A BRIEF RETROSPECTIVE ON THE LEGAL TERM

BY MICHELLE PHAM

What is "art"? This eternal, ever-vexing question became the center of one of the most significant clashes of art and law—the *Brancusi v. United States* case.[1] Constantin Brancusi is celebrated as one of the most revered and influential sculptors of the 20th century. He made his "name" and rose to the ranks of popularity in the art world by rejecting traditional views of sculpture and, instead, favoring simplified, abstract sculptures that stirred much controversy among those in the art world and in the general public. *Bird in Space*, the subject of the *Brancusi* case (which now resides in the Seattle Art Museum), is a 4 1/4-foot-tall piece of highly polished yellow bronze sculpture with a gently tapering bulge. The U.S. Customs Court originally described it as "a production in bronze about 4 1/2 feet high supported by a cylindrical base about 6 inches in diameter and 6 inches high."[2]

Despite several earlier shows in the United States and much media coverage of the *Bird in Space* sculpture, U.S. Customs officials did not see a bird in Constantin Brancusi's *Bird in Space* and refused to exempt it as a work of art when it arrived at New York Harbor in October 1926. Instead, they classified it as a "kitchen utensil" and imposed a standard 40 percent tariff on the sale price, or $240 (about $3,200 in today's dollars).

The U.S. Customs decision quickly made headlines, and the court agreed to reconsider it. In February 1927, the federal customs appraiser F.J.H. Kracke confirmed his office's initial finding that any sculptures Brancusi sold in the United States, like the *Bird*, would be subject to duty. Kracke explained that he relied on "[s]everal men, high in the art world," one of whom told him, "[i]f that's art, hereafter I'm a bricklayer." In general, it was their opinion that Brancusi "left too much to the imagination."[3]

Edward Steichen, the photographer and Brancusi admirer who bought the *Bird* and who was to take possession of the piece after the exhibition, filed *Brancusi v. United States* in the U.S. Customs Court to recover the duty and thereby put abstract art on trial. At trial in October 1927 before Judges George Young and Byron Waite, the *Bird* itself was present in the courtroom as Exhibit 1, while the lawyers argued whether it was an "original sculpture" or a metal "article or ware not specially provided for" under the 1922 Tariff Act.[4]

For the *Bird* to enter the country duty-free under the Act, Steichen's lawyers had to prove:

1. that Brancusi was a professional sculptor;
2. that the *Bird* was a work of art;
3. that it was original; and
4. that it had no practical purpose.

There was no dispute that Brancusi was a professional sculptor and that the *Bird* had no practical purpose even though U.S. Customs labeled it as a kitchen utensil. However, it was not clear whether *Bird in Space* was an original because Brancusi had shown four other bird sculptures, and it was not clear whether his sculpture was art.

The court ultimately was satisfied that the *Bird* was an original based on testimony from Steichen and Brancusi that the sculpture was not a duplicate but a variation on a theme, the essence of flight. To determine whether the sculpture was art, Judges Young and Waite emphasized the *Bird*'s title. Under the 1916 Customs Court decision *United States v. Olivotti*, sculpture had to be representational to be art.[5] Sculptures qualified as artworks only if they were "chisel[ed]" or "carve[d]" "imitations of natural objects," chiefly the human form representing such objects "in their true proportions."[6] So the judges pressed Steichen:

Waite: What do you call this?
Steichen: I use the same term the sculptor did, oiseau, a bird.
Waite: What makes you call it a bird, does it look like a bird to you?
Steichen: It does not look like a bird but I feel that it is a bird, it is characterized by the artist as a bird.
Waite: Simply because he called it a bird does that make it a bird to you?
Steichen: Yes, your honor.
Waite: If you would see it on the street you never would think of calling it a bird, would you?
Steichen: [Silence]
Young: If you saw it in the forest you would not take a shot at it?
Steichen: No, your honor.[7]

At the trial, Brancusi's witnesses defended his move toward abstraction and argued that the *Bird*'s "birdness" was irrelevant to its artistic quality. Forbes Watson, *The Arts* editor, said the piece's name was a "minor point . . . not of any consequence"; far more revealing were its form and balance.[8] The sculptor's six expert witnesses, all influential art figures, said that the *Bird*'s "harmonious proportions" and "beautiful sense of workmanship" had given them great pleasure.[9]

On the other hand, Thomas Jones, a Columbia professor who testified for the U.S. Customs office, testified that the *Bird* was "too abstract and a misuse of the form of sculpture."[10] Robert Aitken, the government's other witness, said that art should "arouse an unusual emotional reaction" and "[stir] the esthetics, the sense of beauty."[11] Aitken, like many other experts who have tried to define art after him, had difficulty communicating his opinions:

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Speiser: Now, Mr. Aitken would you mind stating why this (Exhibit 1) is not a work of art?
Aitken: First of all I might say it has no beauty.
Speiser: In other words, it aroused no aesthetic emotional reaction in you?
Aitken: Quite no.
Speiser: You would limit your answer exclusively to the fact that so far as you are concerned it does not arouse any aesthetic emotional reaction?
Aitken: Well, it is not a work of art to me.
Speiser: That is the sole reason you assign for it?
Aitken: It is not a work of art to me.[12]

Judge Waite eventually held:

> The object now under consideration . . . is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental, and as we hold under the evidence that it is the original production of a professional sculptor and is in fact a piece of sculpture and a work of art according to the authorities above referred to, we sustain the protest and find that it is entitled to free entry . . . .[13]

Judge Waite's decision dismissed the *Olivotti* requirement that art had to be representational and thus recognized the new school of abstract art. "Whether or not we are in sympathy with these newer ideas and the schools which represent them," the court said, "we think the facts of their existence and their influence upon the art world as recognized by the courts must be considered."[14]

As Judge Waite's decision and reliance on his personal taste indicate, the question of "what is art" can often be confused with another question—whether a work qualifies as "good art." What an average member of the public considers art or good art can vary from the judgments of experts such as curators, art critics, and art historians.

Moreover, what is considered to be art or good art will undoubtedly change over time; underappreciated art could become more valued in the future. Today, we consider Vincent van Gogh to be one of the greatest and most influential painters of all time, but that was not the case when he was alive. He received little to no recognition during his lifetime. The task of defining art becomes even more complex under the context of cultural property and cultural heritage. What may not have been considered art in the past, like stone tools and cooking pots, may be considered art antiquities later. Modern or contemporary art may be accepted for a period of time, only to fail the test of time and be rejected by future generations. We view works of art in the context of time and circumstance, whether past or present.

Even after the *Brancusi* decision, it took 61 years until the Harmonized Tariff Schedule of 1989 for U.S. Customs to allow free entry to works that were both artistic and functional.[15]

In the copyright context, Congress defined what is and is not a "work of visual art," but the same question arose about whether a work can be protected under copyright law when it is both artistic and functional.[16] In considering the validity of copyright registrations for statuettes of male and female dancing figures that were also used as table lamp bases with electric wiring, sockets, and lamp shades attached, the U.S. Supreme Court found "nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright [as a work of art] bars or invalidates its registration."[17] It believed that the "[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."[18]

On the other hand, artistic freedom and the scope of what art is under the law is not unlimited. The famous appropriation artist, Jeff Koons, encountered this in *Rogers v. Koons*.[19] The photographer Art Rogers sued Koons for copyright infringement after he took a copy of Rogers's *Puppies* photograph of a man and a

woman sitting on a bench while holding a line of eight German Shepherd puppies and directed his assistants to duplicate the photo as closely as possible in sculptural form. To assess copyright infringement, the court considered whether the plaintiff had a valid copyright, which he did under the copyright statute, and whether Koons's work was "substantially similar" to Rogers's photograph. "Substantially similar" means that an average person viewing the two works would recognize that the "artistic expression" in one was copied from the other.[20] The court concluded that copyright infringement does not require "literally identical copying of every detail," and that "small changes here and there made by the copier are unavailing."[21] Ultimately, an artist's change in media from photograph to sculpture, the change from the black and white photo to color, the addition of flowers in the couple's hair, and the more bulbous noses of the puppies were not enough to avoid infringement.

In assessing whether an allegedly obscene work contains serious literary, artistic, political, or scientific value to be protected by the First Amendment, the U.S. Supreme Court has held that the proper inquiry rests upon "whether a reasonable person would find such value in the material, taken as a whole."[22] Justice Scalia, in his concurring opinion, stated:

> I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste"—a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decision making is not always impossible under such a regime, it is at least impossible in the cases that matter. I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum.* Just as there is no use arguing about taste, there is no use litigating about it.[23]

Art is exceptionally hard to define, yet judges and legislatures throughout the world are called upon to decide whether an object qualifies as a work of art or a cultural object for different legal purposes, such as avoiding customs duties, protecting against obscenity or pornography charges, or distinguishing fakes from originals. Different legal disciplines treat it differently. Customs law distinguishes works of arts from other objects; copyright law favors original over derivative works; international trade law deals with restitution claims for artifacts such as those looted during World War II and other conflicts, colonial periods, and, even to this day, in countries rich in cultural property and heritage. Judges waver between avoiding definitions, applying strict legal standards, and recognizing the complex ethical issues involved in settling art-related claims.[24] ◆

Endnotes

1. 54 Treas. Dec. 428 (Cust. Ct. 1928).
2. *Id.*
3. Stephanie Giry, *An Odd Bird*, Legal Aff., Sept./Oct. 2002.
4. H.R. 7456, 67th Cong. (1922) (enacted).
5. 7 Ct. Cust. 46 (App. 1916).
6. *Id.*
7. *See* Giry, *supra* note 3. For a full transcript and discussion of the trial, see Margit Rowell & André Paleologue, Brancusi vs. United States: The Historic Trial, 1928 (1999).
8. Giry, *supra* note 3.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928).
14. *Id.*
15. *See* 19 U.S.C. § 3001.
16. *See* 17 U.S.C. § 101; *Mazer v. Stein*, 347 U.S. 201 (1954).
17. *Mazer*, 347 U.S. at 218.
18. *Id.* at 214.
19. 960 F.2d 301 (2d Cir. 1992).
20. *Id.* at 307–08.
21. *Id.*
22. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).
23. *Id.* at 504–05 (Scalia, J., concurring).
24. Christine Haight Farley, *Judging Art*, 79 Tul. L. Rev. 805, 836–39 (2005) (arguing that courts circumvent the task of evaluating art by employing "avoidance techniques").

Mobile Devices, Public Spaces, and Freedom of Panorama

continued from page 18

22. Christopher F. Schuetze, *European Universities Catch the Online Wave*, N.Y. Times, Sept. 22, 2013, http://www.nytimes.com/2013/09/23/world/europe/european-universities-catch-the-online-wave.html.
23. *Id.*
24. 17 U.S.C. § 110(1).
25. *Id.* § 110(2).
26. The OCILLA provides "safe harbor" protection to online service providers against liability for infringing acts of their users under certain circumstances. *See id.* § 512.
27. *Id.* § 106A.
28. *Id.*
29. *See Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000) (ruling that a large art installation titled *Zanja Madre*, which appeared in the movie *Batman Forever*, was physically a part of the building's features and conceptually inseparable from the building, and thus subject to the freedom of panorama provisions of 17 U.S.C. § 120(a)).
30. 134 F.3d 749 (6th Cir. 1998).
31. *Id.* at 754.
32. *Tourists Warned They Are Breaking the Law Because Taking Photos of the Eiffel Tower at Night or Sharing Images on Facebook Is ILLEGAL*, Daily Mail (Nov. 12, 2014), http://www.dailymail.co.uk/travel/travel_news/article-2831331/Tourists-warned-breaking-law-taking-photos-Eiffel-Tower-night-sharing-images-Facebook-ILLEGAL.html.
33. *See Rock & Roll Hall of Fame*, 134 F.3d 749.