TECHNICAL

IF PHILOSOPHERS CAN'T TELL US WHAT ART IS, CAN OFFICIALS?

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ABSTRACT

'One of the most elusive of the traditional problems of human culture [is] the nature of art.'[1] Over millennia, philosophers have failed to agree on what 'art' is or have resorted to an apparently circular reductivism, such as, art is what is found in an art gallery. Despite this uncertainty, it is not unusual for tax laws to initially place an interpretative duty on Revenue or Customs services to decide which things constitute artworks under particular pieces of legislation. This power to construct meaning is, however, constrained. In performing their hermeneutic function, officials construe laws and regulations created by lawmakers, and the ultimate interpretative power lies with the courts. The most famous, albeit not unique, example of officials engaging with artworks is the *Bird in Space* case which arose from customs officials in the United States categorising one of Constantin Brâncuşi's modernist sculptures as a hospital and kitchen supply.

This article surveys tax laws that require officials to engage in aesthetic judgment and analyses notable cases to elicit key issues. The principal purpose of the article is to consider whether a customs or revenue service, which presumably represents a broad cross-section of society but not art experts, should be charged with making such decisions. While the discussion is specific, it remains relevant to drafting tax statutes in general.

Keywords: art, artwork, customs duty, tariffs

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1 Richard Wollheim, *Art and Its Objects* (Cambridge University Press, 2nd ed, 1980) 1.

I INTRODUCTION

Differential tax or customs duty treatment occasionally requires officials to determine whether an artefact is an artwork or something more mundane. The most famous case in this field arose in the 1920s from the importation of an abstract sculpture into the United States: Constantin Brâncuşi's *Bird in Space* (1923).[2] Customs officers, who, understandably, were not versed in developments in modern art, classified the artefact as hospital and kitchen supplies,[3] and therefore was subject to customs duty as an 'article of utility' (a sculpture was free from customs duties under paragraph 1704 of the *Tariff Act 1922* (US) but 'articles of utility' were taxed at a rate of 40 per cent under paragraph 399 of that Act). Relevantly, the decision of an official is formally subject to judicial review,[4] and a customs court in *Brancusi v United States*[5] (*'Brancusi*') subsequently found the object to be a duty-free artwork. The *Brancusi* case is neither unique nor a historical curiosity. More recently, imports of artworks by celebrated contemporary artists Don Flavin, Bill Viola[6] and Bjarne Melgaard[7] have initially been treated as mundane objects subject to higher rates of duty or indirect tax than artworks.

'One of the most elusive of the traditional problems of human culture is the nature of art.'[8] As Joes Segal observes '[t]he concept of "art" itself is far from unambiguous and constantly subject to more or less (un)inspiring attempts to define it',[9] such as 'anything is art if it is

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2 See 'Constantin Brancusi, *Bird in Space*, c. 1941', *MoMA* (Web Page) <https://www.moma.org/collection/works/81503>. I use the orthographically correct 'Brâncuşi' to refer to the artist, but use 'Brancusi' when it was originally used in that form. As is usual with cast sculptures, the artist created a limited number of artefacts from the original plaster casts (15 in this case). That is why the MoMA statue is dated c 1941.

3 See Daniel McClean and Armen Avenessian, 'Trials of the Title: The Trials of Brancusi and Veronese' in Daniel McClean (ed), *The Trials of Art* (Ridinghouse, 2007) 37.

4 Because our knowledge of customs disputes is invariably derived from reported tribunal or court decisions, we do not know whether other controversial decisions were made but not appealed.

5 (1928) US Customs Court 3rd Div, N.209109-G.

6 Marina P Markellou, 'Rejecting the Works of Dan Flavin and Bill Viola: Revisiting the Boundaries of Copyright Protection for Post-Modern Art' (2012) 2(2) *Queen Mary Journal of Intellectual Property* 175.

7 Amah-Rose Abrams, 'Bjarne Melgaard's Brush with Customs Officials Helps Change Outmoded Laws in Norway', *ArtNet News* (Web Page, 18 November 2016) <https://news.artnet.com/art-world/bjarne-melgaard-norway-customs-regulations-752051>.

8 Wollheim (n 1) 1.

9 Joes Segal, *Art and Politics: Between Purity and Propaganda* (Amsterdam University Press, 2016) 11.

found in an art gallery'.[10] Marcel Duchamp defined 'art' as whatever an artist uses[11] but did not identify who an artist is. For art world insiders, tax and customs cases may provide droll evidence of barbarianism on the part of the bureaucracy — Daniel McClean and Armen Avenessian, for example, describe the *Brancusi* case as 'landmark, yet comical'.[12] Why should customs officials presume to resolve the ontological problems of art, when philosophers have failed to do so?

The assessments of the customs officials in the *Brancusi* case are likely to have reflected and represented the conceptions of art held by the general public at that time. Beyond the specific artwork (as the court found it to be), this and similar cases raise more generalisable questions about taxation and art. Invariably, an inquiry into the aesthetic nature of an artefact is prompted by an attempt to take advantage of a tax or customs duty concession extended to artworks. Assuming plausible grounds can be adduced for extending tax preferences to artworks,[13] subsequent policy questions include:

- Should the legislature seek to provide an exhaustive definition of an artwork?
- Should definitions be open-ended so that the Administration decides, unless a complainant has the motivation and economic wherewithal to take a dispute to court where a judge would then decide?
- Whose views on art should be represented — officials as presumptive bearers of a common sense most likely shared with the general public or art experts, such as artists, critics and academics?[14]

This article engages with these questions. Relevantly, Part II considers the problems of imported art, and outlines tax and customs duty cases where the nature of an artwork has been central to the judgment. Part III surveys different approaches to defining art in taxing statutes. Part IV discusses these approaches and comments on key policy issues prior to concluding in Part V.

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10 Stuart Culver, 'Whistler v. Ruskin: The Courts, the Public and Modern Art' in Richard Burt (ed), *Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere* (University of Minnesota Press, 1994) 149, 151. Sometimes objects can only make sense as artworks in the context of a gallery and supporting text. See, for example, Carl Andre's sculpture, *Equivalent VIII* (1966), commonly known as 'Bricks'.

11 Duchamp spoke of 'an ordinary objected elevated to the dignity of a work of art by the mere choice of an artist'. See Lois Fichner-Rathus, *Understanding Art* (Cengage Learning, 2012) 188.

12 McClean and Avenessian (n 2) 38.

13 At a level of principle, preferential tax treatment of art can be justified on the grounds of rewarding positive externalities, market failure and merit. See Kazuko Goto, 'Why Do Governments Financially Support the Creative Industries' in Sigrid Hemels and Kazuko Goto (eds), *Tax Incentives for the Creative Industries* (Springer, 2017) 21.

14 When claims are made to common sense, it is reasonable to ask: common to whom? Here, I mean a likely appeal to a broad range of different groups in society.

II THE ONTOLOGICAL PROBLEMS OF (IMPORTED) ART

This part of the article identifies the ontological problems that arise when art is imported and reviews customs and tax decisions on the nature of artworks.

A *Identifying Art*

Orson Welles reportedly quipped 'I don't know anything about art but I know what I like.'[15] Welles was one of cinematic art's greatest auteurs, and a noted aesthete, and so the first clause of his *bon mot* is implausible. His real point, as the author understands it, is this: we cannot avoid subjectivity in appreciating art or deciding what constitutes art in the first place. Accordingly, when a person is empowered to decide whether or not a thing should be classified as an artwork, they are bounded by their individual life experiences — their education, class background, cultural preferences and so forth.

Creating art is a primal human urge,[16] however, it seems likely that, from earliest times, certain people who were especially skilled in representing the natural world have been differentiated from others.[17] For millennia,[18] invariably anonymous craftworkers created artworks.[19] Only during the Renaissance did the creators of autographed paintings and sculptures become distinguished from unnamed artisans, such as stone masons, who remain typically unidentified.[20] In the Romantic era, this distinction became more entrenched as artists were garlanded with the laurels of creative genius.[21] Despite William Morris's fudging of the distinction between artist and artisan through his leadership of the Arts and Crafts movement,[22] in copyright law, at least,[23] the distinction between the things artists and artisans create is maintained.[24]

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15 Cited by Matias Masuccihttp, 'Orson Welles Quotes Collection', *Independent Society* (Blog, 5 August 2013) <http://indso.com/orson-welles-quotes>.

16 See Denis Dutton, 'Aesthetic Universals' in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (Routledge, 3rd ed, 2013) 267.

17 For example, it seems implausible that the skill demonstrated by the Palaeolithic artists of the Lascaux cave was commonplace.

18 Australia is home to the world's oldest continuous culture — the author's perspective is Eurocentric.

19 See Margot Wittkower and Rudolf Wittkower, *Born Under Saturn: The Character and Conduct of Artists: A Documented History from Antiquity to the French Revolution* (W W Norton, 1963) 42.

20 See Erin J Campbell, 'Artisans, Artists and Intellectual' (2000) 23(4) *Art History* 622, 626.

21 See generally, Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (Columbia University Press, 1994).

22 In order to accommodate the Arts and Crafts movement — notably the works of William Morris (see *George Hensher Ltd v Restawhile Upholstery (Lancs)* Ltd [1975] RPC 31) — English-heritage copyright law includes a special sub-category of 'artistic work' (work of artistic craftsmanship) that must manifest artistic quality. See *Copyright Act 1968* (Cth) s 10; *Copyright Act 1994* (NZ) s 2.

23 New Zealand's national museum Te Papa Tongawera includes furniture among its fine arts exhibitions.

24 The distinction that copyright law draws between different things can lead to ostensibly absurd results. For example, the most skilful and aesthetically pleasing traditional carving does not attract copyright protection if its design does not originate with the creator, whereas the drawings for something as

In the late nineteenth century, Impressionist and Post-Impressionist artists disrupted the state-controlled academies and salons.[25] Nevertheless, they continued to produce recognisable artworks that were soon received and celebrated as such. In contrast, Robert Hughes characterises the emergence of modern art in the early twentieth century as the 'Shock of the New'.[26] Along with other Dadaist and Cubist works, Duchamp's painting *Nude Descending a Staircase* (1912) was exhibited at New York's landmark Armory Show in 1913.[27] The social and cultural irruption of the Great War led people to create or appropriate things, and to present them as artworks when they bore no resemblance to the art of the past. Most notoriously, Duchamp (or perhaps it was his fellow, but lesser known, Dadaist Elsa von Freytag-Loringhoven) created *Fountain*, a purchased urinal altered only by the addition of the pseudonymous signature 'R Mutt'.[28] Thirteen years after the Armory Show, New York-based photographer, Edward Steichen, bought and imported a cast of Brâncuși's *Bird in Space*.

B *Tax and Customs Duty Cases*

According to Leonard DuBoff, customs tariffs, to the extent their purpose is to protect domestic firms are:[29]

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mundane as glue-packaging do. See *Henkel KgaA v Holdfast New Zealand Ltd* [2006] NZSC 102; [2007] 1 NZLR 577.

25 See 'Impressionism and Post-Impressionism', *Oxford Art Online* (Web Page, 2019) <https://www.oxfordartonline.com/page/impressionism-and-post-impressionism/impressionism-and-postimpressionism>.

26 See generally, Robert Hughes, *The Shock of the New: Art and the Century of Change* (Thames & Hudson, 1990).

27 See Tess Thackera, 'How the 1913 Armory Show Dispelled the American Belief that Good Art Had to Be Beautiful', *Artsy* (Web Page, 6 March 2018) <https://www.artsy.net/article/artsy-editorial-1913-armory-dispelled-belief-good-art-beautiful>.

28 Hughes (n 26) 66. For an image of the artefact, see 'Marcel Duchamp Fountain 1917, replica 1964', *Tate* (Web Page) <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>.

Because the urinal used for the original *Fountain* was purchased in New York, US customs officials were not presented with the even trickier question of whether *Fountain* constituted a work of art or sanitary supplies. As noted, Duchamp argued that anything an artist uses is art. This argument reaches its nadir in Piero Manzoni's art piece, *Merda d'artista* (1961). In the late 1950s, protesting against the status of the saleable art object, the late Italian-born artist, Manzoni saved his own excrement. Every day he had it canned in little tins duly signed, numbered, dated and labelled 'Merda d'artista'. A local magistrate denied that the work constituted art. See John Henry Merryman, Albert E Elsen and Stephen K Urice, *Law, Ethics and the Visual Arts* (Wolters Kluwer, 5th ed, 2007) 672–673.

29 Customs duties are also revenue-raising instruments, and, historically, an important source of revenue. See J F Rees, *A Short Fiscal and Financial History of England 1815-1918* (Methuen, 1921) 3. Since works of fine art are expected to have no practical use, they could plausibly be the target of sumptuary taxes. Under the *Tariff Act 1907* (NZ), paintings and statuary fell into the category of 'Class X – Fancy Goods, Musical Instruments, etc' and were dutiable at the usual rate of 20 percent. However, certain paintings, statuary and works of art were duty-free in terms of Schedule B. These were artefacts imported for the collections of public institutions or for public display, such as a statue for a public park. A further exemption applied to:

> … only appropriate when foreign goods compete directly with domestic items. If a foreign produced item is unique and no domestically produced substitute exists, then there appears to be no justification for taxing the article upon its importation. The imposition of a tariff upon a unique foreign good has the effect of increasing the price to domestic consumers for an otherwise unavailable article.
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> Consequently, when determining whether an item is to be given duty-free status as a work of art, customs law looks to see whether the imported piece will directly compete with [domestic] goods. Theoretically, works of art are unique to their creator and when they are not interchangeable with [domestic works of art], they are generally accorded duty-free status.[30]

Members of the World Customs Organization ('WCO'), including Australia, New Zealand, the United States and the European Union, have adopted the *International Convention on the Harmonized Commodity Description and Coding System*.[31] The European Union's *Common Custom Tariff* ('CCT')[32] therefore uses substantively the same nomenclature as the United States' *Harmonized Tariff Schedule*[33] in relation to artworks (chapter 97).[34] The European Union VAT directive in relation to imports, which provides for an effective rate for artworks as low as five per cent, is based on the CCT. Therefore, decisions from different jurisdictions on artworks in relation to different imposts are broadly relatable, although older decisions may relate to temporally and spatially particular rules.[35]

> Paintings or pictures [not statuary] or drawn by New Zealand students, within five years of the time of their departure from the colony for the purpose of undergoing a period of tuition abroad for the first time, upon evidence being produced to the satisfaction of a Collector of Customs.

30 Leonard D DuBoff, 'What Is Art – Toward a Legal Definition' (1990) 12 *Hastings Communications and Entertainment Law Journal* 303, 323. Sigrid Hemels observes:

> … artworks compete not only with each other, but also with other commodities, such as jewels, expensive cars and holidays. The consumer can spend his or her money only once. The art dealer who purchased Claes Oldenburg's work could have also purchased a work by Andy Warhol, Pablo Picasso, or Johannes Vermeer, Works of art do compete economically with each other or with other articles.

See Sigrid Hemels, 'Tax Incentives for the Art Market' in Hemels and Goto (n 13) 184.

31 UNTS 1503 (p 3) 1 January 1988.

32 Council Regulation (EEC) No 3000/80 of 28 October 1980 and Council Regulation (EEC) No 3300/81 of 16 November 1981 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journals 1980 L 315, p 1, and 1981 L 335, p 1). The compendious explanatory notes to the CCT provide no comment on 'Section XXI Works of Art, Collectors' Pieces and Antiques'. See 'Explanatory Notes to the Combined Nomenclature of the European Union (2006/C 50/01)', *European Parliament* (Report, 2006) <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/comitologie/info/2013/D026072-02/COM-AC_DI(2013)D026072-02_EN.pdf>.

33 See 'Harmonized Tariff Schedule (2019 Revision 16)', *US International Trade Commission* (Web Page, 2019) <https://hts.usitc.gov/>.

34 While some of the ECJ cases refer to differently numbered chapters, the current version of the CCT is consistent with the *International Convention on the Harmonized Commodity Description and Coding System*.

35 Daniel McClean argues that Chapter 97 of the European Union's CCT is 'derived indirectly from Article 1704' of the *Tariff Act 1922* (US). See Daniel McClean, '"I Would Prefer Not To" – The Legal Judgment of Art: The Trials of Brancusi v. United States (1928) and Haunch of Venison & Partners v. Her Majesty's

However, while WCO members must harmonise their import identifiers, subject to their World Trade Organization and free trade agreement commitments, they may set different rates of duty. Artworks are typically duty-free but the Trump Government, for example, imposed a 10 per cent tariff on imported Chinese artworks and antiquities in September 2019.[36]

This section of the article outlines key importation cases: firstly, the United States decisions that culminated in the *Brancusi* case; and secondly, more recent European Union decisions.

1 *The United States*

(a) Perry

United States v Perry[37] concerned imported stained glass windows to be installed in a church.[38] The *Tariff Act 1890* (US) para 122 provided for duty at a rate of 45 percent on 'all stained or painted window glass and stained or painted glass windows', whereas 'paintings in oil or watercolors' were dutiable at a rate of 15 percent.[39] The importer optimistically argued the windows were 'paintings *upon* glass'.[40] The court acknowledged the beauty of the artefacts but found them to be industrial or decorative in nature, rather than fine art. According to Emily Lanza, the Supreme Court identified four classes of art:

1) fine arts intended solely for ornamental purposes including oil paintings, watercolours, and marble statuary;

2) minor objects of art that are intended for ornamental purposes but are also 'susceptible of an indefinite reproduction' such as statuettes, vases, plaques, drawings and etchings;

3) objects of art that are primarily ornamental but also serve a useful purpose, such as stained glass windows, tapestries and paper hangings; and

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Revenue & Customs (2008)' (2011) 38 *Propriétés Intellectuelles* 20, 23. While he does not adduce evidence to support his claim, it is plausible. Officials' arguments across time and jurisdictions are remarkably similar.

36 Taylor Dafoe, 'The US Will Hit Chinese Art and Antiquities with an Additional 10 Percent Tariff Next Month as the Trade War Escalates', *The New York Times* (online, 15 August 2019) <https://news.artnet.com/market/chinese-art-antiquities-extra-tariff-1625869>.

37 146 US (1892).

38 See Leonard D DuBoff and Christy O King, *Art Law* (Thomson West, 4th ed, 2006) 1.

39 Emily Lanza, 'Brancusi's Bird in Space: Is it a Bird or is it Art?', *The Legal Palette* (Web Page, 20 March 2018) <https://www.thelegalpalette.com/home/2018/3/20/brancusis-bird-in-space-is-it-a-bird-or-is-it-art>.

40 Ibid (emphasis added).

4) objects primarily designed for a useful purpose but are made ornamental 'to please the eye', including ornamental clocks, carpets, gas fixtures and household furniture.[41]

Only the first category qualified for preferential treatment because works of art must be purely ornamental and must not have a practical use.[42]

(b) Olivotti

In *United States v Olivotti & Co*,[43] the customs court limited sculptures to portrayals of natural objects, chiefly the human form, represented in true proportions.[44] 'The court noted that a marble font and two marble seats, although admittedly beautiful, were not art within the meaning of the Tariff Act since they were not representations of a natural object.'[45] Crucially, 'the primary conception of these seats was to serve a useful purpose, and any artistic features were purely decorative'.[46]

(c) Brancusi

Paragraph 1704 of the *Tariff Act 1922* (US) exempted works of art from customs duty.[47] When Steichen imported *Bird in Space*, he claimed duty-free status for it. According to Thomas Hartshorne:

> Customs appraiser F. J. H. Kracke, acting on the advice of "several men high in the world of art" [decided it] was not properly a work of art and thus not entitled to duty-free entry into the country. Instead, he classified it as "a manufactured implement of bronze": and

41 Ibid.

42 See, eg, *O O Friedlaender Co v US*, 19 CCPA 198 (1931) where 'statuary' to be used as bookends were not found to be artworks. Benvenuto Cellini's *Salieri* (salt cellar), one of the most celebrated artefacts of the Renaissance, and universally recognised for its beauty, might not qualify as a work of art in terms of this definition. See discussion in *Mazer v Stein* 347 US 201 (1954). (For images and commentary on the salt cellar, see Giovanni Garcia-Fenech, 'Benvenuto Cellini and the world's most spectacular salt cellar', *Artstor* (Web Page, 6 July 2016) <https://www.artstor.org/2016/07/06/benvenuto-cellini-and-the-worlds-most-spectacular-salt-cellar/>.) Conversely, in *G Heilman Brewing Co v US* 14 CIT 614 (CIT 1990), decorated beer steins were accepted as fine art because they were chiefly used for display purposes. Cited by DuBoff and King (n 38) 6.

43 7 Ct Cust App 46.

44 See DuBoff and King (n 38) 2.

45 James J Fishman, 'The Emergence of Art Law' (1977) 26 *Cleveland State University Law Review* 481, 485 n 23.

46 Lanza (n 39).

47 For a critical analysis of the Act, see F W Taussig, 'The Tariff Act of 1922' (1922) 37(1) *Quarterly Journal of Economics* 1.

> assessed the 40 percent ad valorem duty prescribed for household and hospital utensils in metal.[48]

With financial assistance from Gertrude Vanderbilt Whitney, Steichen challenged the customs classification. The witnesses for Brâncuşi were Steichen, 'the sculptor Jacob Epstein, Forbes Watson, editor of *The Arts*, Frank Crowninshield editor of *Vanity Fair*, William Henry Fox, curator of the Brooklyn Museum of Art, and Henry McBride, art critic of the *New York Sun'*.[49] The witnesses for the government were 'Robert I. Aitken, a sculptor whose statues and monuments stood in many parks and public buildings, and Thomas H. Jones, a sculptor and teacher of sculpture at Columbia University'.[50]

In the light of precedent, Justice Waite, the presiding judge, showed a remarkable openness in accepting *Bird in Space* as a sculpture. While the author acknowledges having limited knowledge of this judge, it is, perhaps, the Armory Show and the debate and commentary that followed it that normalised the idea of modern art among informed New Yorkers. *Bird in Space* challenged the customs court to consider art differently, in particular, to relinquish the representational requirement. While the court in *Brancusi* did not specifically articulate a new definition of art, its recognition and acceptance of abstraction was a significant departure from *Olivotti*. However, the decision is not as radical as it might first appear. The artefact was accepted as a sculpture because it was intended to be used purely to please the eye: this finding entrenches the questionable distinction between fine art, and arts and crafts. It was beautiful and symmetrical in outline: this requirement entrenches conservative perceptions of art, yet much of modern art sought to challenge traditional aesthetics. It was the work of a professional sculptor:[51] this requirement also entrenches arguably unnecessary distinctions between creators of 'useless' and 'useful' artefacts.[52]

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48 Thomas L Hartshorne, 'Modernism on Trial: C. Brancusi v. United States (1928)' (1986) 20(1) *Journal of American Studies* 93, 94. The particular kitchen or hospital use to which *Bird in Space* might be put is not immediately obvious.

49 Ibid 97.

50 Ibid 99. According to the Smithsonian, 'Some of Aitken's famous works include monuments to the Navy and to President William McKinley'. See 'Robert Aitken', *SAAM* (Web Page) <https://americanart.si.edu/artist/robert-aitken-40>. Thomas Hudson Jones is best known for his frieze at the Arlington memorial for the Unknown Soldier. See 'Thomas Hudson Jones', *Society of the Honor Guard, Tomb of the Unknown Soldier* (Web Page, 10 June 2014) <https://tombguard.org/column/2014/06/thomas-hudson-jones>. Aitken and Jones were, no doubt, highly competent sculptors but also conservative practitioners, embedded in the traditions of the (military) establishment.

51 See DuBoff and King (n 38) 3. Paul Kearns, *The Legal Concept of Art* (Hart, 1998) 164–165 records that an old totem pole was assessed for duty because the sculptor was not identified.

52 Compare the constitutional promotion of 'the useful arts' in the United States: see Edward C Walterscheid, 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution' (1994) 2(1) *Journal of Intellectual Property Law* 1.

(d) Wannamaker

In *United States v Wannamaker*,[53] woollen copies of tapestries were treated as items of wool, rather than 'free fine art' because evidence was not shown that the work was done — or overseen — by an artist.[54] Following amendments to the tariff statute in 1958, emphasis was placed on the artist as a professional sculptor, with that status being indicated by art school certification, exhibition at pure fine art work shows, and critical recognition.[55] An artist was thought to work from inspiration and skill — original paintings executed solely by hand have special status; fine art does not include items of utility or those with a commercial use.[56]

2 *European Union*[57]

(a) Firma Farfalla Fleming und Partner

In *Firma Farfalla Fleming und Partner v Hauptzollampt München-West*,[58] paperweights, executed entirely by hand in limited series and signed by well-known glass work artists were denied fine art status because they were considered works of a commercial character to be judged by their constituent materials. Farfalla Flemming presented the goods for customs clearance and declared them as '[o]riginal sculptures and statuary, in any material', an exempt class of goods. However, the court found them to be dutiable 'glassware ... for indoor decoration, or similar uses'.[59] The European Court of Justice ('ECJ') applied 'the principle of the objective characteristics and qualities of a good' whereby the court, in order to identify the proper category to classify a product, seeks to identify the objective characteristics and qualities of the thing in dispute.[60] In this case, the objects had the objective characteristics and qualities of paper weights, rather than sculptures. This approach obviates reliance on experts, who might, for example, claim a *urinoir trouvé* is a sculpture.

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53 19 CCPA 229 (1931).

54 Ibid 231.

55 See DuBoff and King (n 38) 4.

56 See ibid 5.

57 For an in-depth examination of the European decisions, see Bert Demarsin, 'Qu'est-ce qu'une oeuvere d'art en droit de douane? Antholgie des manifestations perturbantes and des juges perturbés' in André Puttemans and Bert Demarsin (eds), *Les Aspects Juridiques de l'Art Contemporain* (Larcier, 2013) 84.

58 [1990] ECR 1-3387.

59 Ibid [4]–[5]. Demarsin (n 57) 109 notes that the United States also refused to treat the works of the master glass-blowers René Lalique and Henri Navarre as works of art for customs purposes.

60 See Christina Sala, 'The Definition of Art in the Customs Law' (Working Papers Series International Trade Law, Istituto Universitario di Studi Europei, 2014) 26.

(b) Raab

Ingrid Raab v Hauptzollamt Berlin-Packhof[61] concerned the importation of 36 photographs by Robert Mapplethorpe, who is widely considered to have been one of the leading artists of the late twentieth century.[62] The ECJ held:

> Original engravings, prints and lithographs … and artists' screen prints … are characterized by the personal intervention of the artist in executing the original by hand, and only the reproduction of the original may be carried out by means of a mechanical printing process. Art photographs therefore cannot be classified [as original engravings, prints and lithographs] nor may they be regarded as artists' screen prints … All photographs must be classified, regardless of whether or not they are artistic, under … a residual heading which covers all artistic printed matter not listed or referred to in any other heading ...[63]

(c) Huber

In *Volker Huber v Hauptzollamt Frankfurt am Main-Flughafen*,[64] the ECJ was required to determine whether certain prints should be considered original lithographs. The artist hand executed plates but did not sign or number the prints, which were produced by a mechanical press using a reprinting process that allowed multiple impressions to be made. The court held that the lithographs were original, notwithstanding the mechanical process and the reprinting.[65]

(d) Onnasch

In 1982, Reinhard Onnasch, a Berlin gallerist, imported from the United States *Modi. Motor Section – Giant Soft Fan*,[66] a wall relief by the American artist Claes Oldenburg. The work measures 61 cm by 87.5 cm by 31.5 cm, and is made from cardboard glued to expanded polystyrene, sprayed with black paint and oil, and attached by means of wire and synthetic resin to a wooden panel. The Museum of Modern Art ('MoMA') explains:

> Here Oldenburg has rendered a hard object in a soft material so that it sags and droops, and he has greatly inflated its size. There is humor in this transformation of a hard machine into a collapsible object, and the result has a bodily and sexual connotation.[67]

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61 C- 1/89 (13 December 1989) ('*Raab*').

62 See 'Collection Online: Robert Mapplethorpe', *Guggenheim* (Web Page, 2019) <https://www.guggenheim.org/artwork/artist/robert-mapplethorpe>.

63 *Raab* (n 61) 4423.

64 Case 291/87 (14 December 1988).

65 Compare with *Westfälischer Kunstverein v Hauptzollamt Münster* (C 23-77) [1977] ECR 1985 in which the court held that works that were not produced by the hand of the artist — even if the print run was limited and the artist signed the prints – did not qualify as duty-privileged original works.

66 See 'Claes Oldenburg *Giant Soft Fan* 1966-67', *MoMA* (Web Page, 2019) <https://www.moma.org/collection/works/82053>.

67 Ibid.

The defendant, supported by an opinion of the Zolltechnische Prüfungs und Lehranstalt [Customs Laboratory and Training College], conceded the object constituted a work of art but denied it was a sculpture because it was not made from a hard material following traditional techniques of sculpturing. The ECJ held that the identifier 'original sculptures and statuary, in any material' refers to all three-dimensional artistic productions, irrespective of the techniques and materials used.[68]

(e) Gmurzynska

In 1988, Berlin gallerist Krystyna Gmurzynska bought László Moholy-Nagy's painting *Konstruktion in Emaille I (Telefonbild)* (1923),[69] which consists of a steel plate with a fused coating of enamel-glaze colours, in the Netherlands for the sum of USD400,000 for import into Germany. The Revenue Office's classification as 'other ornaments, of base metal' meant the work was subject to the full rate of German turnover tax on imports.[70] Gmurzynska argued *Telefonbild* should be considered as a work of art that constitutes a painting executed entirely by hand within the meaning of Heading 9701, and therefore was subject to a lower rate of tax. The court agreed with Gmurzynska.[71]

(f) Haunch of Venison

Unlike the ECJ decisions, experts were called to give evidence in the *Haunch of Venison* case.[72] This involved the importation of the components of works by Don Flavin (light fittings with assembly instructions)[73] and Bill Viola (audio-electronic equipment with assembly instructions).[74] The judges visited the Tate Modern gallery to see the assembled Flavin sculpture on display. It would have been unusual for them to conclude that the

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68 *Reinhard Onnasch v Hauptzollamt Berlin-Packhof* (C-155/84) European Court of Justice <http://curia.europa.eu>.

69 See 'László Moholy-Nagy *EM 2 (Telephone Picture*) 1923', *MoMA* (Web Page, 2019) <https://www.moma.org/collection/works/78747>.

70 *Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln* (C-231/89) European Court of Justice <http://curia.europa.eu/juris/liste.jsf?language=en,T,F&num=231/89>.

71 Hemels and Goto (n 13) 184 observes that the reason the work is titled *Telefonbild* (telephone picture) is that Moholy-Nagy did not paint it himself but rather gave instructions to artisans in a sign factory by telephone.

72 *Haunch of Venison Partners Ltd v Her Majesty's Commissioners of Revenue and Customs*, London Tribunal Centre, released on 11 December 2008. For a discussion, see Pierre Valentin, 'UK: The European Commission Says It's Not Art', *Mondaq* (Web Page, 20 June 2011) <http://www.mondaq.com/uk/x/135086/Music+and+the+Arts/The+European+Commission+Says+Its+Not+Art>.

73 According to McClean (n 35) 22, the gallery only expressed an intention to import Don Flavin's *Six Alternating Cool White/Warm White Fluorescent Lights, Vertical and Centered* (1973).

74 Including Bill Viola's *Man of Sorrows* (2001) and *Catherine's Dream* (2002).

components really were just fluorescent tubes and other mundane items having seen the assembled work in a leading public gallery.[75]

A curious feature of this case was Her Majesty's Revenue and Custom's attempt 'to have its cake and eat it'. On the one hand, it purported to levy duty on the items as if they were not (components of) artworks,[76] but, on the other hand, assessed the import value as if they were assembled artworks. The tribunal found that the items were the components of sculptures to be assembled and therefore dutiable at the preferential rate. The European Commission promptly issued a regulation clarifying the CCT to exclude video-sound installations and light art installations from the definition of sculpture.[77]

(g) Melgaard

Norway charges concessional rates of VAT (*Merverdiavgift*) on imported works of art.[78] The term 'works of art' is not defined in the taxing legislation, however the Ministry of Finance may promulgate regulations on its meaning. In 2016, Norwegian customs officials retained 16 imported paintings by Bjarne Melgaard, one of the country's most prominent artists, and demanded Melgaard pay NOK 1.3 million (AUD210,000) — the full rate of tax on imported goods.[79] According to officials:

> Melgaard's paintings were not entirely produced by his own hand because the canvas is a digital portrayal (an impression on the canvas that's part of the motif of the oil painting) and can therefore not be seen as a painting according to the tariff rules.[80]

The Minister of Finance reportedly intervened to clarify the regulations to ensure the works were taxed at the concessional rate.[81]

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75 Rachel Tischler observes that that Flavin's sculptures do not stop being sculptures when the caretaker turns the electricity off at night, and, conversely, they do not start to be artworks when fully assembled and the lights turned on. See Rachel J Tischler, '"The Power to Tax Involves the Power to Destroy" How Avant-Garde Art Outstrips the Imagination of Regulators, and Why a Judicial Rubric Can Save It' (2012) 77(4) *Brooklyn Law Review* 1665, 1685.

76 The first part of HMRC's argument had some support from the decision in *Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart-West* (Case C-35/93) in which the ECJ held that nomenclature related to dissembled parts, rather than the thing they would be finally assembled into. But that case related to photocopiers, not works of art.

77 See Commission Regulation (EU) No 731/2010 of 11 August 2010, concerning the classification of certain goods in the Combined Nomenclature, OJ (L214)(2018).

78 See section 4-1(2) of the *VAT Act of 19 June 2009 No 58* [unofficial English translation] <https://www.skatteetaten.no/globalassets/bedrift-og-organisasjon/avgifter/merverdiavgift/refusjon-av-mva---avgiftsinfo/vat-act---oversatt-versjon-av-merverdiavgiftsloven-updatet-may-2014.pdf>. Since Norway is not a member of the European Union, it is not bound by the VAT Directive but, as a member of the European Economic Area, its cross-border laws and regulations are closely aligned to those of the Union.

79 Nina Berglund, 'Ministry to Liberate Melgaard's Art', *News in English.no* (Web Page, 4 November 2016) <https://www.newsinenglish.no/2016/11/04/melgaards-art-halted-at-osl>.

80 Ibid.

81 Ibid.

C *Preliminary Conclusions*

As observed by Paul Kearns:

> '[c]ourts have tended to focus on the occupation of the person producing [the art piece], the purpose for which the object is made, and, if the object is editioned, like certain sculptures or prints, the method of execution or number of pieces in the series.'[82]

Kearns adds, 'in deciding what qualifies for art for the purpose of determining tariff rates or exemption as imports, the courts have nevertheless often focused heavily on the appearance of the object'.[83]

III CUSTOMS AND TAX LAW DEFINITIONS OF ARTWORKS

This part of the article is principally about drafters' attempts to exhaustively define artworks for customs or indirect purposes.[84] The example of the *Value Added Tax Act 1994* (UK) is used to demonstrate the difficulty or, perhaps, folly of this approach. Alternative approaches are also identified.

A *Exhaustive Positive Definitions*

A remarkable example of the legislature seeking to positively identify works of art is provided by the *Value Added Tax Act 1994* (UK) ('*VATA 1994*') which was enacted in order to comply with the European Union's VAT Directive ('VAT Directive').[85] The provision of the *VATA 1994* in question relates to imported artworks and is substantively the same as the Directive albeit more prolix, as English-heritage legislation tends to be.

In summary, section 21 of the *VATA 1994*:

> 'gives the general valuation rules. Subsection 4 sets out the method for arriving at a reduced valuation, to which the 17.5 per cent VAT rate is applied, to produce an effective import VAT rate of 5 per cent. Sub-sections 5 to 6D contain definitions of the goods that qualify to be taxed on a reduced value at importation, giving an effective VAT rate of 5 per cent.'[86]

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82 Kearns (n 51) 161.

83 Ibid 162.

84 HM Revenue and Customs, 'Internal Manual: Imports' (Web Page, 2020) <https://www.gov.uk/hmrc-internal-manuals/imports/imps05200>. In jurisdictions that are not governed by the rule of law, the state itself may simply determine whether or not an artefact or a performance constitutes art. See, for example, Taylor Dafoe, '"The Government Gets to Decide Who Is an Artist": Cuban Authorities Crack Down on Dissent as the Havana Biennial Opens', *ArtNet News* (Web Page, 16 April 2019) <https://news.artnet.com/art-world/havana-biennial-cuban-government-1519024>.

85 *Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax* (OJ L 347, 11.12.2006, p 1). I am grateful to David Massey for guidance on this issue — any errors are mine alone.

86 'Valuation for import VAT: Exceptions to the Normal Rules: Permanent Imports: Works of Art, Antiques and Collectors' Items' in HM Revenue and Customs (n 84).

VATA 1994 s 21(6)(g) includes:

> (g) any enamel on copper which –
>
> (i) was executed by hand;
>
> (ii) is signed either by the person who executed it or by someone on behalf of the studio where it was executed;
>
> (iii) either is the only one made from the design in question or is comprised in a limited edition; and
>
> (iv) is not comprised in an article of jewellery or an article of a kind produced by goldsmiths or silversmiths;

Section 21(6B)(c) further provides in relation to scarcity:

> in the case of enamels on copper –
>
> (i) the edition is limited so that the number produced from the same design does not exceed eight; and
>
> (ii) each of the enamels in the edition is numbered and is signed …

Why enamels on *copper*? Enamel can be applied to any stable base, including other metals — the *Gmurzynska-Bscher* case related to enamel on steel — and stone.[87] While the VAT Directive broadly follows the World Customs Union ('WCU'), the WCU is not so specific on what constitutes a work of art — certainly, enamels on copper are not specifically identified.

Enamelling metal has a long tradition in European artistic practice, and later, Chinese art[88] but underwent a particular surge of interest and development in the late Victorian era. Alexander Fisher (1864–1936) is generally considered to have been the master practitioner and explicator of enamelling at that time. In his canonical treatise,[89] Fisher explained different techniques for applying enamel to metals, with copper, given its inexpensiveness and relative inertness, being the most common, but not unique base. Of particular note, Fisher advised that practitioners of the ancient champlevé method (an alternative to the more popular cloisonné method) should not use pure copper but rather a 16:1 ratio of copper to zinc, in other words, a form of brass. If a non-insignificant amount of zinc is added to copper, technically, the metal becomes an alloy.[90] The meaning of copper itself is, therefore, contestable and might require officials to engage in a metallurgical investigation into the exact consistency of the base of the enamel work.

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87 For a discussion of the huge variety of enamel works, see Hugh Tait, 'Enamelwork', *Encyclopædia Britannica* (Web Page, 2016) <https://www.britannica.com/art/enamelwork>.

88 'Chinese Cloisonné', *Heilbrunn Timeline of Art History* (Web Page, 2004) <https://www.metmuseum.org/toah/hd/clos/hd_clos.htm>.

89 Alexander Fisher, *The Art of Enamelling Upon Metal* (Offices of "The Studio", 1906).

90 The usual definition of brass includes a copper to zinc ratio as low as 20:1. See 'Brass', *Encyclopædia Britannica* (Web Page, 2019) <https://www.britannica.com/technology/brass-alloy>.

B *Alternative Approaches*

In Australia, the *Resale Royalty Right for Visual Artists Act 2009* (Cth)[91] provides an extensive definition of 'artwork' but empowers the relevant Minister to declare other artefacts to be artworks for the purposes of the Act through regulation.[92] In contrast, section 995.1 of the *Income Tax Assessment Act 1997* (Cth) includes a broad definition of artwork but with no possibility of Ministerial extension.[93] Australia's Cultural Gifts Program for capital gains tax purposes leaves it to public collections to decide whether something is worth collecting — acceptable objects extend far beyond artworks.[94] In England, under the Arts Council England's Acceptance in Lieu scheme, a panel of experts determines whether an object is sufficiently 'pre-eminent' to be accepted instead of monetary settlement of inheritance tax.[95] The Canadian province of Québec provides tax concessions to closely defined artists,[96] whereas Ireland's Artists Tax Exemption permits an exemption from an artist's income tax, provided the relevant works are considered by the Revenue Commissioners to have cultural or artistic merit.[97]

C *Courts*

The *George Hensher* case, a House of Lords decision, provides a remarkable example of judicial dyspraxia when engaging with artistic quality, something that must be manifest in an artisanal work before it may attract copyright protection.[98] The five Law Lords presented separate judgments, each unpersuasive in their own ways, to decide that a suite of furniture did not have artistic quality.[99] William Cornish observes 'it took pages of

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91 The resale royalty right is not a tax (i.e. not an unrequited payment to government) but may be identified as a tax by economists.

92 See *Resale Royalty Right for Visual Artists Act 2009* (Cth) s 7.

93 An 'artwork' is '(a) a painting, sculpture, drawing, engraving or photograph; or (b) a reproduction of such a thing; or (c) property of a similar description or use.'

94 Australian Government, *Cultural Gifts Program Guide: Tax Incentives for Cultural Gifts to Australia's Public Collections* (2013).

95 'Acceptance in Lieu', Arts Council England (Web Page) <www.artscouncil.org.uk/tax-incentives/acceptance-lieu>. For examples of objects deemed sufficiently pre-eminent, see 'Cultural Gifts Scheme & Acceptance in Lieu Report 2017', *Arts Council England* (Report, 2018) <www.artscouncil.org.uk/sites/default/files/download-file/AIL-CSG%20201617%20Digital%20Annual%20Report.pdf>.

96 See section 7 of *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, CQLR c S-32.01.

97 See *Taxes Consolidation Act 1997* (Ireland) s 195.

98 See *Copyright Act 1968* (Cth) s 10, definition of 'artistic work'; *Burge v Swarbrick* [2007] HCA 17 on the hull of a yacht not constituting an artistic work.

99 The quality of expert advice — as recorded in the case report, which incidentally includes an egregious spelling mistake — was patchy.

convoluted agony to say so, in essence the objects were judged to be of such tasteless designs as to be unsuited for the reception of their Lordships' stately fundaments'.[100]

The artist J C G Boggs, commenting on a judicial assessment of two artworks for copyright purposes, waspishly suggested that judges generally hold a preference for Victorian hunting prints.[101] Notwithstanding, it should be recalled that Justice Waite in *Brancusi* opened the door for recognition of abstract sculpture, and the tribunal in the *Haunch of Venison* case recognised Flavin's works as sculptures. Nevertheless, Justice Holmes's following dictum in *Bleistein v Donaldson Lithographic Co* is pertinent:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves as final judges of the worth of pictorial illustrations outside the narrowest and most obvious limits.[102]

On this point, *Bleistein* related to a copyright dispute that required the court to determine whether a poster was a substantial copy of another. That task appears more challenging than a basic importation question — is this thing a work of art that should be subject to a lower rate of duty? To this end, judges may play a common sense role for the community. For example, the state of New York provided sales tax concessions to promote the arts, including dramatic and musical arts performances. The tax administration refused to apply this concession to fees paid by customers to women to perform pole and lap dancing. While the dissenting judge was no doubt plausible in finding that freedom of expression (in its peculiar United States version) demanded neutral treatment of ballet and choreographed erotic dancing, in denying the concession, the majority almost certainly reflected common sense morality,[103] and therefore saved all branches of government from ridicule.

IV DISCUSSION

This part of the article establishes some fundamental principles for drafting taxing legislation, and then discusses those principles in relation to the problems of artworks identified so far.

A *Drafting Fundamentals*

Lon Fuller argued that legislation should manifest the following characteristics: generality; prospective operation; intelligibility and clarity; avoidance of contradictions;

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100 W R Cornish, 'Authors in Law' (1995) 58(1) *Modern Law Review* 1, 6 [fn omitted].

101 J S G Boggs, 'Who Owns This?' (1993) 68 *Chicago-Kent Law Review* 889. Honoré Daumier's caricatures of the legal fraternity might be closer to the mark. See also, Sergio Muñoz Sarmiento and Lauren van Haaften-Schick, '*Cariou v, Prince*: Toward a Theory of Aesthetic-Judicial Judgements' (2014) 1(4) *Texas A & M Law Review* 941.

102 [1903] 188 US 239 (US).

103 See 'Matter in 677 New Louden Corp v State of New York Tax Appeals Tribunal', *Justia US Law* (Web Page, 2019) <https://law.justia.com/cases/new-york/appellate-division-third-department/2011/2011-04787.html>.

avoidance of impossible demands; constancy through time; and congruence between official action and publication.[104] Despite Fuller's alternative characterisation of these rules as the 'procedural version of natural law' they are not ideological, and Herbert Hart plausibly characterised them as being 'essentially principles of good craftsmanship'.[105] Of Fuller's prescriptions, certainty in law is the quality traditionally considered the most important for taxation.[106] Indeed, there is a tendency to portray a special claim to certainty for tax laws: Adam Smith, for example, proposed that tax certainty is 'a matter of so great importance that a very considerable degree inequality … is not so near so great an evil as a very small degree of uncertainty'.[107]

Tax laws do not have any special claim to certainty. Retrospectivity, for example, is generally repugnant in any area of the law. The need for lawfulness should not provide a mask for conservatism, and, as Fuller observes: '[i]f every time a man relied on existing law in arranging his affairs, he were made secure against change in legal rules, the whole body of our law would be ossified forever'.[108] Likewise Lord Maitland, contemplating the doctrine of precedent, said: '[c]ertainty in law must not become certainty in injustice'.[109]

Oliver Wendell Holmes's characterisation of 'the law' as '[t]he prophecies of what the courts will do in fact, and nothing more pretentious' identifies the expectation of predictability that lies at the root of the rule of law.[110] For legislation, the possibility of prediction starts with the ability to understand the text. Opacity and ambiguity in legislative texts may provide both the collection agency and taxpayers with an excuse to interpret the law in their own favour.[111]

Why not hand over interpretation to experts? Roger Cotterrell observes:

> Although the law is reason, reason alone will not give mastery of it … Thus, obviously, actual knowledge of law is denied to the community. This knowledge is necessarily – by its nature – the monopoly of lawyers, who appear as the absolutely indispensable representatives of the community in stating, interpreting and applying the law.[112]

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104 Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 42.

105 Cited by Wolfgang Friedman, *Law in a Changing Society* (Penguin, 2nd ed, 1972) 502 n 5.

106 Likewise, Carl S Shoup, *Public Finance* (Aldine, 1969) 23 includes certainty as an element of equal tax treatment because it assures individuals that they will be treated equally in successive periods should the same bundle of relevant circumstances recur.

107 Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica, 1952) 362.

108 Fuller (n 104) 60.

109 Cited by R W M Dias, *Jurisprudence* (Butterworths, 4th ed, 1976) 279.

110 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461.

111 Edward Wajsbrem, 'Taxation Reform: A New Agenda for the Nineties' (1992) 21 *Australian Tax Review* 140, 144.

112 Roger Cotterrell, *The Politics of Jurisprudence* (University of Pennsylvania Press, 1989) 34.

Internal morality does not uniquely demand clarity. Transparent governance implies the drafting of legislative texts in such a way that they are readily comprehensible to ordinary taxpayers and not merely a relatively small coterie of specialists.[113]

Provided the purpose and principles of a statute are adequately and concisely formulated, tax legislation may be drafted in a more accessible style than traditionally published. John Avery Jones, for instance, argued that traditionally prolix and complex, United Kingdom tax statutes could be recast in a way that follows the simpler European Union practice of formulating principles.[114] Brevity, is not, however, the principal concern. For example, when New Zealand rewrote its income tax legislation in plain English, the redrafted text became lengthier than the existing Act because the 'simplified' legislation incorporated diagrams, flowcharts, readers' notes and lists of definitions following provisions as interpretative aids.

B *Application to Artworks*

When interviewed about the Melgaard affair, Thorbjørn Jacobsen, Chief Operations Officer at Oslo Airport observed that '[t]he general public's definition of what constitutes art does not always mesh with the definition of art in the (state) regulations', which required an artwork to be made by the artist's hands.[115]

While the decisions of the administrative officials in relation to the imported works of Brâncuşi and others may seem to be those of philistines, the author submits they are often common-sensical and likely to reflect the views of the general community. While the author is not familiar with Melgaard's works, other than online,[116] the author has seen Brâncuşi's and Flavin's works in various galleries. Brâncuşi's sculptures are arguably some of the most beautiful artworks of the twentieth century.[117] However, it is understandable that customs officials at that time might have considered Brancusi's minimalist sculptures in packing crates to be part of something else, rather than constituting sculptures as traditionally conceived. The court disputation was not between

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113 Phillipe Nonet, 'Legal Competence' in C M Campbell and Paul Wiles (eds), *Law and Society* (Martin Robertson, 1979) 268 observes that although the aim of the legal order is that everyone should be equal before the law, notwithstanding their power, social standing or political leverage, the administration of law does not work in a vacuum. Cost and ignorance are considerable barriers.

114 John Avery Jones, 'Tax Law: Rules or Principles?' (1996) 17(3) *Fiscal Studies* 63.

115 Abrams (n 7). It has been commonly observed that law and regulation cannot keep pace with avant-garde art, but this is the first time the author has seen it proposed that the general public's conception of art outstrips that of the government.

116 Melgaard's works may be likened to the neo-Expressionist work of Jean-Michel Basquiat. See Justin Wolf, 'Neo-Expressionism Movement Overview and Analysis', *TheArtStory.org* (Web Page, 2020) <https://www.theartstory.org/movement/neo-expressionism>.

117 The same cannot be said of Oldenburg's or Melgaard's works which are intended to critique and challenge traditions and orthodoxy, including aesthetics. The author would place himself in Lord Reid's presumptive five percent of the population that has some knowledge of and does care about aesthetics (see below n 119), but, whereas Brâncuşi's works appeal to the authors' taste and Oldenburg's do not, the dutiability or taxation of their different artefacts cannot be based on such subjective considerations.

common-sensical customs officials and aestheticians; it was about the ontology of art, whether a sculpture must represent nature or merely suggest it or do nothing of the sort — surely an issue that should not be left to customs officials or judges?

In *George Hensher*,[118] Lord Reid observed: 'I doubt whether ninety-five per cent of the public know about aesthetics and care even less – to refer to aesthetics would restrict [a consideration of artistic quality] to cogniscenti (sic)'.[119] This statement may appear condescending, however the opinions of non-cognoscenti on concessions to artworks are important. Tax privileges granted to artworks may have infinitesimal direct economic impacts on those who do not enjoy them, but they should be justifiable as a deviation from the principle of equal treatment.

The ECJ's approach (what is the essence of a thing?) conceals prejudices; the query is really about what the particular bench of judges thinks the thing is. We live in a time of suspicion of expertise and connoisseurship,[120] a fact that partly explains popular reception of phenomena such as fake news and anti-vaccination disinformation. Courts therefore need to tread a careful line between deferring to expert opinion and recognising commonplace perceptions, especially on matters that defy scientific best evidence, such as the nature of art.

Class 97 of the CTT has an 'other' category for paintings and similar artefacts, but no residual category of 'other artworks'. If such a category existed, officials might feel less compelled to adjudge whether an artefact fits within a strictly defined category, and to take advice. The author doubts whether any senior customs or VAT official are unaware of the Brancusi, Haunch of Venison or Melgaard controversies and would not welcome the opportunity to defer to the advice of experts.

V CONCLUSION

Presenting an archetypal academic approach to the meaning of 'artwork' in relation to customs duties and indirect taxes, Kearns observes:

> Sadly, customs arts appraisal is frequently, but perhaps ineluctably, a step behind seemingly esoteric, particularly contemporary, definitions of art, not least because of the enduringly static nature of the guiding written legal policy or statute.[121]

To reiterate, knowledge of reported customs or indirect tax decisions are only known due to a dissatisfied importer appealing to a tribunal. Perhaps, numerous avant-garde artworks have not been shared across borders due to the conservative judgement of

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118 [1976] RPC 31.

119 Ibid 50. The 'this' in the quote refers to a consideration of whether an object was a work of artistic craftsmanship.

120 See Michael W Clune, 'Judgement and Equality' (2019) 45 *Critical Inquiry* 910; Jane Kallir, 'Art Authentication is not an Exact Science', *The Art Newspaper* (online, 23 November 2018) <www.theartnewspaper.com/comment/art-authentication-is-not-an-exact-science>; Sam Rose, 'The Fear of Aesthetics in Art and Literary Theory' (2017) 48(2) *New Literary History* 223.

121 Kearns (n 51) 162.

customs officials. However, this seems unlikely — it is more likely that the customs and VAT treatment of artworks greatly coincides with broadly-held conceptions of art.

The problem faced in the *Brancusi* case has not gone away and, perhaps, never will. The judgment of a customs official, who is unlikely to be trained in aesthetics, on whether an imported article is an artwork can be expected to provide a common-sensical perspective to the issue. Copyright law has not proved capable of accommodating avant-garde creations, such as Duchamp's *Fountain*; why should we expect tax and customs duty law to do so? Indeed, had customs officials been presented with an item of sanitary equipment with what would appear to be a graffito, but described in a consignment as an artwork, they would have been — and would still be — right to reject such a radical proposition.

Maurizio Cattelan, a prankster-artist, is noted for his asinine works, such as *America* (2016), a gold-plated, functioning toilet that was exhibited at the Guggenheim in New York but stolen from Blenheim Palace, Oxfordshire, and presumably (and mercifully) melted for its scrap value.[122] Cattelan's *Comedian* (2019) consists of a banana duct taped to a gallery wall. Interestingly, when another prankster-artist ate the banana, a substitute was exhibited in its place. If a customs official were to refuse to recognise a banana, a piece of duct tape, and instructions on how to adhere the banana, using the duct tape, to a gallery wall, as an artwork, they should have the full support of everyone, except admirers of the Emperor's new clothes. Cattelan is, of course, a provocateur who reasonably asks if *this* thing is art, why not *that* thing? Perhaps with regard to his works, a customs official or judge is better placed to answer that question than the trustees of the gallery who paid USD120,000 for a 'limited edition' of *Comedian*.[123]

REFERENCES

A *Articles/Books/Reports*

Boggs, J S G, 'Who Owns This?' (1993) 68 *Chicago-Kent Law Review* 889

Campbell, Erin J, 'Artisans, Artists and Intellectual' (2000) 23(4) *Art History* 622

Clune, Michael W, 'Judgement and Equality' (2019) 45 *Critical Inquiry* 910

Cornish, W R, 'Authors in Law' (1995) 58(1) *Modern Law Review* 1

Cotterrell, Roger, *The Politics of Jurisprudence* (University of Pennsylvania Press, 1989)

Culver, Stuart, 'Whistler v. Ruskin: The Courts, the Public and Modern Art' in Richard Burt (ed), *Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere* (University of Minnesota Press, 1994)

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122 See 'Maurizio Cattelan's Solid Gold Toilet was Stolen from a British Palace', *Artsy* (Web Page, 16 September 2019) <https://www.artsy.net/news/artsy-editorial-maurizio-cattelans-solid-gold-toilet-stolen-british-palace>.

123 See Graham Russell, 'Banana Artwork that Fetched $120,000 is Eaten by "Hungry" Artist', *The Guardian* (online, 8 December 2019) <https://www.theguardian.com/artanddesign/2019/dec/08/banana-artwork-that-fetched-120000-is-eaten-by-hungry-artist>.

Bert Demarsin, 'Qu'est-ce qu'une oeuvere d'art en droit de douane? Antholgie des manifestations perturbantes and des juges perturbés' in André Puttemans and Bert Demarsin (eds), *Les Aspects Juridiques de l'Art Contemporain* (Larcier, 2013)

Dias, R W M, *Jurisprudence* (Butterworths, 4th ed, 1976)

DuBoff, Leonard D, 'What Is Art – Toward a Legal Definition' (1990) 12 *Hastings Communications and Entertainment Law Journal* 303

DuBoff, Leonard D and Christy O King, *Art Law* (Thomson West, 4th ed, 2006)

Dutton, Denis, 'Aesthetic Universals' in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (Routledge, 3rd ed, 2013)

Fichner-Rathus, Lois, *Understanding Art* (Cengage Learning, 2012)

Fisher, Alexander, *The Art of Enamelling Upon Metal* (Offices of "The Studio", 1906)

Fishman, James J, 'The Emergence of Art Law' (1977) 26 *Cleveland State University Law Review* 481

Friedman, Wolfgang, *Law in a Changing Society* (Penguin, 2nd ed, 1972)

Fuller, Lon L, *The Morality of Law* (Yale University Press, rev ed, 1969)

Goto, Kazuko, 'Why Do Governments Financially Support the Creative Industries' in Sigrid Hemels and Kazuko Goto (eds), *Tax Incentives for the Creative Industries* (Springer, 2017)

Hartshorne, Thomas L, 'Modernism on Trial: C. Brancusi v. United States (1928)' (1986) 20(1) *Journal of American Studies* 93

Hemels, Sigrid, 'Tax Incentives for the Art Market' in in Sigrid Hemels and Kazuko Goto (eds), *Tax Incentives for the Creative Industries* (Springer, 2017)

Holmes, Oliver Wendell, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457

Hughes, Robert, *The Shock of the New: Art and the Century of Change* (Thames & Hudson, 1990)

Jones, John Avery, 'Tax Law: Rules or Principles?' (1996) 17(3) *Fiscal Studies* 63

Kearns, Paul, *The Legal Concept of Art* (Hart, 1998)

Markellou, Marina P, 'Rejecting the Works of Dan Flavin and Bill Viola: Revisiting the Boundaries of Copyright Protection for Post-Modern Art' (2012) 2(2) *Queen Mary Journal of Intellectual Property* 175

McClean, Daniel and Armen Avenessian, 'Trials of the Title: The Trials of Brancusi and Veronese' in Daniel McClean (ed), *The Trials of Art* (Ridinghouse, 2007)

McClean, Daniel, '"I Would Prefer Not To" – The Legal Judgment of Art: The Trials of Brancusi v. United States (1928) and Haunch of Venison & Partners v. Her Majesty's Revenue & Customs (2008)' (2011) 38 *Propriétés Intellectuelles* 20

Merryman, John Henry, Albert E Elsen and Stephen K Urice, *Law, Ethics and the Visual Arts* (Wolters Kluwer, 5th ed, 2007)

Muñoz Sarmiento, Sergio and Lauren van Haaften-Schick, '*Cariou v, Prince*: Toward a Theory of Aesthetic-Judicial Judgements' (2014) 1(4) *Texas A & M Law Review* 941

Phillipe Nonet, 'Legal Competence' in C M Campbell and Paul Wiles (eds), *Law and Society* (Martin Robertson, 1979)

Rees, J F, *A Short Fiscal and Financial History of England 1815-1918* (Methuen, 1921)

Rose, Sam, 'The Fear of Aesthetics in Art and Literary Theory' (2017) 48(2) *New Literary History* 223

Segal, Joes, *Art and Politics: Between Purity and Propaganda* (Amsterdam University Press, 2016)

Shoup, Carl S, *Public Finance* (Aldine, 1969)

Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica, 1952)

Taussig, F W, 'The Tariff Act of 1922' (1922) 37(1) *Quarterly Journal of Economics* 1

Tischler, Rachel J, '"The Power to Tax Involves the Power to Destroy" How Avant-Garde Art Outstrips the Imagination of Regulators, and Why a Judicial Rubric Can Save It' (2012) 77(4) *Brooklyn Law Review* 1665

Wajsbrem, Edward, 'Taxation Reform: A New Agenda for the Nineties' (1992) 21 *Australian Tax Review* 140

Walterscheid, Edward C, 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution' (1994) 2(1) *Journal of Intellectual Property Law* 1

Wittkower, Margot and Rudolf Wittkower, *Born Under Saturn – The Character and Conduct of Artists: A Documented History from Antiquity to the French Revolution* (W W Norton, 1963)

Wollheim, Richard, *Art and Its Objects* (Cambridge University Press, 2nd ed, 1980)

Woodmansee, Martha, *The Author, Art, and the Market: Rereading the History of Aesthetics* (Columbia University Press, 1994)

B *Cases*

Bleistein v Donaldson Lithographic Co [1903] 188 US 239 (US)

Brancusi v United States (1928) US Customs Court 3rd Div, N.209109-G

Burge v Swarbrick [2007] HCA 17

Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart-West (Case C-35/93)

Firma Farfalla Fleming und Partner v Hauptzollampt München-West [1990] ECR 1-3387

George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd [1975] RPC 31

G Heilman Brewing Co v US 14 CIT 614 (CIT 1990)

Haunch of Venison Partners Ltd v Her Majesty's Commissioners of Revenue and Customs, London Tribunal Centre, released on 11 December 2008

Henkel KgaA v Holdfast New Zealand Ltd [2006] NZSC 102; [2007] 1 NZLR 577

Ingrid Raab v Hauptzollamt Berlin-Packhof C- 1/89 (13 December 1989)

Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln (C-231/89) European Court of Justice <http://curia.europa.eu/juris/liste.jsf?language=en,T,F&num=231/89>

Mazer v Stein 347 US 201 (1954)

O O Friedlaender Co v US, 19 CCPA 198 (1931)

Reinhard Onnasch v Hauptzollamt Berlin-Packhof (C-155/84) European Court of Justice <http://curia.europa.eu>

United States v Olivotti & Co 7 Ct Cust App 46

United States v Perry 146 US (1892)

United States v Wannamaker 19 CCPA 229 (1931)

Volker Huber v Hauptzollamt Frankfurt am Main-Flughafen Case 291/87 (14 December 1988)

Westfälischer Kunstverein v Hauptzollamt Münster (C 23-77) [1977] ECR 1985

C *Legislation*

Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, CQLR c S-32.01

Commission Regulation (EU) No 731/2010 of 11 August 2010

Copyright Act 1968 (Cth)

Copyright Act 1994 (NZ)

Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax (OJ L 347, 11.12.2006, p 1)

Resale Royalty Right for Visual Artists Act 2009 (Cth)

Tariff Act 1907 (NZ)

Tariff Act 1922 (US)

Tariff Act 1890 (US)

Taxes Consolidation Act 1997 (Ireland)

VAT Act of 19 June 2009 No 58 (Norway)

Value Added Tax Act 1994 (UK)

D *Treaties*

Common Custom Tariff, Council Regulation (EEC) No 3000/80 of 28 October 1980 and Council Regulation (EEC) No 3300/81 of 16 November 1981 amending

Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journals 1980 L 315, p 1, and 1981 L 335, p 1)

International Convention on the Harmonized Commodity Description and Coding System UNTS 1503 (p 3) 1 January 1988

E *Other*

Abrams, Amah-Rose, 'Bjarne Melgaard's Brush with Customs Officials Helps Change Outmoded Laws in Norway', *ArtNet News* (Web Page, 18 November 2016) <https://news.artnet.com/art-world/bjarne-melgaard-norway-customs-regulations-752051>

'Acceptance in Lieu', Arts Council England (Web Page) <www.artscouncil.org.uk/tax-incentives/acceptance-lieu>

Australian Government, *Cultural Gifts Program Guide: Tax Incentives for Cultural Gifts to Australia's Public Collections* (2013)

Berglund, Nina, 'Ministry to liberate Melgaard's art', *News in English.no* (Web Page, 4 November 2016) <https://www.newsinenglish.no/2016/11/04/melgaards-art-halted-at-osl>

'Brass', *Encyclopædia Britannica* (Web Page, 2019) <https://www.britannica.com/technology/brass-alloy>

'Chinese Cloisonné', *Heilbrunn Timeline of Art History* (Web Page, 2004) <https://www.metmuseum.org/toah/hd/clos/hd_clos.htm>

'Claes Oldenburg *Giant Soft Fan* 1966-67', *MoMA* (Web Page, 2019) <https://www.moma.org/collection/works/82053>

'Collection Online: Robert Mapplethorpe', *Guggenheim* (Web Page, 2019) <https://www.guggenheim.org/artwork/artist/robert-mapplethorpe>

'Constantin Brancusi, *Bird in Space*, c. 1941', *MoMA* (Web Page) <https://www.moma.org/collection/works/81503>

'Cultural Gifts Scheme & Acceptance in Lieu Report 2017', *Arts Council England* (Report, 2018) <www.artscouncil.org.uk/sites/default/files/download-file/AIL-CSG%20201617%20Digital%20Annual%20Report.pdf>

Dafoe, Taylor, '"The Government Gets to Decide Who Is an Artist": Cuban Authorities Crack Down on Dissent as the Havana Biennial Opens', *ArtNet News* (Web Page, 16 April 2019) <https://news.artnet.com/art-world/havana-biennial-cuban-government-1519024>

Dafoe, Taylor, 'The US Will Hit Chinese Art and Antiquities with an Additional 10 Percent Tariff Next Month as the Trade War Escalates', *The New York Times* (online, 15 August 2019) <https://news.artnet.com/market/chinese-art-antiquities-extra-tariff-1625869>

'Explanatory Notes to the Combined Nomenclature of the European Union (2006/C 50/01)', *European Parliament* (Report, 2006)

<http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/comitologie/info/2013/D026072-02/COM-AC_DI(2013)D026072-02_EN.pdf>

Garcia-Fenech, Giovanni, 'Benvenuto Cellini and the world's most spectacular salt cellar', *Artstor* (Web Page, 6 July 2016) <https://www.artstor.org/2016/07/06/benvenuto-cellini-and-the-worlds-most-spectacular-salt-cellar/>

'Harmonized Tariff Schedule (2019 Revision 16)', *US International Trade Commission* (Web Page, 2019) <https://hts.usitc.gov/>

HM Revenue and Customs, 'Internal Manual: Imports' (Web Page, 2020) <https://www.gov.uk/hmrc-internal-manuals/imports/imps05200>

'Impressionism and Post-Impressionism', *Oxford Art Online* (Web Page, 2019) <https://www.oxfordartonline.com/page/impressionism-and-post-impressionism/impressionism-and-postimpressionism>

Kallir, Jane, 'Art Authentication is not an Exact Science', *The Art Newspaper* (online, 23 November 2018) <www.theartnewspaper.com/comment/art-authentication-is-not-an-exact-science>

Lanza, Emily, 'Brancusi's Bird in Space: Is it a Bird or is it Art?', *The Legal Palette* (Web Page, 20 March 2018) <https://www.thelegalpalette.com/home/2018/3/20/brancusis-bird-in-space-is-it-a-bird-or-is-it-art>

'László Moholy-Nagy *EM 2 (Telephone Picture*) 1923', *MoMA* (Web Page, 2019) <https://www.moma.org/collection/works/78747>

'Marcel Duchamp Fountain 1917, replica 1964', *Tate* (Web Page) <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>

Masuccihttp, Matias, 'Orson Welles Quotes Collection', *Independent Society* (Blog, 5 August 2013) <http://indso.com/orson-welles-quotes>

'Matter in 677 New Louden Corp v State of New York Tax Appeals Tribunal', *Justia US Law* (Web Page, 2019) <https://law.justia.com/cases/new-york/appellate-division-third-department/2011/2011-04787.html>

'Maurizio Cattelan's Solid Gold Toilet was Stolen from a British Palace', *Artsy* (Web Page, 16 September 2019) <https://www.artsy.net/news/artsy-editorial-maurizio-cattelans-solid-gold-toilet-stolen-british-palace>

'Robert Aitken', *SAAM* (Web Page) <https://americanart.si.edu/artist/robert-aitken-40>

Russell, Graham, 'Banana Artwork that Fetched $120,000 is Eaten by "Hungry" Artist', *The Guardian* (online, 8 December 2019) <https://www.theguardian.com/artanddesign/2019/dec/08/banana-artwork-that-fetched-120000-is-eaten-by-hungry-artist>

Sala, Christina, 'The Definition of Art in the Customs Law' (Working Papers Series International Trade Law, Istituto Universitario di Studi Europei, 2014)

Tait, Hugh, 'Enamelwork', *Encyclopædia Britannica* (Web Page, 2016) <https://www.britannica.com/art/enamelwork>

Thackera, Tess, 'How the 1913 Armory Show Dispelled the American Belief that Good Art Had to Be Beautiful', *Artsy* (Web Page, 6 March 2018) <https://www.artsy.net/article/artsy-editorial-1913-armory-dispelled-belief-good-art-beautiful>

'Thomas Hudson Jones', *Society of the Honor Guard, Tomb of the Unknown Soldier* (Web Page, 10 June 2014) <https://tombguard.org/column/2014/06/thomas-hudson-jones>

Valentin, Pierre, 'UK: The European Commission Says It's Not Art', *Mondaq* (Web Page, 20 June 2011) <http://www.mondaq.com/uk/x/135086/Music+and+the+Arts/The+European+Commission+Says+Its+Not+Art>

Wolf, Justin, 'Neo-Expressionism Movement Overview and Analysis', *TheArtStory.org* (Web Page, 2020) <https://www.theartstory.org/movement/neo-expressionism>