In this interdisciplinary course we will systematically explore how the law shapes and constrains visual expression. The censorship of art will be our focus for the most significant portion of the semester. We will use the special problems presented by the interpretation of visual images in order to probe more deeply into the meaning of “speech” for purposes of the First Amendment. The next part of the class will examine copyrights, moral rights, and the right of publicity. The final portion of the class will address legal issues that arise in the art market. Throughout the semester, we will frequently consider contemporary art controversies as a means of examining these broader issues.

**NOTE ON THE COURSE READINGS**

Readings for this course are located in a variety of places. Many of the readings are available on NYU Classes. Some of the readings are from the casebook. As noted below, I have placed two copies of the casebook on reserve in the library. In reviewing the syllabus, please note the following:

- Readings marked “(DBM)” are from the Duboff, Burr and Murray casebook (Aspen: Revised Edition).
- If there is **no notation** following an assigned reading on the syllabus, that means that this material is available on NYU Classes.
- Many online materials are listed on the syllabus as **available at** followed by a web link. Please click on the link in the syllabus to go directly to these materials.
- The following materials are available at the bookstore and on reserve in the library: Susan Sontag’s “On Photography” (which we will read for one class), and the Duboff, Burr and Murray casebook.
- I have frequently included suggestions for further reading on the syllabus. These materials are not assigned reading. I have included some but not all of these materials in NYU Classes.

**Please note that I will make changes in this syllabus as the semester progresses.**
COURSE OUTLINE

I. ART AND THE FIRST AMENDMENT
   Introductory Texts
   A. The Artist’s Right to Free Expression: Censorship Law and Theory
      1. Obscenity Law
         a. Introduction
         b. The Evolution of Obscenity Law
         c. Introduction to Postmodern Art: The Problem for Obscenity Law
      2. Child Pornography Law
         a. Child Pornography Cases
         b. The Question of Serious Artistic Value: Child Pornography Law and Artistic Expression
      3. The Feminist Anti-Pornography Movement
      4. Hate Speech
      5. What is Art and (Why) Is Art Protected by the First Amendment?
         a. Text v. Image
         b. Photography
         c. Dance and Live Performance
   B. Museums, Galleries, and the Public: The Politics of Art
      1. Government Funding of the Arts
      2. Museums and Galleries: Self-Censorship
      3. Public Art

II. INTELLECTUAL PROPERTY IN ART
   A. “Moral Rights” of Artists
   B. Copyright Law and the Problem of Postmodernism
      1. Introductory Copyright Issues and Copyrightability
      2. Fair Use and Contemporary Art
   C. The Right of Publicity

III. THE ART MARKET
   A. Authenticity
   B. Looted Art
ASSIGNED READINGS

I. ART AND THE FIRST AMENDMENT

INTRODUCTORY TEXTS

- First Amendment, U.S. Constitution 1791
- Exodus 20, Ten Commandments
- Rene Girard, Things Hidden since the Foundation of the World (1987) (excerpt)
- Nathaniel Hawthorne, The Prophetic Pictures (1882) (excerpt)
- W.J.T. Mitchell, What Do Pictures Want? (excerpt)

A. The Artist’s Right to Free Expression: Censorship Law and Theory

1. OBSCENITY LAW

   a. Introduction
      

   b. The Evolution of Obscenity Law
      
      - John Stuart Mill (excerpts)
      - Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) (DBM 285-88)
      - Roth v. United States, 354 U.S. 476 (1957)
      - Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)
      - Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214 (Ohio Mun. 1990) (DBM 303-06)
c. Introduction to Postmodern Art: The Problem for Obscenity Law


**Koons**

- Scott Rothkopf, *No Limits* (excerpt from the catalogue essay by the curator for the Whitney exhibition)


Suggestions for Further Reading

- Amy Adler, All Porn All the Time, 31 N.Y.U. J. OF L. AND SOCIAL CHANGE 695 (2007)
- Frederick Schauer, Speech and “Speech”—Obscenity and “Obscenity,” 67 GEO. L.J. 899 (1979)
- Eleanor Heartney, Postmodernism (2001)

2. Child Pornography Law

a. Child Pornography Cases

- United States v. Knox, 32 F.3d 733 (3d Cir. 1994)

b. The Question of Serious Artistic Value: Child Pornography Law and Artistic Expression


SUGGESTIONS FOR FURTHER READING

3. THE FEMINIST ANTI-PORNOGRAPHY MOVEMENT
• Catharine MacKinnon, excerpt from ONLY WORDS pp. 3-41 (1993) [Please note this book is on reserve in the library.]
• American Booksellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985)

SUGGESTIONS FOR FURTHER READING
• Linda Williams, Hard Core: Power Pleasure and the Frenzy of The Visible (1999)

4. HATE SPEECH

6
• Jeremy Waldron, The Harm in Hate Speech (excerpt)
• Glenn Ligon images, available at http://whitney.org/Exhibitions/GlennLigon/images

SUGGESTIONS FOR FURTHER READING
• Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 UNIV. CHI. L. REV. 873 (1993)

5. WHAT IS ART AND (WHY) IS ART PROTECTED BY THE FIRST AMENDMENT?
• Duboff, Burr, Murray, Legal and Other Definitions of Art, (DBM 1-5)
• Customs Definitions of Art (DBM 5-13)
• Bery v. City of New York, 97 F.3d. 689 (2d Cir. 1996) (“Bery II”)
• Kleinman v. City of San Marcos, 597 F. 3d 323 (5th Cir. 2010), available at http://www.ca5.uscourts.gov/opinions/pub/08/08-50960-CV0.wpd.pdf
• Arthur Danto, excerpts from Warhol essays

a. Text v. Image
  • Kaplan v. California, 413 U.S. 115 (1973)
  • Blake Gopnik, Read All About It: With Explanatory Labels Papering Museum Walls, Are We Still Looking at the Pictures They Explain?, WASHINGTON POST, Dec. 9, 2001

SUGGESTIONS FOR FURTHER READING
  • David Freedberg, Idolatry and Iconoclasm from The Power of Images

b. Photography
  • SUSAN SONTAG, ON PHOTOGRAPHY (1977) [on sale at bookstore and on reserve in library]
  • Michael Kimmelman, Abu Ghraib Photos Return, This Time as Art, N.Y. TIMES, Oct. 10, 2004, available at http://www.nytimes.com/2004/10/10/arts/design/10kimm.html?_r=1&scp=1&sq=%93Abu+Ghraib+Photos+Return%2C+This+Time+as+Art&oref=slogin
SUGGESTIONS FOR FURTHER READING

- Susan Sontag, Regarding the Pain of Others (2003)
- Luc Sante and Jim Lewis, Photography and Morality, Slate

SUGGESTIONS FOR FURTHER READING:

C. Dance and Live Performance

- Miller v. South Bend, 904 F.2d 1081 (7th Cir. 1990)
- Judith B. Prowda, The Martha Graham Case: Determining Who Owns a Dance
- Carolee Schneemann, More than Meat Joy

B. Museums, Galleries, and the Public: The Politics of Art

1. Government Funding of the Arts

  - DBM 346–55

SUGGESTIONS FOR BACKGROUND/FURTHER READING

- David Wojnarowicz, A Fire in my Belly (Video), available at http://www.youtube.com/watch?v=gHRCwQeKCuo
- Marlon T. Riggs, Meet the New Willie Horton, N.Y. Times, Mar. 6, 1992
- Humanities Act of 1965
2. MUSEUMS AND GALLERIES: SELF-CENSORSHIP

- Piarowski v. Prairie State College, 759 F.2d 625 (7th Cir. 1985)

SUGGESTIONS FOR FURTHER READING

- Carol Becker, *Art Thrust into the Public Sphere*, 50 ART 3 (1991)
- Close v. Lederle, 424 F.2d 988 (1st Cir. 1970)
- News Articles on current censorship from NCAC, available at http://ncac.org/
• Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757 (7th Cir. 2001)

3. PUBLIC ART
• Serra v. U.S. General Services Administration, 847 F.2d 1045 (2d Cir. 1988) (DBM 334-40)
• The Destruction of Tilted Arc: Documents (Read only the testimony from the Serra case which appears at the end of this document on pages 61-65; skip the rest)
• Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (excerpts)
• Sanford Levinson, Silencing the Past: Public Monuments and the Tutelary State, 17 CARDOZO ARTS & ENT. L.J. 149 (1999)

SUGGESTIONS FOR FURTHER READING
• Maya Ling Lin, Statement on Her Winning Design

II. INTELLECTUAL PROPERTY IN ART

A. “MORAL RIGHTS” OF ARTISTS
• John Merryman, The Refrigerator of Bernard Buffet [read only pages 1023-1029]
• Duboff, Burr and Murray, Chapter 4, pp. 165-95 [You can read/skim this for background only, except please read thoroughly pp. 169-71 (Dali case) and pp. 182-86 (Vargas case)]
• DBM, pp. 202-14.
• DBM, pp. 219-235
• Henry Hansmann & Marina Santilli, Authors’ and Artists’ Moral Rights, 26 J. OF LEGAL STUDIES 95 (1997) [read only pp. 95-112]
• Amy Adler, Against Moral Rights, 97 CAL. L. REV. 263 (2009), available at
B. COPYRIGHT LAW AND THE PROBLEM OF POSTMODERNISM

1. INTRODUCTORY COPYRIGHT ISSUES AND COPYRIGHTABILITY
   • Duboff, Burr and Murray, pp. 57-63; 72-74 (skim for background only)
   • DBM, pp. 27-43
   • Walter Benjamin, The Work of Art in the Age of Mechanical Reproduction (1936)
   • Steinberg v. Columbia Pictures, 663 F. Supp. 706 (S.D.N.Y. 1987) available at http://www.law.cornell.edu/copyright/cases/663_FSupp_706.htm (read only Parts II-IV primarily for background; you can skip the other parts of the case)

2. FAIR USE AND CONTEMPORARY ART
   • Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) http://law.justia.com/cases/federal/appellate-courts/F2/960/301/350058/
   • Affidavits in Koons case (Halbreich, Caldwell & Rosenblum)
   • Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (DBM 108-126)
   • Randy Kennedy, Apropos Appropriation, N.Y. TIMES, Dec. 28, 2011, available at http://www.nytimes.com/2012/01/01/arts/design/richard-
prince-lawsuit-focuses-on-limits-of-appropriation.html?_r=1&ref=randykennedy

- Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003) (read only through page 806 of case)
- Fairey v. AP (S.D.N.Y.), complaint with exhibits
- AP’s answer and counterclaims, with exhibits
- Cowan, Liebowitz & Latman, P.C. letters to Vera & Adler

C. THE RIGHT OF PUBLICITY
- Duboff, Burr and Murray, pp. 262-74

III. THE ART MARKET

A. AUTHENTICITY
- Rembrandt/Not Rembrandt in the Metropolitan Museum of Art
court-rejects-Knoedler-and-Freedmans-motion-to-dismiss-fakes-cases/30647

- Scholars Still Skeptical of Getty Kouros

**SUGGESTIONS FOR FURTHER READING**


**B. LOOTED ART**


**Readings for Guest Lecturer Howard Spieglar on Looted Art**


• Wally Case, Stipulation and Order of Settlement and Discontinuance and Amended Stipulation and Order

• Washington Conference Principles on Nazi-Confiscated Art (December 3, 1998)

• Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009)