Art’s elusive nature fights with courts’ needs to define a work of art to create functioning laws that address it. Technology, culture, and society constantly evolve and so does art and its numerous expressive forms in response to these changes. Unfortunately, laws do not change as quickly to accommodate these developments as art does. Customs laws in the U.S. and Europe provide the clearest examples of the difficulties in defining art and the problems these definitions can have for untraditional artwork.

In 1928, a landmark customs law case concerning art’s precise description took place in the United States. Constantin Brancusi, a Romanian-born French artist, traveled from France to New York City to show his abstract sculptures at the avant-garde Brummer Gallery. Gerstenblith, *Art, Cultural Heritage, and the Law* (Durham, North Carolina: Carolina Academic Press, 2nd ed, 2008), p 10-11. Brancusi began to make headlines at this time for creating a novel art form that depicted the essence of his subject instead of an exact likeness of a subject’s exterior appearance. This new type of art fell under the umbrella name “Modern Art.” At this time, art professionals and the public were accustomed to art that imitated nature.

Consequently, U.S. customs officials declared Brancusi’s sculpture titled *Bird in Space* (also known as *Bird in Flight*) not art according to customs law under the 1922 Tariff Act. *Id.* at 11. The law stated that only representational art or art that imitates nature in size and appearance falls under the “fine art” category exempt from an import duty. Merryman, et al., eds, *Law, Ethics and the Visual Arts* (The Netherlands: Kluwer Law International, 5th ed, 2007), p 674. Brancusi’s sculpture did not resemble a bird as its title suggested. It looked like an extenuated, oblong piece of polished golden bronze metal, 54 inches tall, attached to a base imitating no recognizable animal whatsoever. Customs officials declared the sculpture a “manufacture of metal” falling under “kitchen utensils and hospital equipment” subject to a 40% tax of the sale price making the import duty $600. *Id.* at 674; Gerstenblith, *supra*, at 11.

Infuriated with the customs officials’ decision, Brancusi and his supporters filed an appeal with the Customs Court. In *Brancusi v United States*, T.D. 43063, 54 Treas. Dec. 428, the Court weighed the artistic merits of the sculpture to decide whether the work “felt” like a piece of art that possibly resembled a bird. After hearing art experts’ testimonies, the Court decided that the present test for determining what constituted art was outdated according to current trends that validated abstract art. Merryman, *supra*, at 674. The Court, therefore, declared Brancusi’s *Bird in Space* a duty-free artwork and concluded that:

> 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 fact of their existence and their influence upon the art world as recognized by the courts must be considered. *Id.*

The *Brancusi* case demonstrates how the law sometimes holds onto outdated norms, like naturalistic art, yet is capable of adjusting to new cultural trends under the right circumstances. While the early twentieth-century U.S. Customs Court’s decision embraced the new Modern Art, twenty-first-century European courts have differing views on untraditional art. In 2006, the British gallery called Haunch of Venison imported six, disassembled video art installations and one colored light installation by American artists Bill Viola and Dan Flavin, respectively, into the UK for an exhibition. Daniel McClean, *Legal...*
Drama, Frieze, <http://blog.frieze.com/legal_drama/> (accessed February 16, 2014). The installations, as a whole, function as sensory experiences that absorb viewers into the artworks. To do this, the artists carefully choose their materials to produce a specific experience. Both art forms have been around since the 1960s and legitimized as art in art journals, art history books, art museums, and so forth.

Despite its legitimate status, the United Kingdom’s Her Majesty’s Revenue and Customs (HMRC) declared that the works were not art. Id. Instead, they were “projectors” and “light fittings” that fell under the “electrical devices” category under the European Union’s (EU) customs law. Id. The ruling was overturned in the UK’s VAT and Duties Tribunal in 2008. Id. The Tribunal declared that the installations fell under the “sculptures” category allowing the works a low 5% VAT. Id. EU customs law has no category for light and video installation art or art in general. Id.

The European Commission (EC) overturned the ruling in 2008 declaring that the art works were not sculptures when disassembled. McClean, supra. They were “projectors” and “light fitting.” Id. For example, the EC reasoned that Flavin’s light installation was only art when the colored florescent light bulbs were turned on. Georgina Adam, Flavin and Viola Light Works Ruled “Not Art,” The Art Newspaper, <http://www.theartnewspaper.com/articles/Flavin-and-Viola-light-works-ruled-not-art”> (accessed February 16, 2014). One could argue that the artwork is latent in the unlit light bulbs and active when the light bulbs are on. Without the light bulbs, the art would not exist. Subsequently, Bill Viola’s video installations totaled approximately $60,000 in import taxes with the 15% VAT. Id; McClean, supra. The EC’s narrow definition of art demonstrates customs law’s potential to prevent art from crossing borders through high monetary prohibitions.

In both court cases, the artworks’ untraditional materials and artistic expressions were questionable as art under outdated legal definitions. While Brancusi expanded art’s definition to include new abstract art, the EC disallowed untraditional art with its literal interpretation of the artworks’ materials. As the twenty-first-century progresses, hopefully the courts, worldwide, will consider the wider, serious implications their role in defining art potentially has on the collective world culture.

More information and samples of Bill Viola’s work are on the J. Paul Getty Trust’s website: http://www.getty.edu/art/exhibitions/viola/index.html

Dan Flavin’s works are on the The Los Angeles County Museum of Art’s website: http://www.lacma.org/flavin/index.html

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