

## Final Review: Art and Law

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## Moral Rights: Right of Integrity

- ✧ Artist has the right to insist on the work being presented in its intended form, even after sale.
- ✧ Distortion or misrepresentation of work damages the artist's identity and reputation.
- ✧ Example: Buffet's refrigerator: 6 panels painted on the refrigerator—then purchaser dismantled and attempted to sell individually.

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## Moral Rights: Right of Attribution

- ✧ Artist has the right to insist that the work be associated with his/her name.
- ✧ Also can prevent his/her name from association with work that is not his/her own.

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### Moral Rights: Right of Disclosure

- ✧ Artist has the right to determine when a work can be made public and to withhold or withdraw work from public display.
- ✧ This right recognized in Europe, but not in U.S., where property rights concepts prevail when works sold. Buyer has the right to display, under U.S. law.

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### Moral Rights in U.S. Law

- ✧ U.S. law has taken a strong property rights position in all areas.
- ✧ Moral rights in artworks conflicts with property rights concepts in ways that were disturbing to Americans (and still are!).
- ✧ California and New York first states to enact moral rights statutes. (1982 and 1984, respectively.)

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### Visual Artists Rights Act

- ✧ Federal legislation passed in 1990.
- ✧ Defines “visual art” as painting, drawing, sculpture in single copy or limited edition, and photos produced for exhibition in limited edition.
- ✧ Excludes posters, maps, diagrams, models, videos, web sites, advertisements, and work for hire.

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### VARA Provisions

- ✧ Right of attribution: right to claim ownership and prevent false use of name.
- ✧ Right to prevent intentional distortion, mutilation, or modification of work in way prejudicial to reputation of artist.
- ✧ Right to prevent destruction of a work of “recognized stature.”
- ✧ Rights endure for life of the artist (or last survivor, if joint work).

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### VARA Rights Waiver

- ✧ VARA rights may be waived by written agreement.
- ✧ Joint work: waiver of one artist good for all.
- ✧ Implication: contracts for sale of artwork often contain waiver of VARA rights.

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### VARA and Copyright Compared

VARA	Copyright
Right of personality (reputation of artist)	Property right (monetary interest of artist)
Limited scope of coverage	Broader coverage of art and design work
Duration: life of artist	Duration: life + 70 years
Nature of protection: protects how artwork itself is treated after sale (unless waived).	Protects artist against unauthorized duplication of work and income disruption from copies.

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### Copyright Protection

- ✧ With copyright, artist has the exclusive right to:
  - ✦ Copy
  - ✦ Distribute, sell
  - ✦ Display
  - ✦ Prepare derivative works
  - ✦ Prevent unauthorized exercise of rights stated above.

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### Transfer of Copyright

- ✧ When artwork sold, artist may transfer some or all of copyrights.
- ✧ 3 sets of rights involved:
  - ✦ Creator of the artwork
  - ✦ Owner of the physical artwork
  - ✦ Owner of each of the copyrights.

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### Copyright Law Changes

- ✧ First U.S. copyright law passed in 1909.
- ✧ Duration of rights: 28 years, renewable for another 28 years.
- ✧ New law passed in 1976, effective 1978. Changed duration to life of artist + 70 years.
- ✧ Renewal periods also extended with new law.
- ✧ Bottom line: works created before 1923 are in public domain. Works created later may still be copyrighted.

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### Copyright Notice and Registration

- ✧ Works created after 3/1/1989 are copyrighted regardless of proper use of the © notice symbol when published.
- ✧ Not necessary to register work with copyright office, but advisable:
  - ✦ Registration increases damages available if infringement occurs.
  - ✦ Necessary before any enforcement lawsuit can be filed.

13

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### Copyright originality requirement

- ✧ “Original” not same as unique. Two people can copyright the same creative work simultaneously produced, as long as did not copy each other.
- ✧ Must contribute something innovative and creative to the work, even if humble.
- ✧ Example: Uncle Sam banks
  - ✦ Changes not sufficiently innovative to make it original (metal to plastic, change in size and a few other details).

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### Copyright and Photographs

- ✧ Problem: how can photos ever be “original?” Are copies of another image, by nature.
- ✧ Portrait photo case: portrait photos are copyrightable because of creative decisions that go into posing, shooting, and developing the photograph.
- ✧ Creating color transparencies of original artworks are not copyrightable, because lack originality. Are exact copies, with no creative contribution.

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### Transfer of copyright

- ❖ Owner may transfer copyrights in artwork in whole or in part.
- ❖ Transfer of the material object does not transfer the copyright unless there is an agreement to that effect.
- ❖ Right of display: goes along with transfer of ownership of the object. Other rights remain with the artist, unless specified in sales contract.

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### Museums and copyright

- ❖ Museums typically want not only the right to display the work but also the right to reproduce in form of photos for catalog and promotional materials and reproductions for the museum shop.
- ❖ Some insist on exclusive transfer of all copyrights; others have ethical objections and get only specified rights.

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### Collectors and copyright

- ❖ Similar position to museum's, except that they don't necessarily need to promote the object.
- ❖ Rights of reproduction and making derivative works should be negotiated when the work is sold to the collector.
- ❖ Resale royalties: Accepted practice in Europe, but not in U.S. except in California, where artists entitled to 5% of gross sales price upon each resale of work.

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### Works for Hire

- ✧ Major issue for artists and designers working for companies.
- ✧ If work is considered “for hire,” then copyrights belong to the employer, not to the artist or designer.
- ✧ Two classes of “works for hire:”
  - ✦ Work prepared by an employee within scope of employment
  - ✦ Contributed work agreed to be a work for hire.

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### Works for Hire

- ✧ Most disputes involve who is an “employee” under the first class.
- ✧ *Community for Creative Non-Violence v. Reid* (case involving the Christmas sculpture showing homeless people on a steam grate) set the standard for “works for hire” as the same agency test to distinguish an employee from an independent contractor.
- ✧ Each situation decided on its own facts, unless there is a written agreement about the status of the work.

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### Joint Work

- ✧ If work is considered joint, then all the parties involved in its creation share ownership of the work and the copyright.
- ✧ Each joint owner can agree on behalf of all others.
- ✧ “Joint work” = prepared by two or more authors with the intention that their creative contributions be merged into a single, inseparable work.

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### Joint Work

- ✧ Much design work is not only “work for hire,” but “joint work,” as well, given the way design work is created.
- ✧ Illustrators and photographers may also be involved in “joint work” when they work with an art director who makes significant creative decisions along the way.
  - ✦ *Strauss* case: art director was joint creator of photographs because designed layout and supervised photo shoots.

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### Copyright Infringement: What is “copying?”

- ✧ *Steinberg* (case involving *New Yorker* cover) set standard that is applied here:
  - ✦ Question: is there such substantial similarity that an average lay observer would recognize that the alleged copy was appropriated from the original?
  - ✦ The copy need not be the same in every detail, as long as the overall result is substantially similar.

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### Fair Use Exception

- ✧ The Fair Use clause allows use of copyrighted work for purposes of criticism, comment, news reports, teaching, scholarship, and research.
- ✧ Comes up often for all copyright situations, involving both text and images.

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### Fair Use Factors

- ◇ 4 factors considered:
  - ✦ Purpose of the use (use for profit? Or public benefit?)
  - ✦ Character of the copyrighted work (factual? creative?)
  - ✦ Proportion of the work used.
  - ✦ Effect of the use on the market value of the original work.

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### Parody Defense

- ◇ In visual art context, the claim is often made that a use falls under the Fair Use exception because it was intended as a parody of the original.
- ◇ To be effective, the parody must be a comment about the actual artwork on which the piece is based. Jeff Koons has used the parody defense unsuccessfully because his comments are about the state of society at large, not about a particular work.

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### *Campbell* and Transformation

- ◇ Under fair use exception, the *Campbell* case created a new standard that may open up use of copyrighted work.
- ◇ Question is whether the fair use of a copyrighted work transformed the original work sufficiently to create a new purpose, and effect. If so, then is not infringement, if falls under one of the allowable purposes of the fair use exception (most often criticism or parody).

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### De Minimus Defense

- ◇ Another recognized exception to copyright infringement claims is the *de minimus* defense.
- ◇ Theory is that, although there is technically infringement, it is so minimal that it did no damage to the copyright holder.
- ◇ Defining how “minimal” it needs to be happens with case-by-case analysis.
- ◇ *Sandoval* case: appearance of 10 photos for a brief time in a film was considered *de minimus* infringement.

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### Copyright Remedies

- ◇ Copyright statute gives 2 options for damages:
  - ✦ Copyright owner's actual damages or profits of the infringer
    - ⌘ Profits = gross revenue minus expenses
  - ✦ Can elect statutory damages instead
    - ⌘ \$750-\$30,000 basic damages
    - ⌘ Up to \$150,000 for willful infringement.
- ◇ Can also ask for injunction to stop infringing use of the images.
  - ✦ The competing product is confusingly similar, resulting in confusion among consumers.

29

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### Trade Dress and Copyright

Trade Dress	Copyright
Broader protection of similarity in the “look and feel”	Narrower definition of “copying” (transformation defense)
Duration=time of use of product	Duration=life of artist + 70 years
Proof of violation requires consumer confusion	Proof of infringement based on images only
Requires secondary meaning	Not required

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### Artistic Freedom and Censorship

- ✧ Idea of artistic freedom: recent in history of art.
- ✧ Art as form of writing in non-literate societies.
- ✧ Strict control of religious art because served as medium to convey religious ideology before writing.
- ✧ Religious art that was not “correct” was often threatened or destroyed (e.g. Sistine Chapel - some of Michelangelo’s images draped when nudity considered improper).

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### Control of Art

- ✧ Inquisition: Council of Trent declared rules for religious art:
  - ✦ Nudity generally forbidden
  - ✦ Images of Christ, Virgin Mary, and saints to be portrayed only with honor and veneration
- ✧ Soviet Union: After revolution, art controlled so that it portrayed life with “social realism” consistent with principles of the revolution’s ideology.
  - ✦ Proletariat=good, Bourgeoisie=bad.

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### Control of Art

- ✧ Nazi Germany: “degenerate art” included all works by Jewish artists, all abstract and modern art, especially that associated with the Bauhaus, and all art depicting “inferior racial types.”
  - ✦ Cezanne, Picasso, Matisse, Gauguin, Van Gogh, Braque, Pissarro, many others.
- ✧ Art seized for regime; some sold through Switzerland and other sellers.

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### Holocaust Art

- ✧ Art that changed ownership in Europe between 1932 and 1946 considered potential "Holocaust art" -- art seized from Jewish and other people.
- ✧ Art Loss Registry records known looted holocaust art.
- ✧ Museums and galleries trying to confirm provenance of art in holdings (including Walker and MIA).

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### American censorship: art during the McCarthy era.

- ✧ George Dondero was the most vocal critic of art during the McCarthy era.
- ✧ His view of 20th century art:
  - ✦ Cubism aims to destroy by disorder.
  - ✦ Futurism aims to destroy by machine myth.
  - ✦ Dadaism aims to destroy by ridicule.
  - ✦ Expressionism aims to destroy by aping the primitive and insane.
  - ✦ Abstract art aims to destroy by the creation of brainstorm.
  - ✦ Surrealism aims to destroy by denial of reason.

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### American art censorship

- ✧ Censorship took the form of withdrawing government funding for tours of works of art.
- ✧ Also highly censored public art that was to be placed in public buildings under construction.

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**Defamation of Character**

- ✧ Artists have been charged with defamation of character for creating art that makes false, injurious statements about a person's character.
- ✧ Private individuals have a reasonable expectation of privacy, and can win lawsuit or damages if prove that content of statement was false and harmed reputation in a serious way.

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**Defamation**

- ✧ Public figures are "fair game" to some extent and must prove "actual malice" to win lawsuit for defamation: statement was made with actual knowledge that it is false or reckless disregard for truth.
- ✧ Fair comment: is a defense to defamation, whether private person or public figure: is OK to make reasonable comment/criticism about art or public events.

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**Censorship of Art**

- ✧ First Amendment protects freedom of expression, including symbolic speech of visual art.
- ✧ Obscenity is a form of expression not protected by the First Amendment, and thus subject to suppression.

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### Miller standard

- ✧ The *Miller* case established the standard for deciding what is obscene, and thus not protected:
  - ✦ Average person, applying contemporary community standards, finds that the work, taken as a whole, appeals to prurient interests.
  - ✦ The work depicts sexual activity in a patently offensive way, and
  - ✦ The work lacks serious literary, artistic, political, or scientific value.

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### Placement of offensive art

- ✧ *Piarowski v. Prairie State College* case established that the location of potentially offensive art can be regulated, as long as there is not total suppression.
- ✧ Case involved the exhibition of stained glass with images offensive to some in public hallway, with racial implications (masturbation, oral sex, gas emission involving brown-skinned women).

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### Political censorship of art

- ✧ *Nelson v. Streeter*: big case involving depiction of late Harold Washington, mayor of Chicago, wearing bra, G-string, garter belt, and stockings.
- ✧ Painting produced violent reaction from city council members.
- ✧ Artist won that case: expression of ideas in art not subject to "heckler's veto." Idea that people might be upset and resort to violence not enough to censor display of art.

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### Government censorship of "offensive" art

- ✧ Rudy Giuliani tried to cut off funding for Brooklyn Institute of Art for exhibition titled: "Sensation: Young British Artists from the Saatchi Collection."
  - ✦ Included *Holy Virgin Mary* with elephant dung and Damien Hirst's pigs in formaldehyde.
- ✧ Court: City may not censor art exhibition or withhold funds based on ideas of "offensiveness."

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### State as Benefactor: National Endowment for the Arts

- ✧ Established in 1965 to support the arts and artists.
- ✧ Great controversy has arisen over some projects that are "ahead" of the community's appreciation of art.
  - ✦ Calder's *La Grande Vitesse* initially disliked in Grand Rapids, Michigan, but now embraced as the city's symbol.

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### Threats to NEA

- ✧ 1989: 3 major controversies arose concerning NEA-funded projects:
  - ✦ Andres Serrano's *Piss Christ*
  - ✦ Mapplethorpe's homoerotic images, especially sexualized images of children, and
  - ✦ David Wojnarowicz's *Tongues of Flame* series (homoerotic, AIDS, and drug themes).

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### NEA Restrictions

- ✧ Congress passed a bill attempting to restrict NEA funding so that “general standards of decency and respect” would be followed.
- ✧ Court upheld the amendment, but also approved NEA board’s interpretation of the requirement that effectively dodged the censorship potential.

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### Contracts and Artists

- ✧ Contracts formed through negotiation process.
- ✧ Be aware of provisions and their implications.
- ✧ Get legal advice if uncertain about implications of provisions.

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### Basic sales contracts

- ✧ Should address copyright status after sale of artwork.
  - ✦ Arist reserves all rights except right of possession and display, unless transferred in writing.
- ✧ Does artist get a share of proceeds of subsequent sales? Negotiable (Projansky contract).
- ✧ If work damaged, does artist have a right to be consulted about repairs?

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### Consignment agreements

- ✧ Specify percentage that goes to gallery and how price calculated.
- ✧ Usually price range or percentage range of acceptable prices.
- ✧ Specify amount of commission, usually percent of sale price (25, 33, 50%)
- ✧ Risk of loss while work in gallery should be specified.

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### Contracts for work assignments

- ✧ Contract will specify exact assignment, delivery schedule, and fee payment schedule.
  - ✦ Will usually specify a "kill fee" as percentage of price at various stages.
- ✧ Expenses: usually the client will pay expenses incurred in addition to the fee.
- ✧ Usage rights transferred to the client: very important provision.
  - ✦ Some will want "all rights."
  - ✦ Not good for artist -- should instead give specific rights to client and reserve rest to artist.

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### Work assignment contracts

- ✧ Electronic rights: should also be specified and limited in contract.
- ✧ Alterations and revisions in work: artist should have first option to make revisions or alterations in work.
- ✧ Credit line: the client should be required to give the artist credit for the work when reproduced.
- ✧ Warranty of originality is standard for these contracts.

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