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“The Power to Tax Involves the Power to Destroy”¹

HOW AVANT-GARDE ART OUTSTRIPS THE IMAGINATION OF REGULATORS, AND WHY A JUDICIAL RUBRIC CAN SAVE IT

INTRODUCTION

Had they been there, Dan Flavin and Bill Viola might have felt as naked as the fabled emperor when the customs officials in London declared their artwork, carefully packed in crates for international shipping, was just not art. Not art? No—only light fixtures and DVD players. Dan Flavin, hailed as the “conjurer of light and lyrical poet of Minimal Art,”² and considered part of the inner core of Minimalism, passed away in 1996 after decades of making neutral, geometric works with fluorescent light tubes.³ Seminal video artist Bill Viola today continues to make haunting, existential video works exploring a central theme—birth and death.⁴ In 2006, United Kingdom customs (Her Majesty’s Revenues & Customs or H.M. Revenues & Customs) handed the London art gallery, Haunch of Venison, a £36,000 bill⁵ when the gallery imported these two works from the United States; Customs reasoned that the works, when disassembled, fail to qualify for the discounted import tax normally given to “works of art.”⁶ So disassembled, the works amount to little more than electronic parts—light bulbs, various lighting fixtures, projectors, and their accoutrement.

¹ *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

² Manfred Schneckenburger, *Sculpture*, in *ART OF THE 20TH CENTURY*, VOL. II, at 528 (Germany, 1998).

³ *The Collection: Dan Flavin*, MOMA.ORG, http://www.moma.org/collection/artist.php?artist_id=1911 (last visited Mar. 8, 2012).

⁴ Christiane Fricke, *New Media*, in *ART OF THE 20TH CENTURY*, *supra* note 2, at 615.

⁵ Georgina Adam, *Flavin and Viola Light Works Ruled “Not Art.”* ART NEWSPAPER (Dec. 16, 2010), <http://www.theartnewspaper.com/articles/Flavin-and-Viola-light-works-ruled-not-art/22069>.

⁶ Pierre Valentin & Daniel McClean, *Haunch of Venison VAT Victory*, ART NEWSPAPER (Feb. 11, 2009), <http://www.theartnewspaper.com/articles/Haunch-of-Venison-VAT-victory/16944>.

Under U.K. law, if classified as *sculpture* (a subcategory of the general category of *works of art*), the works would only be subject to an import value-added tax (VAT) of 5 percent and would be completely exempt from customs duty.⁷ When U.K. Customs declared that the parts of these artworks did not qualify as *artworks*, or more specifically *sculptures*, the importers were subjected to the standard import VAT rate⁸ (17.5 percent at the time,⁹ and 20 percent as of January 1, 2011¹⁰).

In 2008, the gallery brought a lawsuit in the London VAT and Customs Tribunal (Tribunal) challenging the customs bill.¹¹ At this proceeding, favorable U.K. and European Union precedent, statements from U.S. tax officials, and testimony from gallerists and critics convinced the court that the works should be classified as sculptures, bringing them within the VAT reduction and duty exemption.¹² The Tribunal held that it would be “absurd” to classify the components of the works as something different from what they would be—works of art—when they were fully assembled.¹³ But, in a 2010 reversal that shocked the art world, the European Commission (Commission) issued a regulation that reversed the 2008 decision of the Tribunal and reaffirmed the original customs determination.¹⁴ According to the Commission, the light and video works of Flavin and Viola were no more than the sum of their *non-art*

⁷ *Dan Flavin and Bill Viola Not Art?*, OTHER BLOG (Dec. 20, 2010, 6:53 PM), <http://blog.othercommunications.com/?p=788>; Valentin & McClean, *supra* note 6.

⁸ Valentin & McClean, *supra* note 6.

⁹ Pierre Valentin, *United Kingdom: The European Commission Says It's Not Art*, MONDAQ (June 20, 2011), <http://www.mondaq.com/x/135086/Music+and+the+Arts/The+European+Commission+Says+Its+Not+Art> [hereinafter Valentin, *Not Art*].

¹⁰ *Europe Rules that Dan Flavin and Bill Viola Artworks Are Not Art*, ARTINFO (Dec. 17, 2010), <http://www.artinfo.com/news/story/36594/europe-rules-that-dan-flavin-and-bill-viola-artworks-are-not-art/>; see also Maev Kennedy, *Call that Art? No, Dan Flavin's Work Is Just Simple Light Fittings, Say EU Experts*, GUARDIAN (Dec. 20, 2010, 3:43 PM), <http://www.guardian.co.uk/artanddesign/2010/dec/20/art-dan-flavin-light-eu>.

¹¹ *Haunch of Venison Partners Ltd. v. Revenue & Customs Comm'rs*, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820 (Dec. 11, 2008 VAT & Duties Tribunal (London)).

¹² Valentin & McClean, *supra* note 6.

¹³ *Haunch of Venison Partners Ltd.*, 2008 WL 5326820, at [49]; see also Valentin & McClean, *supra* note 6.

¹⁴ Commission Regulation 731/2010, 2010 O.J. (L 214) (EC). See *infra* Part II; see also Adam, *supra* note 5; *Dan Flavin Work Classified by EU as Light Fittings*, ARTLYST (Dec. 29, 2010), <http://www.artlyst.com/articles/dan-flavin-work-classified-by-eu-as-light-fittings/>; *Europe Rules that Dan Flavin and Bill Viola Artworks Are Not Art*, *supra* note 10; Kennedy, *supra* note 10; Murray Wardrop, *VAT on Modern Art as EU Says Works are "Light Fittings"*, TELEGRAPH (Dec. 21, 2010, 8:47 AM), <http://www.telegraph.co.uk/culture/art/art-news/8216017/VAT-on-modern-art-as-EU-says-works-are-light-fittings.html>.

parts.¹⁵ Not only was this regulation—passed “behind closed doors . . . [and] contrary to the jurisprudence of the European Court of Justice”—highly suspect, but it suggests that artists’ right to even call their work *art* is subject to the prevailing opinions and mores of lawmakers.¹⁶ Additionally, the regulation did not result from any appeal from the defendant, H.M. Revenues & Customs. The Commission acted on its own,¹⁷ and contrary to court rulings in two separate European Community member states that held that these and similar works *should* be classified as art.¹⁸ Lawmakers with no vested interest in the litigation passed this objectionable law. The implications following from this regulation have riled the art world. Far more radical contemporary artworks could face even greater difficulty gaining widespread recognition as artworks. Adding to the mystery, the Commission did not attempt to make clear its overall policy or reasoning behind the regulation. This note argues that legislating what does and does not qualify as an “artwork” without any objective or specific rubric goes against legal precedent and is dangerous to the livelihood of artists.¹⁹ Implementing a universal standard for the assessment of “art” as a formal classification would not be as difficult as it might seem: U.S. copyright standards already possess the necessary structure,²⁰ and the European recognition of artists’ moral rights is mirrored in these standards.²¹

This note will begin in Part I with brief overviews of Minimalist Art and Conceptual Art, paying particular attention to the public reception of—and reactions to—shifting trends in artworks over time and geography. Part II will give a brief explanation of the legislative systems at work in the European

¹⁵ Kennedy, *supra* note 10.

¹⁶ Pierre Valentin, *European Definition of Art Is Absurd: The Fact that the European Commission Can, Without Any Public Consultation or Publicity, Overrule the Decision of Two National Tribunals, Makes a Mockery of the Judicial Process*, ART NEWSPAPER (Jan. 13, 2011), <http://www.theartnewspaper.com/articles/European-definition-of-art-is-absurd/22178> [hereinafter Valentin, *European Definition*].

¹⁷ *Id.*; Valentin, *Not Art*, *supra* note 9.

¹⁸ Valentin, *Not Art*, *supra* note 9.

¹⁹ For an in-depth treatment of art and judicial subjectivity through the lens of various aesthetic theories, see Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005). Farley suggests that judges and courts could rely more directly on these various aesthetic theories in developing their art-judging jurisprudence. *Id.* at 808. Aesthetic philosophies filter into opinions subconsciously, even sometimes reluctantly, according to Farley. *Id.* at 845. Being more upfront about the use of these theories could clarify courts’ rulings, and the “rich discourse” could give courts more support. *Id.* at 809.

²⁰ For a discussion of “recognized stature” under U.S. copyright law, see *infra* notes 262-80 and accompanying text.

²¹ For a discussion of “*droit morale*” under the Berne Convention, see *infra* notes 245-46 and accompanying text.

Community (EC),²² as well as an introduction to the European value-added tax system. Part III of this note will discuss various instances of courts, both in the United States and abroad, attempting to navigate the intersection of artwork and customs duties and taxation. Part IV will explore various approaches to protection for conceptual and visual artworks, giving special attention to problems encountered by the more difficult cases. That part will conclude with a suggested method for evaluation and classification of artworks that can be applied by courts and legislators, domestically and abroad, that leaves intact both the artists' intentions and their artworks' integrity. This note will conclude with a brief discussion of how similar VAT or flat-tax systems implemented in the United States could lead to comparable difficulties in U.S. courts and legislatures.

I. THE ART BACKDROP

New art, and particularly conceptual art, has a history of challenging the public with works that have not yet been received as *art*. Legislators and customs officials are not typically on the cutting edge of the art world, and they can be as hostile as the general public to new works by avant-garde artists. Flavin's and Viola's works, though hardly new artforms, represent conceptual methods in art that fit into a rich history of progressive upstarts challenging the established norms of the art world.²³ The criticisms of many late twentieth and early twenty-first century works of art—the Damien Hirst vitrines,²⁴ the Allan Kaprow “happenings,”²⁵ the Chris Burden performance works²⁶—are numerous, but discord between newer artists, who experiment in form, material, and content, and the canon of art history, is almost a tradition itself.

²² For purposes of this note, I will be using EC and EU interchangeably—EC when referring to cases where the EC is specifically mentioned, and EU when referring to the member states. The EC was absorbed into the EU when it was created, but current case law and legislation still refers to the EC without caveat. *European Community—EC*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/european-community.asp#axzz1rfwQHwWh> (last visited Apr. 10, 2012).

²³ See WILLIAM FLEMING, *ARTS & IDEAS* 583 (9th ed. 1995) (describing twentieth century modern artists as “command[ing] attention” by “intend[ing] to delight or irritate, to arouse or denounce, to exhort or castigate, to surprise or excite, to sooth or shock”).

²⁴ See Maeve Kennedy, *Art Market “a Cultural Obscenity,”* GUARDIAN (June 3, 2004, 6:29 AM), <http://www.guardian.co.uk/uk/2004/jun/03/arts.artsnews>.

²⁵ See Judith Rodenbeck, *Madness and Method: Before Theatricality*, 13 GREY ROOM 54, 59 (2003), available at http://slc.academia.edu/JudithRodenbeck/Papers/402348/Madness_and_Method_Before_Theatricality.

²⁶ See Roger Ebert, *The Agony of the Body Artist*, ROGER EBERT'S J. (Oct. 14, 2009, 11:08 PM), http://blogs.suntimes.com/ebert/2009/10/the_agony_of_the_body_artist.html.

A. *Flux Is Constant in the Art World: A Brief History*

Take the seventeenth century turn from the late Renaissance's "bold humanistic thinking" into the "bitter self-reproach" of the Counter-Reformation.²⁷ This social movement brought a return to a strong religious presence in art.²⁸ Caravaggio and others imbued this baroque-period work with a dark humanism that was not always well received.²⁹ The religious populace favored a "more conventional elegance and illusionism . . ." ³⁰ Even the nineteenth century romantic Delacroix's color-intensive, emotional, and macabre works were once the subject of "storms of protest and abuse[,] though they now rest comfortably among other works of the movement."³¹ These "rebels" draw attention for the blatant and unapologetic ways in which they push the edge of the previous movement into the infancy of the next. Manet's Realist paintings "drew all manner of critical vituperation from the press and public."³² Academics of the day "held [Raphael] to be the perfect painter" even though all agreed the "ugliness" of realism should be put aside for a more uplifting style of art.³³ Rodin had trouble as well, suffering accusations that his sculpture was "[t]oo lifelike"—or worse—" [t]oo good."³⁴ Even when *Impressionism* was first introduced it was "a term of critical derision."³⁵

Twentieth century modernists often intended for their works to be overt challenges to the form of art *de mode*, and "[j]udging from the reactions to Picasso's early exhibits [and Stieglitz's famous Armory Show] . . . some artists succeeded beyond their wildest expectations."³⁶ Artists of the early twentieth century had to fight hard for acceptance, holding "street demonstrations against museums and art galleries that refused the modernists recognition."³⁷ The protests subsided halfway through the century, and many of "[t]hese artists [are now considered] old masters of modern art."³⁸

²⁷ FLEMING, *supra* note 23, at 377.

²⁸ *Id.*

²⁹ *Id.* at 383-85.

³⁰ *Id.* at 385.

³¹ *Id.* at 516-17.

³² *Id.* at 551.

³³ *Id.* at 553.

³⁴ *Id.* at 554.

³⁵ *Id.* at 560.

³⁶ *Id.* at 583, 630.

³⁷ *Id.* at 585.

³⁸ *Id.* at 583, 630.

Even the most open modernist mind was challenged by the cubists' and futurists' abstractions, but the Dadaists' and Surrealists' reactions to World War I pushed it even further.³⁹ The Dadaists and Surrealists both advocated abandoning the prevailing styles of art.⁴⁰ The constant state of flux of the early twentieth century continued well into the middle of the century, and the technological innovations of the greater society continued to have a profound effect on the arts.⁴¹ Facing alienation from a society deeply affected by war, modernists in New York developed the abstract expressionist "school," expanding on the breakthroughs of the cubists and futurists.⁴² And even these Abstract Expressionists found acceptance difficult at first, with "some of the avant-garde commercial galleries hesitat[ing] to accept their paintings for exhibition."⁴³ The action painting of Jackson Pollock and the color-field painting of Mark Rothko and Barnett Newman eventually put some of this resistance to rest.⁴⁴

When the Minimalists emerged later in the century, the hard-fought emotion and humanism was gone from their works, traded instead for "primary structures' [and] basic geometric volumes . . ."⁴⁵ What most distinguished minimalism was the increased importance of the works' physical or environmental context—not just hanging on walls or atop pedestals, but "rest[ing] on the floor . . . or occupy[ing] a whole room."⁴⁶ Another shift in focus characteristic of minimalism was the presentation of "art items that are indistinguishable from the raw material they were made from."⁴⁷ There is minimal differentiation between the artwork and the non-art materials used in its creation.⁴⁸ Duchamp and his "readymades"—vacuum cleaners, bicycle wheels, urinals—were the inspiration for this shift.⁴⁹ The problem for

³⁹ *Id.* at 605-07.

⁴⁰ *Id.* at 605-09.

⁴¹ *Id.* at 629-30.

⁴² *Id.* at 632-33.

⁴³ *Id.* at 635.

⁴⁴ *Id.* at 635-40.

⁴⁵ *Id.* at 645 (citation omitted).

⁴⁶ *Id.* at 647.

⁴⁷ Rikki Sapolich, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 *IDEA* 453, 460 (2007) (footnotes omitted).

⁴⁸ *Id.*

⁴⁹ *Id.*

minimalists was that viewers would often be puzzled by a lack “of the things [they] tend to expect to find within artworks.”⁵⁰

B. *The Artists, Themselves*

Dan Flavin was an American minimalist who devoted the latter part of his career to, and garnered a great deal of international attention from, a series of art installations crafted primarily from fluorescent lighting fixtures one could buy in any hardware store.⁵¹ The Museum of Modern Art and the Guggenheim and Whitney museums hold a number of Flavin’s works in their permanent collections. His work occupies an important place in the conceptual-art movement, and his installations are generally abstract and untitled except for dedications to various people.⁵² This note concerns a work by Flavin entitled *Six alternating cool white/warm white fluorescent lights vertical and centred (1973)*.⁵³ Flavin’s minimalist style is very context-dependent, because his works are generally large enough to fill an entire room.

Bill Viola is an American conceptual and experimental artist whose work has been dedicated primarily to installations involving video.⁵⁴ Viola’s work is also held by museums internationally, and he is considered a major figure in contemporary art, particularly for his experimental and moving work with video. This note concerns a work by Viola entitled *Hall of Whispers*.⁵⁵ While Flavin and Viola challenge “traditional sculpture,”⁵⁶ they are far from rebels in the worlds of minimalist art and video art.

One of the ironies of this litigation was that the materials Flavin and Viola used in their sculptures, while not very “traditional,” were hardly the most unusual. For over a

⁵⁰ NANCY G. HELLER, WHY A PAINTING IS LIKE A PIZZA: A GUIDE TO UNDERSTANDING AND ENJOYING MODERN ART 52 (2002).

⁵¹ Gemini G.E.L., *Dan Flavin*, JONIWEYL.COM, http://www.joniweyl.com/Flavin_Bio.pdf (last visited Mar. 8, 2012). Dan Flavin was born in Jamaica, New York, in 1933. He died in 1996. *Id.*

⁵² *The Collection: Dan Flavin*, MOMA.ORG, http://www.moma.org/collection/artist.php?artist_id=1911 (last visited Mar. 8, 2012).

⁵³ Valentin, *Not Art*, *supra* note 9; *see also* Haunch of Venison Partners Ltd. v. Revenue & Customs Comm’rs, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820 [3] (Dec. 11, 2008 VAT & Duties Tribunal (London)).

⁵⁴ *Artist Biography*, BILLVIOLA.COM, <http://www.billviola.com/biograph.htm> (last visited Mar. 16, 2012). Bill Viola was born in 1951. *Id.*

⁵⁵ Valentin, *Not Art*, *supra* note 9; *see also* Haunch of Venison Partners Ltd., 2008 WL 5326820, at [2].

⁵⁶ For purposes of this note, “traditional sculpture” is defined as three-dimensional forms cast or carved of wood, metal, or clay, often in human form.

century artistic rebels have been “expand[ing] the vocabulary of visual media [T]he twentieth century produced a succession of artistic innovators, each in turn pushing expressive norms to their limits and beyond.”⁵⁷ Examples of other non-art materials used by minimalists and other artists are raw wood, Legos, bricks, aluminum, “rope, cigarette butts, newsprint, taxidermic animals, latex,”⁵⁸ crockery,⁵⁹ bodily fluids,⁶⁰ pieces of candy,⁶¹ chewing gum,⁶² human hair,⁶³ chocolate,⁶⁴ soup cans,⁶⁵ tiger sharks,⁶⁶ money,⁶⁷ and post-it

⁵⁷ Nathan M. Davis, Note, *As Good as New: Conserving Artwork and the Destruction of Moral Rights*, 29 CARDOZO ARTS & ENT. L.J. 215, 218 (2011).

⁵⁸ *Id.*; see HELLER, *supra* note 50, at 101-07; see also Farley, *supra* note 19, at 822 n.54 (brick); *A Mixture of Frailties*, AGNEW'S GALLERY, <http://www.agnewsgallery.com/latest-acquisitions/a-mixture-of-frailties/> (last visited Mar. 9, 2012) (latex); *Artist Database: Alisa Dworsky*, ARTMAPBURLINGTON.COM, <http://artmapburlington.com/artistdatabase/?portfolio=alisa-dworsky> (last visited Mar. 9, 2012) (rope); Carolyn Classen, *Newsprint Artist Nick Georgiou Is Unique*, TUCSON CITIZEN (Dec. 6, 2010), <http://tucsoncitizen.com/community/2010/12/06/newsprint-artist-nick-georgiou-is-unique/> (newsprint); Paul Heidelberg, *He Turns Raw Wood into Works of Art*, SUN SENTINEL (July 10, 1986), http://articles.sun-sentinel.com/1986-07-10/news/8602100655_1_horse-wood-cypress-warehouse (raw wood); *Milwaukee Art Museum Acquires Aluminum Slice Chair by Designer Mathias Bengtsson*, EASTCITYART.COM, <http://www.eastcityart.com/2011/05/04/milwaukee-art-museum-acquires-aluminium-slice-chair-by-designer-mathias-bengtsson/> (last visited Mar. 9, 2012) (aluminum); Paula Mitchell Bentley, *Upcycled Cigarette Butt Artwork*, GREEN UPGRADER, <http://greenupgrader.com/5572/green-cigarette-butts/> (last visited Mar. 9, 2012) (cigarette butts); Rachel Poliquin, *Taxidermy Artists*, RAVISHING BEASTS, <http://www.ravishingbeasts.com/display/ShowJournal?moduleId=10934318®isteredAuthorId=126289¤tPage=2> (last visited Mar. 9, 2012) (taxidermic animals); Nathan Sawaya, *THE ART OF THE BRICK*, <http://www.brickartist.com/> (last visited Mar. 9, 2012) (Legos).

⁵⁹ *Dam Sen Park, Saigon*, AMASCBLOG, <http://amasc.blogspot.com/2007/12/dam-sen-park-saigon.html> (last visited Mar. 9, 2012).

⁶⁰ See Marina Galperina, *10 Artworks Made with the Artist's Own Bodily Fluids*, FLAVORWIRE.COM, <http://flavorwire.com/185770/10-artworks-made-with-the-artists-own-bodily-fluids> (last visited Mar. 9, 2012).

⁶¹ See Félix González-Torres: *Portrait of Ross*, SHAPE & COLOUR BLOG (June 23, 2010), <http://shapeandcolour.wordpress.com/2010/06/23/felix-gonzalez-torres-portrait-of-ross/>; Stefanie Hessler, *One Small Piece of Candy in Félix González-Torres' Art*, SMALL WORLDS PROJECT (Apr. 19, 2011), <http://smallworldsproject.com/?p=674>.

⁶² See Sarah Lyall, *Whimsical Works of Art, Found Sticking to the Sidewalk*, N.Y. TIMES, June 14, 2011, at A1, available at <http://www.nytimes.com/2011/06/14/world/europe/14muswell.html>.

⁶³ See “Spooky,” *Art Student Creates Hair Raising Necklaces from Human Hair*, ODDITY CENT. (June 30, 2011), <http://www.odditycentral.com/news/art-student-creates-hair-raising-necklaces-from-human-hair.html>.

⁶⁴ See Jean L. Zaun, *Chocolate Artistry*, WERTZ CANDY, <http://www.wertzcandy.com/chocolate/about.html> (last visited Mar. 9, 2012).

⁶⁵ See Christopher Knight, *Critic's Notebook: Was Andy Warhol's "Campbell's Soup Cans" Inspired by Willem de Kooning?*, L.A. TIMES (July 10, 2011), <http://articles.latimes.com/2011/jul/10/entertainment/la-ca-knight-notebook-20110710>.

⁶⁶ See Davis, *supra* note 57, at 218; Roberta Smith, *Just When You Thought It Was Safe*, N.Y. TIMES (Oct. 16, 2007), <http://www.nytimes.com/2007/10/16/arts/design/16muse.html>.

⁶⁷ See JOHNNY SWING .11, <http://johnnyswing.com/> (last visited Mar. 9, 2012).

notes.⁶⁸ These materials appear with increasing regularity on the tags next to artworks in major museums.⁶⁹ These “atypical” materials are undeniably a part of “our cultural heritage.”⁷⁰

II. INTRODUCTION TO THE VALUE-ADDED TAX SYSTEM

The fees imposed by U.K. Customs on the Haunch of Venison gallery included “value added tax.”⁷¹ Value-added tax (VAT) is a form of consumption tax which is levied against goods and services both “within the territory of [an EC member state] . . . [and through] the importation of goods” into a member state.⁷² The Sixth Council Directive implemented the present VAT system in 1977.⁷³ This directive “aim[ed] at a further harmonization of the various national laws” that developed from the first five directives.⁷⁴ The implementation of these first five directives was intended to establish “a common market [among the EC member states] . . . whose characteristics are similar to those of a domestic market.”⁷⁵ A “harmonized” system of tariffs (TARIC) developed out of these directives, which established a “uniform basis for assessment” in a “[c]ommon system of value-added tax.”⁷⁶ Each member state was required to adopt a version of the legislation into its individual legal system.⁷⁷ In the U.K., the “common market” system was adopted in 1973 after implementation of the Second Directive.⁷⁸

⁶⁸ Gavon Laessig, *Awesome Post-It Note Art*, BUZZFEED, <http://www.buzzfeed.com/gavon/post-it-note-art> (last visited Mar. 9, 2012).

⁶⁹ Davis, *supra* note 57, at 218.

⁷⁰ *Id.*

⁷¹ Valentin & McClean, *supra* note 6.

⁷² BEN J.M. TERRA & JULIE KAJUS, INTRODUCTION TO VALUE ADDED TAX IN THE EC 6 (1991).

⁷³ Sixth Council Directive, 77/388/EEC, 1977 O.J. (L 145). This Directive was published on June 13, 1977.

⁷⁴ TERRA & KAJUS, *supra* note 72, at 8.

⁷⁵ *Id.* at 5.

⁷⁶ Sixth Council Directive, *supra* note 73, at 1.

⁷⁷ The two primary ways in which the European Commission passes legislation are through directives and regulations. EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET 5 (Ralph H. Folsom et al., eds., 1996) [hereinafter MAASTRICHT]; *see also* art. 249 (189) of the EC Treaty. A directive sets a policy that each member state must then adopt in a manner appropriate for its individual system. MAASTRICHT, *supra*, at 5. The member states are not always required to take *any* action in response to the issuance of a directive. *Id.* “[D]irective[s] are ‘binding as to the result to be achieved’ but ‘leave[] to the national authorities the choice of form and methods.’” *Id.* (quoting art. 189 of the Treaty of Rome).

Regulations differ from directives in that they are *immediately* binding on all member states upon their publication in the Official Journal of the European Community (Official Journal or O.J.) and “must be complied with fully by those to whom they are addressed.” *European Parliament Fact Sheets*, EUR. PARLIAMENT (Oct. 16, 2000),

The Seventh VAT Directive was implemented in 1994⁷⁹ upon the recognition that, in regards to works of art, the different systems of the various member states were causing “distortion of competition and deflection of trade”⁸⁰ This directive established “[s]pecial arrangements applicable to . . . works of art.”⁸¹ The Seventh Directive added language to the previous version that lowered the taxable amount on works of art to “a fraction of the amount” of tax applied to all other imported goods.⁸² This directive had the effect of *raising* the import tax on works of art in the U.K. from 2.5 percent to 5 percent.⁸³ Of course, U.K. art dealers were upset by this increase in import costs. They worried that this tax increase would “undermine [their] competitiveness with the New York market.”⁸⁴ The Commission, however, felt strongly that harmonizing EC “artists’ resale rights [would] . . . put an end to various kinds of discrimination and inequality . . . which currently exist across the Community for visual artists and . . . allow them to achieve parity with other categories of creative artists . . . who could expect ongoing copyright royalties.”⁸⁵

“Works of art” were defined in Article 26a, added in the Seventh Directive,⁸⁶ and this new article fit within the system of “combined nomenclature” (CN) instituted by a 1987 amendment to the Sixth Directive.⁸⁷ This new article defined works of art, in

http://www.europarl.europa.eu/factsheets/1_2_1_en.htm (citing art. 5(10) of the EC Treaty in ¶ 2(a)). Regulations do not require the individual member states to adopt their content through some form of their own legal system. *Id.* They are in force either upon publication of the Official Journal or on a date specifically indicated in the regulation itself. The EC regulation passed concerning Flavin’s and Viola’s works was specifically noted to take effect twenty days after publication in the O.J. Commission Regulation 731, *supra* note 14, at 2. The “decision” at issue in this note is one of these regulations—immediately binding on all member states in the European Community and in force upon its publication—August 11, 2010. *Id.*

⁷⁸ Neil Warren, *The UK Experience with VAT*, 3 REVENUE L.J. 75, 75 (1993).

⁷⁹ *Id.* The Seventh Directive was published on February 14, 1994 as an amendment to the Sixth Directive. *Id.* For a brief discussion of the Sixth VAT Directive, see DAVID W. WILLIAMS, EC TAX LAW 82-83, 852-86 (1998).

⁸⁰ Seventh Council Directive, 94/5/EC, 1994 O.J. (L 60) 16.

⁸¹ *Id.*

⁸² *Id.* (art. 1(b)). Generally the taxable amount was either the price paid by the importer or the open-market value of the goods. See Sixth Council Directive, *supra* note 73, at 7 (art. 11(B)(1)(a-b)).

⁸³ Maren Günther, *Written Question to the Commission E-0551/98*, 1998 O.J. (C 223) 93.

⁸⁴ *Id.*

⁸⁵ Mr. Monti, *Answer Given on Behalf of the Commission*, 1998 O.J. (C 223) 94.

⁸⁶ Seventh Council Directive, *supra* note 80, at 17.

⁸⁷ Council Regulation 2658/87/EEC, 1987 O.J. (L 256) 1-5. Regulation 2658 created a system of nomenclature and classification code numbers in accordance with previously adopted regulations in order to update and assume the management of the TARIC system (a system of integrated tariffs of the European Communities). Council

particular *sculptures*, as “original sculptures and statuary, in any material, provided that they are executed entirely by the artist.”⁸⁸ The structure of this system of combined nomenclature allowed for expansion of the tariff classifications at the member state level and regularized the system.⁸⁹ This 1987 regulation also “laid down the general rules . . . [of] interpretation” for this harmonized tariff system.⁹⁰ The regulation affecting Flavin and Viola (2010 regulation) was adopted as further clarification of the 1987 regulation.⁹¹

Sellers of goods and services in the United States will only encounter the VAT when “importing goods [or] services into the

Regulation 2658, *supra*, at 1-2. “The combined nomenclature shall comprise: (a) the harmonized system nomenclature; (b) Community subdivisions to that nomenclature, referred to as ‘CN subheadings’ in those cases where a corresponding rate of duty is specified; and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.” *Id.* at 2 (art. 1(2)).

Each CN was assigned an eight-digit code, the first six of which indicate the heading and subheading of the harmonized system nomenclature, with the last two indicating the CN subheading if one is present. *Id.* art. 3; *see also* Integrated Tariff of the European Communities (TARIC), 1993 O.J. (C 143) 8; Commission Regulation 2793/86/EEC, 1986 O.J. (L 202) (setting out the numeric codes to be used in the unified system). Absent a subheading the last two digits would be “00.” Council Regulation 2658, *supra*, art. 3(1)(b). Additional digits would be added onto this code for purposes of member state statistical subdivisions and any additional community subdivisions. *Id.* art. 3(2)-(4).

The 2010 regulation affirmed the original customs classifications of the Flavin and Viola artworks under Chapters 94 and 85, respectively. Commission Regulation 731, *supra* note 11, at 2. Chapter 94 covers “miscellaneous manufactured articles,” which includes lamps and lighting fixtures. Council Regulation 2658, *supra*, at Annex Sec. XX; *see also* TARIC Consultation, EUR. COMM’N: TAX’N & CUSTOMS UNION, http://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en&Taric=9405&Area=US&Expand=true&SimDate=20110923#9405000000 (last modified Mar. 19, 2012).

Chapter 85 covers, among other things, “television image and sound recorders and reproducers.” Council Regulation 2658, *supra*, at Annex Sec. XVI; *see also* TARIC Consultation, EUR. COMM’N: TAX’N & CUSTOMS UNION, http://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en&Taric=85219000&Area=US&Expand=true&SimDate=20110923#8521900000 (last modified Mar. 19, 2012).

⁸⁸ Seventh Council Directive, *supra* note 80, at 24 (Annex 1(a)). The standard classification for works of art in the TARIC system followed the language of the Seventh Directive. These definitions were placed within Chapter 97 under Section XXI of TARIC entitled “Works of Art, Collectors’ Pieces and Antiques.” Council Regulation 2658, *supra* note 87, at Annex Sec. XXI; *see also* TARIC Consultation, EUR. COMM’N: TAX’N & CUSTOMS UNION, http://ec.europa.eu/taxation_customs/dds2/taric/measures.jsp?Lang=en&SimDate=20110923&Area=US&Taric=9703000000&LangDescr=en (last modified Mar. 19, 2012). Under this chapter, heading 9703 is the CN code for “[o]riginal sculptures and statuary, in any material.” *Id.* Neither the Seventh Directive nor TARIC goes any further in describing what might qualify as sculpture under this harmonized system heading. *Id.*

⁸⁹ Council Regulation 2658, *supra* note 87, at 1.

⁹⁰ Commission Regulation 731, *supra* note 14, at 2.

⁹¹ *Id.* The Flavin/Viola amendments were not the only ones made by the Commission at that time. *See* Commission Regulation 732, 2010 O.J. (L 214) 4 (EU). Many other amendments have been made over time.

EU [member states]" from the United States.⁹² This import tax is generally paid by the buyer of the goods or services, and does not apply to goods with only a *de minimis* value.⁹³ The tax is "chargeable at the time when [the] goods enter the [member state]."⁹⁴ The standard VAT rate among EU member states ranges from 15 to 25 percent.⁹⁵

III. THE INTERSECTION OF ART AND THE LAW

When courts approach the problem of classification of artworks for tax and import duty purposes, deference is generally correctly given to the vicissitudes of the art world.⁹⁶ Courts, both in the United States and abroad, have customarily declined to act as arbiters of taste.⁹⁷ What may not have been considered "art" ten, twenty, or fifty years ago might now be recognized as valuable by experts and the art world. There is a continued risk, as evidenced by the 2010 regulation, that vanguard contemporary artworks may still be denied their status as art. Neither the U.S. judiciary nor courts and legislative bodies abroad should permit this unfortunate and shortsighted result. Part III explores the U.K. approach to this problem, both in the context of the Flavin/Viola matter and through earlier EU jurisprudence. As to the domestic approach, the United States has had fewer occasions to address this question, though one case in particular concerned the importation of an abstract sculpture that was initially charged

⁹² Tax Advisors Planning System, Title 43, 43:13:01(E) Imports Into the EU (RIA 2011) (referencing Sixth EC VAT Directive, art. 70).

⁹³ *Id.*

⁹⁴ *Sixth VAT Directive: Uniform Basis of Assessment*, EUROPA, http://europa.eu/legislation_summaries/other/l31006_en.htm (last updated Feb. 12, 2007); Sixth Directive, *supra* note 73, at 7 (tit. VII, art. 10, sec. 3).

⁹⁵ Tax Advisors Planning System, Title 43, 43:13:01(C) Value Added Tax (VAT) Rates (RIA 2011). As of Directive No. 77/388, the minimum tax must be at least 15 percent in each member state. *Sixth VAT Directive*, *supra* note 94. The minimum rate was increased as of January 1, 2011. This caused much consternation among those affected by the undiscounted VAT rate on imports, as the minimum then increased to 20 percent. *See Accounting for VAT When the Standard Rate of VAT Returned to 17.5 Per Cent*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/vat/forms-rates/rates/rate-changes.htm> (last visited Jan. 19, 2012); *Increase in the Standard Rate of VAT to 20 Per Cent*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/vat/forms-rates/rates/rate-increase.htm> (last visited Jan. 19, 2012).

⁹⁶ *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-50 (1903); *Brancusi v. United States*, 54 Treas. Dec. 428, 430-31 (Cust. Ct. 1928); *Haunch of Venison Partners Ltd. v. Revenue & Customs Comm'rs*, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820 (Dec. 11, 2008 VAT & Duties Tribunal (London)).

⁹⁷ *See, e.g., Bleistein*, 188 U.S. at 251; *Haunch of Venison Partners Ltd.*, 2008 WL 5326820 at [50]-[51].

import tax on the basis of its component material.⁹⁸ The U.S. court, just as the U.K. Tribunal did with Flavin and Viola, found the work product to indeed be art.⁹⁹ There are still other methods by which courts and legislatures can approach this issue, and those are suggested and discussed in Part IV.

A. Haunch of Venison Partners Ltd. v. H.M. Revenue & Customs

The heart of this inquiry is the dispute over customs bills charged to London's Haunch of Venison gallery when it imported the contemporary sculptures of Dan Flavin and Bill Viola. Both works were imported in a disassembled state and subject to a tariff rate normally charged to goods and component parts intended for further sale or assembly.¹⁰⁰ In other words, the customs officials assessed the light tubes and video equipment as light tubes and video equipment, not as disassembled artworks packed in boxes. Ironically, they assessed the tariff on the estimated value of the assembled pieces—in their final form as artworks.¹⁰¹ Thus the customs officials acknowledged the imports were valuable as artwork, but simultaneously denied them the reduced tariff rate.¹⁰²

1. 2006–2008: Trouble with U.K. Customs

The Haunch of Venison gallery appealed the customs bill because Flavin's and Viola's sculptures were not assessed under the discounted rate normally reserved for works of art.¹⁰³ When the artworks were first imported, customs officials declared that the works were subject to the full VAT (then 17.5 percent).¹⁰⁴ The gallery brought a lawsuit against HM Revenue & Customs (HMRC) protesting this classification before the London VAT and Duties Tribunal in 2008.¹⁰⁵ The gallery sought relief from the tariff assessment by arguing that the artworks—even in their disassembled state—qualified for the discounted rate

⁹⁸ See *Brancusi*, 54 Treas. Dec. at 428-29; see also *infra* Part III.B.

⁹⁹ See *Brancusi*, 54 Treas. Dec. at 431; see also *infra* Part III.B.

¹⁰⁰ *Haunch of Venison Partners Ltd.*, 2008 WL 5326820 at [18].

¹⁰¹ Irina Tarsis, *Of Art and Tax: The EU Commission on Customs Code Redefines Art for Tax Purposes*, CARDOZO JURIST (Feb. 1, 2011), <http://www.cardozojurist.com/2011/02/of-art-and-tax-the-eu-commission-on-customs-code-redefines-art-for-tax-purposes/>; Valentin, *Not Art*, *supra* note 9.

¹⁰² See sources cited *supra* note 101.

¹⁰³ *Haunch of Venison Partners Ltd.*, 2008 WL 5326820 at [18].

¹⁰⁴ Tarsis, *supra* note 101.

¹⁰⁵ See generally *Haunch of Venison Partners Ltd.*, 2008 WL 5326820.

reserved for artworks.¹⁰⁶ The trial lasted four days, during which the Tribunal visited the Tate galleries to view similar Flavin and Viola works.¹⁰⁷ The Tribunal also heard testimony from “[s]everal high profile witnesses” as to the correctness of the customs officials’ classifications.¹⁰⁸ HMRC’s central concern was that treating imported goods that do not appear to be traditional artworks as art would open the door to “any importer . . . declar[ing] any goods to be works of art and thereby circumvent[ing] the positive rates of duty.”¹⁰⁹ HMRC argued that the particular components in this case should be considered not as unassembled artworks but instead according to their “objective characteristics,”¹¹⁰ namely as light bulbs and DVD players.¹¹¹ HMRC also argued that sculptures could not be only two dimensional.¹¹² This related particularly to the Viola works,

projection[s] emanating from the screen which is itself a flat object and [about which HMRC contended] . . . it is simply incorrect as a matter of fact to consider the mechanism by which that image is realized as being part of a sculpture even if that mechanism does have a three dimensional form.¹¹³

The Tribunal dismissed both of these concerns. These pieces qualified as sculpture by virtue of “all the components [having been chosen] deliberately and as part of the artistic process with a view to achieving [the] artistic intention with the greatest effect.”¹¹⁴ The Tribunal did not expressly require engagement with the third dimension. It found instead that these components included the structure by which the projectors and screens would be hung, the materials and equipment selected for the projectors and screens, and the specific spatial arrangement of these elements for the actual installation.¹¹⁵ The combination of these elements satisfied the Tribunal’s definition of sculpture.¹¹⁶

¹⁰⁶ *Id.* at [4].

¹⁰⁷ Valentin, *Not Art*, *supra* note 9.

¹⁰⁸ *Id.*

¹⁰⁹ *Haunch of Venison Partners Ltd.*, 2008 WL 5326820, at [39].

¹¹⁰ *Id.* at [36], [40] (citing Case C-35/93, *Develop Dr Eisbein GmbH & Co. v. Hauptzollamt Stuttgart-West*, 1994 E.C.R. I-2655).

¹¹¹ *Id.*

¹¹² *Id.* at [35].

¹¹³ *Id.*

¹¹⁴ *Id.* at [48].

¹¹⁵ *Id.* at [49]-[51].

¹¹⁶ *Id.*

The Tribunal also dismissed HMRC's more central concern—"that importers might declare just anything as works of art" to evade duty rates.¹¹⁷ The Tribunal declared it

absurd to classify any of these works[, in their unassembled form,] as components ignoring the fact that the components together make a work of art. . . . It stretches the objective characteristics principle too far to say that a work of art is no longer a work of art if it is dismantled for transportation¹¹⁸

The Tribunal also noted that "where there is doubt about a classification . . . , preference should be given to one of the Chapter 97 headings over those of any other Chapter."¹¹⁹ Having negated both of HMRC's main arguments, the Tribunal concluded that these works should be classified as sculptures and are thereby subject to the lesser VAT rate.¹²⁰ Appeals were allowed by the Tribunal, but as of this writing HMRC has not appealed.

The Tribunal relied upon *Develop Dr Eisbein GmbH & Co. v. Hauptzollamt Stuttgart-West*, which addressed tariff classifications for articles imported in an unassembled or disassembled state.¹²¹ The parts at issue in *Eisbein GmbH* were photocopier parts and accessories.¹²² The classifications, although made by German customs officials, ultimately utilized the same EU harmonized tariff system that the U.K. customs officials applied to Flavin and Viola.¹²³ Imports of fully-assembled apparatuses into Germany owe an additional antidumping duty, and this duty was imposed in *Eisbein GmbH*.¹²⁴ The importer appealed, arguing that the parts were not fully-assembled photocopiers and thus not subject to the duty.¹²⁵ The importer relied on the Explanatory Notes to the antidumping rule, which included simply-assembled articles (i.e., apparatuses) in the "fully assembled" category.¹²⁶ These

¹¹⁷ *Id.* at [50].

¹¹⁸ *Id.* at [49]-[51].

¹¹⁹ *Id.* at [44] (discussing Case 155/84, *Onnasch v. Hauptzollamt Berlin-Packhof*, 1987 E.C.R. 1449). For a discussion of the various classification "Chapters," see *supra* notes 87-88 and accompanying text; see also *infra* note 149.

¹²⁰ *Id.* at [51]. Such a classification would also exempt the works from a separate customs duty of 3.7 percent, which was charged to the gallery. Valentin, *European Definition*, *supra* note 16.

¹²¹ Case C-35/93, *Develop Dr Eisbein GmbH & Co. v. Hauptzollamt Stuttgart-West*, 1994 E.C.R. I-2655, at [3].

¹²² *Id.*

¹²³ *Id.* at [1].

¹²⁴ *Id.* at [4] (discussing the antidumping duty under Regulation 2640/86/EEC, 1986 O.J. (L 239) 5).

¹²⁵ *Id.* at [6].

¹²⁶ *Id.*

were described as “articles the components of which are to be assembled” using only simple instructions.¹²⁷ The importer argued that the components of a photocopier require highly specialized staff for assembly, and that therefore assembly cannot be accomplished with simple instructions.¹²⁸ Thus, the photocopiers were neither “unassembled” requiring simple assembly nor “fully assembled,” the antidumping rule did not apply, and the parts should be treated solely as components.¹²⁹ Customs officials argued that the requirement of highly specialized staff did not take these articles out of the “simple assembly” category.¹³⁰ They argued that this only occurs when “changes to . . . the part in question [would be required] in the course of the production process.”¹³¹

The court disagreed with the importer, asserting instead that “highly qualified specialized staff” does not mean the assembly was not “simple,”¹³² and further, that neither “the assembly technique [nor] the complexity of the assembly method” should be taken into account when classifying components for customs purposes.¹³³ The court defined simple assembly in the negative: “parts [that] have to undergo major processing before assembly . . . [do] not have the relevant essential character” of the final product.¹³⁴ The inverse of that argument is that parts that *do not* have to undergo major processing *do* “have the relevant essential character of the final product.”¹³⁵

Flavin’s and Viola’s installation components may have technical and specific assembly instructions, but they do not require major processing before assembly, as raw materials might. Thus, these component light bulbs, projectors, and screens can be understood to possess the “relevant essential character” necessary for classification under *Eisbein GmbH* as their final forms—sculptures and works of art. This distinction implies that, unless changes to the forms of Flavin’s and Viola’s installation components needed to take place, they should be classified as the full apparatus when imported. The rule in *Eisbein GmbH* makes this even plainer: “[F]or tariff purposes an article presented unassembled or disassembled must be

¹²⁷ *Id.* (internal quotation marks omitted).

¹²⁸ *Id.*

¹²⁹ *Id.* at [6]-[7].

¹³⁰ *Id.* at [8].

¹³¹ *Id.*

¹³² *Id.* at [17]-[23].

¹³³ *Id.* at [19].

¹³⁴ *Id.* at [12].

¹³⁵ *Id.*

regarded as a complete article. No reference is made to the assembly technique which must be applied in order to produce the finished product.”¹³⁶ Simple assembly or major processing requirements aside, if disassembled products “must be regarded as a complete article,”¹³⁷ it is clear that the Tribunal relied on the holding in *Eisbein GmbH* in making its decision regarding Flavin’s and Viola’s works.

2. 2008–Today: The Reaction of the European Commission

Within weeks of the Tribunal decision, “the issue [of the Flavin and Viola imports] was on the agenda of the EC Customs Code Committee”¹³⁸ The committee knew that two member states (the U.K. and Holland) “had held that video installations should be classified as sculptures[,]” while other member states “expressed the view that components of video installations should be taxed individually (e.g. as video projectors).”¹³⁹ Within one year, and “without apparent further consideration or consultation, the committee decided that a draft regulation [would] be prepared for a future meeting—[one that would] overturn the UK and Dutch National Court decisions.”¹⁴⁰

This proposal was before the Customs Code Committee by June 2010;¹⁴¹ acting under the 1987 regulation it “was adopted at the [August] meeting and supported by the UK.”¹⁴² The new regulation’s sole concern was the classification of these specific artworks by Flavin and Viola. Although the 1987 regulation allows for changes to be made to the harmonized system that relate to “changes in requirements relating to statistics or commercial policy,”¹⁴³ there are no claims or references made in the text of the 2010 regulation to any such changes in “statistics or commercial policy”¹⁴⁴ driving this amendment. As a regulation, this change to the tariff classification system CN was effective immediately upon its

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Valentin, *Not Art*, *supra* note 9. This was discovered through a Freedom of Information request made by Pierre Valentin, the attorney representing the gallery in the 2008 Tribunal matter. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (internal quotation marks omitted).

¹⁴¹ *Id.*

¹⁴² *Id.*; Commission Regulation 731, *supra* note 14, at 2.

¹⁴³ Council Regulation 2658, *supra* note 87, at 4 (art. 9(b)).

¹⁴⁴ *Id.*

publication in the Official Journal, which made it binding on all member states.¹⁴⁵

The artworks at the center of the 2010 regulation were described objectively, without any reference to the artists' names or the names of the works.¹⁴⁶ Under the heading "Description of the goods," Bill Viola's video work was listed as:

A video-sound installation consisting essentially of the following components:

- 10 video reproducing apparatus of the digital versatile disc (DVD) type,
- 10 projectors using matrix liquid crystal display (LCD) technology, of a kind also capable of displaying digital information generated by an automatic data-processing machine,
- 10 single self-powered loudspeakers, mounted in their enclosures, and
- 20 digital versatile discs (DVDs) containing recorded works of "modern art" in the form of images accompanied by sound.

The appearance of the video reproducing apparatus, the projectors and the loudspeakers has been modified by an artist with a view to appear as a work of "modern art" without altering their function.¹⁴⁷

Dan Flavin's sculpture was described as:

A so-called "light installation" consisting of six circular fluorescent lighting tubes and six lighting fittings of plastics.

It has been designed by an artist and operates in accordance with instructions provided by the artist. It is intended to be displayed in a gallery, fixed to the wall.

The fittings are separate from each other and are intended to be mounted vertically.

The tubes are to be placed into the fittings, providing two alternating shades of white.¹⁴⁸

Each of these two descriptions was assigned a classification code: Viola's work was assigned to TARIC Chapter 85 (Electrical Machinery and Equipment) and Flavin's to

¹⁴⁵ Commission Regulation 731, *supra* note 14, at 2. The regulation actually provided that the regulation was "to enter into force on the 20th day following its publication in the Official Journal." *Id.* (art. 3) (emphasis omitted). With the date of publication at August 14, 2010, the regulation would be effective as of September 3, 2010.

¹⁴⁶ Nevertheless, those familiar with the matter would have no trouble making out to what the EC was referring. *Id.* at 3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Chapter 94 (Miscellaneous Manufactured Articles).¹⁴⁹ The reasons given for the classifications range from the presumptive to the “absurd.”¹⁵⁰ For Flavin’s work, the Commission claimed that “[c]lassification under [Chapter 97] as a sculpture is excluded, as it is not the installation that constitutes a ‘work of art’ but the result of the operations (the light effect) carried out by it.”¹⁵¹ The Commission asserted that Viola’s “video-sound installation is neither composite goods, as it rather consists of individual components, nor goods put up in sets for retail sale Consequently, the components of [both] installation[s] are to be classified separately.”¹⁵² The thrust of the Commission’s reasoning can be found in the following section of the regulation:

Classification under [Chapter 97] as a sculpture is excluded, as none of the individual components or the whole installation, *when assembled*, can be considered as a sculpture. The components have been slightly modified by the artists, but these modifications do not alter their preliminary function of goods of Section XVI. It is the content recorded on the DVD which, together with the components of the installation, provides for the “modern art.”¹⁵³

The concern here is whether these works are classifiable as “sculpture.” Chapter 97 of TARIC only specifies that a sculpture be of “any material.”¹⁵⁴ Nothing in that chapter attempts to define or give features to any of the categories of art mentioned (sculpture is not the only category).¹⁵⁵ The Tribunal judges in 2008 had no trouble recognizing these works

¹⁴⁹ Chapter 85 under Section XVI of TARIC is entitled “Electrical Machinery and Equipment and Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles.” Council Regulation 2658, *supra* note 87, at Annex Sec. XVI; *see also* *TARIC Consultation*, EUR. COMM’N: TAX’N & CUSTOMS UNION, http://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en&Taric=85219000&Area=US&Expand=true&SimDate=20110923#8521900000 (last visited Mar. 23, 2012). Viola’s work was classified under codes 8521 90 00, 8528 69 10, 8518 21 00, and 8523 40 51.

Chapter 94 under Section XX of TARIC is entitled “Furniture; Bedding, Mattresses, Mattress Supports, Cushions and Similar Stuffed Furnishings; Lamps and Lighting Fittings, Not Elsewhere Specified or Included; Illuminated Signs, Illuminated Nameplates and the Like; Prefabricated Buildings.” Council Regulation 2658, *supra* note 87, at Annex Sec. XX; *see also* *TARIC Consultation*, EUR. COMM’N: TAX’N & CUSTOMS UNION, http://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en&Taric=9405&Area=US&Expand=true&SimDate=20110923#9405000000 (last visited Mar. 23, 2012). Flavin’s work was classified under code 9405 10 28.

¹⁵⁰ *Haunch of Venison Partners Ltd. v. Revenue & Customs Comm’rs*, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820, at [49] (Dec. 11, 2008 VAT & Duties Tribunal (London)).

¹⁵¹ Commission Regulation 731, *supra* note 14, at 3.

¹⁵² *Id.*

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ Council Regulation 2658, *supra* note 87, at Annex sec. XXI.

¹⁵⁵ *Id.*

in their assembled states as sculptures and artworks.¹⁵⁶ The Tribunal also found it a “stretch” to refuse to recognize the components as the equivalent of their finished, assembled form.¹⁵⁷ The dictionary defines sculpture as “the product of the sculptor’s art,”¹⁵⁸ as well as “a three dimensional work of art.”¹⁵⁹ While neither definition clarifies the matter, the judicial system has traditionally relied on the art maker and the art community to affirm a work as art.¹⁶⁰ The members of the Commission, however, applied some other analysis to this same question, though the regulation does not make clear the principles they based their decision upon.¹⁶¹

The Commission’s reasoning disregards the U.K. VAT Tribunal’s 2008 decision. Since the component parts of Flavin’s and Viola’s installations are both presented disassembled, the Commission holds, they must be classified by their individual components.¹⁶² But the Commission also declares that, even assembled, these works are not art.¹⁶³ The Commission believes displaying the images contained on the Viola DVDs is the final step necessary for his work to become sculpture.¹⁶⁴ It reasons similarly with Flavin’s work, claiming that the addition of a “light effect” to the arrangement of light tubes creates the art.¹⁶⁵ The Commission distinguishes between “art effects” and assembled, non-art components, which it finds necessary but not sufficient to constitute a finished work. If this distinction holds, the “art effect” of, for example, Flavin’s work could never be conveyed: it is a “light effect,” something that could not be shipped or taxed because it is not a material. Even more troubling, the Commission does not follow its own rule when it assesses the nondiscounted VAT rate for the supposed non-art components; it assesses VAT on the value of the finished artwork, which is much higher than the value of industrial

¹⁵⁶ *Haunch of Venison Partners Ltd. v. Revenue & Customs Comm’rs*, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820, at [47]-[49] (Dec. 11, 2008 VAT & Duties Tribunal (London)).

¹⁵⁷ *Id.* at [51].

¹⁵⁸ *Sculpture Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/sculpture> (last visited Mar. 16, 2011).

¹⁵⁹ *Sculpture Definition*, OXFORD ENG. DICTIONARY ONLINE, <http://oxforddictionaries.com/definition/sculpture?q=sculpture> (last visited Mar. 23, 2012).

¹⁶⁰ *See infra* notes 194-200 and accompanying text.

¹⁶¹ Commission Regulation 731, *supra* note 14, at 3.

¹⁶² *Id.* at 3.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

light bulbs and DVD players combined.¹⁶⁶ The Commission is willing to use the value of the art works as a basis for the tax, but it refuses to grant the components of unassembled works the discounted status granted to art.¹⁶⁷

Non-art components are necessary components of certain artworks. “Art effects” require their non-art components, and the Commission acknowledges this critical interplay, though only nominally.¹⁶⁸ These artists expressly desired the “light effect” and the DVD images to be produced with *these* screens and light tubes arranged in a certain way, and the Commission also acknowledges this intention.¹⁶⁹ And while true that these works rely on certain non-material, non-art components, under the Commission’s standard, it is impossible to import any kind of artwork that employs electricity in its final form under the discounted VAT rate for artworks. This standard is too high. If a court accepted the Commission’s standard, any work that uses infrastructure upon its completion—pressurized water for a fountain, electrical plugs for a neon sculpture, wind for chimes—may not be classified as art, but rather a composition of non-art components. A work would only become art in its intended context or ultimate form—when the play button is pressed or the electrical current is live. This is akin to legislating that artworks that are intended for a particular context are “not art” until they are actually placed in that context. Under this standard, a fully assembled Flavin work would cease to be an artwork once the gallery closed for the night and the janitor turned off the lights.¹⁷⁰ This standard thus requires that an artwork be continually connected to every element of its context in order to remain art.¹⁷¹

¹⁶⁶ Valentin, *Not Art*, *supra* note 9.

¹⁶⁷ *Id.*

¹⁶⁸ Commission Regulation 731, *supra* note 14, at 3.

¹⁶⁹ *Id.*

¹⁷⁰ Pierre Valentin asked a similar question in a series of opinion pieces published by *The Art Newspaper*. See, e.g., Valentin, *European Definition*, *supra* note 16.

¹⁷¹ Interestingly, Duchamp’s *Fountain* was never intended to be connected to a plumbing source. His intention was to keep it freestanding and unconnected to any piece of infrastructure, but for its platform. William Camfield, *Marcel Duchamp’s Fountain: Its History and Aesthetics in the Context of 1917*, in MARCEL DUCHAMP: ARTIST OF THE CENTURY 78 (Rudolf E. Kuenzli and Francis M. Naumann, eds., 4th prtg. 1996). Under the Commission’s ruling, there would be no “art effects” of Duchamp’s piece because it is free of infrastructure and context; thus it would not be ruled as a protected sculptural artwork.

More significantly, this standard separates the artist's work product from the art itself. The Commission asserts that the art is found when the artist's work product is added to a particular infrastructure or context, but of course that final element is generally outside of the artist's control. Creating the art is not the accomplishment of the gallery owner who turns on the lights! The problem is that this standard creates no account in the law for what "art" is at all. Recall the definition of sculpture under the TARIC classification—"original sculptures and statuary, in any material, provided that they are executed *entirely by the artist . . .*"¹⁷² The Commission's standard, which places the work done by the context and infrastructure ahead of the work done by the artist, is clearly operating outside of the harmonized system.

B. *U.S. Analogues in Customs Duties*

The United States does not have a consumption tax or VAT system, but there are customs duties imposed on imports.¹⁷³ By statute, art works are exempt from these customs duties.¹⁷⁴ Courts will occasionally need to determine if an import is a work of art in order to decide upon the proper customs duty.¹⁷⁵ There are a handful of cases in the United States that address relevant import duties, but they were decided under an earlier iteration of the customs code. This historical precedent is still instructive, however, when evaluating the recent Commission regulation.

One of the most famous of these cases involved a simple sculpture cast from bronze that the customs officials had trouble classifying as a "sculpture."¹⁷⁶ Interestingly, this rather "sensational lawsuit . . . captured the attention of American public opinion for two years."¹⁷⁷ This 1928 U.S. Customs Court decision concerning Constantin Brancusi's *Bird in Space* sculpture is the U.S. case that most closely parallels the Flavin and Viola matter in both the facts and the court's reasoning.¹⁷⁸

¹⁷² Seventh Council Directive, *supra* note 80, at 24 (Annex 1(a)) (emphasis added).

¹⁷³ See generally 19 U.S.C. § 1202 (2006) (briefly discussing the Harmonized Tariff Schedule of the United States).

¹⁷⁴ Farley, *supra* note 19, at 822 (citing Tariff Act of 1930, 46 Stat. 590, 684 (1930), 19 U.S.C. § 1201, P1807 (1958), amended by Pub. L. No. 86-262, 73 Stat. 549 (1959)).

¹⁷⁵ *Id.*

¹⁷⁶ See *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928).

¹⁷⁷ André Paleologue, *Afterword to BRANCUSI VS. UNITED STATES: THE HISTORIC TRIAL*, 1928, at 118 (English-language ed., Adam Biro 1999).

¹⁷⁸ *Brancusi*, 54 Treas. Dec. at 428. In the case, the sculpture is referred to as *Bird in Flight. Id.*

Brancusi's sculpture was subject to an import duty upon its entry into the United States because the sculpture did not exactly resemble a "bird."¹⁷⁹ In the United States at the time, sculptures were exempt from import duties as "zero-rated works of art."¹⁸⁰ Customs, refusing to classify the sculpture as such, subjected the "bird" to a 40 percent import duty, the rate generally applied to manufactures of metal.¹⁸¹ Photographer Edward Steichen had purchased the sculpture; he paid the duty and then went to court to protest the determination.¹⁸² The court eventually agreed with Steichen, and his \$240 was returned.¹⁸³

The Customs Court acknowledged that under the Tariff Act of 1922 artworks were entitled to duty-free entry, as opposed to "manufacture[s] of metal" which would be subject to a tariff of "40 per cent ad valorem."¹⁸⁴ The court wrote into its opinion the entire list of materials and processes included under the Tariff Act's "art and sculpture" heading.¹⁸⁵ While the Tariff Act does not make this list explicitly exclusive, all of the "traditional" materials of sculpture are included, and the statute did not indicate that any "non-traditional" artwork or materials should be read into the list.¹⁸⁶ Even while the court conceded that "the exercise of rather a vivid imagination" is required to see the Brancusi sculpture as even resembling a bird,¹⁸⁷ it held that the sculpture, crafted from traditional materials, warranted the discounted duty under the Tariff Act.¹⁸⁸

¹⁷⁹ *Id.* at 429.

¹⁸⁰ Kennedy, *supra* note 14.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Margit Rowell, *Preface to BRANCUSI VS. UNITED STATES*, *supra* note 177, at 9. *The Guardian* lists this amount as \$600. Kennedy, *supra* note 10.

¹⁸⁴ *Brancusi*, 54 Treas. Dec. at 428. "Ad valorem" taxes are taxes "based on the assessed value of [the] real estate or personal property" at issue. *Ad Valorem Tax*, INVESTOPEdia, <http://www.investopedia.com/terms/a/advalorematax.asp#axzz1rCwgDuPW> (last visited Apr. 5, 2012). A familiar example of an ad valorem tax is municipal property tax.

¹⁸⁵ *Id.* at 428-29. Paragraph 1704 of the Tariff Act of 1922 specified that "sculpture" was to be understood as:

professional productions of sculptors only, whether in round or in relief, in bronze, marble, stone, terra cotta, ivory, wood, or metal, or whether cut, carved, or otherwise wrought by hand from the solid block or mass of marble, stone, or alabaster, or from metal, or cast in bronze or other metal or substance, or from wax or plaster, made as the professional productions of sculptors only

Id. at 428.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 429.

¹⁸⁸ *Id.* at 431.

The court applied a three-part test: (1) was this the work of a professional, (2) was this an original work, and (3) was this an article of utility?¹⁸⁹ Despite contradictory testimony, the court answered the first two questions affirmatively: “There is no question in the mind of the court but that the man who produced the [sculpture] is a professional sculptor, . . . [and w]e also find it is an original production.”¹⁹⁰ The court would need to answer the third question in the negative for the work to qualify as an artwork under the Act.¹⁹¹ Interestingly, the court addressed this question somewhat inversely. Instead of saying whether this piece was an article of utility, the court set out to determine whether it was a “work of art.”¹⁹² The court acknowledged a strong precedent that would suggest this work be denied this categorization.¹⁹³

Nevertheless, the court favored a more contemporary approach.¹⁹⁴ In recognizing the “so-called new school of art” the court accepted an art movement “whose exponents attempt to portray abstract ideas rather than to imitate natural objects.”¹⁹⁵ While the majority stated that it did not have to agree or be “in sympathy with these newer ideas[,]” the court held that it must recognize the change.¹⁹⁶ The court stated that “the fact of [the new art movements’] existence and their influence upon the art world as recognized by the courts must be considered.”¹⁹⁷ The Brancusi object was “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 . . .”¹⁹⁸ Thus, the court recognized the metal production as a sculpture and a piece of art, and granted it free entry under the Tariff Act.¹⁹⁹ The court relied on the principle of “objective acceptance,” which subordinates conflicting subjective responses of the court to expert testimonials. This principle recognizes the shifting trends of the art world, and should have been employed by the Commission when assessing Flavin’s and Viola’s works, though this rubric likely needs additional structure.

¹⁸⁹ *Id.* at 430.

¹⁹⁰ *Id.* at 429.

¹⁹¹ *Id.* at 428 (citing Paragraph 1704 of the Tariff Act of 1922).

¹⁹² *Id.* at 430.

¹⁹³ *Id.* The court even discussed briefly the reasoning and holding in *United States v. Olivotti*, 7 Ct. Cust. App. 46 (1916). See *infra* notes 216-22 and accompanying text.

¹⁹⁴ *Brancusi*, 54 Treas. Dec. at 430.

¹⁹⁵ *Id.* at 430-31.

¹⁹⁶ *Id.* at 431.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

At the very least, the Commission should have explained why it did not analyze the works under this “objective acceptance” principle. In Part IV of this note, other rubrics will be discussed that offer more structure but still maintain this objective character.²⁰⁰

Two other U.S. Customs Court cases (one that predated *Brancusi* and another that followed four decades after) addressed questions that relate to the *parts versus wholes, components versus finished products* issues. In one case, the intention to use the pieces of the work as a unit determined the imports being considered a whole.²⁰¹ In the other, a marble “sculpture,” which was only decorative and failed to rise to the level of fine art, was found *not* to be an artwork by the court.²⁰²

In *Miniature Fashions, Inc. v. United States*, importers appealed a decision classifying patterned cotton shirts and shorts imported from Japan as separates.²⁰³ This classification subjected the clothing to a rate of 25 percent ad valorem under the Tariff Act of 1930.²⁰⁴ Plaintiffs in the suit contended that the sets—designed, manufactured, and sold together as “cabana sets”—were instead “*entireties* for tariff purposes.”²⁰⁵ They argued that these “entireties” should be assessed under the “Other” category under the same section of the Tariff Act, which covered articles of clothing manufactured “wholly or in part . . . of cotton, and not specially provided for [elsewhere in the Act].”²⁰⁶ Articles falling under this “Other” category were only subject to a rate of 20 percent ad valorem.²⁰⁷ Witnesses for the plaintiffs testified that the sets were “inexpensive . . . [and] have very little . . . value when separated.”²⁰⁸ The Customs Court found the articles to be separates because the shirts and shorts would remain functionally the same even upon separation: “[A]lthough these cabana sets were designed . . . for sale together, . . . the functions of the several parts of the set were no different from what they would otherwise have been had the sets not been so coordinated. . . . [T]he shirt continued to be a shirt and the shorts remained shorts.”²⁰⁹

²⁰⁰ See *infra* Part IV.

²⁰¹ *Miniature Fashions, Inc. v. United States*, 55 Cust. Ct. 154 (1965).

²⁰² *United States v. Olivotti & Co.*, 7 Ct. Cust. App. 46 (1916).

²⁰³ *Miniature Fashions*, 55 Cust. Ct. at 155.

²⁰⁴ *Id.*

²⁰⁵ *Id.* (emphasis added).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 156.

The importers' appeal focused on proving that trends in fashion, with an emphasis on dual-purpose apparel manufacturing, were determinative of whether these pieces were "entireties" and not separates.²¹⁰ The court admitted "that [while] a changing popular attitude played a role in the conclusions reached in [cases like *Brancusi v. United States*], we do not believe that [those] decisions actually rested upon this factor."²¹¹ The court declared that "a designer's conception of 'fashion' or 'eye appeal'" is not sufficient to overcome previous policy of the court:

If what is imported as a unit is actually . . . two or more individual entities which, even though imported joined or assembled together, nevertheless, retain their individual identities and are not subordinated to the identity of the combination, duties will be imposed upon the individual entities in the combination as though they had been imported separately. Conversely, if there are imported in one importation separate entities, which by their nature *are obviously intended to be used as a unit*, or to be joined together by mere assembly, and in such use or joining the individual identities of the separate entities are subordinated to the identity of the combined entity, duty will be imposed upon the entity they represent.²¹²

Therefore, the question of subordinated identity was the determining factor for the Customs Court, and applying that concept to Flavin and Viola is instructive. The Commission argues that the imposed VAT rate should apply to the functional components of Flavin's and Viola's works. But, the Commission also concedes that the works take on a separate, unified identity when assembled and "used as a unit[,]"²¹³ in the words of the *Miniature Fashions* court.²¹⁴ This qualified concession as to the "unified identity" of the Flavin and Viola works is inconsistent with the Commission's claim that the value on which tax should be calculated is the value of the unit *as an artwork* rather than the value of the individual components.²¹⁵

Closer to the realm of sculpture, the question of whether carved marble objects were dutiable as "manufactures of marble" valued on their component material or as works of art arose in *United States v. Olivotti*.²¹⁶ Valued on their component material, the marble boxes and plinths at issue would have

²¹⁰ *Id.* at 157.

²¹¹ *Id.* at 158.

²¹² *Id.* at 160 (emphasis added) (quoting *Donalds Ltd. v. United States*, 32 Cust. Ct. 310 (1954)).

²¹³ *Id.*

²¹⁴ Commission Regulation 731, *supra* note 14, at 3.

²¹⁵ See Tarsis, *supra* note 101.

²¹⁶ *United States v. Olivotti & Co.*, 7 Ct. Cust. App. 46, 47 (1916).

been subject to a 45 percent ad valorem duty the Tariff Act of 1913; but, if classified as works of art under a different paragraph the applicable duty rate would have been 15 percent ad valorem.²¹⁷ The government appealed the decision of the Board of General Appraisers, which found the marble works to fall within the 15 percent rate as works of art.²¹⁸ The board had reasoned that since Greek temples were art by virtue of simply being sculpture, these pieces must be art as well.²¹⁹ The Court of Customs Appeals was not as easily satisfied, reasoning that one of the pieces being “the work of a sculptor[,] . . . fashioned from solid marble[,]” and “artistic and beautiful” was insufficient “to constitute a sculpture.”²²⁰ The court in *Olivotti* was ultimately unwilling to expand the reach of Paragraph 376 to include the decorative and undeniably sculptural, even beautiful, *qualities* of the marble pieces in question, holding that neither the marble font nor the marble seats were sculptures or works of fine art dutiable at the lower rate.²²¹ “That everything artistic and beautiful can not [sic] be classed as fine art was well established in [a Supreme Court decision],” which held that concededly beautiful paintings on glass windows “were representative of the decorative and industrial rather than of the fine arts.”²²²

In *Olivotti*, the court addressed decorative elements that, when added to functional objects (or precious stone), did not rise to the level of artworks. This is distinguishable from Flavin’s and Viola’s use of nondecorative *components* that themselves comprise an artwork. *Olivotti* holds that the decorative elements of a finished commercial product may not elevate it to the classification of “sculpture” or “artwork.” But, the European Commission correctly understands that Flavin’s light tubes and Viola’s DVD players were not *decorative* elements of the installations. Haunch of Venison did not argue that decorative elements made these sculptures art; instead, the gallery argued it was the artists’ intentions, along with their

²¹⁷ *Id.*; see also Paragraphs 98 (“Manufactures of marble, etc.”) and 376 (“Paintings, drawings, etc.”) of the Tariff Act of 1913, 38 Stat. 114, 123, 151 (1913), ch. 16, paras. 98, 376.

²¹⁸ *Olivotti & Co.*, 7 Ct. Cust. App. at 47.

²¹⁹ *Id.*

²²⁰ *Id.* at 48. At this time the court was still hewing closely to the conception of sculpture being mainly representative of “natural objects, chiefly the human form.” *Id.* Twelve years later in *Branco*, the court recognized this traditional understanding but gently put it to the side in light of the changing tides of contemporary art. See *supra* notes 176-98 and accompanying text.

²²¹ *Olivotti & Co.*, 7 Ct. Cust. App. at 49.

²²² *Id.* (citing *United States v. Perry*, 146 U.S. 71, 74 (1892)).

reception by the art world, that made the works art.²²³ Thus *Olivotti* is not on point in this matter. In any event, *Brancusi* removes any lingering doubts that even basic materials can be deserving of tax discounts offered to works of art by virtue of their artistic manipulation by artists into artworks.²²⁴

IV. CRITIQUES AND SUGGESTIONS

The “tension between the law and the evolution of ideas in modern or avant garde art”²²⁵ can lead to the protectionist tendencies seen in the U.K. customs officials’ worries about retail imports classified under false pretenses. The law is insistent upon “taxonomiz[ing and classifying] artistic creations,” while the avant-garde is making valiant efforts to be “whatever [one] can get away with.”²²⁶ On a fundamental level, this tension might always exist because “law is about precedent whereas art is about the evolution of ideas.”²²⁷ The law cannot be expected to accommodate such a broad (and shifting) definition of art,²²⁸ but, significantly, “[a]rt is not apart from the law.”²²⁹ Often with conceptual art, “extrinsic circumstances” and context must be taken into account to properly classify the works.²³⁰ If a work is accepted within the context of the “art world,” that is sometimes the full extent to which it is validated as art.²³¹ The law’s inherent structure is at odds particularly with a school of art that requires a certain amount of context in its presentation. The troubles foreseen by U.K. customs officials—an open door for importers to call any shipped product “art”—is rooted here. For some of the more conceptual artworks, testimony as to their legitimacy will grow in necessity and importance. The alleged or potential burden of such a requirement, however, is not a justification for blanket legislation that makes even legitimate imports impossible.

²²³ *Haunch of Venison Partners Ltd. v. Revenue & Customs Comm’rs*, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820 (Dec. 11, 2008 VAT & Duties Tribunal (London)).

²²⁴ See *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928).

²²⁵ Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 213 (2010) (quoting *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *11 (N.D. Ill. Sept. 29, 2008)).

²²⁶ *Id.*

²²⁷ Farley, *supra* note 19, at 807.

²²⁸ Cronin, *supra* note 225, at 213.

²²⁹ Farley, *supra* note 19, at 808.

²³⁰ Cronin, *supra* note 225, at 236.

²³¹ See generally Arthur C. Danto, *The Artworld*, 61 J. PHIL. 571 (1964); see also Farley, *supra* note 19, at 844 (discussing Danto and “institutionalism”).

The Visual Artists Rights Act (VARA), adopted by Congress in 1990 to broaden general copyright protections to include artists producing physical “work[s] of visual art,”²³² attempts to resolve some of the art versus law dispute by establishing criteria which obviate subjective classification. While VARA is not without criticism, it makes inroads to recognizing the “moral rights” of artists in a way that the United States has not previously done. VARA gives credence to both the claims of the artists themselves (in declaring a visual work “art”) and the claims of the art world and its specialists (in recognizing or lauding a visual work as “art”).²³³ The foreign nations that are signatories to the Berne Convention accept a similar convention in the “*droit morale*” protections offered to artists in those jurisdictions. The copyright protections under VARA—echoes of *droit morale*—bridge art and law, and may offer an effective legal rubric for the assessment of art for tax and other purposes. The Tribunal that heard the 2008 Haunch of Venison lawsuit has already employed this standard: it took testimony from experts in the art world and made sure to ascertain that Flavin and Viola were indeed bona fide artists—that they had “recognized stature.”²³⁴ This part will further discuss these and other possible “bridges” between art and law.

A. *Problems for Conceptual Art*

Contemporary, conceptual art has a difficult status in society and in the law. Part of the problem is that “the ‘plain and ordinary’ meanings of words describing modern art”²³⁵ cannot keep pace with the developments within these art styles and types. The law has equal difficulty determining how to treat these types of developing works. As discussed below, VARA offers protection of certain artists’ rights for works of a “recognized stature.”²³⁶ Some scholars read this to mean that VARA only protects “the most revered work of the Old Masters.”²³⁷ Yet others see the low bar on creativity in the

²³² 17 U.S.C. § 106A(a) (2006); *see also* Cronin, *supra* note 225, at 209.

²³³ 17 U.S.C. § 106A(a)(3).

²³⁴ *See* Haunch of Venison Partners Ltd. v. Revenue & Customs Comm’rs, [2008] UKVAT (Customs) C-00266, 2008 WL 5326820 (Dec. 11, 2008 VAT & Duties Tribunal (London)).

²³⁵ Cronin, *supra* note 225, at 213 (quoting *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *11 (N.D. Ill. Sept. 29, 2008)).

²³⁶ 17 U.S.C. § 106A(a). *See infra* Part IV.B.

²³⁷ Cronin, *supra* note 225, at 213 (citing *Kelley*, 2008 U.S. Dist. LEXIS 75791, at *11).

copyright standards as allowing for artwork with only a minimal level of original, authored expression to garner copyright protections.²³⁸

Charles Cronin, in a 2009 article concerning VARA and conceptual artworks made with living materials, asserts that in order to classify these conceptual works as art, “extrinsic circumstances [are relied upon] to a much greater extent than . . . works in traditional genres.”²³⁹ He argues that the nature of conceptual works requires a contextual approach: the works cannot be interpreted without these extrinsic circumstances. A Monet would easily be recognized, even if “stripped of its sumptuous frame[,]” but Jeff Koons’s balloon figures or Duchamp’s urinal would be seen as having little or no aesthetic appeal if they were encountered outside of their “frame” or “art” context.²⁴⁰ For Cronin, the reliance on extrinsic circumstances and context means this avant-garde art garners less protection from VARA. Cronin’s argument is limited, however, because these more conceptual works are *intentionally* moving away from the traditional confines of gallery walls and museum spaces.²⁴¹ In fact, “[c]ertain current art practice is about breaking down the doors of art’s exalted cloister and exploding the definition of art, especially definitions that envision a narrow ‘high’ art.”²⁴² This artistic practice should be protected even if it presents a challenge to the current copyright scheme.

Cronin also argues that conceptual works garner less copyright protection because they are primarily *concepts* or ideas. It is universally understood that ideas are not copyrightable, yet this overlooks the material components of these works. Artists over the last century have been stretching the form of artworks but have not ceased creative expression through their chosen medium. Conceptual and contemporary artists have utilized customarily functional materials to access artistic expression that the more removed and rarified “traditional” art materials sometimes cannot. Conceptual artists present finished works that

²³⁸ See *infra* notes 254-53 and the accompanying text.

²³⁹ Cronin, *supra* note 225, at 236.

²⁴⁰ *Id.* at 235-36. What Cronin considers a demerit toward the classification of the artwork Arthur Danto argues is a baseline required for the interpretation of art objects. Danto and other “institutionalists” would not distinguish between Monet and Duchamp; for them, all art objects require the context of the “art world” in order to be seen as art. See *generally* Danto, *supra* note 231; see also Farley, *supra* note 19, at 844.

²⁴¹ For a discussion of intentional changes in and departures from the art-world ethos, see *supra* Part I.A.

²⁴² Farley, *supra* note 19, at 814.

are products of creative expression, but Cronin argues that artists should not be allowed to “elevate[] the status of these [non-art] materials to that of art by addressing them as such”²⁴³ Cronin asserts that works employing materials that have not been in use “[s]ince time immemorial” do not rise to the level of art just because an artist has done something creative with them.²⁴⁴ However, this assertion is simply untenable. Nowhere in the copyright-protection statutes exists such a requirement that art materials satisfy some preapproved list of acceptable and traditional materials. Cronin offers two pointed criticisms of avant-garde art, both of which focus on contextual and material components, but he leaves out artistic intention and how the art world receives the work. These conceptual works should not fail to garner protection simply because they are focused on the *idea*, and not the materials employed in their execution.

B. *Moral Rights, Foreign and Domestic*

International copyright protections were established in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). This doctrine is particularly focused on the “[r]ights of [a]tribution and [i]ntegrity.”²⁴⁵ Berne Convention rights “are commonly called ‘moral rights’ because they ‘are a constellation of rights that ensure an ongoing relationship between the author and the creative work outside [of] economic issues.’”²⁴⁶ For instance, the right of integrity “allow[s] an artist to prevent changes to her work that would affect her honor or reputation negatively.”²⁴⁷ This right, granted to artists, serves to protect their finished work product from

²⁴³ Cronin, *supra* note 225, at 252.

²⁴⁴ *Id.* at 243.

²⁴⁵ 17 U.S.C. § 106A(a) (2006); 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 23:16 (2011); Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986), 1160 U.N.T.S. 30. The United States adheres to the Berne Convention with certain important exceptions, namely that the U.S. Berne Implementation Act of 1988 insists that “the Copyright Act, the Lanham Act, and state law” are the “sole source of rights” for copyright protection in the United States, rejecting the additional “moral rights” under Article 6*bis* of the Berne Convention. 7 PATRY, *supra*, § 23:23. “The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.” *Id.* § 23:45 (quoting Pub. L. No. 100-568, 100th Cong., 26 Sess. § 2(2), 102 Stat. 2853). This is not to say that certain moral rights have not been extended in the Copyright Act to works of visual art over time (e.g., VARA), but rather that the United States’s recognition of artists’ moral rights came well after the international community’s. *Id.* § 23:23.

²⁴⁶ Davis, *supra* note 57, at 219-20 (quoting Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 660 (2007)).

²⁴⁷ *Id.* at 220 (quoting H.R. Rep. No. 101-514, at 6).

being changed into something else (e.g., a collection of non-art components). Though a layperson might try to destroy an artist's work by denigrating or taxing it, this kind of clumsy effort might indeed enhance the prestige of the artist. Still, the honor of artists *as artists* lives through their works; the act of denying that their work is art may play well in the press, but it indeed negatively affects their honor.

European copyright laws appear "better adapted to address the interests of fine artists because they protect not only the finished work, but also the artist's control over the creative process and ultimately her persona and reputation."²⁴⁸ It is ironic, then, that EU copyright better respects the persona and reputation of the artist while the EU VAT system, which recognizes both the existence and cultural importance of fine artwork, does not. These two systems should ideally be working in concert; interpretations under one (i.e., TARIC) should respect and heed the protections of the other (i.e., the Berne Convention). In passing the 2010 regulation, the Commission seems to be doing anything but that. Considering the increasing use of "atypical" materials in contemporary artworks, the implications of the 2010 regulation become all the more alarming. The next time a customs official in the U.K. is confronted with a box of bricks or cords of wood imported by a gallery or museum and listed as an artwork, it is very likely that they will be subject to the import VAT appropriate for their raw industrial components.²⁴⁹ The problem of appropriate taxation will continue to arise as the frequency of inclusion of non-art materials continues to increase in paintings, sculptures, and other types of artworks.

In the United States, VARA extended certain copyright protections to "author[s] of work[s] of visual art."²⁵⁰ Some of the rights granted through VARA were "[r]ights of attribution and integrity."²⁵¹ These rights match the Berne Convention system, but standard U.S. copyright requirements must first be met before the VARA rights are even reached.²⁵² The basic tenets of copyright protection under the Copyright Act require that a work be an original, authored expression in a fixed and

²⁴⁸ Sapolich, *supra* note 47, at 455.

²⁴⁹ For a discussion of the increasingly common use of nontraditional materials in artworks, see *supra* notes 58-69.

²⁵⁰ 17 U.S.C. § 106A(a) (2006).

²⁵¹ *Id.*

²⁵² *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011), *cert. denied* 132 S. Ct. 380 (2011). The court in *Kelley* called these basic copyright requirements "foundational." *Id.*

tangible form.²⁵³ In U.S. copyright law, “the ‘requisite level of creativity is extremely low; even a slight amount will suffice.’”²⁵⁴ Courts find “creativity is not a high bar to copyright[, and] . . . a ‘work of art’ exists when ‘by the most generous standard [it] may arguably be said to evince creativity.’”²⁵⁵ This implies that moral rights of conceptual artists could be given all the more protection: if only a modicum of creativity is required, many alleged artworks will be accepted as such, and many alleged artists will have their moral rights protected.

Though Flavin’s and Viola’s sculptures are only “minimally differentiated from [their] non-art materials,”²⁵⁶ these artists have contributed more than a little creativity in detailing how to construct the installations. So long as this minimal level is met, it would seem U.S. copyright protection could be asserted. How is it, then, that the U.S. copyright provisions can be seen as *more* assertive of an artist’s moral rights than the European system and its *droit morale* protections? This demonstrates that something is amiss in the 2010 regulation.

A copyright can be obtained with a “low standard of originality.”²⁵⁷ This “is intended to minimize the possibility that judges would interject their own ideas of what is and is not art.”²⁵⁸ Setting the creativity bar low keeps judges from having to make subjective determinations, thus “ensur[ing] that judges remain objective and neutral.”²⁵⁹ Unpopular or controversial art movements could be at risk if judges needed to make subjective determinations as to whether a work warrants copyright protection. Certain trends in “artistic development might be stultified by ignorant or outdated legal evaluations.”²⁶⁰ “Judges [could not] make artistic decisions while remaining objective,” since the heart of artistic decisions is individual taste, an inherently subjective concept.²⁶¹ The U.S. copyright system properly considers a work worthy of protection even if it only

²⁵³ 17 U.S.C. § 102.

²⁵⁴ Sapolich, *supra* note 47, at 461 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991)).

²⁵⁵ *Id.* (second alteration in original) (quoting MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08(B)(1) (Matthew Bender & Co. 2006)).

²⁵⁶ *Id.* at 460.

²⁵⁷ *Id.* at 472.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Farley, *supra* note 19, at 814.

²⁶¹ Sapolich, *supra* note 47, at 473 (quoting Farley, *supra* note 19, at 812-13).

evinces creativity. That the Commission, operating within a system granting greater protections for artists' moral rights, does not acknowledge this creativity as a contributing factor for being considered "art" further demonstrates the mysteriousness of the Commission's standard.

C. VARA's "Recognized Stature" Protection

Section 106A(a)(3) of VARA has particular relevance for Flavin and Viola. This section provides authors of works of visual art the rights:

(A) to prevent any intentional distortion . . . or . . . modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion . . . or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.²⁶²

Destruction is defined as "the state or fact of being destroyed" or "the action or process of destroying something."²⁶³ *Destroy* means "to put out of existence" or "neutralize."²⁶⁴ Admittedly these definitions are narrow in that they bring to mind tangible, visceral destruction. In the context of more conceptual and experiential work, what is destruction?²⁶⁵ Perhaps it is simply seeing only the components and not the whole. When a party—not the artist—acts to remove or collapse or disassemble an artwork, provided it fulfills the other requirements under VARA, that party can become liable for destruction under the statute. When the discussion centers on minimal or conceptual works of art, the question of destruction is often tricky. Damien Hirst's "trash installation" following an opening-night party is a near-perfect example.²⁶⁶ The morning after the opening, the gallery cleaning crew threw away bags containing spent wine cups and cigarette butts, thinking them

²⁶² 17 U.S.C. § 106A(a)(3)(A)-(B) (2006).

²⁶³ *Destruction Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/destruction> (last visited Oct. 23, 2011).

²⁶⁴ *Destroy Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/destroy> (last visited Oct. 23, 2011).

²⁶⁵ VARA briefly discusses what destruction or modification is *not*, holding conservation and relocation efforts acceptable "modifications" of an artwork that do not actually *destroy* it. 17 U.S.C. § 106A(c)(1)-(2). For conceptual artworks, this does not go far enough. In dismissing something as small as an idea, a conceptual work may in fact be destroyed.

²⁶⁶ Daniel Rozenberg ("Dadara"), *Trash Worth \$100 Million*, ART AS MONEY (Feb. 25, 2011), <http://blog.artasmoney.com/art-as-money/trash-worth-100-million/>.

nothing more than garbage.²⁶⁷ But, Hirst had arranged the “trash” after the party, considering it a part of the installation.²⁶⁸ Although Hirst found it humorous, in terms of VARA protection it is possible that the cleaning crew, or even the gallery, would have been liable for the installation’s “destruction.”²⁶⁹

In the context of artwork preservation, these definitions also chafe against the realities of some contemporary works of art. Certain works “must be disassembled in order to preserve their value and ensure their continued existence.”²⁷⁰ Certainly Flavin’s and Viola’s installations must be “destroyed” (i.e., disassembled) in order to move them from museum to gallery or vice versa. In fact, “disassembly is [often] required to conserve the work consistently with the artist’s vision.”²⁷¹ Nathan Davis’s article challenged a Southern District Judge’s decision for hewing too closely to the dictionary definitions of “remove” or “destroy” in the context of artwork preservation.²⁷² Davis asserts, “There is a difference between dismantling the sculpture never to recompose it, and dismantling a sculpture intending to put it back together once a part of it has been fixed.”²⁷³ This distinction applies directly to the Flavin and Viola installations. Both the Flavin and Viola works were dismantled with the intention that the London gallery which was importing them would put them back together. When the works arrived at U.K. customs, this should have been obvious. Had the European Commission understood this distinction, it is possible that the classification of these installations as “sculpture,” by the U.K. Tribunal would have gone undisturbed. Sadly, the Commission *did* recognize that the Flavin and Viola components were intended to be reassembled, but they nevertheless denied these installations “sculpture” status.²⁷⁴ Instead, the Commission required the act of switching the lights and projectors *on* in order to achieve a finished artwork.²⁷⁵ As discussed in Part III, this standard is impossibly

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Davis, *supra* note 57, at 241.

²⁷¹ *Id.* (discussing a Robert Morris minimalist sculpture entitled *Rope Piece* consisting of a piece of “rope draped between two painted wooden elements”). *Id.* at 240.

²⁷² *Id.* at 241 (discussing *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005)). That decision seems predicated on the idea that the work is destroyed once disassembled, thereby being unable to “return to existence.” *Id.*

²⁷³ *Id.*

²⁷⁴ *See supra* Part III.A.

²⁷⁵ *See supra* Part III.A.

high, and the distinction the Commission forces on these works is not really one of *assembled versus disassembled*, but one of *on versus off*. Conservationists of any other type of artwork would hardly make such a distinction as “whether the electricity is flowing.”

The “moral rights” secured through VARA “protect[] the right of an artist to preserve a work of art even after that work is sold.”²⁷⁶ It is VARA’s requirement of “*recognized stature*” that gives an artist’s moral-rights claim any legitimacy²⁷⁷: “where a particular work of art has achieved recognized stature, VARA gives the artist the right to prevent its destruction.”²⁷⁸ The two-part test for prevailing on these VARA-violation claims requires the plaintiff to prove (i) that the piece is a “work of recognized stature,” and (ii) that the “[d]efendants destroyed the piece in an intentional or grossly negligent manner.”²⁷⁹ Recognized stature “is generally established through expert testimony” that proves that the “artistic merit” of the piece has “been recognized by . . . the artistic community and/or the general public.”²⁸⁰ For VARA protection, the artist’s particular piece at issue must “have achieved such stature[,]” though there are circumstances imaginable in which an artist “is of such recognized stature that any work by that artist would be subject to VARA’s protection.”²⁸¹ Nathan Davis reads the statute and concludes it is “[a]n imperfect solution to the problem”²⁸² because it leaves out too many conceptual artists, honoring only the “Old Masters.”²⁸³ Though not perfect, accepting recognized stature of the artist as proof that the artist’s finished products are “art” is certainly more defensible than the Commission’s treatment of Flavin and Viola.

²⁷⁶ *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) (citing *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003)).

²⁷⁷ 17 U.S.C. § 106A(a)(3)(B) (2006); see also *Scott*, 309 F. Supp. 2d at 400.

²⁷⁸ *Scott*, 309 F. Supp. 2d at 400 (citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, rev’d in part and vacated on other grounds*, 71 F.3d 77 (2d Cir. 1995)).

²⁷⁹ *Id.* (citing 17 U.S.C. § 106A(a)(3)(B); *Carter*, 861 F. Supp. at 325); see also *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (discussing *Carter*’s test interpreting VARA).

²⁸⁰ *Scott*, 309 F. Supp. 2d at 400 (internal quotation marks omitted).

²⁸¹ *Id.* In the instance of the Hirst party trash being thrown away, Hirst’s recognized stature would likely impute onto any work he claims to have authored.

²⁸² *Davis*, *supra* note 57, at 221.

²⁸³ *Id.* at 228.

D. “Self-Expression” and Arbiters of Taste

Besides recognized stature, U.S. courts have required self-expression when granting protections to an artwork under the First Amendment. The Ninth Circuit Court of Appeals held that “[a]ny artist’s original [artwork] holds potential to ‘affect public attitudes,’ by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist’s self-expression, [an artwork] will be protected under the First Amendment, because it expresses the artist’s perspective.”²⁸⁴ This “self-expression” need not be singular or narrow. The Supreme Court has said that “a narrow, succinctly articulable message is not a condition of constitutional protection”²⁸⁵ Requiring such a message, the Court reasoned, would invalidate entire wings of major museums that show artists like Jackson Pollock.²⁸⁶ Rather, self-expression can be broadly construed. The Court has also “distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious.”²⁸⁷ A “bedrock principle” of First Amendment jurisprudence “is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁸⁸ When legislation’s “suppression of speech . . . attempt[s] to give one side of a debatable public question an advantage[,] . . . the First Amendment is plainly offended.”²⁸⁹

The Second Circuit takes a similar view of legislation that “looks upon visual art as mere ‘merchandise’ lacking in communicative concepts or ideas.”²⁹⁰ In *Bery v. City of New York*, the court addressed an appeal concerning regulations the City of New York had adopted prohibiting sales of art in public places without a general vendor’s license.²⁹¹ The court found the approach of the city “myopic[,] . . . [and] fundamentally

²⁸⁴ *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (citation omitted) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)) (discussing the right of an itinerant painter to be granted the necessary permits to sell his work in a restricted park).

²⁸⁵ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (discussing constitutional protections due to a gay and lesbian group seeking to march in a St. Patrick’s Day parade).

²⁸⁶ *Id.*

²⁸⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring in judgment).

²⁸⁸ *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

²⁸⁹ *Id.* at 430-31 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785-86 (1978) (internal quotation marks omitted)).

²⁹⁰ *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

²⁹¹ *Id.* at 691.

misperceiv[ing] the essence of visual communication and artistic expression.”²⁹² “Visual art[,]” the court held, “is as wide ranging in its depiction of ideas, concepts and emotions as any book . . . or other writing, and is similarly entitled to full First Amendment protection.”²⁹³

Not so surprisingly, these courts have *not* required the aesthetic opinions of the judges themselves. Judges have been hesitant to take steps that would “destroy” an artwork (though they are also practicing some self-protection). The majority in *Martin v. City of Indianapolis*, a Seventh Circuit case, began, “We are not art critics, do not pretend to be and do not need to be to decide this case.”²⁹⁴ The concurrence expressed a similar sentiment: “Like my colleagues, I am not an art critic. So I begin with the well-worn adage that one man’s junk is another man’s treasure. No doubt [the artist] treasured what the city’s bulldozers treated as junk.”²⁹⁵

These judges, and many others, rely on Justice Oliver Wendell Holmes’s famous statement on the intersection of aesthetics and judicial restraint.²⁹⁶ In *Bleistein v. Donaldson*, one of Holmes’s first Supreme Court opinions, he said that “[it] would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artworks] [S]ome works of genius would be sure to miss appreciation.”²⁹⁷ Holmes’s opinion understood that many art movements are “repulsive until the public [learns] the new language in which [the artist] spoke.”²⁹⁸ Judges fear exposing themselves as “culturally elite” by revealing their aesthetic

²⁹² *Id.* at 695.

²⁹³ *Id.* Ten years later, in *Mastrovincenzo v. City of New York*, the Second Circuit declined to extend the “*Bery* injunction” to plaintiffs who were selling articles of clothing painted with graffiti. 435 F.3d 78, 82 (2d Cir. 2006). The court reasoned that articles of clothing painted with graffiti were not necessarily expressive, and that the *Bery* injunction should be narrowly read not to include “clothing painted with graffiti” under the category of “paintings.” *Id.* Additionally, objects that are utilitarian in nature or are promotional/advertising materials do not fall within the protections of VARA. 17 U.S.C. § 101 (2006); *Kleinman v. City of San Marcos*, 597 F.3d 323, 327, 329 (5th Cir. 2010).

²⁹⁴ *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999). In *Martin*, the court discussed the city’s argument that the artist had waived this VARA protection through their contract. *Id.* at 614. Ultimately, the court was not persuaded by the city’s argument. *Id.*

²⁹⁵ *Id.* at 615 (Manion, J., concurring in part and dissenting in part).

²⁹⁶ Farley, *supra* note 19, at 815.

²⁹⁷ *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

²⁹⁸ *Bleistein*, 188 U.S. at 251.

opinions in court—and no judge wants their opinion to be vulnerable to later attack.²⁹⁹

In *Martin* there was a contract between the artist and the city, which had included the possibility of future removal of his sculpture from its original site.³⁰⁰ In fact, the sculpture was created with this specific possibility in mind, “engineered . . . so that it could be disassembled for removal and later reassembled.”³⁰¹ Nowhere in the *Martin* opinion did the court indicate that the artwork, or the VARA protections afforded to it, suddenly ceased to exist upon any potential disassembly for relocation. Once afforded the recognized stature, the VARA protections for Martin’s sculpture could not be easily undone; taking the piece apart for relocation would not have compromised those protections; neither would have, for example, moving the piece on a flatbed travelling down the highway. The legal protections would not disappear simply because the artwork was disassembled for removal. Clearly they would not cease to exist during shipment, either. Such an implication would be—to recall the language of the U.K. VAT Tribunal—absurd. It would mean that an artwork’s VARA protections could be circumvented if the artwork was first disassembled. Somehow the components could be destroyed without violating VARA but the assembled work could not. Such machinations would be the equivalent of removing a work’s copyright protections simply by disassembling it. The courts’ VARA interpretations provide that an artist’s legal protections extend to the disassembled components of an artwork because the artwork retains its status as an artwork even when disassembled. The European Commission’s declaration that Flavin’s and Viola’s works in disassembled form (and even once re-assembled) are void of artistic content is in direct contradiction to this learned jurisprudence.

While both the U.S. and EU legal systems accommodate the artist’s moral rights—either through *droit morale*, VARA and copyright protections, or the First Amendment concept of self-expression—what underpins them all is an acceptance that once a work is recognized by the art community as art, copyright and other protections should be afforded to it. Conceptual works of art may find trouble in language and definition, but having satisfied the baseline original and

²⁹⁹ Farley, *supra* note 19, at 814-15.

³⁰⁰ *Martin*, 192 F.3d at 611.

³⁰¹ *Id.*

creative expression requirements under the U.S. copyright system, these works should at a minimum not be denied protections under the law. The question of what qualifies as destruction under VARA, while important to investigations of liability under the Act, is secondary to the first requirement under VARA—the recognized stature provision. It is this standard that courts, both domestic and foreign, are primed to apply, and many have already proven their ability to do so. Legislators can easily get behind this standard because it removes any subjectivity they might need (or want) to employ in their lawmaking. Lawmakers should decline to act as arbiters of taste, just as many learned judges have done, and leave instead the expert determinations of an artwork's status to the art experts.

CONCLUSION

While some of the pitfalls of VARA have been discussed above,³⁰² the standards set out in the legislation—the requirements of “recognized stature” in particular—would make courts' evaluations of the merits of an object, installation, or experience *as an artwork* more reliable. This same structure could also be applied to the imposition of import taxes and duties, particularly in jurisdictions that provide for lower tax rates on artwork. The means for applying taxes on the basis of an object's status as “artwork” would be well served by the requirements imposed under this recognized-stature condition.

While the United States does not currently impose a tax system similar to the harmonized system of the European Community, leading economists have proposed a “consumption tax” as an answer to the nation's economic woes.³⁰³ Though the idea “offends many conservatives”³⁰⁴ for its enabling of an expanded spending power of the government and an increase in government overall,³⁰⁵ liberals find it equally unfavorable for imposing taxes on citizens' consumption. It is possible that the VAT “appeal to liberals can be enhanced . . . by exempting items

³⁰² See *supra* notes 282-83 and accompanying text.

³⁰³ Robert J. Barro, Op-Ed, *How to Really Save the Economy*, N.Y. TIMES, Sept. 10, 2011, at SR8 [hereinafter Barro, *Save the Economy*], available at <http://www.nytimes.com/2011/09/11/opinion/sunday/how-to-really-save-the-economy.html>.

³⁰⁴ *Id.*

³⁰⁵ Robert J. Barro, Opinion, *How to Get That AAA Rating Back*, WALL ST. J. (Aug. 8, 2011), http://www.economics.harvard.edu/faculty/barro/files/11_0808_AAA_WSJ.pdf [hereinafter Barro, *AAA Rating*]; Barro, *Save the Economy*, *supra* note 303.

such as food and housing.”³⁰⁶ Economists claim that implementing this type of tax on consumer spending could raise “revenue [of] . . . roughly five percent of G.D.P.”³⁰⁷ In fact, some economists see a VAT as “more efficient than an income tax.”³⁰⁸ But, regardless of one’s opinion, implementing such a system would leave the nation vulnerable to a host of classification questions. Of course, the classification of artworks for taxation purposes is not the main concern of a government seeking to dig itself out of a sluggish economy, but allowing further sacrifice of the value of our cultural works would have its own deleterious effects on the nation.

For Flavin’s and Viola’s works, the matter is not yet closed, even though the European Commission went “to such elaborate lengths to overturn the decision of [the Tribunal] in relation to a relatively small amount of import tax in relation to artworks[.]”³⁰⁹ There is hope: David Zwirner gallery, which brought a seldom-seen Flavin series to the International Contemporary Art Fair (FIAC)³¹⁰ in October 2011, and which represents the Flavin estate, has recently retained the law firm of Mayer Brown to “explore the gallery’s legal options regarding the . . . ruling.”³¹¹

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³⁰⁶ Barro, *AAA Rating*, *supra* note 305.

³⁰⁷ Barro, *Save the Economy*, *supra* note 303.

³⁰⁸ *Id.*

³⁰⁹ Henry Lydiate, *VAT: Flavin’s Fittings*, ARTQUEST, <http://www.artquest.org.uk/articles/view/flavin-s-fittings> (last visited Oct. 30, 2011).

³¹⁰ FIAC is the International Contemporary Art Fair. Begun in 1974, it returned to Paris in 2005 and exhibits modern and contemporary artists represented by galleries throughout the world. *FAQ’s, FIAC!*, <http://www.fiac.com/faq.html?lg=en> (last visited Mar. 16, 2012); *see also* Nicolai Hartvig, *A Supercharged FIAC Returns to Paris, Surprising Dealers With Fierce Competition and Million-Dollar Sales*, ARTINFO (Oct. 20, 2011), <http://www.artinfo.com/news/story/38923/a-supercharged-fiac-returns-to-paris-surprising-dealers-with-fierce-competition-and-million-dollar-sales/>.

³¹¹ Charlotte Burns, *Legal Fight over Light Bulb Ruling*, ART NEWSPAPER, INT’L ED. (Oct. 14, 2011), <http://www.theartnewspaper.com/fairs/frieze/2011/3.pdf>.

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