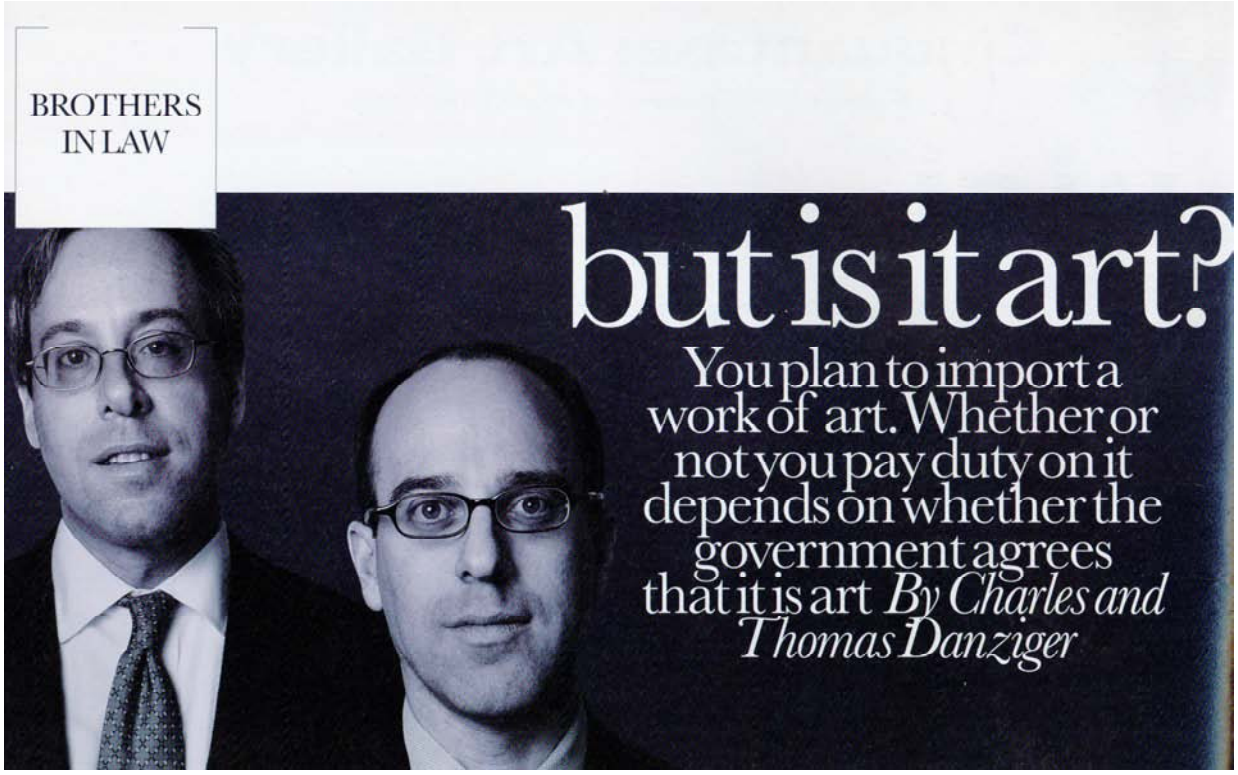

By Thomas & Charles Danziger

"Nice couch," Thomas said, glancing at the photograph in Eunice's hand. "But it looks a bit uncomfortable."

"It's a conceptual granite sculpture," Eunice replied, rolling her eyes. "The artist calls it *Form Meets Futon.* The work was carved in Europe and when I arranged to bring it here, the shipper claimed I'd have to pay duty. But that's clearly wrong, since art comes into the U.S. duty-free."

Our client was right, but she missed the shipper's point: Her piece might be dutiable based on whether U.S. Customs officials viewed it as "fine art," which is allowed to enter America duty-free, or as furniture, which is not. In fact, whether or not an object is considered art can affect its status in other areas, such as copyright, tax and artist rights laws.

Under U.S. customs regulations, objects do not have to be figurative to qualify for favorable treatment. The landmark case in this area was *Brancusi* v. *United States,* a 1928 Customs Court decision involving Constantin Brancusi's abstract sculpture *Bird in Flight.* The case began in 1926, when crates of Brancusi sculptures arrived in New York from France, accompanied by the artist Marcel Duchamp. (Brancusi himself was already in New York.) The works were to be exhibited at the avant-garde Brummer Gallery in New York and later at the Arts Club in Chicago, but when U.S. customs officials saw the 41/2-foot-tall, shiny yellow bronze sculpture, they refused to declare that it was "art" and thus exempt from customs duties. Instead, they classified *Bird* as "Kitchen Utensils and Hospital Supplies" and imposed the standard tariff for manufactured metal objects (40 percent of the sale price, or in the case of *Bird,* $240), releasing it on bond so it could be exhibited.

When, in the following year, the federal customs appraiser confirmed that *Bird* would be subject to duty, the photographer Edward Steichen—who had actually purchased the sculpture—appealed the decision. Although Brancusi had returned to Paris by then, a host of art world luminaries

testified on his behalf at the trial, during which *Bird* roosted on a table in the middle of the courtroom.

The court concluded that *Bird* was actually a duty-free "work of art," reasoning that there "has been developing a socalled new school of art, whose exponents attempt to portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy with these newer ideas and schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be considered."

"Would the court have been as open-minded about applying the same tariff ruling to Duchamp's own *Fountain*?" Eunice wondered aloud, referring to the porcelain urinal that shocked the art world when it was exhibited in New York in 1917. "Or to a two-ton couch?" Charles said, eyeing Eunice's photograph.

Since the question of whether a particular object is art is highly subjective—and the answer, especially in the area of customs law, can have significant financial consequences—we advise our clients to be prepared when importing a potentially borderline work. This might entail hiring a specialized customs broker, obtaining a certification from a curator or another recognized expert, or even applying for an advance ruling from Washington before the piece is imported. The ruling is binding, but if it goes against the applicant, there are several grounds for review, including alleging a mistake of fact or an erroneous application of the law. When all else fails, we have found that describing a work as "mixed-media" often does the trick.

"I don't believe that customs officials or judges are qualified to make subjective determinations of what constitutes art," Eunice declared. "It's a question that has stymied art historians for generations."

Fortunately, U.S. courts don't take that long to decide cases in this area, and what decisions they reach may vary depending on what type of case is brought. A customs court, for instance, may find that a given piece is not "art" for customs purposes, even though another court might reach the opposite conclusion under different circumstances.

In *Pollara* v. *Seymour,* a federal appeals court in 2003 was forced to decide whether an approximately 10-foot high by 30-footlong banner was protected "visual art" under the Visual Artists Rights Act (vara), which gives an artist the right to prevent intentional mutilation of an artwork. The case involved a multicolored banner illustrated with words and pictures by the artist Joanne Pollara that was erected in a public space surrounded by government office buildings in Albany, New York, to protest the absence of state funding for low-income legal services. Ms. Pollara had worked more than 100 hours on the banner, for which she was paid $1,800. When state officials removed and destroyed the banner, she sued them under VARA.

The Second Circuit appeals court affirmed the lower court's decision that the banner was not protected under vara because it constituted advertising or promotional material. In finding that it wasn't art, the court noted that Congress had instructed courts to "use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."

"But isn't the whole point of modern art to challenge 'generally accepted standards?'"

Eunice asked. "And besides, if some judge says that my sculpture isn't art, can anyone knock it off?" We explained that in the area of copyright, the key question is whether an object is pictorial, graphic or sculptural (in which case it is copyrightable) or simply utilitarian (in which case it is not). We told Eunice that in the 1987 case *Brandir International* v. *Cascade Pacific Lumber,* the Second Circuit court denied copyright to *Ribbon Rack,* a bicycle rack constructed of metal tubing and modeled after an abstract sculpture consisting of continuous undulating wire. The court reasoned that "the form of the rack is influenced in significant measure by utilitarian concerns and thus any aesthetic elements cannot be said to be conceptually separable from the utilitarian elements."

Even tax law involves aesthetic questions. Machinery, for example, is eligible for depreciation deductions unless it is considered "art." The Internal Revenue Service ruled in 1968 that "a valuable and treasured art piece does not have a determinable useful life. While the actual physical condition of the property may influence the value placed on the object, it will not ordinarily limit or determine the useful life. Accordingly, depreciation of works of art generally is not allowable."

"So accountants have now become the arbiters of what constitutes art?" Eunice complained. "Mine can't even match his tie to his suit."

Eunice was right, of course: The definition of art simply depends on whom you ask. U.S. Customs may claim that your Giacometti sculpture is just another dutiable lamp, but Christie's will surely disagree when the first hand is raised at auction.