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Introduction

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.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.)

I. INTRODUCTION TO LAW, ETHICS, AND THE VISUAL ARTS,
SIXTH EDITION

This book covers a wide range of legal and ethical issues concerning visual art. For example: Do the realities of a visual artist's profession call for special legal treatment? To what extent can artists control the reproduction or distribution of their own creative works? Should the legal owner of a work of art be free to alter or destroy it, without incurring liability? Why do we care if a renowned, beautiful, and powerful painting is discovered to be a forgery? How do art auctions operate? How do taxes affect artists, art dealers, and collectors? Who owns relics of the past – the current possessors of antiquities, the modern countries in which they were created or in which they were discovered, or, in the words of the 1954 Hague Convention, “all mankind”? Can military necessity ever justify destruction of a great architectural monument? Should the Elgin Marbles, now in London's British Museum, be returned to Greece – or Benin Bronzes in numerous Western museums, to Nigeria? May a financially unstable museum sell works from its collection to pay operating expenses or fix the roof? Can we rely on state attorneys general to control conflicts of interest, insider advantage, and self-dealing on the part of museum trustees and staff? Does and should the First Amendment protect ugly, obscene, or politically offensive works of art? These are but a few of the questions addressed in the following chapters.

This book describes how law and ethics apply to the people and institutions in the art world – an international, interdependent complex of artists, collectors, museum professionals, dealers, and auctioneers, with a large supporting cast of art historians, archaeologists, critics, experts, bronze founders, fine printers, suppliers of artists' materials, city planning commissions, corporate sponsors, governmental sources of funding, the Internal Revenue Service, insurers, art nappers, thieves, counterfeiters, and many others.

It is easy to suppose that art is incompatible with law and ethics. In art, we value the creative act: the gesture that transcends boundaries, defies conventions, and breaks rules, leading to new perceptions, insights, and understandings. In contrast, law and ethics work within a system of boundaries, conventions, and rules, maintained by an established order, albeit one that is ever-evolving. How can they coexist? Is there an inexorable equation: the more law and ethics, the less art (and vice versa)?

Clearly not. Law establishes the conditions of social peace and stability that liberate artists to make art and protects artists against repression or censorship on political, religious, or moral grounds. Law provides artists with enforceable rights in their works and in their relationships with dealers. Law protects works of art against theft and destruction and against adulteration and misrepresentation through fakes and forgeries. Law makes possible the assembly and display of art collections and exhibitions, and the formation and operation of museums. It supports and regulates the art market, providing an orderly process for the distribution (and redistribution) of works of art. Law and ethics define and protect the competing interests of parties in transactions among artists, dealers, auction houses, collectors, and museums. They ensure the freedom of historians, experts, and critics to study art and to express their opinions. Without a legal system and codes of ethics, there could be nothing comparable to the sophistication, diversity, and prosperity that art and some artists and arts institutions currently enjoy.

That said, we will notice throughout this book that the law is often a blunt instrument to draw lines and resolve disputes involving works of visual art. In most judicial proceedings, only one party – the plaintiff or the defendant – will prevail: there can be no Solomonic judgment with a work of art. Repeatedly, we will see outcomes demanded by law or precedent that leave us feeling queasy. Indeed, many (if not most) art and cultural property disputes would be served better by alternative dispute resolutions such as mediation or by creative settlements. To paraphrase an early scholar in this field, Marie Malero, the law makes us only bearable, not honorable. Avoiding legal liability falls short of achieving the ethical behavior characteristic of civil societies. So, throughout this book, we will ask not only whether a court's decision was a proper application of the law to the facts, but also whether the result accords with what is ethically acceptable. Put another way, was the prevailing party merely bearable or, instead, honorable? We hope readers will come to understand why so many actors in the art world rely on codes of ethics to guide their decision-making.

As the book's title states, our focus is on the visual arts. The cases, articles, and other materials that follow reflect the concerns of painters, sculptors, photographers, printmakers, art dealers, collectors, auction houses, museums, and other art world participants. This heterogeneous collection of issues comprises an area of practice, rather than a single body of coherent doctrine. Therefore, the subject matter of the book's various materials is unusually diverse – from censorship to income taxes, copyright to fiduciary duty, contracts to international treaties – and draws on the substance of many legal disciplines including property, contracts, torts, international law, and civil and criminal procedure, among others. Given the potential breadth of what we might include, we have limited ourselves to legal and ethical issues particular to the visual arts. Accordingly, we do not dwell on issues that apply as much to the art world as they do for other areas of life, such as employment or real estate law. The result is a wide-ranging set of materials covering a diverse set of areas – a feast for polymaths, one might say.

We have prepared this new edition to reflect the expansion of legislation, cases, scholarship, and interest in art law with three primary audiences in mind. First and foremost, this book is a classroom text, as all prior editions have been, meant to introduce students in law schools and other college and university courses to the wide range of unique issues located at the intersection of the visual arts, law, and ethics. Second, although not a treatise, it serves as a resource for legal practitioners that includes most of the key statutes (or references to them) and the critical legal authorities on most art law issues. Third, we hope anyone interested in art and the law will find this book to be an accessible, interesting, and (perhaps even) fun way to learn how law and ethics affect the contemporary world of the visual arts.

The book's legal and ethical issues are enhanced by the context of the art world, with its cast of intriguing characters, colorful charlatans, and genuine geniuses. Decades ago, Ed Hayes, sometime lawyer for the estate of Andy Warhol, told the *New Yorker*, "The worst thugs I ever ran into were in the art business." Warren St. John, *Ed Hayes's Huzzahs*, THE NEW YORKER, May 8, 1995, at 33. The stories throughout the book are engaging, memorable, and occasionally shocking. The materials that follow provide one of the most enjoyable ways to look at a variety of legal issues, liberally laced with culture, history, and entertaining anecdotes. As the pioneering art and museum law scholar Stephen E. Weil commented 30 years ago, "Things that would be deadly dull become vivid when talking about art. Take the statute of limitations for example. You can keep an audience spellbound when it is discussed in conjunction with art. The tension between art and the law produces that effect. It's wonderfully heady." Barbara Lyne, *Art Law Blooms*, NAT'L L.J., June 18, 1990, at 1. In other words, this book is really intended for anyone who is curious about art, ethics, and law – and enjoys good stories.

While the issues are wide-ranging, certain themes recur. For example, how do (and should) the law and judges decide what is "art" and who is an "artist"? Does the distinct character of art justify or require different treatment under the law from that accorded other tangible personal property? How does and should the fact that art is a form of expression affect the way it is regulated, protected, and funded? What special fiduciary or other duties should be imposed on those who buy, sell, or exhibit works of art? What is and should be the role of judges (or juries) in deciding disputes involving aesthetic determinations, such as whether a particular work is obscene or authentic? We see repeated tensions between art as property and art as expression, and between art as property and art as *cultural* property that may be better characterized as stewarded rather than owned. We turn later in this chapter to two such recurring themes: As a matter of law, what is art and who is an artist?

The book's chapters provide a tour of different art world actors and issues. Chapter 2 addresses artists and the art market, covering the distinctive issues faced by visual artists – for example, where they live and work, the toxic nature of some of their materials, the sale of their works into the primary market (i.e., an artwork's first sale), and the relationships between artists and dealers. Although the Uniform Commercial Code (UCC) governs transactions involving works of art, treating them no differently than other "goods," many states have enacted laws that deviate from the UCC to provide greater protection for artists in their crucial relationship with dealers.

Chapter 3 turns to intellectual property law and asks what rights artists have in the works they create. We start with copyright law, which generally protects original and creative works from being copied or used by others without permission. We take a lengthy tour to consider, among other issues, the requirements for copyright protection, how one artist's work may infringe another's copyrighted work, and how the fair use doctrine applies to visual art. We also consider the right of publicity – the right of individuals to control the commercial use of their names and likeness. For example, when may an artist paint a famous musician or athlete without permission? We next look at resale royalties, the notion that artists should receive some remuneration when works they create are *resold*, on the theory that the continuing value of the work is attributable in significant part to the artist's contribution. Finally, we look at moral rights, which protect an artwork from alteration, mutilation, or destruction, without the artist's permission, and prevent an artist's name from being used in connection with a work the artist did not create or did create but that subsequently has been altered or mutilated.

Chapter 4 considers transactions in works of art from the perspective of collectors, primarily looking at laws and practices governing sales in the secondary market, whether at public auction or through art galleries and dealers. We consider rules governing auctions and how the law

balances the competing interests of collectors (whether as buyers or sellers), auction houses, and art dealers. In Chapter 5, we focus on two critical issues in the acquisition of a work of art: title and authenticity. For example, works of art that were stolen or otherwise disappeared and then rediscovered raise important issues of ownership and good title. A critical issue in these circumstances is how to apply statutes of limitations. For example, a stolen painting reappears decades later; is a lawsuit brought by the original owners (or their heirs) to recover the work too late? Does it – and should it – matter if the current owner purchased the work in good faith, without knowledge it had been stolen? Authenticity has been an issue as long as there has been an art market and is particularly challenging for courts, which sometimes must rule on a work's authenticity in the face of conflicting testimony from expert witnesses.

In Chapter 6, we consider how art intersects with the inevitability of taxes and death, and the frequent occurrence of divorce. How are tax regimes applied to artists, dealers, and collectors? When are their expenses deductible? What are the tax consequences of their sales of works of art? For purposes of charitable deductions and estate taxes, how do taxpayers determine the fair market value of works of art? And when a couple accumulates a valuable collection of art, how is it divided if they divorce?

In Chapter 7, we shift from these individual-focused concerns to consider the fate of art in times of armed conflict. Art, always fragile, is particularly vulnerable in wartime. What rules has the international community adopted in efforts to protect works of art, monuments, and great architecture when combat breaks out? We then focus on the historically unprecedented scale of confiscation and displacement of works of art under the Third Reich (1933–1945), and describe efforts to restitute such works to their rightful owners (or their heirs) and how the law has both fostered and stalled those efforts. Chapter 8 turns to the treaties, laws, and codes of ethics applicable to the collecting of, and the international trade in, antiquities. We address issues such as how the law and codes of ethics attempt to regulate the market in antiquities and under what circumstances antiquities should be returned to their country of origin.

Chapter 9 focuses on museums, a central institution in the art world, including the legal issues they often encounter and the duties they owe to the public with respect to their collections. Finally, Chapter 10 addresses art and freedom of expression, particularly how courts have applied the First Amendment to artistic expression. We also consider government funding of art in light of its expressive nature and the frequent, controversial issues generated by art in public places.

Some of the issues and materials in the book could appear in multiple chapters, so their placement may, at times, seem arbitrary – and, to an extent, it is. Museums, covered in Chapter 9, face cultural property issues addressed in Chapter 8. Collectors, the focus of Chapter 4, encounter issues of title and authenticity, discussed in Chapter 5. Difficulties in organizing these issues reflect the intertwined, overlapping, and often conflicting interests of the art world's various players. Thus, any categorization of these complex issues will necessarily be somewhat capricious. In addition, we recognize that most teachers, students, and other readers will not treat the materials in this book as a linear journey, but, instead, as an enticing buffet – to be dipped into, sampled, and enjoyed.

Comments

1. For thoughtful and engaging, if somewhat outdated, reflections on the nature and significance of “art law,” see Stephen E. Weil, *Introduction: Some Thoughts on “Art Law,”* 85 DICK. L. REV. 555 (1981), reprinted as *Some Thoughts on “Art Law”* in STEPHEN E. WEIL, *BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW AND THE MARKET* 199 (1983).

II. WHAT IS ART?

We will encounter numerous instances in which legislators have sought to define “art” (or similar terms, such as “work of fine art”) and judges must determine whether a particular work meets the applicable definition. At law, as in life, there is no one answer to “what is art,” and the line drawing that legislatures and courts engage in is rarely easy to understand.

One context in which this question first arose concerned tariffs – taxes on imported goods. Historically, US tariffs have often favored artistic works over other objects, taxing the former at a lower rate. This policy required the customs service (and courts) to make judgments as to whether an object is a work of art as defined in tariff schedules. We consider several such cases.

***United States v. Perry*, 146 U.S. 71 (1892)**

Brown, Justice:

It is difficult to fix the proper classification of the importations in question under the act of October 1, 1890, without referring to the prior acts upon the same subject.

By the tariff act of March 3, 1883, 22 Stat. 497, c. 121, there was imposed a duty of 45 per cent upon “porcelain and Bohemian glass, chemical glass ware, painted glass ware, stained glass, and all other manufactures of glass ... not specially enumerated,” while “paintings, in oil or water colors,” were subject to a duty of 30 per cent; and “paintings, drawings and etchings specially imported in good faith” for religious institutions were admitted free. Under this and similar prior statutes, which did not differ materially in their language, it was uniformly held by the Treasury Department that the term “paintings” covered all works of art produced by the process of painting, irrespective of the material upon which the paint was laid; and that paintings on glass, which ranked as works of art, were dutiable as paintings, and when imported for religious institutions were entitled to admission free of duty. Like rulings were made with respect to paintings on ivory, silk, leather and copper, having their chief value as works of art. The term was also held to include wall panels painted in oil and designed for household decoration. A like view was taken by this court in *Arthur v. Jacoby*, 103 U.S. 677, of pictures painted by hand upon porcelain where the porcelain ground “was only used to obtain a good surface on which to paint, and was entirely obscured from view when framed or set in any manner, and formed no material part of the value of said paintings on porcelain, and did not in itself constitute an article of china ware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings.”

In the meantime, however, the manufacture of stained glass began to be a recognized industry in this country. Strong protests were sent to Congress against these rulings of the Department, and demands were made for the imposition of a duty upon stained glass windows as such, to save the nascent industry from being crushed out by foreign competition. Accordingly, in the act of October 1, 1890, we find a notable change in phraseology and the introduction of a new classification. By paragraph 122 a duty of 45 per cent is imposed upon “all stained or painted window glass and stained or painted glass windows, and hand, pocket or table mirrors, not exceeding” a certain size; while by paragraph 465, “paintings, in oil or water colors,” are subject to a duty of only 15 per cent. The former exemption of “paintings, drawings, and etchings specially imported” for religious institutions is continued in paragraph 677, while in paragraph 757 a similar exemption is extended to “works of art, the production of American artists residing temporarily abroad, or other works of art, including pictorial paintings on glass,

imported expressly for ... any incorporated religious society, ... except stained or painted window glass or stained or painted glass windows.”

It is insisted by the defendants that the painted glass windows in question, having been executed by artists of superior merit, specially trained for the work, should be regarded as works of art, and still exempted from duty as “paintings,” and that the provision in paragraph 122, for “stained or painted window glass and stained or painted glass windows,” applies only to such articles as are the work of an artisan, the product of handicraft, and not to memorial windows which attain to the rank of works of art. Those who are familiar with the painted windows of foreign cathedrals and churches will indeed find it difficult to deny them the character of works of art; but they would nevertheless be reluctant to put them in the same category with the works of Raphael, Rembrandt, Murillo, and other great masters of the art of painting. While they are artistic in the sense of being beautiful, and requiring a high degree of artistic merit for their production, they are ordinarily classified in foreign exhibits among the decorative and industrial rather than among the fine arts. And in the catalogues of manufacturers and dealers in stained glass, including the manufacturers of these very importations, no distinction is made between these windows and other stained or painted glass windows, which, by paragraph 757, are specially excepted from the exemption of pictorial paintings on glass.

For most practical purposes works of art may be divided into four classes:

1. The fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone or bronze. These are subject to a duty of 15 per cent.
2. Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite reproduction from the original.
3. Objects of art, which serve primarily an ornamental, and incidentally a useful, purpose, such as painted or stained glass windows, tapestry, paper hangings, etc.
4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas-fixtures, and household and table furniture.

No special favor is extended by Congress to either of these classes except the first, which is alone recognized as belonging to the domain of high art. It seems entirely clear to us that in paragraph 757, Congress intended to distinguish between “pictorial paintings on glass” which subserve a purely ornamental purpose, and stained or painted glass windows which also subserve a useful purpose, and moved doubtless by a desire to encourage the new manufacture, determined to impose a duty of 45 per cent upon the latter, while the former were admitted free.... If the question in this case rested solely upon the language of paragraph 677, doubtless these importations would be exempted as paintings imported for religious purposes; but as, by paragraph 757, pictorial paintings on glass, a more specific designation, are again exempted, and stained glass windows are excepted and taken out of this exemption, we think the intent of Congress must be gathered from the language of the latter paragraph rather than the former. Particularly is this so in view of the fact that, by paragraph 122, a duty is levied upon “stained or painted window glass and stained or painted glass windows” *eo nomine*.¹ ... [The court concludes] Congress intended to subject them to a duty....

¹ [Latin for “by that name.”]

United States v. Olivotti & Co., 7 Ct. Cust. 46 (1916)

Smith, Judge:

A marble font, two marble boxes and stands, and two marble seats imported at the port of New York were classified by the collector of customs as manufactures of marble, and were accordingly assessed for duty at 45 per cent ad valorem under that part of Paragraph 98 of the tariff act of 1913 which reads as follows:

98. Marble, breccia, onyx, alabaster, and jet, wholly or partly manufactured into monuments, benches, vases, and other articles, or of which these substances or either of them is the component material of chief value, * * * not specially provided for in this section, 45 per centum ad valorem.

The importers protested that the several articles which were so classified and assessed by the collector were dutiable at 15 per cent ad valorem under the provisions of Paragraph 376 of said act, which said Paragraph reads as follows:

376. Works of art, including paintings in oil or water colors, pastels, pen-and-ink drawings, or copies, replicas or reproductions of any of the same, statuary, sculptures, or copies, replicas or reproductions thereof, and etchings and engravings, not specially provided for in this section, 15 per centum ad valorem.

... The [Board of General Appraisers of the U.S. Treasury Department] held that the marble font and marble seats were works of art within the meaning of Paragraph 376 as interpreted by the board in the matter of the protest of Downing & Co. (T. D. 35564). In that case the board decided that if the so-called Greek temple there involved was a work of art at all it was such by reason of the fact that it was a sculpture, and from that we assume that the board must have concluded that the marble font and seats here in controversy were sculptures, and therefore held them to be works of art and dutiable under Paragraph 376 apparently because they were copies of original sculptures not provided for in Paragraph 652.

From the decision of the board the Government appealed and now contends that its appeal should be sustained on the ground that the font and marble seats are not sculptures at all, and that they are not works of art as that term is used in Paragraph 376.

It appears from the photographs in evidence that the font is a plain marble basin, supported by a long, slender, tapering column, which is sustained by a short, round pillar of smaller diameter. The short pillar springs from an annular base which rests on a plain square slab of marble. The surface of the long, tapering column is ornamented by carvings suggestive of leaves. The font was made by Molonari, a sculptor, and was copied by him from an original found in one of the churches of Italy; but whether the original was the work of a sculptor does not appear. The production is the work of a sculptor. It is fashioned from the solid marble. It may be conceded that it is artistic and beautiful. Nevertheless, those conditions, or, better said, those distinguishing features of the article, are not sufficient of themselves to constitute a sculpture. Sculpture as an art is that branch of the free fine arts which chisels or carves out of stone or other solid material or models in clay or other plastic substance for subsequent reproduction by carving or casting, imitations of natural objects, chiefly the human form, and represents such objects in their true proportions of length, breadth, and thickness, or of length and breadth only. It can not be said that the font, considered as an entirety, portrays any natural object. The surface of the tapering column which supports the plain marble basin is carved, it is true, with a representation suggestive of leaves, but that representation is so plainly ornamental and so clearly incidental that it can scarcely be regarded as sculpture and much less as giving that status to the whole article. Indeed, as appears from the photograph in evidence and the testimony in

the case, that which makes the font artistic and beautiful is the purity of its lines and its just proportions, *and not the carving on the column*, which we think must be regarded at best as decorative and not sculptural art.

Finding, as we do, that the font is not sculpture, the next question which arises is, Can it, because of its beauty and artistic character, be classified as a work of art within the meaning of Paragraph 376? We think not. In our opinion, the expression “works of art” as used in Paragraph 376 was not designed by Congress to cover the whole range of the beautiful and artistic, but only those productions of the artist which are something more than ornamental or decorative and which may be properly ranked as examples of the free fine arts, or possibly that class only of the free fine arts imitative of natural objects as the artist sees them, and appealing to the emotions through the eye alone. The potter, the glassmaker, the goldsmith, the weaver, the needlewoman, the lace maker, the woodworker, the jeweler, all produce things which are both artistic and beautiful. It can hardly be seriously contended, however, that it was the legislative purpose to include such things, beautiful and artistic though they may be, in a provision which, as shown by its history and the enumeration therein contained, was intended to favor that particular kind of art of which painting and sculpture are the types.

That everything artistic and beautiful can not be classed as fine art was well established in *United States v. Perry*.... In that case it was held by the Supreme Court that the windows were not paintings and that, although they were artistic in the sense that they were beautiful, they were representative of the decorative and industrial rather than of the fine arts.

Inasmuch as we find that the font is not sculpture and not a work of the fine arts, we think that it is not dutiable under Paragraph 376 as found by the board.

The marble seats or chairs in controversy are copies of a Grecian original found in the Vatican museum, and, as appears from the record, were made by Molonari, a sculptor. The ends of the arm rests of the seats are carved into the form of lions' heads, which are sustained by supports terminating in what appear to be carved lions' paws. These carvings, even if they could be regarded as demanding the exercise of sculptural art, were evidently designed as an embellishment of the seats, and it would be going far to say that of themselves they were sufficient to give the character of sculptures to the entirety of which they are a minor, not a predominating, part. It may be conceded for the purposes of this case that because of the sculptural work upon them, the articles under consideration have an artistic beauty which otherwise they would not possess. Nevertheless, no one gazing upon them can forget that they are seats or chairs and that they are not the expression of the sculptor's impulse to imitate some object in nature as he conceived it to be, but a conception brought to material form primarily and principally to serve a useful purpose, and not to please. The making of seats and chairs is strictly industrial, not sculptural, art; and when the sculptor's hand is called upon to make such conveniences artistic and beautiful, his work reaches no higher plane than the purely decorative, unless it be so compelling that the achievement of the artisan is lost in the realized sentiment of the artist. The seats here involved were not designed to serve as mere settings for whatever of sculptural work there may be upon them, but as seats to which such sculptural work clearly bears the relation of adornment and nothing more. They must, therefore, be classed as articles of utility produced by industrial art because of a sense of need or usefulness and not as sculptures or examples of fine art the activities of which are chiefly, if not wholly, called into play by sentiment and for the purpose of appealing to the emotions.

As we are of opinion that the carved marble seats are not sculptures or works of art within the intention of Paragraph 376, we must hold that they are not dutiable as found by the board, and that the assessment of the collector should be sustained....

Comments

1. Do you concur with the holding in *Perry* that stained glass windows of scenes from religious history were not “fine arts” for purposes of applicable tariffs? Do the legislative distinctions at issue in *Perry* make sense more generally?
2. The *Olivotti* court distinguishes between utilitarian and fine arts in finding that the marble chairs must “be classed as articles of utility produced by industrial art because of a sense of need or usefulness and not as sculptures or examples of fine art.” What does the court mean by defining fine arts as works “called into play by sentiment and for the purpose of appealing to emotions”? Can useful objects ever be considered art?
3. Sculpture is often categorized as reductive, molded, or additive. The first is represented by the definition provided in *Olivotti* – starting with a block of material, a sculptor reduces it to the form the artist intends. Molded works are, typically, cast in such material as bronze from molds made in a variety of media and techniques. Finally, additive (or assembled) works achieve their final form when an artist adds elements together – for example, David Smith’s or Mark di Suvero’s abstract sculptures. In defining sculpture, what elements should the court consider – the technique by which it was made, whether it is representational or abstract, or its material?
4. Notice the explanation in *Olivotti* that “[s]culpture as an art is that branch of the free fine arts which [depicts] ... imitations of *natural objects, chiefly the human form*, and represents such objects in their true proportions of length, breadth, and thickness, or of length and breadth only.” (Emphasis added.) That narrow conception of sculpture was tested a decade after *Olivotti*.

In 1926, several sculptures by Romanian artist Constantin Brancusi were shipped to the United States for exhibition. They included Brancusi’s *Bird in Space* (Figure 1.1), which had been



FIGURE 1.1 Constantin Brancusi, *Bird in Space* (1926).

purchased from the artist by noted American photographer Edward Steichen and now resides in the Seattle Art Museum.

US Customs did not recognize any of the Brancusi sculptures in the shipment as works of art and denied them duty-free entry as provided in the then-applicable tariff schedule. Instead, Customs assessed the works at 40 percent of declared value as “[a]rticles or wares not specially provided for ... if composed wholly or in chief value of iron, steel, lead, copper, brass, nickel, pewter, zinc, aluminum, or other metal, but not plated with platinum, gold, or silver, or colored with gold lacquer, whether partly or wholly manufactured.” Steichen raised the issue with Brancusi, who was, predictably, distressed. Ultimately, various patrons of modern art, including the artist Gertrude Vanderbilt Whitney (who later founded New York’s Whitney Museum of American Art), agreed to support an appeal of the customs decision. The case went to trial in the United States Customs Court in late 1927.

Technically, the question before the court was whether *Bird in Space* qualified as “original sculpture or statuary” under the 1922 Tariff Act. That statute defined those terms “to include professional productions of sculptors only” and to exclude “any articles of utility, nor such as are made wholly or in part by stenciling or any other mechanical process.” And, of course, the Customs Court considered the issue in light of *Olivotti*’s interpretation of “sculpture,” with its restriction to “imitations of natural objects, chiefly the human form.” So the focus in the trial was whether *Bird in Space* – present in the courtroom – was an “original sculpture or statuary” and the “professional production of a sculptor,” as opposed to “an article of utility.” These issues made for interesting exchanges at trial, as these excerpts from the testimony of Edward Steichen reflect:

MARGIT ROWELL, BRANCUSI VS. UNITED STATES: THE HISTORIC TRIAL, 1928 (1999)

BY MR. C.J. LANE [Counsel for Brancusi]:

- Q. Will you be kind enough to tell the Court the reputation of Constantin Brancusi as an artist?
 A. Constantin Brancusi has been in Paris for the last twenty-five years, and he has been exhibiting in all art exhibitions in Europe as well as in America.

BY JUSTICE WAITE:

- Q. You have seen the exhibitions?
 A. I have seen the exhibitions, yes, in Paris, I have seen them in London and the exhibitions here in New York as well. He is looked upon as one of the most famous of the ultimate school of art.

BY MR. C.J. LANE:

- Q. Is he represented in any capacity as an artist in America at present?
 A. I believe he has one of his bronzes in the Buffalo Museum of Art, and one in Chicago.... He is also in the Chicago Art Museum....
 Q. Of your own knowledge is he represented in galleries in Europe [or] private collectors of Europe?
 A. He is represented in the National Gallery of Romania, and in one of the Scandinavian galleries, I don’t know whether Norway or Sweden.
 Q. He has been a recognized sculptor, has he not?
 A. He has....

BY JUSTICE WAITE:

- Q. What do you call this?
 A. I use the same term the sculptor did, *oiseau*, a bird.