

ART LAW

CASES AND MATERIALS

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DEDICATION

Leonard DuBoff would like to dedicate this book to his partner in law and in life—Mary Ann Crawford DuBoff—for her love of art, her knowledge of law, and her ability to meld the two.

Sherri Burr dedicates this book to her mother, her first art teacher, and to the students who have taken her Art Law classes at the University of New Mexico, and attended her Art Law related lectures at universities throughout the United States, Japan, Greece and in other countries around the world.

Michael Murray dedicates this book to Denise, Olivia and Dennis, “who show patience and love as I pursue my dream,” and to Donald King, who greatly helped make it all happen.

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INTRODUCTION

Greatness in art, similar to immortality in literature, may be measured by its long-term impact on the lives of human beings. Just as children and adults continue to read the plays of Shakespeare 500 years after their creation, people throughout the world still revere the art works of Michelangelo, Rembrandt, and van Dyck. An even more supreme era of art creation took place during the life of Ramses the II, the pharaoh who oversaw the rise of Egyptian empire between 304 and 1237 BC. The lasting impact of this period can be measured in the infinite treasures that tell the story of Egypt's artistic soul in museums from New York to Cairo and from London to Tokyo.

Great art may be timeless, yet just as an artist's work changes during his or her lifetime, art has undergone many transformations throughout history. Art does not grow in a vacuum. As the ideas of mankind change, so does their mode of expression. Today, anything from bread wrappers and abstract paintings to teakettles and skyscrapers can be art. The urge to portray "color suspended in air" has driven some artists to fashion their art with the use of spray paint. "Vasari Diary," *ARTnews*, Apr. 1988, at 11–12. Others utilize a can of paint to express their artistic feelings in a more traditional manner—graffiti. Yet it is not beyond comprehension to imagine the argument in support of defining either form of expression as art. An artist may contribute nothing more of herself than a signature and a date to a piece of garbage, and call the result art. *Id.* Applying the label "art" is a judgment one makes for oneself, whether the subject matter is rubbish, spray paint on a wall, or replicas of currency drawn on paper, cleverly exchanged by the artist for goods and services and subsequently exhibited along with receipts and other paraphernalia representing the transactions. Weschler, "Onward and Upward with the Arts: Value," *New Yorker*, Jan. 18, 1988.

Judging art changes with contemporary standards. Works considered poor at one time may at another time be acknowledged as masterpieces. Witness the furor associated with the development of abstract painting. What we call art, in part, may be a product of what survives the passage of time. In fact, "[i]n the long run [it could be that] any artifact will be art . . . [and in] a thousand years the art of this century will be ceramic sinks and toilets because that's all that will survive the wars and the developers." Judd, "A Long Discussion Not About Master-pieces But Why There Are So Few of Them," *Art in Am.*, Oct.

1984, at 9. Art itself is a critic of the culture that produced it and serves as a historic record for future civilizations. Even after much time has elapsed, we can learn a great deal about other people by studying their art forms.

The search for a universal definition of art has produced an array of responses and little agreement. Of those artists, philosophers and art historians who have attempted to define the term, few have settled on any single meaning or even a single common component. The suggested definitions run the gamut from the simple and familiar “art is experience,” to the more complex “a work of art . . . is an organic complex presented in sensuous medium, which complex is composed of elements, their expressive characteristics and the relations obtaining them.” Weitz, *Philosophy of the Arts* 44 (1950) (quoted in Margolis, *The Language of Art & Art Criticism* 40 (1965) [hereinafter Margolis]). See also Karlen, “What Is Art?: A Sketch for a Legal Definition,” 94 *L.Q. Rev.* 383 (1978) (discussing the legal definition of art in the United Kingdom).

For the purposes of this text, it may be less important to define what art is than to determine what art does. Art communicates. It transmits aspects of human experience that often cannot be expressed in words. R.G. Collingwood suggests that “art is expression, and it cannot arise until men have something to express.” R.G. Collingwood, *Essays in the Philosophy of Art* (A. Donagan ed. 1964). John Dewey viewed art as the “most universal and freest form of communication.” J. Dewey, *Art as Experience* 270 (1934). What it communicates is inextricably interwoven with and depends upon a mesh of the creator, the creator’s culture and society, the viewer, and the viewer’s culture and society.

Moreover, art feeds the soul. Paintings can make us laugh, cry, and ponder the meaning of life. Sculpture can fill us with hope for humanity or disgust over the degradation of human beings. A photograph can move us to political action or stop us in our tracks. Even glasswork observed from seats in churches, mosques, synagogues, and temples sends our minds wandering on new journeys and adventures.

Art affects us. We buy visual art for our homes and offices so we can enjoy the images over moments in our day. We visit unobtainable art in museums to see products of artistic imagination over the centuries. We peruse galleries to discover the output of contemporary artists.

Art can evoke passionate responses centuries, even millennia, after creation. An Egyptian cab driver complained to Sherri Burr on a trip from Manhattan to La Guardia airport about Hitler having placed the Bust of Nefertiti in his office. “How dare such an evil man possess something so precious to the Egyptian soul?” he wanted to know.

Unbeknownst to the cab driver, the Germans counted the Bust of Nefertiti among their assets. On Sunday, April 8, 1945, Josef Goebbels, Hitler’s Minister of Information, wrote in his diary, “Our entire gold reserve amounting to

hundreds of tons and vast art treasures, including the bust of Nefertiti, have fallen into American hands.”

Greek students wailed about the fact that England had the marbles of the Parthenon (a/k/a Elgin Marbles) and refused to give them back. When Sherri Burr asked them in 1997 whether their country would be a different place if the marbles of the Parthenon had never been taken, the Greek students responded, “We would be so much stronger today.”

It is moments like these that inspired the authors to research and write this book. We write for all the students we’ve taught in our U.S. classes and lectured to throughout the world. We write for the gallery owners and museum personnel who have shared so much about art over the decades with our students or called us with their legal issues. We write for the Egyptian cab driver who cared about others looking at and touching art created millennia before his birth.

The ten chapters in this book develop and define the legal contours for protecting art. Chapter 1 investigates legal definitions of art that have arisen in the copyright and customs areas. As artists explore the range of human capability, the law has expanded to protect their creative output.

In Chapter 2, this book surveys the international movement of art during *times of war and peace*. Unfortunately, the looting of conquered enemies has been taking place for millennia. Humankind has termed this type of theft “the spoils of war” or “war booty.” The Gulf Wars are only the latest example of countries’ losing their treasure while under attack from foreign enemies. Unfortunately, nations are not safe from being deprived of their art even in times of relative peace. In times of tranquility, nations must also be on guard to protect their resources from those who would seek to deprive them of their heritage.

Chapter 3 analyzes the problematic issue of how to preserve art and cultural property. *Cultural property* is the term we use to refer to group-owned art treasures. Groups and nations seek to preserve cultural property to benefit current and future generations. From the property they select to safeguard, we can tell what a group or nation values and appreciates. Native Americans have been particularly challenged to protect their heritage as they lost much of the land they held sacred. Chapter 3 delves into the efforts of Native Americans to repatriate their art and burial goods from museums and to create a national museum dedicated to preserving their cultural resources.

In Chapter 4, we survey copyright protection, the cornerstone of legal rights, for artists. Chapter 4 covers the type of art that the law protects and bundle of rights that artists obtain through copyright law. We also probe the problems of copyright infringement and how to make fair use of other people’s works.

Chapter 5 continues our discussion of intellectual property protection by addressing how artists can employ trademark law to protect their work. Because

trademarks can be utilized to protect distinctive words, letters, numbers, slogans, nicknames, symbols and designs, artists can draw on trademark law to protect the distinctive images that they associate with their work. Since trademark protection can be both federal and common law, artists have options as to how much protection they want to pursue.

Moral and economic rights, along with the right of publicity, are the subjects of Chapter 6. Artists have both domestic and international moral and economic rights. Chapter 6 examines the differences between the artistic protection offered in the United States and what is available in the countries who are signatories to the Berne Convention for the Protection of Literary and Artistic Works. Publicity rights are important to artists who obtain a certain celebrity status and who seek to use celebrities as a source of artistic inspiration. Chapter 6 discusses the legal parameters of what is appropriate use of celebrity images and what is not.

Chapter 7 presents contours to artists' business relationships. Given that Michelangelo had problems dealing with the Pope during his lifetime, imagine how he might have felt after the restoration of the Sistine Chapel. Chapter 7 focuses on the business dynamics between artists and commissioners, sellers, and purchasers of their works. Chapter 7 provides information on the content of contracts, be they oral or written, and illuminates a variety of concerns.

Auctions are the focus of Chapter 8. In any given year, as much as 50% of art may be sold at auctions, both live and online, to purchasers. "Buyer beware" has always been a tenant of the auction market and remains so in the online world. Chapter 8 explores the problems that sellers, purchasers, and auction houses have encountered, particularly when a work turns out to be inauthentic, i.e. not what the seller proclaimed it to be.

Museums are major purchasers and displayers of art. Chapter 9 delves into the problems that museums may encounter with their structure and their relationships with governmental entities and donors. Museums are major players in protecting and preserving cultural heritage, whether they were created to display fine art, modern treasures, items of industrial design, or objects that are *sexual in content*.

Chapter 10, the final one in this book, addresses the thorny issue of censorship. Obscenity, pornography, and protest art challenge the boundaries of what is legally acceptable creation and what is not. As the definition of what constitutes great art may change throughout the ages, so does what society deems suitable creative output. One generation may find Michelangelo's *David* to be obscene and desire to ban it from public display, while another generation may consider it one of the greatest works ever created. Chapter 10 begins with a discussion of the evolution of censorship rules and concludes with an analysis of private and indirect censorship.

We hope that you enjoy reading and thinking about these issues as much as we have taken pleasure in writing this book. We wish you a happy journey into the world of art law. For further information, please contact our website at <<http://artlaw.unm.edu>>.

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