

Object Lessons: De Sole v. Knoedler & Company (Part I)

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In 2011, the 165-year-old **Knoedler & Company** (“Knoedler”), one of Manhattan’s most venerable galleries, abruptly closed its doors amid accusations that the gallery had been selling fakes for more than a decade. Ten lawsuits have been filed against the gallery and its former director, Ann Freedman,^[1] six of which have ended in settlements. Four suits remain pending. These cases have involved works purporting to be by Robert Motherwell,^[2] Jackson Pollock^[3]; Clyfford Still; ^[4] Willem de Kooning; ^[5] and Mark Rothko^[6]. The most recent of these to settle is the suit brought by collectors Domenico and Eleanore De Sole (the “De Soles”) against Knoedler and Freedman. That suit produced two weeks of closely-watched testimony before the parties reached separate agreements on February 7th (with respect to Freedman) ^[7] and February 10th (with respect to the gallery).^[8]

Since the De Sole case settled, it did not elicit a refined judicial statement on the due diligence required of a sophisticated collector when purchasing a work of art or, conversely, the due diligence required of a leading gallery when investigating a work’s provenance and authenticity, as some commentators had hoped. However, the trial is important because it opened a window into how an artwork’s provenance is investigated, and how a work is authenticated and an attribution established. It is a case study in interpretation, misinterpretation, and misdirection. This case offers lessons not only in due diligence, but in the importance of maintaining a self-protective skepticism in the highly relationship-based environment of art transactions. The question this case asks, for the collector, the gallerist, and the

authenticator, is: “What information can and should a person rely on?”^[9]

The De Sole Rothko

In late 2004, the De Soles purchased a painting from Knoedler – a red and black canvas identified as *Untitled, 1956* by the American Abstract Expressionist artist, Mark Rothko. In connection with the sale, Freedman provided the De Soles with a letter stating that the gallery “warrants the authenticity and good title of the painting, *Untitled, 1956*, and confirms its ‘remarkably good condition.’” The De Soles were told that the painting had been viewed by many scholars and specialists, including Christopher Rothko, the artist’s son. They were also told that the authors of the Rothko *catalogue raisonné* intended to include it in a forthcoming supplement and that the gallery had been approached concerning a loan request for the painting for an exhibition at Basel’s *Fondation Beyeler*.

However, the painting’s provenance (that is, the history of its ownership from the time of its creation to the present day) was problematic. It was new to the market, never having been exhibited, and was previously unknown to scholars. No record of it existed. They were told that the painting came from the collection of a couple (now deceased) who had lived in Switzerland and Mexico and had acquired it, along with many other works directly from the artists, with the assistance of art dealer David Herbert^[10] (who himself died in 1995). The couple’s son had inherited the painting, along with other works in his parents’ collection. Since he desired anonymity, the gallery could not disclose his identity or the identities of his parents.

Seven years after they acquired the painting, Eleanore De Sole happened to read an article about a lawsuit between Knoedler and another collector over the sale of a Jackson Pollock painting that turned out to be fake. One fact in particular caught her attention the Pollock had originally been purchased directly from the artist himself with the assistance of David Herbert.

A Mysterious Provenance

When Ann Freedman was introduced to the Long Island art dealer Glafira Rosales in the mid-1990s, Rosales spoke to Freedman of a client with a collection of Abstract Expressionist paintings. The paintings, she said, had been acquired by a wealthy businessman (whom Rosales would identify only as “Mr. X”) who lived in Mexico and Switzerland. The collector had acquired the paintings in the 1940s and 1950s directly from the artists in studio sales. The paintings had been in storage for decades and were unknown to the art world. None had ever been exhibited. When the collector and his wife passed away, their son and daughter had inherited the works. Rosales told Freedman that the current owner (the son) was a very private person and would not permit his name or the names of his parents to be disclosed. In response to inquiries, Freedman was told that no records of the paintings’ purchase had been retained – no bills of sale, no correspondence.

Expert Disagreements

The authenticity of a work of art is established through a combination of three distinct types of expert opinion – (1) provenance (the documented history of the work from its creation to the present); (2) connoisseurship (the analysis of an artist’s style, subject, and typical manner of working – often by scholars, the artist’s friends and family or estate representatives, and formal authentication boards); and (3) scientific analysis of the object itself (to determine if its materials are consistent with those available to and used by the artist). As in many areas, art experts frequently disagree with each other’s conclusions. This was certainly true of the paintings from Mr. X’s collection.

A perfect provenance would document a work from the moment it was created or left the artist’s studio down to the present day. It would include any bills of sale, correspondence, art transport documents, conservation documents, as well as the work’s exhibition history, catalogs and scholarly publications. For a painting to arrive on the market out of the blue, without a documented provenance, it creates a tremendous problem. Knoedler engaged art historian Stephen Polcari, the author of *Abstract Expressionism and the Modern Experience*, to review the paintings and to research and assess their provenance and historical significance. Polcari initially believed that the paintings had been acquired through painter Alfonso Ossorio^[11], a colleague and close friend of many of the artists. But when that provenance was disproven by a report issued by the International Foundation for Art Research (“IFAR”)^[12], which cast doubt on the authenticity of a Knoedler-Rosales Pollock, he and Knoedler revised that provenance, replacing Ossorio with David Herbert. Polcari considered the paintings to be of “obvious quality and achievement.” In his April 2012 deposition (more than a year before Rosales admitted that all of the paintings were fakes), he stated “I was convinced of the works’ authenticity because of the quality of the artists achievement, and the variety, depth, and breadth of the works. I never for a moment doubted that the Silver Pollock or the De Sole Rothko were by their respective artists.”^[13]

Even where a work’s provenance is better documented, experts may nevertheless disagree based on either connoisseurship or materials analysis. A cache of 32 unsigned paintings purported to be by Jackson Pollock were discovered in 2003 in an East Hampton storage locker that had belonged to artist Mercedes Matter and filmmaker Herbert Matter, who had been friends of Pollock and his wife, Lee Krasner. After his parents’ deaths, the Matters’ son discovered the paintings wrapped in brown paper on which was written “Pollock (1946–49), Tudor City (1940–49), 32 Jackson Pollock experimental works (gift + purchase).” Leading scholars of Pollock’s work, reviewing the group of paintings, disagreed sharply on whether they were, in fact, by Pollock.^[14] Ellen Landau believed them to be by Pollock, but Eugene Victor Thaw said that they were not.^[15] Both Landau and Thaw are former members of the Pollock-Krasner Foundation authentication board (which has disbanded in 1996)^[16], and Thaw is an author of the Pollock *catalogue raisonné*.

Materials analysis of the Matters’ paintings tipped the balance of opinion. They were subjected to several types of scientific analysis, which cast serious doubt on claims that the paintings were Pollock’s. Analysis of the pigments used in the paintings revealed that the paintings included pigments that were not available until considerably after Pollock’s death in 1956. A study conducted by the Harvard

University Art Museums concluded that “a pigment in one of the paintings wasn’t introduced as artists’ paint until 1996, and a pigment on a second work has been available only since 1971.”^[17] Additional testing identified a specific pigment that was used in 10 of the Matter paintings (Red 254, which is also known as “Ferrari Red”), which was only patented in 1980.^[18] The paintings were also subjected to fractal analysis to determine whether they contained repeating patterns researchers believed to have been found in authentic Pollock paintings.^[19] This analysis failed to find patterns consistent with those in works by Pollock in the Matter paintings.

With the Knoedler/Rosales paintings, which came with no documented provenance, experts disagreed over the paintings’ authenticity, with some voicing doubt from the start. Among the first paintings Rosales brought to Knoedler were several purportedly by Richard Diebenkorn. Freedman showed the paintings to a number of Diebenkorn experts, including members of the Diebenkorn family. Based upon a combination of provenance and connoisseurship, the Diebenkorn experts expressed strong skepticism about the works and pointed out that it would have been highly unlikely that any genuine work by Diebenkorn in that period would have left the artist’s studio with no record of it existing.^[20] But other experts, examining the style of the paintings, praised their quality and how finely they fit into the artists’ known oeuvres. When IFAR issued its report calling into question the authenticity of the Greenish Pollock, Polcari rejected IFAR’s conclusions. “I do not believe,” Polcari stated in his deposition testimony, “that an IFAR opinion on authenticity is inherently definitive, and I do not regard IFAR as the authority on modern art. . . . I have reviewed the IFAR report and I do not find it convincing. IFAR never asked for my opinion on the authenticity of the Greenish Pollock.”^[21]

Notably, Polcari and Knoedler did accept IFAR’s conclusion that the paintings could not have been acquired through Ossorio. Although Knoedler and Polcari replaced Ossorio with David Herbert, that surmise, which was presented to potential buyers as a fact, lacked any documentary support. Provenance researchers engaged by the gallery to research the relevant archives were unable to find any such connection. One of those researchers testified that “Provenance is like detective work...You need to include a question mark or indicate in some way that there is a qualifier if you do include someone in the provenance and it isn’t fully established.”^[22] One of the experts listed in the Knoedler authentication letter for the De Sole Rothko, art historian Jack Flam, testified that he was surprised to find himself so included. While Flam is an expert in the work of Robert Motherwell, he stated that he is not an expert in the work of Mark Rothko.^[23]

Scientific analysis of the De Sole Rothko also played an important role, and simultaneously highlighted how the seemingly objective, implacable factuality of scientific analysis can itself be the subject of expert disagreement. The De Soles engaged a materials analysis and consulting firm to examine the Rothko. The resulting report identified a number of elements of the canvas inconsistent with Rothko’s known materials and techniques, including the presence of (1) “crossbar marks” (marks on the canvas where it “presses against the edge of a crossbar... [which] can cause primer and paint to crack, primer and paint to build up along the edge, or both”)^[24], (2) white opaque primer layers, (3) a polyvinyl acetate based

ground, and (4) an acrylic polymer emulsion “which did not appear in Rothko’s paintings until the mid 1960s, nearly a decade after the date on the back of *Untitled, 1956*.” [25] The report concluded that “materials and techniques used to create the Painting are inconsistent and irreconcilable with the claim that *Untitled* was painted by Mark Rothko... in 1956 or any other date.”[26]

Polcari rejected the report’s conclusions, persisting in his assessment that the painting was a “work of obvious quality and achievement.” He pointed out that some artists in the 1950s were given access to paints that were not yet commercially available. “[T]he fact that the De Sole Rothko may contain paints that Rothko decided not to use in other works in the mid-1950s, or used sparingly,” Polcari said, “is unremarkable.” [27] However, except for raising a broad caution, Polcari failed to explain why the particular materials identified in the report should be regarded as consistent with the artist’s practice in this period. Materials analysts examined 16 of the Knoedler/Rosales paintings and identified the same materials (including the puzzling primers and grounds – “what you would find if you went to Home Depot for primer”). Of the 16 paintings examined, 14 “used historically inaccurate materials, six had suspicious signatures, five showed signs of deliberate aging, and nine had been created on top of old paintings.”[28]

[1] James Panero, “‘I Am the Central Victim’: Art Dealer Ann Freedman on Selling \$63 Million in Fake Paintings,” Aug. 27, 2013, *New York Magazine*, available [here](#)

[2] Patricia Cohen, “Motherwell Painting Declared a Forgery,” *The New York Times*, Oct. 11, 2011, available [here](#)

[3] Patricia Cohen, “Settlement Agreement Ends Lawsuit Over Disputed Pollock,” *The New York Times*, Oct. 5, 2012, available [here](#); Patricia Cohen, “Hearings Shed Light on Pollock Dispute,” *The New York Times*, Dec. 16, 2011, available [here](#); Laura Gilbert, “Knoedler Gallery and former director quietly settle three claims over fake paintings,” *The Art Newspaper*, Aug. 11, 2015, available [here](#)

[4] Laura Gilbert, “Knoedler gallery and former director quietly settle three claims over fake paintings,” *The Art Newspaper*, August 11, 2015, available [here](#)

[5] Laura Gilbert, “Knoedler Gallery Settles Lawsuit Over Fake Willem de Kooning,” *The Art Newspaper*, Dec. 3, 2015, available [here](#)

[6] Patricia Cohen, “Knoedler Gallery Again Accused of Fraud in New Lawsuit,” *The New York Times*, Jan. 30, 2013, available [here](#); Laura Gilbert, “Knoedler gallery and former director quietly settle three claims over fake paintings,” *The Art Newspaper*, August 11, 2015, available [here](#)

[7] Colin Moynihan, “Knoedler Gallery Director Settles Lawsuit Over Fake Rothko,” *The New York Times*, Feb. 7, 2016, available [here](#)

[8] Colin Moynihan, “Knoedler Gallery and Collectors Settle Case Over Fake Rothko,” *The New York Times*, Feb. 10, 2016, available [here](#)

- [9] I have previously written about the legal position of buyers and sellers with respect to art fakes and forgeries [here](#)
- [10] <http://www.aaa.si.edu/collections/david-herbert-papers-6259>
- [11] <http://www.ossoriofoundation.org/>
- [12] <http://ifar.org/home.php>
- [13] Declaration of Stephen Polcari (April 27, 2012), p. 3.
- [14] Randy Kennedy, "Is This a Real Jackson Pollack?" *The New York Times*, May 29, 2005, available [here](#)
- [15] Kelly Devine Thomas, "The Newfound Pollocks: Real or Fake?" *ArtNews*, July 1, 2005, available [here](#)
- [16] Because of the threat of litigation, many scholars and authentication boards have ceased giving opinions on the authenticity of works of art. Jack Flam, president of the Daedalus Foundation, and co-author of the Robert Motherwell *catalogue raisonné*: "In the US, unfortunately, the relationship between scholarship and the market is asymmetrical. Anyone can say with impunity that a painting is an authentic work, based solely on personal opinion. Even if they are wrong, their saying so is not necessarily actionable in court. But if a scholar who specializes in that artist's work says the painting is not authentic, the threat of a lawsuit arises - even though the scholar's opinion is right and is being offered gratis and in the public interest." Jack Flam, "Break the Silence Over Fakes," *The Art Newspaper*, April 12, 2012, available [here](#)
- [17] Geoff Edgers, "Harvard Study Casts More Doubt on Disputed Pollock Paintings," *The Boston Globe*, Jan. 30, 2007, available [here](#)
- [18] M. Rae Nelson, "Authentic or Not? Chemistry Solves the Mystery," *ChemMatters*, April 2011, available [here](#)
- [19] See, e.g., J.R. Minkel, "Pollock or Not? Can Fractals Spot a Fake Masterpiece?" *Scientific American*, Oct. 31, 2007, available [here](#); see also Michael Schreyach, "'I Am Nature': Science and Jackson Pollock," *Apollo*, July 2007, available [here](#)
- [20] Eileen Kinsella, "Richard Diebenkorn's Daughter Challenges Ann Freedman's Story at Knoedler Forgery Trial," *ArtNet News*, Jan. 27, 2016, available [here](#)
- [21] *Declaration of Stephen Polcari* (April 27, 2012), p. 5.
- [22] Cait Munro, "Conservator Found Rothko Painting in Knoedler Trial to be a 'Deliberate Fake'", *ArtNet News*, Feb. 4, 2016, available [here](#)
- [23] Brian Boucher, "Art Historian Jack Flam Bristles on the Stand at Knoedler Fraud Trial," *ArtNet News*, Feb. 3, 2016, available [here](#)
- [24] *Report of Orion Analytical, LLC [Orion Project No. 1745]*, Feb. 6, 2012.

[25] *Id.*

[26] *Id.*

[27] Declaration of Stephen Polcari (April 27, 2012), p. 9.

[28] Cait Munro, "Conservator Found Rothko Painting in Knoedler Trial to be a 'Deliberate Fake'", *ArtNet News*, Feb. 4, 2016, available [here](#)

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