propositions:

First, auction houses enjoy a privileged position and are given special consideration in the art market. Auction data such as catalogue attributions and price information are put into the public domain. The information on consigned property that auction houses establish is used by other market actors, for example to assess a work's authenticity or a creator's establishment on the market. Given the publicity of their sales and established information, auction houses have a much greater reach and success than any other art dealer. Auction houses further develop their privileged position through the value-based marketing of their expertise and of the property they offer for sale.

Secondly, auction houses challenge the market's trust and confidence that they enjoy by disclaiming liability to consignors for the created attributions and prices. Thereby, auction houses put into question the reliability of the established information and their expertise. Adequate security proves to be highly requested on a market that is, in reality, characterised by lack thereof. The art market requires accurate attributions in order to function. By subjecting attributions to their disclaimers, auction houses are not assuming their role as point of reference, and consequently threaten the art market's health and stability, which leads to the situation that an art lawyer so well summarised recently: "trust no one."

Thirdly, the analysis of statutory and case law that applies in Switzerland, England and in the United States reveals several outcomes that affect the involved parties, the courts and the art market. Under all three jurisdictions, the auctioneer's liability for selling a sleeper is based on his duty of care and skill and fiduciary duty as the consignor's agent. In order to assess whether the auctioneer has met the required threshold of diligence with regard to his duties, the courts first examine upon what the parties have agreed, and secondly based on the reasonable auctioneer standard.

This standard, which assesses the performance that can be expected from a "reasonable auctioneer" in the position of the given auction house, causes much confusion. The courts assess whether the auctioneer had reasonable grounds for holding the disputed attribution. The standard requires courts to distinguish between broad factors which lack a clear definition. These factors include the expert's knowledge and level of expertise, the auction house's size, the circumstances of the sale and the

expert's level of negligence in establishing the attribution. The outcome of the courts' assessment is difficult to foresee for the parties to the dispute. Case law has been too inconsistent and vague to formulate a standard that auctioneers and consignors can use for each attribution.

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These findings lead the author to put forward two proposals designed to help redress the inequities observed.

First, introduce a scheme whereby auction houses would engage their responsibility to consignors for the attributions that they establish. More specifically, it is proposed that auction houses offer their consignors a guarantee of authenticity. They already do so to purchasers. Instead of broadly disclaiming any warranty to the consignor in relation to any representations made to him, auction houses would guarantee the accuracy of the attributions that they create. Should an auction house, despite great diligence and care, erroneously authenticate an art object, it compensates the consignor for his loss. Essentially, the proposed solution seeks to provide auction houses with an incentive to implement a more rigorous and diligent authentication process in the consignor's favour. With such a guarantee, auction houses manifest to consignors and to the art market that they can rely on the auction house's expertise and produced attribution.

In order to maintain the attractiveness of auction sales, the guarantee should be restricted (1) to the direct consignor, excluding any subsequent owner; (2) to lots that actually succeeded to sell, so as to encourage auction houses to continue their research right until the sale date; and (3) to investigations that are necessary and sound. In fact, the guarantee should provide auction houses with the flexibility to exchange with the consignor on possible authentication avenues and the costs that they entail. Interestingly, auction houses are still very reluctant to proceed to scientific analysis, despite the benefits of this authentication tool. In offering an authenticity guarantee, auction houses may allocate the costs of the additional research and investigation to their client. These costs can be borne by consignors as part of the consignment fee, given that it is in the consignor's interest that an auction house assesses his property thoroughly.

It is a strong, brave proposal, and for it to be followed, the auction houses would have to be aware of the key role they play. As in other spheres, the solution involves significant financial interests, insofar as it introduces a form of insurance.

The second proposal concerns the resolution of disputes. The author quite correctly notes that, despite their many qualities, the ordinary courts

are not adequately equipped to rule on this type of dispute. Judges are not usually specialised, so they must place considerable reliance on the opinion of experts. As previously mentioned, whatever the legal system in which this issue arises, courts in general have proved very timid when it comes to attributing liability to auction houses.

The solution, in the spirit of an approach now commonly accepted in all commercial spheres, would be to turn systematically to alternative methods of resolving disputes. The author foregrounds mediation, the advantages of which are well known: the solution can be entrusted to specialists, with a knowledge of the field, and the proceedings are not only confidential, they are also swift and flexible.

The proposal is judicious and perfectly in keeping with the spirit of current trends. It might perhaps be a good idea to add to the system from two different angles: where mediation is unsuccessful, it should be supplemented by a recourse to arbitration, which is its natural complement. Better still, it would be good to create dispute resolution centres specialising in this field, to which all those involved could turn.

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The publication is very readable, clear and well structured, and will be of interest to both practitioners and lawyers. The title alone does not really do justice to the wealth of matter presented, which in fact covers the main aspects of the art market.

First it covers the factual aspects, giving an in-depth description not just of the notion of sleepers but also of market participants and current practices. It then addresses the legal aspects, presenting a detailed examination of the solutions adopted in the legal systems under review, using an extensive critical apparatus. Finally, a critical reflection on these solutions enables the author to ground the proposals she has made in a solid foundation. An excellent awareness of the financial issues at stake is demonstrated throughout. The publication is supplemented by a series of annexes setting out, in particular, the main solutions adopted in practice.

This is a fine demonstration of how the rigour of law can be reconciled with newly emerging issues in art.