Editor’s Note

This is Volume 2, Issue No. 2 of Spencer’s Art Law Journal. This issue contains two essays, which will become available by posting on Arnet, starting November 2011. (Volume 2, Issue No. 3 will appear in Winter 2011/12.)

As noted in Volume 1 of this Journal, art law is an amalgam of personal property law, contract, estate, tax and intellectual property law relating to the acquisition, retention and disposition of fine art.

Opinions always matter, and certainly, very much so in the art world. This issue will concentrate on some of those opinions.

The first essay in this Fall issue deals with the nature of opinions about the authenticity of visual art. The second essay deals with a famous case of American import duties on “kitchen utensils”, and whether a Brancusi sculpture fit this category. The judge’s decision, relying on expert opinion to define art, altered the public’s understanding of the meaning of modern art.

Opinions about the Authenticity of Art

Ronald D. Spencer

The Brouhala: When the Bird Became Art and Art Became Anything

Tamara Mann

Three times a year issues of this Journal will address legal questions of practical significance to collectors, dealers, scholars and the general art-minded public.

--- RDS
OPINIONS ABOUT THE AUTHENTICITY OF ART

Ronald D. Spencer

This essay is first, about the meaning of “opinion” and second, about its legal consequences. Since the 2007/8 financial crisis and its economic aftermath, the opinions of financial ratings agencies have been much in the news. Are the agency ratings like newspaper editorials, and what consequence for expert opinion in the visual arts? --- RDS

Ronald D. Spencer is counsel to the New York law firm of Carter Ledyard & Milburn LLP, where he specializes in art law as Chairman of the Art Law Practice. He is expert in the legal aspects of art authentication issues and has written and edited, The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts, (Oxford University Press, New York 2004).

Art experts, including art scholars, dealers, museum curators, authors of catalogues raisonnés and others who make decisions about the authenticity of visual art are all concerned to avoid legal claims over their decisions. This essay addresses a free-speech defense for these experts, under American constitutional law.

It is the well and truly held view that an idea can never result in liability for the person who expresses it, because ideas are so personal and subjective and because society should protect ideas as inherently beneficial, even if they are sometimes wrongheaded. In the art attribution area this unexceptional view of the value of ideas is equated with an “opinion.”

Experts who determine the authenticity of a work of art, whether in the context of the publication of a catalogue raisonné, curating an exhibition, a sale or purchase, an appraisal of value, or scholarly essay on the attribution of art, almost always describe their conclusion as their “opinion” on the authenticity or attribution of the work.

Of course, they use the term opinion because that is their judgment, evaluation, or deduction, based upon an interpretation of existing facts which they have collected and analyzed, and to which they have applied their learning and experience.

There is often another motivation for characterizing their conclusion as opinion: a desire to limit or avoid legal liability in the event their conclusion is wrong. Thus, the expert’s statement “In my opinion, the work is [or is not] by Rembrandt,” is thought, if it turns out to be incorrect, to result in legal consequences different from those resulting from the statement “The work is [or is not] by Rembrandt.” This view appears to have some support in the law. Thus, in 1974, U.S. Supreme Court Justice Lewis Powell stated, “Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may be, we depend for its correction, not on the conscience of judges and juries, but on the competition of other ideas.” Thus, even a false idea has become constitutionally protected free speech under the First Amendment to the American Constitution.

However, an analysis of the two statements will quickly make it apparent that they mean precisely the same thing. The addition of the words “in my opinion” to a statement of fact (“the work is not by Rembrandt”) does not change this assertion of fact, which has the quality of being true or false, into an opinion which may be “good” or “bad,” “reasonable” or “unreasonable,” “sound or unsound.” And, indeed, at a simpler level, the expert may feel he is fairly expressing his state of mind and, so long as this is so, the apparent statement of fact can never be false because the speaker/writer is only communicating what he honestly believes, without regard to whether the subject of his belief, the factual statement, is true or false. Recent American cases (from 1999 onward) with respect to opinions of credit rating agencies tend to support the expert’s view – more so with respect to opinion published for a wide audience, and less so when the opinion is given to a limited number of people. This suggests that a catalogue raisonné published for the art public would be protected opinion under the First Amendment to
the American Constitution, while opinions delivered to a small number of people, say a buyer or owner of art, would not be so protected.

Two U.S. Court Decisions Attempt to Define Opinion Protected by the First Amendment of the American Constitution

In 1990, the Supreme Court of the United States in *Milkovich v. Lorain Journal* wrote the following:

If a speaker says, “In my opinion, John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion, Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct], simply by using, explicitly or implicitly, the words ‘I think.’” It is worthy of note that at common law, even the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion.” (Restatement (Second) of Torts, §566, comment a (1977))²

A Negative “Opinion” on the Value of Bonds Is Protected by the First Amendment

The frequent garden-variety evaluation by financial analysts of the value of bonds and stocks seems analytically similar to an evaluation of authenticity of art. In 1999, a school district sued Moody’s Investor Services for publishing an article about the “negative outlook” and “ongoing financial pressures” for the school district’s bonds, claiming the article was materially false. The Tenth Circuit Court of Appeals found that if those expressions had material false components, they would not be shielded by raising the word “opinion” as a shibboleth, but the “vagueness” of the two phrases indicated that the Moody’s article constituted protected expression of opinion.

*Moodys* reasoning is instructive for us in determining whether a First Amendment defense is available for a determination on authenticity of art (whether or not expressly styled as an “opinion”) where the legal claim is that the decision was wrong and caused economic loss to the art owner by disparaging his property:

. . . evaluative opinions are those that are not provably false, and a writer or speaker may not be held liable on a defamation claim for expressing them. In contrast, deductive opinions are those that state or imply assertions that may be proven false; the First Amendment does not immunize them from defamation claims.

In some instances, defamatory statements have been deemed too indefinite to be proven true or false. For example, … the Fourth Circuit concluding that a magazine article’s statement that optimistic projections about a company’s stock were based on “hype and hope” represented the kind of irreverent and indefinite language that indicated the writer was not stating actual facts.

In other instances, courts have concluded that due to the subject matter involved, there is simply no objective evidence that could prove that an allegedly defamatory statement was false … (concluding that the statement that a product was not worth the price was not verifiable because “the worth of a given service or product is an inherently subjective measure which turns on myriad considerations and necessarily subjective economic, aesthetic, and personal judgments”).

The *Moody* court continued:

In contrast to these decisions, courts have also applied *Milkovich* to conclude that certain statements, even though couched as expressions of opinion, are provably false and therefore
are not protected from defamation claims by the First Amendment. For example, the Ninth Circuit has concluded that a statement in a broadcast that a product “didn’t work” would be reasonably interpreted to refer to the performance of specific functions, a matter that could be assessed by evaluating objective evidence.  

Standards for Separating Assertions of Fact from (Constitutionally) Protected Opinion

In 1984 a U.S. Federal Court of Appeals attempted to describe the nature of opinion in *Ollman v. Evans and Novak* as follows:

At one end of the continuum are statements that may appropriately be called “pure” opinion. These are expressions which are commonly regarded as incapable of being adjudged true or false in any objective sense of those terms. Matters of personal taste, aesthetics, literary criticism, religious beliefs, moral convictions, political views and social theories would fall within this category. 

Also, near the pure-opinion end of the continuum … are “those loosely definable, variously interpretable” derogatory remarks that frequently are flung about in colloquial argument and debate … expressions of generalized criticism or dislike.

... Perhaps far more common … are statements that reflect the author’s deductions or evaluations but are “laden with factual content.” The apparent proportions of opinion and fact in these “hybrid” statements varies considerably. For example, a statement that “Jones is incompetent to handle that job” suggests some factual underpinning but, on the whole, imports a fairly high degree of subjective judgment. By contrast, a statement that “Smith is a murderer” appears much closer to an assertion of objective fact.

In light of the above 1984 analysis by the Court in *Ollman*, a statement of an expert about the authenticity of a painting, even if preceded by the phrase “I think,” “I believe,” or “In my opinion,” is, at least, a “hybrid” opinion, in that it intimates the existence of specific facts and conveys the author’s judgment upon, or interpretation of, those facts. Of course, there often is also an intimation of personal aesthetic taste with respect to the art, but there can be no question that the statement is based, in large part, on express or implied facts which can be proven true or false.

The 2007/8 Financial Crisis and Rating Agency Cases and (“Mere”) Opinion

The American constitutional free speech defense of “opinion” for decisions on authenticity of art may have received recent support from a series of cases involving financial rating agencies. Since the financial crisis of 2007/8 many rating agencies received legal claims based on their ratings of various securities backed by mortgages on real estate. The rating agencies’ defense has been that their statements about the credit-worthiness of these mortgage-backed securities are constitutionally protected statements of opinion. Indeed, the general counsel for Fitch ratings agency famously told a U.S. Senate Committee investigating the collapse of Enron that the rating Fitch assigns a security is “the world’s shortest editorial”.

In the case of *Compuware Corp. v. Moody’s Investors Services*, Compuware sued credit rating agencies for defamation for a publicly published credit report. The Court of Appeals for the 6th Circuit held Compuware had failed to establish the constitutionally required element of actual malice. The Court stated:
A plaintiff who qualifies as a public official or public figure may recover for defamation only if he produces clear and convincing evidence that the defendant acted with actual malice. Compuware, is a public figure for purposes of First Amendment defamation analysis.

The actual-malice standard requires the plaintiff to prove that the defendant made the statement with knowledge of its falsity or with reckless disregard of its truth. “Reckless disregard of a statement’s truth” is a subjective standard, it is “not measured by whether a reasonably prudent man would have published [ ] or would have investigated before publishing,” but by whether “the defendant in fact entertained serious doubts as to the truth of [its] publication.”

“[M]ere proof of failure to investigate, without more, cannot establish reckless disregard [of] the truth”.

Put differently, a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts. A Moody’s credit rating is a (predictive opinion) dependent on a subjective and discretionary weighing of complex factors. However, where Moody’s only sent its report to a select group of investors, and did not publicly disseminate its ratings report, the Compuware actual-malice standard would not be a defense. In Abu Dhabi Commercial Bank v. Moody’s Investors & Standard & Poor’s Ratings, an investor sued rating agencies for their financial losses in mortgage-backed investments rated by the agencies. In 2009 the Federal Court in the Southern District of New York stated:

It is well-established that under typical circumstances, the First Amendment protects rating agencies, subject to an “actual malice” exception, from liability arising out of their issuance of ratings and reports because their ratings are considered matters of public concern. However, where a rating agency has disseminated their ratings to a select group of investors rather than to the public at large, the rating agency is not afforded the same protection.

I also reject the argument that the Rating Agencies’ ratings in this case are nonactionable opinions. “[A]n opinion may still be actionable if the speaker does not genuinely and reasonably believe it (or if it is without basis in fact.) . . . plaintiffs have sufficiently pled that the Rating Agencies did not genuinely or reasonably believe that the ratings they assigned to the Rated Notes were accurate and had a basis in fact. As a result, the Rating Agencies’ ratings were not (mere opinions) but rather actionable misrepresentations.

The Abu Dhabi Court went on to compare [(1) a 1985 U.S. Supreme Court holding that a credit report published to five subscribers did not involve a matter of public concern because it was intended for a “specific business audience”, and (2) a refusal to allow the First Amendment defense where Moody’s ratings had been disseminated to a “select class of institutional investors”)] with cases like Compuware [above] which upheld the First Amendment defense where Moody’s had rated a publicly-held corporation.

Thus, these above-described rating agency cases seem to provide expert opinion on the authenticity of art with a free speech First Amendment defense (that is, “actual malice” must be proved by the claimant) where the opinion is a matter of “public concern” published for the public at large (such as the readers of a catalogue raisonné, newspapers, journals, etc.), while denying a First Amendment defense to an opinion given privately to a limited number of persons.

Even in jurisdictions outside the U.S., where there is no explicit free speech First Amendment defense for “opinion” it seems likely that courts will take note of this defense (that is, courts should not punish a “false” idea), and perhaps apply their own national version, especially in the case of authenticity opinions published for the general public (as opposed to opinion given to a specific owner) as in catalogues raisonnés, newspapers, journals and publicly published scholarly essays.
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Ronald D. Spencer, Esq.
Carter Ledyard & Milburn LLP
Two Wall Street
New York, NY 10005-2072
Email: spencer@clm.com
Website: www.clm.com

NOTES

3 Jefferson County School District v. Moody’s Investor Services, 175 F.3d 848 (10th Cir. 1999).
4 Id. at 852-53.
5 Ollman v. Evans and Novak, 750 2d 970 (DC Cir. 1984).
6 Id. at 1021-22.
8 Compuware Corp. v. Moody’s Investor Services, 499 F.3rd 520 (6th Cir. 2007).
9 Id. at 525-29.
11 Id. at 175-76.
12 At least one commentator has argued that courts should reject the Abu Dhabi distinction between publicly and privately disseminated credit agency ratings and, instead, should analyze ratings as commercial speech, arguing that the manner of (opinion) dissemination should not determine whether ratings qualify as a matter of public concern. And, “even if courts find that rating agencies’ communications constitute opinions, the First Amendment does not bar holding the agencies to legislatively created standards if courts also find that agencies targeted specific clients with this information.” 110 Colum. L. Rev. 1818 at p. 7 (2010). Yet another commentator: “The determinations of whether a rating is a matter of public concern and whether rating agencies are comparable to journalists both depend on the distinction between fact and opinion.” (Milkovich v. Lorraine Journal Co.) “Although the test for defamation requires that the statements be proven false, this test is misplaced in the rating agencies context because the ratings assigned are predictions about future issuances, and intuitively one cannot prove in the present that a prediction of future events is false.” 8 First Amend. L. Rev. 452 at p. 6.
THE BROUHAHA: WHEN THE BIRD BECAME ART AND ART BECAME ANYTHING

Tamara Mann

This essay, like the first essay in this Issue No. 2, is about opinion – the opinions of art professionals such as museum curators, directors, art critics and scholars. In a 1929 decision, Brancusi v. United States, overturning the imposition of a U.S. customs duty on Constantin Brancusi’s sculpture, Bird in Flight, Judge Waite of the United States Customs Court, after a trial on the subject, avoided a definition of Modern Art and looked almost exclusively to the changing opinions of experts at a given moment in time.-- RDS

Tamara Mann is a Ph.D. candidate in American History at Columbia University, New York, New York.

Abstract

The Brouhaha began in the fall of 1926, when a customs official at the New York docks declared a bronze object crafted from Brancusi’s hand to be a mere kitchen utensil and therefore subject to an ample import tax. Deriding the customs agent as a pedant and “son of a swine,” aesthetes and writers such as Marcel Duchamp, Edward Steichen, and Ezra Pound lamented the retrograde American cultural landscape and plotted a course to transform New York City into an international Modern Art Mecca. The vehicle for this transformation would be the United States Customs Court. Conceived by Marcel Duchamp, funded by Gertrude Vanderbilt Whitney, and facilitated by Edward Steichen, Brancusi v. United States brought the budding New York art world – for a brief few days – under the same roof to answer the question: “What is art?”

The Brouhaha, as Constantin Brancusi aptly termed the legal ordeal, began in the fall of 1926, when a customs official at the New York docks declared a group of objects from Paris to be akin to mere kitchen utensils.1 Repulsed by this assessment, an international assemblage of self-proclaimed artists hailed the works as quintessential examples of a new kind of art. Deriding the customs worker as a pedant and “son of a swine,” aesthetes and writers such as Marcel Duchamp, Edward Steichen, and Ezra Pound lamented the retrograde American cultural landscape and plotted a course to transform New York City into an international Modern Art Mecca.2

The vehicle for this transformation would be the United States Customs Court. Under the heady banner of the “fight for free art,” a motley crew of wealthy collectors, fringe artists, and esteemed writers joined to appeal the customs agent’s unfortunate taste.3 Conceived by Marcel Duchamp, funded by Gertrude Vanderbilt Whitney, and facilitated by Edward Steichen, Brancusi v. United States brought the budding New York art world – for a brief few days – under the same roof to answer the essential question: “What is art?”

This question, prompted by the tariff code, bewitched an international squadron of media personalities. Eager to embrace the delicious absurdity of a court determining what is art, the press focused on the internal details of the trial and ignored the pre-game strategy that placed a fifty-four inch bronze in the courtroom. Taking their cue from the press, scholars looking back on the trial have mimicked this approach. Seduced by the trial’s framing issue – defining “art” – scholars have uncritically assumed that a comprehensive, aesthetically based definition of art exists only outside the courtroom walls. For this reason, they have focused on the limits of Justice Waite’s opinion and the inadequacies of certain legal definitions of art. This myopic analysis has left several questions unanswered: Why did Duchamp, Steichen and Whitney decide to appeal the customs claim? How did the case establish a particularly loose definition of art in the American landscape? How did the case pave the way for New York City to become the center of a booming international art scene?
In his seminal book *Ways of Worldmaking*, the philosopher Nelson Goodman calls attention to the value of “recognizing that a thing may function as a work of art at some times and not at others.” The crucial issue then is not determining “what objects are (permanently) works of art,” it is, instead, establishing when an object is a work of art. By replacing the “what” with a “when,” Goodman reminds scholars that the canon of art history did not come down whole from heaven. Rather, the decision whether to include certain kinds of objects in the canon can often be traced to the anglings of a privileged few. Recalling the way in which the category of art can be manipulated to serve particular needs reframes the Brancusi trial. Rather than as an example of judicial failure, or even as an absurdity, as some scholars have argued, the trial should be analyzed as a strategic effort to utilize the courts to transform the New York art market.

The trial, for those who orchestrated it, was never about the definition of art. In fact, the apostate Duchamp’s deep skepticism about the category of art led him to claim that “as a religion…art isn’t even as good as God.” Rather, individuals like Whitney and Duchamp leveraged the customs official’s placement of Brancusi’s works under the heading “Kitchen Utensils and Hospital Equipment” to jump two hurdles in New York’s ascension as an art capital: the lack of an invested audience that would pay to see Modern Art shows and the exceedingly high cost of tariffs on contemporary artworks. In a single stroke, the Brancusi case solved both problems. The public interest in trials allowed spectacle savants to entrance an American audience with the details of witness testimony while the court’s ability to override the customs bureau’s decision opened the door to a radical fiscal shift in the American art market. Only one year after Justice Waite announced his opinion in favor of New Art, the Museum of Modern Art opened its doors on 53rd Street, enshrining New York at the apogee of a global international art world. In this new order, one could answer the question, “What is art,” with the retort, “Whatever is in the MoMA.”

**New Art debuted** in America in the winter of 1913 at New York’s 69th Regiment Armory. A coalition of bohemian downtown artists and established uptown patrons created the International Exhibition of Modern Art, commonly known as the Armory Show, to expose the American public to an international movement broadly titled Modern Art. Intent on “not drawing the line of nationality or locality upon art,” the exhibition organizers traveled across Europe to locate artists boldly formulating a visual language reflective of the modern condition. Encompassing a plethora of isms, including cubism, futurism, and fauvism, the Armory Show artists dazzled and scandalized an American public whose definition of art had been previously limited to realistic representation.

Despite headlines like “Art Show Open to Freaks,” the show’s organizers were not disturbed by scandal. Rather, they hoped, with an eye to P.T. Barnum, that spectacle would breed sustained interest. Thus the show’s torchbearer, Arthur B. Davies ensured that the Armory was “the best publicized” exhibition of its time. Pamphlets, catalogues, and posters bedazzled New York as each social wing of the founding members hosted parties and salons to spread a feverish buzz. In the heady early days of February, Mrs. Astor, Teddy Roosevelt and President-elect Wilson popped by to decry the show. The utter incomprehensibility of the art in the eyes of the American press and public seemed to work in favor of the exhibition - to hate it, assumed Davies, one had to see it.

Yet the hubbub around the Armory, which largely took place in local papers across the United States, to Davies’ chagrin, did not translate into the expected volume of ticket sales. As the spectacle grew common and the exhibition moved from Chicago to Boston, a “dribbling attendance” plagued the organizers. Not only did viewers not come in droves to see the show, but, when they did arrive, the spectacle derailed audience members from learning much about the content of the work. They could recognize the names of Mondrian, Picasso and Matisse, but they could not explain why these artists chose to express themselves with abstract forms.

In the last days of the Armory Show another dilemma became apparent: high tariffs were cutting into the profit margins, deterring European dealers and American collectors. On top of the extravagant expenses of shipping, insurance, printing, construction, and press, the United States levied tariffs of forty-percent of the worth of any artwork less than one hundred years old. The tariff burden fell to the show’s organizers until a final sale, where some profit from the work would go to repaying the duty. The customs problem proved so prickly that it would not be resolved until 1916, over three years after the show closed.
In spite of these obstacles, the show succeeded in forming a powerful group of dedicated buyers eager to promote and purchase European Modern Art. The great American art patrons like Lillie P. Bliss and Walter Arensberg, whose collections would eventually form the Museum of Modern Art and The Philadelphia Museum of Art, got their start at the 69th Regiment. These nascent collectors, historian Milton Brown comments, differed from the tycoons around the Metropolitan Museum of Art in their “uncommon need and desire to proselytize, which they seem to have inherited from the Armory Show itself.” This “evangelistic activity” prompted the group to close the show with a set of directed goals: to create an American audience and to reform the tariff laws.

Only weeks after the show adjourned, Armory veterans joined together to impose a frenetic educational agenda on the American public. The exhibitions, publications and articles produced by Katherine Dreier’s and Marcel Duchamp’s Société Anonyme complimented the salons of Alfred Stieglitz, Walter Arensberg, and Gertrude Whitney. These leaders demanded nothing less than an American public fluent in the language of Modernism. With over one-hundred-and-sixty different exhibitions and publications, the Société familiarized a growing number of connoisseurs, journalists, and young artists with Modernist movements and convinced an equally expanding number of Europeans that New York was “destined to be the artistic capital of the modern world.”

The plan to bring Modern Art to America, despite the strategic maneuvers of the Société, would have paused in Greenwich Village if not for the will of the Armory Show’s lawyer John Quinn. Remembered as one of the pivotal patrons of European Modernism, Quinn single handedly changed the United States tariff laws to accommodate the work of living artists. Acutely aware of the debilitating costs of the duty on Modern Art for collectors, Quinn went to Washington to convince Congress to strip the outdated clause that levied a duty on contemporary art. In a self-congratulatory letter, Quinn pronounced, “I started the fight; I made the only argument before the House; I submitted the only brief to the House; I submitted a brief to the Senate; I interviewed the Senators... I started the propaganda...I bore all of the expenses of the campaign.” Quinn’s one-man offensive to change the law succeeded, and the 1913 Tariff Act included provisions on behalf of “free art.”

Quinn’s statute, however, retained a few hitches for art importers. Quinn inscribed into the body of the law a set of provisions that reflected his own aesthetic biases. Partly inspired by anti-Semitism, Quinn ensured that importers of copies, many of whom he thought were Jews, would be taxed. To do this, Quinn “read into the law for the first time the word ‘original.’” Moreover, artworks could not have utilitarian value or be the predominant result of a mechanical process. The dictum “art for art’s sake” guided the early Modernists, and Quinn fully believed that a lack of utilitarian purpose comprised an essential aspect of what made an object an artwork. In concert, Quinn’s attributes ingrained a set of standards that artists in the 1920s would try to disassemble. The popularity of the Bauhaus, photography and design seemed to suggest that utility and mechanical reproduction were essential aspects of Modern Art.

While artists dismantled Quinn’s standards from a distance, the United States Custom’s Court limited the efficacy of Quinn’s statute in 1916 in United States v. Olivotti & Co. In this case, the court declared that a sculpted marble font and seats were not, in fact, sculpture or art in the sense intended by Congress. For an object to be a sculpture, in the court’s estimation, it had to reflect or imitate “natural objects, chiefly the human form…. For an object to qualify as duty-free art it had to transcend the merely decorative. As Justice Smith posits:

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....

This interpretation of the tariff code enraged New York art collectors. After the reissue of Quinn’s tariff code in 1922, journalist Watson Forbes remarked that, although Quinn provided for the free admission of sculpture, Olivotti actually offered a description of “what constituted sculpture.” Forbes continued, in the duration of his article, to dismantle the various attributes proposed by the court. “The qualification,” he aired, “is full of holes.” For one, numerous Greek and Roman objects enfranchised into the category of sculpture do not represent “natural objects in their true proportions.” Moreover, he continued, if “the extent to which the artist imitates nature are to be the test of whether a work is or is not sculpture, the works of practically every living artist who is not purely...
academic, or at least literally realistic, would be refused free admittance by our enlightened lawmakers.”

In this article, Watson decried the legal system for intruding into a world it did not fully understand. Art, with its catholic standards, required the eyes of visual experts, not those of legal professionals.

Although Olivotti had been decided in 1916, art insiders ignored the precedent until the mid-1920s when, following the death of John Quinn, the customs bureau began to enforce the decision. As a respected New York lawyer and friend to many of the European Modernists, Quinn capably prevented the customs house from deciding against his pet objects, going so far as to remind Brancusi to send his works with a certificate of originality. Since Quinn collected many of the objects affiliated with Modernism, American collectors could rely on Quinn’s precedent to shield their objects from duties. By 1926, however, the truce with the customs house had ended and New York intellectuals fulminated against the mercenary antics of a protectionist customs house they believed penalized living European artists.

These tirades, though, did not take into consideration the fact that European Modern Art received the same treatment as other goods coming into the United States. Quinn’s tariff adjustment, formally encompassed in the Underwood Tariff Act, was a stark anomaly in tariff policy from 1890 to World War II. “Protectionism,” tariff historian Tom E. Tarrill claims, “remained the fixed policy of the United States until after World War II.” The fact that the court narrowly interpreted the “free art” language put the court, rather than the Modernist-loving art community, in line with American policies toward foreign goods.

Yet, in the years after World War I, an oppositional movement blossomed. Private organizations, funded by moguls like Carnegie and Rockefeller, set out to manage and promote the international exchange of information. Emerging institutions, such as the Guggenheim Foundation and the Committee on Friendly Relations among Foreign Students complemented the goals of contemporary European art collectors. Since Modern Art, perhaps more fully than other artistic movements, hoped to express ideas rather than depict things, patrons of the movement posited that the logic of “free art” mirrored the logic of the free exchange of ideas. Thus, they claimed that artworks should be understood as ideas rather than forms of moveable property.

The banner of “free art,” employed by Quinn, became the rallying cry to unite the disparate interests of artists, collectors and intellectuals tapped to serve as funders, witnesses and reporters for the Brancusi trial. As Margit Rowell, a historian of the trial contends, “It goes without saying that for all those involved…lawyers, artists, critics, collectors, art dealers…. The battle was purely and simply about the free circulation of works of art.” Yet beneath the convenient rhetoric of “free art” lurked the particular designs of the trial’s true choreographer, Marcel Duchamp.

Duchamp was an art skeptic and an art opportunist. Coming of age in pre-war Paris, he circled the bohemian world occupied by his brother, the cubist insider Raymond Duchamp-Villon. Never much of a painter or a Modernist theorist in his youth, Duchamp occupied a peripheral position that alerted him to the high money stakes involved in determining what is or is not art. The revolutionary spirit displayed in Montmartre cafes matched perfectly with a burgeoning gallery world capable of marketing just about anything as modern. As one of Duchamp’s biographers suggests, “In order to sell a new style to a new class of collectors, dealers had to offer it as something ‘modern,’ something that was inescapable, dictated by the historic evolution of art.” The word modern, combined with the Midas touch of an artist, could, in fact, take the most ancient or common of forms and transform it into a lucrative good. Mindful of closing off any potential markets, gallerists and collectors shied away from disparaging anything new, for they realized “that a clever buy of works by an unknown could be a rewarding speculation.”

The artists, often under a guise of naiveté, knew how to please their collectors – through loud doses of “sheer novelty.” Living the life of an artist, replete with eccentric displays of alcoholic fervor, could be as much of a selling point in the early 1900s as going to art school might have been for the previous generation.

Duchamp mastered this role. Bouncing between New York and Paris, he entranced New York’s upper crust. Renowned for his single infamous work in the Armory Show – *Nude Descending a Staircase* – Armory veterans invited him into their homes, displayed him at dinner parties, and relied on him to decide what they should collect.
next. Duchamp, however, desired to do more than advise art collectors like Walter Arensburg; he wanted to blast open the limits of what could be defined as art.

Obsessed with determining whether one can “make works which are not works of art,” Duchamp set out to test whether his affiliation as an artist could preordain all of his creations as art. Compelled by the potentially lucrative answer to this question, he embarked on a riotous set of signing sprees. Could the simple act of signing something make the object a work of art? At the close of 1916, Duchamp got his answer.

In the exhibition “No Jury. No Prizes. Hung in Alphabetical Order,” he scandalized the avant-garde community by entering an autographed porcelain urinal. The object, titled “Fountain,” and signed with the pseudonym R. Mutt, proved Duchamp’s most outlawish dreams. Not only did his own signature make something art, but any signature he employed could make something art. With the “Ready Made” securely within the purview of Modern Art, Duchamp drifted away from art making. Aroused to create only in order to challenge the category of art, Duchamp restlessly wandered across continents devoting most of his time to perfecting his chess game.

Even Duchamp, it seems, realized that spectacle failed to foster long-term interest. During the War years, after episodes as a professional chess player, he set up shop in the United States as a dealer rather than an artist. Exploiting his position as the beloved darling of the New York wealthy, Duchamp began to sell the European Modernists that had excluded him in his youth. Rather than representing artists molded in his own outrageously image, Duchamp settled on individuals, like Brancusi, who possessed all of the authenticity he lacked.

In stark opposition to Duchamp’s riotous iconoclasm, Constantin Brancusi encompassed the tamer qualities of Modernism. When Arthur B. Davies first encountered Brancusi while putting together the Armory Show, he remarked, “That’s the kind of man I’m giving the show for!” Ezra Pound reiterated this praise when he declared that Brancusi was one of “the men who matter.” Brancusi’s plodding artistic process lent Modernism a much-needed aura of authenticity. As a Romanian expatriate who walked to Paris to study under Rodin, Brancusi had mastered the sculptural crafts. His aesthetic bent towards abstraction, unlike other heroes of the movement, did not arise out of a flippant rejection of formal artistic training. Rather, Brancusi marshaled his uncanny sculptural skills to service the intrepid task of creating concrete forms to represent ideas or gestures, such as flight.

Bewitched by “the genuine creative genius of the solitary Romanian,” Duchamp positioned himself as Brancusi’s American dealer and advocate following John Quinn’s death. As his dealer, Duchamp masterfully organized Brancusi’s ascent in America. In 1926, three journals ran feature articles on Brancusi and two galleries requested one-man shows. Duchamp, ever the media hound, ensured that the press tracked each of Brancusi’s successes. In fact, even before the trial monopolized the public’s attention, journalists across the country questioned not only whether Brancusi’s objects were art but whether they were capable of “Poisoning Minds and Morals” of Americans. The negative attention served only to galvanize the nascent American avant-garde around Brancusi and the Modernist cause.

Despite his success with Brancusi, Duchamp realized that the American market for European Modern Art had significant limits. While scholars have examined his role in the Société Anonyme in the early 1920s as an honest effort to educate an American audience, the possibility that Duchamp utilized the group to create a broader audience for his own European sales seems equally feasible. Employing his usual set of antics, Duchamp brought new collectors into the fold through absurd displays of what seemed to be spontaneous art-making. But, by the mid-1920s, the market in European art appeared vulnerable to a serious hit that even absurd antics could not deter. The War had redirected American avant-garde taste toward the American West. Rather than traveling to Europe or purchasing European artists, collectors went so far as to purchase homes in the West to be closer to the creative action. In tandem with this shift in taste, John Quinn’s death meant that the customs bureau would enforce the Olivetti decision. Duchamp might have been able to combat the change in taste, but he could not argue against both taste and price.

Thus, when the customs bureau seized Brancusi’s sculptures on their way from Paris to New York’s Brummer Gallery in October 1926, Duchamp leapt into action. The Janus-faced artist and dealer alerted the public to this outrage by bellowing to the press, “To say that the sculpture of Brancusi is not art is like saying that an egg is not
an egg.'\textsuperscript{48} Well aware of the absurdity of his statement, Duchamp consulted with the photographer Edward Steichen, who actually owned one of the contested pieces, and the poet Ezra Pound, one of Brancusi’s dedicated supporters. Pound affirmed Duchamp’s possibly feigned outrage by asserting, “I did manage to spit in the department’s face, and the department, the revenue people, that is, the sub-underling of the secretary of the paper-pusher who attends to these matters, has promised me a review [of the case].”\textsuperscript{49} When the review came back upholding the original classification, the powerful trio enlisted a slew of well-heeled New Yorkers to find both short-term and long-term remedies.

The short-term solution guaranteed that the works would only be taxed once they were sold and then only on the value of their raw material.\textsuperscript{50} This redress shifted the burden away from the beloved Brancusi and onto the actual American collectors, ensuring, for Duchamp, that wealthy American patrons would be invested in the outcome of a longer legal battle. It was Steichen, however, and not Duchamp, who enlisted the support of Gertrude Whitney. Livid about the extra six hundred dollar duty on an already expensive purchase, Steichen voiced his determination to appeal the decision at one of Whitney’s soirées. “Mrs. Whitney,” Steichen later recalled, “immediately said that this case could establish an important precedent.” In the wake of the mesmerizing Scopes trial, Whitney, like Duchamp, believed that a case centered on determining a definition of art would seduce the American public. Eager to establish her own museum of Modern Art, Whitney knew she needed to abolish the duties on contemporary art and establish a primed audience base. Requesting only that Steichen lend his Brancusi, \textit{Bird in Flight} to the case, Whitney offered to donate the services of her legal staff and absorb the full cost of the trial.\textsuperscript{51}

Meanwhile, Duchamp relished the absurdity of a trial that attempted to establish qualifications for art. After spending a career jeering at the uptight stewards of Modernism, he knew that there was no operative definition of art. But he also recognized that Brancusi, perhaps more than any other working artist, could establish Modern Art as the next stage in the Western canon. As iconoclast and devotee, Duchamp internally mirrored the battle that would soon rage in the court and in the press. The master chess player carefully exploited his own paradoxical relationship to Modern Art to inveigle the papers into covering every detail of the trial. As scholars of this period have often suggested, “two trials were taking place at the same time: one in the Customs courtroom and the other, ‘parallel’ trial in the press.” Due to the attention, worthy in Steichen’s estimation of a sex scandal, Brancusi branded the trial the Brouhaha.\textsuperscript{52}

\textbf{On May 23rd, 1928,} officials ushered Brancusi’s glistening bronze object into the courtroom. Perched near the witness stand, the object of many names enjoyed the attention of judges, lawyers, artists, and reporters. The bronze statue, alternatively referred to as \textit{Oiseau, Bird in Flight} and \textit{Bird in Space}, became the single medium by which various aesthetic theories were tested, both within the courtroom and in conversations across the nation. For this reason, the trial provided an unprecedented arena in which the spectacle of the Armory Show could complement the educational methods of the Société Anonyme.

With full witness testimony reprinted in papers throughout the United States, an engaged public could discuss the various insights into Modernism presented by the plaintiffs. If they tuned into the arguments offered by the sculptors, writers and museum directors called to the stand, they would understand the significant amount of time required to create a work of Modern Art, how balance and harmony collide to create beauty, and, perhaps most importantly, where authority in the peculiar sphere of the art world resides. Not only could the public study the attributes of Modern Art, but they could also learn how viewer response should be conducted. The humorous nature of the more contentious examinations brought the public into an amusing and open discussion. Unlike the austere audience response demanded by accepted forms of high art featured at the Metropolitan, Modern Art seemed to go hand-in-hand with animated debate.

The line of questioning that produced the most engaging verbal banter of the trial focused on the allegation that the bronze did not seem to accurately represent a bird. The defense, eager to demonstrate that the work did not fit the description of art offered in \textit{Olivotti} (that art had to reflect or imitate natural objects), obsessively focused on the discrepancy between the title of the work and its material form.\textsuperscript{53} This led Justice Young to rhetorically demand of Steichen, “If you saw it in the forest you would not take a shot at it?” Additionally, repetitive questions were posed to numerous witnesses inquiring whether or not they would call the bronze “a
fish” or “a tiger” if Brancusi so requested.\textsuperscript{54} Infuriated by the meaningless back-and-forth, Justice Waite attempted, and failed, to put an end to the questions with a brief tirade: “I cannot see any necessity in spending time to prove this is a bird. If it is a work of art, a sculpture, it comes under that paragraph.” The debates over the birdlike attributes of the work did, however, manage to illuminate a crucial aspect of Modernism – the artist’s desire to capture abstract ideas.

The bronze, pondered the plaintiffs’ witness Forbes Watson, contains “the feeling of flight, the feeling of going up….”\textsuperscript{55} Concurring with Watson’s statement, the editor of \textit{Vanity Fair}, Frank Crowninshield, responded to the question of whether he believed the object to be a bird: “It has the suggestion of flight, it suggests grace, aspiration, vigor, coupled with speed, in the spirit of strength, potency, beauty, just as a bird does.”\textsuperscript{56} The thoughtful responses by these witnesses challenged the \textit{Olivotti} standards. Modern artists did not simply try to recreate objects that already existed; rather, they took on the arduous task of creating new forms to encompass intangible ideas. This publicized fact altered how individuals approached works of Modern Art. Instead of vainly attempting to determine what the object represented, they now knew to discuss the idea they believed the work captured.

Although this line of questioning satisfied the press and educated the public, it did not identify the qualifications for art demanded by the court. To overturn the duty, the plaintiff had to prove that the object was original, had no utilitarian value, was the product of a professional sculptor, and qualified as an actual artwork.\textsuperscript{57} The witness testimony explicaded the process by which Brancusi created the bird, attempted to establish particular individuals as art authorities, and offered opinions on what makes an object an artwork.\textsuperscript{58}

Steichen, as the first witness and the object’s official owner, testified on the lengthy artistic process he witnessed in Brancusi’s studio. Careful to establish that Brancusi did not rely only on industrial techniques that could easily be copied, Steichen described how Brancusi began carving in marble and only then created a cast for the bronze. “When the bronze came out,” proceeded Steichen, “it bore a very faint resemblance to this thing, and then with files and chisels Mr. Brancusi cut and worked on this piece ….”\textsuperscript{59} Steichen confirmed that Brancusi’s creative process, despite resembling other mechanically produced objects, actually required detailed craftsmanship. Moreover, the final stage of chiseling ensured that each of Brancusi’s pieces was original rather than a copy.

While originality and a lack of utilitarian value could be proven with some ease, Brancusi’s credentials as well as the credentials of the witnesses were harder to establish. The common markers of a professional, including a diploma, an exam, or a recognized association, did not apply to these self-proclaimed Modern artists. Edward Steichen’s and Jacob Epstein’s lack of any certificate from art school perplexed the judges. To assure the court that an “art world” with standards did exist, the plaintiff questioned Frank Crowninshield, the editor of \textit{Vanity Fair}, and Henry Fox, the director of the Brooklyn Museum of Art. The court’s acceptance of their assertions proved to the public that journals and museums could function as authorities on the definition of Modern Art. When Justice Waite asked, “If you were sent out by somebody to buy a work of art to put in the institution and educate people, would you have selected this as a work of art?” Henry Fox responded with a “Yes Sir,” and the court seemed willing to leave the art-making decisions up to the museum professionals.\textsuperscript{60} Yet, despite the suggestion early in the trial that the court would attribute expertise to editors and directors, much of the witness testimony offered responses to the question of how to define art.

Three distinct answers to this question were proposed during the course of the trial. According to Steichen and two other witnesses called by the United States, Robert Ingersol Aitken and Thomas Jones, art could be determined through the physical attributes of the object such as appearance and harmony. For the sculptor Jacob Epstein, aesthetic qualifications dwelled in the artist rather than the object. “A mechanic,” he claimed, “cannot make beautiful work…he can polish it up but he cannot conceive of the object.”\textsuperscript{61} The artist, through the unique power of conception, Epstein argued, could make any object into an object of art. “The moment a piece of rock,” he continued, is “in the hands of…an artist, it can become from that moment a work of art.”\textsuperscript{62} Forbes Watson and Henry Fox agreed with Steichen’s and Epstein’s assertions but proposed an additional qualification. For Watson and Fox, aesthetic determination resides, above all, in the viewer. The object, they asserted, must arouse beauty
and give “pleasure”. By the close of the trial three distinct locations for the qualifications for art were offered: in
the object itself, in the sincerity of the artist, and in the reaction of the viewer.

The brief submitted by the Plaintiff offered yet another attribute in the broadening definition of art. Artworks, the
lawyers claimed, resembled ideas more than physical objects. Divorcing artworks from their status as a kind of
movable property, they maintained that “there should be no bonuses exacted on art as there are none exacted on
ideas and thought; they are equally entitled to free currency among nations of the earth….” Borrowing from the
language of “free art” proponents, the plaintiffs asserted that artworks were not regular commodities, which could
threaten homegrown craftsmen. Rather, they constituted part of a cosmopolitan discourse that Americans could
not afford to restrict. Furthermore, they argued, “to fall into the error of bounding ‘art’ is almost sufficient to
destroy the principal of its right of free entrance.” Thus, any restriction on the definition or import of art actually
compromises the prospects of the international exchange of ideas.

Thus, by the close of the trial, the term “art” had been filled with a set of unprecedented attributes. Artworks
resembled ideas, retained qualities such as balance and harmony, provoked a sense of beauty, and were the
inspired creation of someone referred to as an artist. Although broad in scope, this definition implicitly rejected
two circulating attributes of art: that artworks imitated natural objects and, perhaps more importantly, that
artworks were a kind of commodity. The lofty conversation in the courtroom obscured the commodity status of
artworks and enshrined the illusion that artworks, despite their growing monetary value, retained a cultural rather
than a market identity. This elision subsequently opened the door to numerous provisions protecting art from
government regulation.

Justice Waite, in his often-quoted opinion, ignored the definitions of art presented during the trial. In their stead,
hed suggested an operative definition that hinged on the existence of a coherent art world with an established
authority base. After concluding that Bird in Flight was the original work of a “professional sculptor,” Waite
offered an unconventional answer to the question of whether the object “conforms to the definition given under
the law for works of art.” He claimed that a new movement, such as Modernism, “require(d) a new opinion” from
the court. No definition of art, Waite reflected, could withstand the test of time. Since Olivetti, he continued:

…there has been developing a so-called new school of art, whose exponents attempt to
portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy
with these newer ideas and the schools which represent them, we think the facts of their
existence and their influence upon the art world as recognized by the courts must be
considered.

Opposed to defining art outside the mercurial realm of historical taste, his decision turned on the fact that art
could be determined only in reference to a changing community of experts. In this capacity, Waite’s opinion
sanctioned the aesthetic authority of certain art professionals such as museum directors and critics.

In 1929, a year after Waite’s opinion overturning the customs duty, the Museum of Modern Art opened to “a
steady stream of visitors.” The New York Times declared “there are no howls of outraged propriety. Modern Art,
if not always understood is generally respected.” No longer reliant on spectacle to entice an audience, the
Armory veterans behind the Museum savored the joys of being securely within the establishment. Without
drumming up scandal, they could rely on the fact that viewers would come to the shows and linger to discuss the
crass, the cruel, and the sometimes beautiful objects that wealthy New York patrons hoarded in their pet
institution.

Brancusi v. United States enshrined Modern Art in the landscape of New York City. By the 1930’s, President
Hoover praised the new Whitney Museum of American Art, cosmopolitan collectors traveled to visit Madison
Avenue galleries, and universities across the country offered their first courses on Modernism. Yet, this rosy tale
of Modern Art’s American ascension is not without a hitch. When Justice Waite opted to forsake an essential
definition of art for a historically situated one, he may have unwittingly deflated the vitality of the category.

Modern Art, as Duchamp lavishly demonstrated, operated within a market culture that highly valued shock and
novelty. Artists gained credibility in such a culture by breaking established rules and destabilizing accepted
values. In a community where anything can be art, as long as enough experts agree, the category itself loses its particularity. Perhaps, Duchamp’s ultimate goal for the Brouhaha was not simply an open American market for European art. The heretical chessman would have relished observing the disappearing line that distinguished art from any mere thing, gesture, or event throughout the later half of the twentieth century. The Brancusi case did not create this phenomenon, but did legitimize it. Conceivably, the patient strategist orchestrated a brouhaha in the courts to impose a certain response to his long-standing concern: can any work be a work of art? In the wake of Brancusi the answer can only be yes.

Columbus, Ohio
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Tamara Mann
505 South Parkview
Columbus, OH 43209
Email: tbm2105@columbia.edu

NOTES
3 See letters compiled in Brancusi vs. United States The Historic Trial, 1928 (Paris, 1995).
5 Goodman, 70.
9 Brown, 112.
10 For example, patrons hosted parties dedicated the various movements of modernism. See “Cube Gowns Worn at Freak Party,” Chicago Daily Tribune 26 February 1913.
11 Brown, 145.
12 Brown, 109.
13 Brown, 95.
14 The final record entry in the Armory’s books is a payment of $2,894.53 to the U.S. Custom’s Office. See Brown, 233.
15 Brown, 239.
16 Brown, 239.
19 <http://artgallery.yale.edu/socanon/>


22 Quinn in Londraville, 143.

23 Quinn in Londraville, 143.

24 See Kamer.


27 Brancusi vs. United States The Historic Trial, 1928 (Paris, 1995), 129.


33 Arndt, 41.


35 Alice Goldfard Marquis, Marcel Duchamp: The Bachelor Stripped Bare (Boston: Museum of Fine Arts, 2002), 44.

36 Marquis, 44.

37 Marquis, 44.

38 Marquis, 91.

39 Marquis, 183.

40 Brown, 70.


43 As Brancusi famously stated, “…what they call ‘abstract’ is in fact the purest realism, the reality of which is not represented by external form but by the idea behind it, the essence of the work.” <http://www.artquotes.net/masters/brancusi_quotes.htm>.

44 Marquis, 223.


46 Marquis, 160.

47 Marquis, 160.


Waite closes his opinions with some gestures towards aesthetics that have been overemphasized scholars. While, he does note that the work “is beautiful and symmetrical in outline” this is not what the bulk of his opinion turns on.


**BIBLIOGRAPHY**


“Brancusi Bronzes Defended by Cubist,” *New York Times* 27 February 1927; ProQuest Historical Newspapers.


“Cube Gowns Worn at Freak Party,” *Chicago Daily Tribune* 26 February 1913; ProQuest Historical Newspapers.


“Modern Art Poisoning Minds and Morals,” The Washington Post 26 December 1926; ProQuest Historical Newspapers.

Monroe, Harriet. “Art Show Open to Freaks,” Chicago Daily Tribune 17 February 1913; ProQuest Historical Newspapers.

“New Art Museum Visited By Scores” New York Times 9 November 1929; ProQuest Historical Newspapers.


Reid, B.L. The Man from New York: John Quinn and His Friends New York, Oxford University Press, 1968.


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