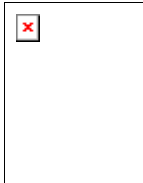
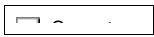


Legal Affairs



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**An Odd Bird**

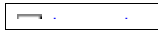
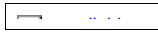


In 1927, a Brancusi sculpture landed at the center of a heated legal battle. Stéphanie Giry on the trial that redefined the meaning of art.

OPTIONS  
SEARCH

By Stéphanie Giry

After a weeklong journey from France, crates of sculptures by Constantin Brancusi arrived in New York harbor on the steamship *Paris*, escorted by the artist Marcel Duchamp. It was October 1926 and the sculptures were to be exhibited in the city at the avant-garde Brummer Gallery. United States Customs officials opened the crates and uncovered 20 mysterious disks, eggs, and flame-like forms of carved wood, polished metal, or smooth marble. One work in particular left them dumbfounded: a thin, 4 1/4-foot-tall piece of shiny yellow bronze with a gently tapering bulge called *Bird in Space*. It didn't look like a bird to the officials, so they refused to exempt it from customs duties as a work of art. They imposed the standard tariff for manufactured objects of metal: 40 percent of the sale price, or \$240 (about \$2,400 in today's dollars).



Duchamp was indignant, as were Brancusi, already in New York to prepare for the Brummer show, and Edward Steichen, the photographer and Brancusi admirer who had bought the *Bird* and expected to take possession of it after the exhibit. News of the customs decision quickly made headlines. The Romanian-born Brancusi was known in New York: He had made a name for himself at the Armory Show of 1913, where his daring minimalist pieces had caused a small scandal and won him admirers among well-known collectors. Now articles in *Art News* and several newspapers took turns attacking Brancusi's "meaningless sculptures" or defending his visionary simplicity.

Under pressure, the customs office agreed to reconsider its decision. In the meantime, it released *Bird in Space* and other sculptures, on bond and under the classification "Kitchen Utensils and Hospital Supplies," so they could be exhibited at the Brummer Gallery and then at the Arts Club in Chicago.

Both shows were successes, but in February 1927 the federal customs appraiser F.J.H. Kracke confirmed his office's initial finding that any sculptures Brancusi sold in the United States, like Steichen's *Bird*, would be subject to duty. In an interview with the *New York Evening Post*, Kracke explained his ruling: "Several men, high in the art world were asked to express their opinions for the Government.... One of them told us, 'If that's art, hereafter I'm a bricklayer.' Another said, 'Dots and dashes are as artistic as Brancusi's work.' In general, it was their opinion that Brancusi left too much to the imagination."

The next month, Steichen filed *Brancusi v. United States* to appeal customs' decision. Abstract Art was now on trial.

An impressive roster of luminaries from the New York art scene was gathered before judges George Young and Byron Waite when the trial opened in October 1927. Brancusi, who was born a peasant and disliked publicity, wasn't there, having retreated to his studio in Paris. The case had become such a "brouhaha," in his view, that he preferred to entrust it to Steichen and

his lawyers, Maurice Speiser, an art lover who took on the case for free, and Charles Lane, the personal lawyer of Gertrude Vanderbilt Whitney, who later helped set up the Whitney Museum of American Art.

Six influential figures testified for Brancusi: Steichen, who was an established photographer; the sculptor Jacob Epstein; Forbes Watson, the editor of the review *The Arts*; Frank Crowninshield, the editor of *Vanity Fair*; William Henry Fox, the director of the Brooklyn Museum of Art; and the art critic Henry McBride. The witnesses for the government, the sculptors Robert Aitken and Thomas Jones, now long forgotten, enjoyed great academic reputations at the time. Judge Young was new to the Customs Court. The 75-year-old Waite had been serving on it and its earlier incarnation, the Board of General Appraisers, for 25 years.

Also present in the courtroom as Exhibit 1 was the *Bird*, which sat on a table, shimmering and soaring toward the ceiling while the lawyers debated whether it was an "original sculpture" or a metal "article or ware not specially provided for" under the 1922 Tariff Act. For the *Bird* to enter the country duty-free under the act, Steichen's lawyers had to prove that Brancusi was a professional sculptor; that the *Bird* was a work of art; that it was original; and that it had no practical purpose.

By 1927 and after four one-man shows in New York, there was little question that the 51-year-old Brancusi was recognized as a professional sculptor—controversial perhaps, but definitely well-known. There was also little question that the *Bird* had no utility, even though the customs office had released it under the classification "Kitchen Utensil."

But because Brancusi had shown four other bird sculptures like Steichen's at the Brummer show, it wasn't clear whether Steichen's was the only one of its kind. And it was far from clear whether the *Bird* could be called art, because it looked like nothing anyone had ever seen before.

During the hearing, Judges Young and Waite placed great emphasis on the *Bird's* title. The Tariff Act didn't require that sculptures be realistic, but under a 1916 Customs Court decision called *United States v. Olivotti* sculptures qualified as art works only if they were "chisel[ed]" or "carve[d]" "imitations of natural objects," chiefly the human form representing such objects "in their true proportions." So the judges pressed Steichen:

**Waite:** What do you call this?

**Steichen:** I use the same term the sculptor did, oiseau, a bird.

**Waite:** What makes you call it a bird, does it look like a bird to you?

**Steichen:** It does not look like a bird but I feel that it is a bird, it is characterized by the artist as a bird.

**Waite:** Simply because he called it a bird does that make it a bird to you?

**Steichen:** Yes, your honor.

**Waite:** If you would see it on the street you never would think of calling it a bird, would you?

[**Steichen:** Silence]

**Young:** If you saw it in the forest you would not take a shot at it?

**Steichen:** No, your honor.

Asking witnesses whether the *Bird* was a bird smacked of the ridiculous to some of the newspapers that covered the trial. The *New York Mirror* ran a picture of the sculpture with the caption: "If it's a Bird, shoot it!" An article in the Warren, Pa., *Times*, entitled "Uncle Sam Can't See It!" mocked the court for following the *Olivotti* "true proportions" test because under that standard "the most perfect work of art is one of the plaster feet that chiropodists use to demonstrate corn and bunion plasters."

That line of questioning also must have seemed absurd to Brancusi, who had once sculpted convincing body parts but had long since decided that his art lay elsewhere. In 1898, at 22, after a few art classes and an apprenticeship with a local cabinetmaker in Pestisani, his rural hometown, Brancusi entered the national art academy in Bucharest. He won several awards for his anatomical sculptures, including the *Skinned Man* (1900-1902), a life-size bronze of a

man's muscular structure so realistic that the Romanian Ministry of Education bought it to display in medical schools.

When he was 26, according to legend, Brancusi set out on foot on the 1,200-mile journey to Paris; however he got there, in 1904 he enrolled at the prestigious école des Beaux Arts. The decade that followed was marked for him by poverty, hard work, and eventually a place in the avant-garde community among Duchamp, Ezra Pound, Amedeo Modigliani, and Erik Satie, who would become his friends and transforming influences. At an exhibit in Paris in 1906, Auguste Rodin, then the towering figure in sculpture, spotted one of Brancusi's pieces and invited him to work in his studio. Brancusi declined because he believed "nothing grows well in the shadow of a big tree."

Instead, he developed quickly working on his own. By 1908, he had decided to stop representing the human form. "The decline of sculpture started with Michelangelo," he once told reporters. "How could a person sleep in a room next to his *Moses*? Michelangelo's sculpture is nothing but muscle, beefsteak, beefsteak run amok." That year he finished *The Kiss*, a boxy stone sculpture of an embrace, still recognizably human but stylized and enigmatic. It was a commentary on Rodin's sensual 1881-82 sculpture by the same name, which represents a couple wrapped in a kiss. It was also one of Brancusi's first moves away from representational sculpture toward the abstract, purified lines that became his signature.

"In art, one does not aim for simplicity," Brancusi liked to say. "One achieves it unintentionally as one gets closer to the real meaning of things." He spent the following 50 years looking for that meaning, 40 of them in two studios on impasse Ronsin, in the 15th arrondissement in Paris, where he lived alone with his sculptures and his white Spitz dog. A short, sinewy man with a grey-white beard, Brancusi at work in his studio was said to look like a peasant cultivating fields, growing sculptures out of wood, metal, and stone.

At a time when many artists claimed affiliations with movements that were breaking away from traditional figurative art, Brancusi belonged to none. He was sometimes called a Futurist, but he fit no category neatly, and his simple, sleek forms eluded many observers, and not only old-school classicists. After the 1913 Armory Show, critics called *Mlle Pogany*, a sculpture of a woman's head, "a hard-boiled egg balanced on a cube of sugar." In 1920, at the Salon des Indépendants in Paris, Brancusi showed *Princess X*, a young woman's bust with the neck craned and curved and the face's features rubbed out. To Brancusi, it was the portrait of a high-society lady, but to those who were searching for the piece's likeness in nature it looked like a penis. The police thought it was indecent and removed it from the show. In October 1926, at a fund-raiser for the French government, Brancusi's *Newborn*, a delicately carved sculpture in the shape of an egg, was auctioned to the accompaniment of hissing by a group of Surrealists, including the author André Breton and the poet Jacques Prévert, who shouted "Down with Brancusi!"

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

But to Thomas Jones, a professor at Columbia who testified for the customs office, the *Bird* was "too abstract and a misuse of the form of sculpture." Robert Aitken, the government's other witness, said that art should "arouse an unusual emotional reaction" and "[stir] the esthetics, the sense of beauty." Clearly the *Bird* hadn't stirred him, but Aitken proved more stubborn than articulate in explaining why not:

**Speiser:** Now, Mr. Aitken would you mind stating why this (Exhibit 1) is not a work of art?

**Aitken:** First of all I might say it has no beauty.

**Speiser:** In other words, it aroused no aesthetic emotional reaction in you?

**Aitken:** Quite no.

**Speiser:** You would limit your answer exclusively to the fact that so far as you are concerned it does not arouse any aesthetic emotional reaction?

**Aitken:** Well, it is not a work of art to me.

**Speiser:** That is the sole reason you assign for it?

**Aitken:** It is not a work of art to me.

The trial's other vexing question was whether the *Bird* was an original piece. Judge Waite pressed the issue, apparently believing that Brancusi's various birds, including the five displayed at the Brummer Gallery, were identical casts or copies. In a letter to Duchamp, Brancusi wrote that the customs officers had made the same mistake when they denied his sculptures free entry into the United States: "Customs labors under the delusion that all of the *Birds* I showed in New York are all the same and that only their titles differ. To put an end to this misconception we would have to exhibit them all together in public—only then will they see the mistake [they made]. Then they'll realize that it's the outgrowth of legitimate work, that my purpose was not to turn out mass-produced goods for a profit."

Brancusi's birds weren't duplicates but variations on a single theme. He had started working on the bird series in 1910 with a bronze sculpture of *Maiastra*, a magical bird from a Romanian folk tale. At first Brancusi gave his birds beaks, feet, and bulging breasts, but over the next decade, he refined the form into the sleek *Bird in Space*, which he continued to develop until the 1940s.

Every work was unique and made of a different material, with different proportions and a different harmony. Brancusi had carved variations of the *Bird* out of white, yellow, and black marble and bronze of varying composition, each time coaxing the stone or the metal to reveal something new about the form. As Brancusi explained, all of those pieces were part of the same search: "All my life I've been looking for one thing, the essence of flight."

To get this point across to the court, it took Steichen testifying that he knew Brancusi had been working on the concept of the *Bird* for 20 years, that he had seen the sculptor work on this particular version of it in his studio in Paris, and that there was no other "in existence in bronze of that shape and size." It also took Brancusi describing the painstaking method he used to make Steichen's *Bird*. In a sworn affidavit he delivered to the American Consulate, he explained:

I conceived it to be created in bronze and I made a plaster model of it. This I gave to the founder, together with the formula for the bronze alloy and other necessary indications. When the roughcast was delivered to me, I had to stop up the air holes and the core hole, to correct the various defects, and to polish the bronze with files and very fine emery. All this I did myself, by hand; this artistic finishing takes a very long time and is equivalent to beginning the whole work over again. I did not allow anybody else to do any of this finishing work, as the subject of the bronze was my own special creation and nobody but myself could have carried it out to my satisfaction.

That testimony established that the *Bird* was original, but it didn't convince everyone that it was art. Marcus Higginbotham, an attorney representing Customs, conceded that Brancusi was "a wonderful polisher of bronze." On the other hand, that didn't make him an artist.

The court's sensibility favored Brancusi. In its decision of November 1928, drafted by Judge Waite, the court held:

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

Judge Waite's decision was seen as a victory not only for Brancusi but also for avant-garde art, because it dismissed the *Olivotti* requirement and recognized the importance of a new school that "portray[ed] abstract ideas rather than ... imitate natural objects." "Whether or not we are in sympathy with these newer ideas and the schools which represent them," the court said, "we think the facts of their existence and their influence upon the art world as recognized by the courts must be considered."

Speiser immediately congratulated Brancusi on his "legal and artistic victory." Lane sent him a copy of the ruling, pointing out that the court had appended to it a photograph of the *Bird*, "an honor which a court of law has rarely, if ever, bestowed on an artist." *Art News* ran an article entitled "Brancusi is an Artist," which called the decision "gratifying" because it showed that the old school's "bitter prejudice" and "crass ignorance" did not always prevail over the modernists. Even today, commentators call the ruling "historic," "perspicacious," and "all to [the] credit" of the customs court.

But the decision's focus on the decorative qualities of the *Bird* made the ruling just as perishable as the standard in the 12-year-old one it replaced. And its reliance on the judges' personal taste made its application perhaps more arbitrary and restrictive. Many of the works that made the renown of Duchamp, the chaperon of the *Bird* on its trip to New York and one of its staunchest defenders, would not have passed the test, for example. Duchamp's "ready-made" sculptures of a bottle rack (*Bottle Dryer*, 1914) and a urinal (*Fountain*, 1917), objects he borrowed from daily life and, with more than a hint of irony, labeled works of art, would not have satisfied Judge Waite's taste for the "beautiful," "symmetrical," and "ornamental."

The *Brancusi* decision may have done away with the requirement that sculptures must be figurative to be art, but it took years for customs law to shed other unreasonable limitations on the free import of artwork. In 1931, tapestries were deemed dutiable because they were made of wool—the material determined the artistic merit. In 1971, the customs court found that six carved door panels destined for a church were dutiable because, as part of the doors, they were utilitarian objects. It wasn't for 61 years, until the Harmonized Tariff Schedule of 1989, that customs law allowed free entry to works that are both artistic and functional.

The law still doesn't know how to define art. Different areas of law treat it differently: Customs law favors fine arts over industrial or mechanical arts; copyright law favors original works over derivative works. And judges don't know how to handle art: They waver between resolving cases without having to define it or recognizing upfront that their own tastes inform their judgments. For every Judge Waite who is satisfied to distinguish what is art from what isn't largely based on his own "esthetic emotional reactions," there is a reluctant Justice Holmes who thinks "it would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges" of the artistic merit of specific works. Because art eludes definitions and law needs to impose them, the law on art often seems to be running after its subject.

*Brancusi v. United States* was a small step forward in that losing chase. It was a victory for Brancusi alone, not modern art, and only because the *Bird* happened to be to Judge Waite's liking. As Steichen put it after the trial: "The *Bird* was its own best witness. It was the only clean thing in the courtroom. It shone like a jewel."

*Stéphanie Giry* is an associate editor of Legal Affairs.



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