

## **“Aesthetic Exports and Experts”**

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Recent philosophy of art has been largely an import business. Much of the best recent work has drawn on insights outside the field: from expertise or practical experience in specific arts like rock music, jazz, comics, or street art; from empirical findings emerging from cognitive science and experimental philosophy; and from engagement with race and feminist theory and, to a lesser extent, queer and disability studies.

These imports, some long overdue, have been, or have the potential to be, transformative. Here though, I want to look at the balance of trade from the other side: to think about how aesthetics might, in the years ahead, get into the export business. More specifically, I want to urge our field to bring its insights to the law, which is both permeated with aesthetic judgment and in deep denial of that fact.

So what has the philosophy of art to teach the law?

Answering that question requires, first, some awareness of the areas of law in which aesthetic judgments are made. Aestheticians’ past interventions in the law have focused mostly on copyright, public art and arts funding, and government censorship. These are all important areas. But even within intellectual property, aesthetic judgment goes beyond copyright, extending to design patents, trade dress, and trademark’s aesthetic functionality doctrine. And beyond IP, aesthetic judgment is central to countless land use, zoning, and historical preservation decisions; it is explicitly required within obscenity law; it recurs across our tax code and our tariff system; and, increasingly, it is providing the basis for claims to exemptions from anti-discrimination law, vendor permit regulations, and even criminal statutes.

As I said, aesthetic judgment permeates the law. But you would not know this from talking to lawyers. Within the field, the conventional wisdom is that of Justice Oliver Wendell Holmes, who declared in 1903 that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”<sup>1</sup>

Close readers of Holmes’s opinion have noted that he doesn’t prohibit all aesthetic judgment, just that by “persons trained only to the law.” Judges trained in aesthetics, whether on their own or, importantly, through the mechanism of trial, with its potential for expert witnesses, would seem to be exempt.

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<sup>1</sup> *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 253 (1903).

How, then, might aestheticians serve as the kind of expert witnesses the law needs if judges (and other legal actors) are to be allowed to make aesthetic judgments—or more accurately, to make explicit the aesthetic judgments they have covertly been making all along? I'd like to suggest that this question itself is philosophically significant. For it forces us to ask whether the discussions carried on within the philosophy of art survive unscathed when they are transplanted into other contexts. In short, it forces us to ask how durable our exports are likely to be.

First, though, to be clear: when I speak of philosophers serving as expert witnesses or otherwise contributing to the law, I am not envisioning them sharing knowledge of particular works, artists, or genres. This kind of testimony, while certainly important, is no different in kind from the musicological testimony in the Marvin Gaye/*Blurred Lines* trial, or the art criticism offered during the Richard Prince affair. Some philosophers may be well-positioned to offer testimony of this sort. But I am focused on the prospect of philosophers testifying not as critics but specifically *qua* philosophers, addressing the kinds of bread-and-butter questions for which the philosophy of art is known.

The problem is that it is unclear whether the bread-and-butter questions of aesthetics remain the same when they get asked within the law. For the law (almost) always addresses these questions within a highly specific legislative or regulatory context, in reference to more-or-less ascertainable governmental ends. Philosophical analysis of artistic concepts and aesthetic categories isn't always, or even often, conducted in a similarly purposive way. The challenge is thus to figure out when and how the answers to questions about art and aesthetic value might vary across the varied contexts in which they are asked.

Consider as an example one of the law's more famous encounters with aesthetics: the 1928 *Brancusi* trial, where the Customs Court was asked to consider whether the sculptor's *Bird in Space* could enter the U.S. duty-free as a sculpture, or whether it would instead be charged the tariff then imposed on "manufactures of metal." Previous courts had required that sculpture be imitative of natural objects. But the *Brancusi* court, after hearing from academics, critics, and curators, took note of "modern schools of art . . . whose exponents attempt to portray abstract ideas" and deemed *Bird in Space* a sculpture.<sup>2</sup>

What would a philosopher of art say about a similar statutory exemption now? It is hard to imagine a contemporary philosopher arguing for a return to mimesis. But consider what philosophers of art would, or should, say about an even more longstanding requirement within tariff law: its definitional exclusion of useful objects from the category of fine art. As a purely philosophical matter, aestheticians might well differ on their views about whether beauty and utility are inherently opposed. These might be bound up, as they often were in the eighteenth century, with one's views on the role of genius versus rule-following. But the truth of these distinctions is not quite what tariff law cares about. There, the question is not "Can works of art be useful?" so much as: "Does defining the fine arts to exclude useful objects best serve the purposes of our tariff system (e.g., the protection of domestic industry from foreign competition)?"

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<sup>2</sup> See *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928).

Now perhaps the latter question is simply too far afield from the former. Perhaps here, a question in aesthetics has not just been transposed into another context; it has been transfigured into something else entirely—a public policy or economic question, not a philosophical one.

This is how I would describe a significant event that occurred in the 1990s, when Congress waded into one of the more contentious debates in contemporary philosophy of art: the question of whether a work's moral value contributes to its artistic worth. As the law now stands, "artistic excellence and artistic merit are the criteria by which applications" for grants from the National Endowment for the Arts "are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."<sup>3</sup> Nine out of the thirteen judges who considered a constitutional challenge to this law read moral considerations as "elements of what Congress regards as artistic excellence," not "factors to be taken into account *in addition to* artistic excellence and merit."<sup>4</sup> These judges, in other words, read Congress to be enshrining *moderate moralism* into the U.S. Code. (I say "moderate" because several judges believed that moral considerations could not apply to pure music; thus the moralism they ascribed to Congress was genre-specific.<sup>5</sup>)

Assume that I am correct in my description of the law. What follows for philosophy? Probably nothing. I doubt many of the philosophers who have participated in this debate would be swayed by the fact that Congress—within the context of a particular statutory scheme—has decreed an answer. Nor is it clear that Congress should care whether ethicists, or autonomists, or immoralists seem to be winning in philosophy. For even if, say, autonomism were shown to be the best way to approach artworks in general, it might still be the case that the governmental interests served by public arts funding are best served by adopting a moderate moralist stance instead.

I have given examples where a change in context may change the question—perhaps beyond recognition. But that will not always be so. There are any number of cases in which philosophers can make a direct and important contribution. Take, for example, the "substantial similarity" test for improper appropriation in copyright law. A philosopher moved by Arthur Danto's gallery of indiscernibles might want to convince a court that when it comes to art, similarity is not a visual (or aural) concept. Two perceptibly identical squares might not, in fact, be relevantly similar at all. Importantly, however, the philosopher making this argument could do so not just in the abstract, as a general truth about art. Rather, he or she could show how copyright law, *by its own lights*, should conceive of similarity in art in ways that are not inherently sensory. Adopting a more nuanced view of similarity—once that could distinguish among "Red Square," "Red Square," "Kierkegaard's Mood," and "Red Table Cloth"<sup>6</sup>—would better serve copyright's goal of incentivizing the creation of art. Or so it might be argued. The point is that a (contested)

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<sup>3</sup> 20 U.S.C. § 954(d)(1).

<sup>4</sup> Nat'l Endowment for the Arts v. Finley, 524 U.S. 573, 591 (1998) (Scalia, J., concurring in the judgment).

<sup>5</sup> Cf. Noël Carroll, *Moderate Moralism*, 36 BRIT. J. AESTHETICS 223, 227 (1996) ("[W]ith some genres, moral considerations are pertinent, even though there may be other genres where they would be tantamount to category errors.").

<sup>6</sup> See ARTHUR C. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART* 1 (1981).

answer to a question in philosophy could be exported here without incurring too much damage, or suffering too many translation errors along the way.

It would be good to know where else in the law exports such as these might be directed. Which of the myriad aesthetic concepts enshrined in law are so aim-driven as to make them purely stipulative—“art for tax purposes” rather than “art” *tout court*—and which, by contrast, try to reflect ordinary usage, or to draw on norms internal to the artworld? These are questions philosophers of art might profitably ask in the years ahead. Were they to do so, the law might profit in turn from philosophy’s answers to whatever questions those two fields turn out to share.