

# Is It Art?

## Overview of themes

- *What is the relationship between art and law? Is there a deep relationship between art and law?*
- *Should the law privilege art or artists in any way? How?*

[What is art?](#) *Who is an artist? Who says so? Who gets to decide?*

The first week's session will focus on some general relationships between art and law, including definitional problems. What is art? Why is art important to our society? Is a work of art more than a commodity? If so, what might that imply for the law's treatment of art?

Elaine Scarry, Walter M. Cabot Professor of Aesthetics and the General Theory of Value at Harvard University, in her book [On Beauty and Being Just](#) aims to prove that beauty "ignites one's desire for truth" and leads almost inevitably toward the pursuit of justice. For two interesting reviews of this thesis, see

- Todd Gitlin, [Review](#), [The American Prospect](#), Volume 11, Issue 3, December 20, 1999.
- Alan A. Stone, [Beauty and Redemption](#), in the February/March 2000 issue of [Boston Review](#).

In many cases experts are asked to testify in court as to why some object of contention is art. It may be for the purpose of avoiding customs duties. It may be to protect the artist or owner from pornography charges. It may be to distinguish a fake from an original. The experts almost always have difficulty communicating their opinions to the lawyers, the judge, the jury. Anne M Carley, [I Know It When I See It](#), Arts4All Newsletter, 2 August 1999.

For centuries there was little or no distinction made between artists, artisans, or craft workers. But after the Renaissance the arts of painting, drawing, sculpture, and perhaps architecture were considered finer than other design or visual crafts. Unique objects of art, products of a unique artistic genius, became highly desirable. Countries took pride in their art legacy and the number of their artistic possessions. Because the work of one Italian genius was not seen to diminish the demand for the work of a French counterpart, the "fine arts" were generally exempt from import duties. Or perhaps there were additional reasons?

Craft works - bowls, flower vases, designer dresses - were treated differently. No matter how beautiful, unless made specifically for display and only for display, products of the useful arts were seen to compete with local craft workers and were subject to import duties. In [United States v. Perry](#), 146 U.S. 71 (1892), stained glass windows were not accepted as fine art and a 45% import duty was levied. In [United States v. Ehrich](#), 22 C.C.P.A. 1 (Cust. &

Pat.App., 1934), the court came to the conclusion that two glass vases by Henri Navarre "lack much of the aesthetic appeal which is ordinarily associated with works of the fine arts" and should be viewed not as fine art but as decorative art.

In United States v. Olivotti & Co., 7 Ct. Cust. 46 (1916), sculpture had to be representational to be art. When Edward Steichen sued to recover the import duties he paid on Constantin Brancusi's [Bird in Space](#), which the US Customs Service viewed as manufactured metal taxable at 40% of its value under the classification of Kitchen Utensils and Hospital Supplies, courts accepted for the first time that a non-representational sculpture could be art. Brancusi v. U.S., 54 Treas.Dec. 428 (Cust.Ct. 1928). For more on this classic case, see

- Stéphanie Giry, [An Odd Bird](#), Legal Affairs, September/October 2002
- BBC radio program on the [Brancusi Trial](#) presented by John Mortimer

Today the traditional fine arts - the "useless arts" - have been greatly expanded, but not without limit. Alfred [Stieglitz](#) is now an artist but [Giorgio Armani](#) is not. See Christine Magdo (JD '00), [Protecting Works of Fashion from Design Piracy](#) (2000). See also Ann Landi, [Moving Mountains, Walking on Water](#), ARTNEWS, June 2004, at 84.

## What Is Art?

For customs purposes, the US now follows the International Convention on the Harmonized Commodity Description and Coding System. See 19 USC [3001](#).

USITC Investigation 332-388 - DRAFT Harmonized Tariff Schedule of the United States (2004), SECTION XXI, "WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES" Official pdf version [here](#).

For copyright purposes, [17 U.S.C. §101](#) says that

A "work of visual art" is -

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include -

(A)

(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

## What Is Cultural Heritage?

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970), Art. 1. The official version is [here](#). The US ratified the UNESCO convention in 1983. The implementation act established a procedure for restricting imports of specific endangered cultural property from specific countries. For example, see the [International Cultural Property Protection](#) page of the US State Department, especially the [Chart of Current and Expired Import Restrictions](#).

Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), Art 2 and Annex I. The UNIDROIT web site is [here](#). See especially the Annex.

## Who Is an Artist?

Arizona Board of Regents v. Wilson, 539 P.2d 943 (Ariz. Ct. App. 1975) [LEXIS](#) [WESTLAW](#)

## Is Tattooing Art?

Yurkew v. Sinclair, 495 F.Supp. 1248 (D.C.Minn.) 1975) [LEXIS](#) [WESTLAW](#)

Ralph Ranalli, [A vote for a dying art](#), Boston Globe, p. B01, January 25, 2000.

[Judge: Massachusetts tattoo rule is unconstitutional](#), AP story on CNN,

October 24, 2000.

David Weber, [Judge gives tattoo artists shot in the arm](#), Boston Herald, Tuesday, October 24, 2000.

Massachusetts Department of Public Health, model regulations on [Body Art](#) (Body Piercing, Tattooing and Branding/Scarification)

"[He's Shedding His Human Skin](#)," Chronicle of Higher Education, January 28, 2000. For more, see [The Lizardman](#).

Bobby G. Frederick, *Tattoos and the First Amendment – Art Should be Protected as Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing*, 55 S.C. L. Rev. 231 (Fall 2003) [LEXIS](#) [WESTLAW](#)

## Is Graffiti Art?

Massachusetts General Laws. § 104. Injury to Building.

Whoever wilfully, intentionally and without right destroys, injures, defaces or mars a dwelling house or other building, whether upon the inside or outside, shall be punished by imprisonment for not more than two months or by a fine of not more than fifty dollars.

[Art Crimes: the Writing on the Wall](#), particularly

- Caleb Neelon, [Critical Terms for Graffiti Study](#)
- Daniel Oliver Tucker, [Graffiti: Art And Crime](#)
- George C. Stowers, [Graffiti Art: An Essay Concerning The Recognition of Some Forms of Graffiti As Art](#)
- [Contemporary Corruption: Art show, LAPD style](#)

[Graffiti Hurts](#), an anti-graffiti resource aimed at youth

[National Council to Prevent Delinquency Anti-Graffiti Project](#)

- Rodney T. Willett, [Drafting an](#)

[Anti-Graffiti Ordinance -- Some Essential Provisions](#)

- Robert Hills, [The Role of Local Lawmaking in Community Anti-Graffiti Planning](#)

Graffiti in Boston

- [BHA graffiti removal policy](#)
- City of Boston, [Graffiti Busters Home](#)

For a different kind of individually placed public art, see the works of Sonik 3000 at <http://www.theartwheredreamscometrue.com/>

Marisa A. Gomez, *The Writing On Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. Mich. J.L. Ref. 633 (1993) [LEXIS](#) [WESTLAW](#)

Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DePaul-LCA J. Art & Ent. L. 225 (Spring 1996). [WESTLAW](#)