

COPYRIGHT- applies to works that have been copied

- A. Art 1, sec. 8 of Constitution: Congress shall have the power “to promote the progress of science and the useful arts, by securing for limited times to authors and investors the exclusive right to their respective writings and discoveries”
- B. Copyright Act of 1976
 - a. Application: applies to works created 1978 and after (otherwise, 1909 Act- 28 yrs + renew for another 28 yrs)
 - b. Length of protection: created on/after 1978 – protection from the instant of creation until 70 yrs after artist’s death
 - c. 5 exclusive rights granted to copyright holder:
 - 1. Reproduce the copyrighted works
 - 2. Prepare derivative works based on the copyrighted work
 - 3. Distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending
 - 4. To perform the work publicly
 - 5. To display the work publicly
 - 6. See VARA for right to create, right of disclosure, right to withdraw, name attribution, integrity
 - d. Sale of copyrighted work:
 - a. Creator retains rights UNLESS there’s a written agreement that specifically transfers those rights to the purchaser
 - b. EXCEPTION: “works made for hire”
 - 1. Works created by employees within the scope of their employment- copyright belongs to employer
 - 2. ARGUE:
 - a. 1) That it’s a work for hire, employee/employer relationship- employer owns copyright
 - b. 2) That it’s an independent contractor, and he retains copyright rights
- C. 2 elements of copyright INFRINGEMENT:
 - a. You are the owner of a valid copyright – copyrightable material
 - b. Defendant’s use of the work violated one of your exclusive rights. Shown by proof of actual copying or:
 - 1. D’s access to copyrighted work and
 - 2. Substantial similarity- would the average lay person recognize that the D’s work has been copied from the P’s work (*Rogers v. Koons*)
- D. What can have a copyright?- “original works of authorship fixed in any tangible medium of expression”- pictorial, graphic, and sculptural works- not map, chart, technical drawing, book, motion picture, magazine, merchandising item, advertising or promotional material, idea, process, work made for hire

- a. Must be **creative/original** work
 - a. Originality- must be created independently, not copied - must contain “some creative spark” (*Feist Publications*)
 - 1. If by magic someone had never read a poem, then wrote the exact same poem independently, this could be copyrighted) (Ex: *Pierson*- inadvertently copied found lettering art)
 - 2. Counter: post modernism- Murakami, Warhol
 - b. 2 tests:
 - 1. 9th Cir- filter out non protectable elements then take sum of protectable parts- Looks at quantity of protectable parts + degree of originality (*Satava*)
 - 2. 2nd Cir- look at total concept and feel of the contested works
 - c. Low threshold for originality: Ct shouldn’t use individual taste to determine originality, any work of art created by any person with any level of artistic skill should be eligible (*Bleistein*)
 - d. Not original: only trivial variation from someone else’s work, expressions that are common to a particular subject matter (*Satava*- jellyfish)- change in medium isn’t enough (*Bridgeman*- transparencies of art)- work that’s too realistic? (*Satava* jellyfish)(photos without specific posing/lighting)
 - 1. If parts aren’t original, can copyright the parts that are (*Satava*- the pose, the lighting) OR that exact thing
 - e. Photos: distinction bt “ordinary production of photos” and posed/arranged photos (accessories, arrangement, light and shade, posing, expressions) (*Sarony*) – blind, slavish copying (photo of a photo) aren’t original even if it takes skill (*Bridgeman*-transparencies)
 - 1. UK 3 types original photos: 1) Angle of shot, light and shade, exposure, filters, development techniques 2) Creation of scene, posing 3) Right place at right time
 - 2. Counter: why are we rewarding photos that reveal themselves to be fakes? Don’t we want to encourage transparency in photography?
 - 3. **See policy sheet**
 - f. Reproductions/Re-photography: even reproductions lack the original work’s history, presence in time and space, so they’re “original” (Walter Benjamin)- Lavine photo of a photo (Dustbowl photo about hardship, hers about lack of originality, gender commentary)- Molotov man (found photos, forget about them and their origin then incorporated them into his works- transformative meanings from anti-govt, to anti-war)- *Campbell* can be read as requiring only conceptual change, not physical change
 - 1. AA: would most likely lose on copyright claim! – would make copyright exceptions too large, swallow the rule

- b. Useful articles NOT copyrighted- can only copyright the elements that can be **identified separately from and are capable of existing independently of, the utilitarian aspects of the article**- copyright extends only to those separate, creative aspects
 - 1. *Esquire*- didn't copyright light fixture where creative elements couldn't be separated- seems to punish well designed items
 - 2. *Mazer*- copyrighted a statue used as a lamp base- physical separable
 - 3. *Kieselstein*- upheld copyright of belt buckles- their decorative pieces were conceptually, maybe even physically, separate from the buckle's utilitarian functions
- c. Must be an expression- can't be any idea, process, concept, principle (*Satava*- jellyfish- just nature) (*Pierson*- using found letters is an artistic idea)

E. FAIR USE- DEFENSE TO COPYRIGHT INFRINGEMENT

Statute: criticism, comment, news reporting, teaching, scholarship or research.

Factors to consider:

1. **Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes**
 - a. Transformative – must create something new (new expression, meaning, message- *Campbell* “pretty woman”)
 - i. Original is used as raw material for something else- whether artist had genuine creative rationale or just borrowed image to avoid drudgery of coming up with something original (*Blanch v. Koons*)
 - ii. Non copied parts must outweigh copied parts (*Rogers v. Koons*)
 - iii. Ex of transformative: using fashion photo in collage (*Blanch v. Koons*), using Demi Moore photo set up for comedy (*Leibowitz v. Paramount*),
 - iv. Not transformative: painting used for tv advertisement b/c they're used for same decorative purpose (like *Steinberg*- Moscow painting)
 - v. Counter: issues with post-modernism, critiques originality and uses copying as a form of expression- line drawing b/t physical changes and change in message
 - b. Parody – most common example of transformative- when artist uses some elements of original work to create a new work that, at least in part, comments on that author's work (*Rogers v. Koons*)- will parodic character be reasonably perceived? (*Mattel*)
 - i. High threshold: *Rogers v. Koons* - can't just parody society (Ex: *Koons*- puppy postcard sculpture,

Steinberg- Moscow poster)- being different than original isn't enough to parody it (*Leibowitz v. Paramount*)

- ii. Low threshold: Demi Moore spoof pic parodies the seriousness of the original, beauty of pregnant body, with a silly grin (*Leibowitz v. Paramount*)
 - iii. Ct seems to favor parody (*Saderup*- right of publicity case) over reverential works
 - 1. But in *Blanch v. Koons*, ct found transformative without parody was enough
 - iv. Satire - satire is making fun of society at large (can be fair use sometimes- *Blanch v. Koons*)
 - c. Made for economic purposes
 - i. You have a higher burden to prove fair use, if it's for economic reasons (*Leibowitz*- Demi Moore)
 - ii. Can be overcome (*Leibowitz*- creative advertising mocking Demi Moore pic was fair use) (compare *Steinberg*- advertising remaking Moscow isn't enough, no parody)
 - d. Bad/good faith- fair use is an equitable doctrine
 - i. *Rogers v. Koons*- ripped off copyright from postcard
 - ii. *Fairey*- has a history of copying other works, AP tried to work out the issue but *Fairey* was unwilling, lied about cropping it
2. **Nature of the copyrighted work**- creative work gets more protection than functional (*Mattel*) – look at whether original has been published (we want author to control its dissemination)
 3. **Amount and substantiality of the portion used in relation to the copyrighted work as a whole**, and
 - a. Quantity and value of materials used are reasonable in relation to the purpose of the copying (*Blanch v. Koons*)
 - b. Has “essence” been copied (*Rogers v. Koons*, *Campbell*)
 - i. Counter: in parody, must strike at heart of work to be effective (*Leibowitz v. Paramount*- Demi Moore comedy spoof)
 - c. Doesn't require artists to use minimal amount for parody- using whole Barbie is fine (*Mattel*)-unimportant prong for a parody (*Leibowitz v. Paramount*)
 4. **Effect of the use upon the potential market for or value of the copyrighted work**

- a. Main factor is **market substitution/ usurpation**- affecting/destroying market isn't enough (a bad parody may depress market-*Campbell*)
 - b. Balance benefit to copyright owner v. benefit to public for fair use (*Rogers v. Koons*- says it's most important factor, but doubtful anymore)
 - c. If work is done for profit, we presume financial loss since they aren't paying artist for derivative use (*Rogers v. Koons*) – parodies have less risk of affecting market (*Mattel*)
 - b. Other factors:
 - 1. Ultimate test: whether **copyright's goal of promoting progress** of science/arts would be better solved by allowing the use than by preventing it (*Blanch v. Koons*)
 - a. Post-modern problems of reproduction
 - b. Tradition of artists copying works – every work is based off another (*Koons* affidavits) – Molotov man (copyright- artists began to post pic online- encourages creativity)
 - c. Adler/Vera- CK vase that was destroyed b/c fair use is too unpredictable
 - c. Ex: *Fairey* case- Fairey's arg: increased value of AP photo, transformative and given a new meaning, Warholized it, Obama as senator vs. presidential candidates, it was a factual work before
 - 1. AP's counterclaim: bad faith, profiting through merchandise, kept heart of photo like camera angle, composition, framing, expression, affects market for photo b/c no one will pay to put it on merchandise now
 - b. Remedies: destruction of infringing copies, copyright owner's actual damages plus an additional profits the infringer made OR statutory damages
- F. Trademark – likelihood of confusion test (all taken from *Mattel*)
- a. Works that transcend their purpose and enter public discourse lose their trademark (like Barbie- *Mattel*)
 - b. Defense: use is nominative (second artist uses P's trademark to describe P's product). Must prove:
 - a. P's product isn't readily identifiable without use of trademark (Ex: it's hard to critique Barbie without use of P's product)
 - b. Only so much of the mark may be used as is reasonably necessary to ID P's product
 - c. Do nothing that suggests P's sponsorship

MORAL RIGHTS/VARA- was the original work altered/destroyed? Was his name misused?

- A. Details of VARA- applies even after sale of works – will apply if you’ve contracted away your copyright rights
 - a. Transfer- can’t be transferred but can be waived (compare French)
 - b. Duration of rights- only applies to works created on or after June 1, 1991 for lifetime of artist (rights die with artist)
 - i. Created before June 1, 1991
 - 1. Never sold = artist’s life + 70 yrs
 - 2. Sold = no protection
 - c. Preemption- VARA preempts state statutes when state provides equivalent rights- might not preempt under state statutes that provide more rights
 - i. How to expand protection: define “visual art” more expansively, public cause of action (CA), right of integrity extended to reproduction (NY), rights that extend beyond author’s life (CA)
- B. Covered works under VARA – drawing, painting, print, or sculpture existing in a single copy or limited edition of 200 or fewer signed and consecutively numbered pieces – photo produced for exhibition purposes only as a signed, numbered edition of 200 or fewer
 - a. For determining if work is included:
 - i. **Use generally accepted standards of artistic community-** don’t worry about materials used (H.R. 514, *Carter*)
 - ii. Includes work not completed yet (*Flack*)
 - iii. **Analyze whether it’s part of one big work** (thematically consistent and the elements can’t be separated w/o losing continuity and meaning)- if so, analyze it all under VARA- if not, analyze each individual piece (*Carter-* apartment lobby art is all one piece) (compare Mapplethorpe- photos analyzed individually)
 - b. **NOT covered:** model, applied art, book, electronic info, movies, merchandising or advertising, **work for hire**, second generational copies, computer graphic art, things not copyrightable
 - i. Work for hire- “work prepared for an employee within the scope of his employment” (Copyright Act)- argue person is ID contractor to get them rights
 - 1. **Reid Factors:** hired party’s right to control the manner and means by which the product is accomplished; skill required; whether hiring party has right to assign additional projects to hired party (if art related, look for additional compensation, no set termination date, whether artist had a say); provision of employee benefits (vacation, insurance); tax treatment of third party; *source of tools, location of work, duration of relationship b/t parties, extent of hired party’s discretion over when and how long to work, method of payment, artist’s role in hiring and paying*

assistants, whether hiring party is in business or the work is part of his regular business

- a. Non-italics emphasized in *Carter*
 - b. Italics weren't analyzed
 - c. Possible plus: Copyright owner
 - d. Ct's view of moral rights influence its interpretation of the Reid factors (*Carter*)
- ii. Applied art- 2D and 3D ornamentation or decoration that's affixed to an otherwise utilitarian object- utilitarian object isn't walls, floors, ceilings (*Carter*- would nullify provision about building art)
 - iii. Model- models like a clay sculpture/cast are considered art (*Flack*- Queen Catherine model)

C. Rights protected

a. **AMERICAN RIGHTS- VARA**

b. INTEGRITY- right to prevent work from being altered, distorted or destroyed

- i. Distortion/modification: right to **"prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation"**
 - 1. EXCLUDES: modification resulting from passage of time, the inherent nature of the materials, conservation or public presentation (including lighting and placement of work)- unless it results from intentional/gross negligence
 - a. Placement in garbage alley is ok (*Flack*)
 - b. Repairing statue's face is conservation (*Flack*)
 - c. Showing an unfinished work after artist demanded more money is ok, if inform public it's incomplete (*Buchel*- made art w/ the ct docs)
 - 2. Altering someone else's art isn't "speech" under 1stA- doesn't serve any social purpose (*Wojnarowicz*)
 - a. Cropping photos and breaking up exhibit isn't ok (*Wojnarowicz*- damage to reputation, makes it seem more homosexual, may scare away buyers- interpreted NY statute)
 - 3. Intentional/Gross negligence is a violation
 - a. *Flack*- 1) Assistant isn't trained in conservation 2) Wasn't competent to perform w/o supervision 3) Had little knowledge or experience in the area
- ii. Destruction: artist can prevent destruction if work is "of recognized stature"
- iii. Building art: protects work incorporated in/made part of building **if removing the work from the building will cause destruction, distortion**, mutilation or other modification of the work as described (if installed June 1, 1991 or after) (*Botello v. Shell Oil*)

- c. PATERNITY/ATTRIBUTION- right to “prevent the use of his name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation”
 - i. Affirmative- artist can insist his name be distributed/displayed only if his name is connected with it
 - ii. Negative- can insist his name not be associated with works that aren’t his
 - iii. Ex: displaying incomplete work is ok if they tell public it isn’t completed (*Buchel*)
- d. **STATE STATUTES**
- e. NY- attribution (protect his name), purpose is for artist’s protection, fine art and reproductions- public displays only covered, destruction permissible, limited to artist’s life
- f. CA- integrity (prevent work from being changed), purpose is for public interest, fine art of recognized quality private and public both protected, destruction forbidden except by artist, right survives artist (Mass. statute is same)
 - i. Fine art- original painting, sculpture, or drawing or an original work of glass art of recognized quality – excludes work for hire
- g. **DROIT MORAL**
- h. Right to create
 - i. America- contracts for personal services aren’t normally specifically enforceable
 - ii. *Droit moral*- completion of a work can’t be mandated, creation of work can’t be prohibited
 - iii. Artist can require completion of work in France (*Renault v. Jean Dubuffet*)
- i. Right of publication- decide when to make work available to public
- j. Right of attribution and paternity
- D. Rationale for Moral Rights
 - a. Protect the artist- right of dignity of personality (Merryman article- altered fridge)- encourage art (creates a “climate of artistic work and honor that encourage the author”- HR 514, quoted in Carter)- art work is an extension of artist’s personality, his child (Hansmann and Santelli) – protect his reputation (reputation can have pecuniary component, it’s like an artist, he sells his name) (Hansmann)
 - b. Protect public- protect creativity, interested in seeing the work as the author intended (Hansmann)
 - c. Why single out art? Unique and highly individual, require substantial skill and effort, strong attachment, non functional, expressive and decorative
- E. Criticize moral rights
 - a. Treats art as “different”- most qualities apply to craft too
 - b. Counter to property and contract rights
 - c. Dampens creativity by jeopardizing the art from start to finish
- F. Adler’s “Against Moral Rights”
 - a. Value of freeing art from artist

- i. Value of protecting art artists want to destroy (destruction of art is a way of cultural purging- Nazis)
- b. Value of destroying/modifying art
 - i. Tilted Arc- public spoke, didn't want it
 - ii. Kissing Cy Twombly- left red mark on painting-said artist left white for her
 - iii. Splasher Controversy- splashing art work- then people started incorporating these into works
 - iv. Erased de Kooning picture
- c. Artists have destroyed art as a category that warrants special treatment
 - i. Modern art- Warhol (factory production)
 - ii. Goya's "Destructions of War"- purchased by Chapman and replaced with puppy faces- increased value "Insult to Injury"
- d. Freedom of ownership- we should do what we want with our goods
 - i. Why do we care about ownership? More rights (Ex: Streeter- cops can't come in and take down private art)

RIGHT OF PUBLICITY

- A. Right of publicity- gives one exclusive right to exploit one's name and likeness - copyright generally fails here b/c you can't copyright your name/likeness
 - a. Elements: 1. Used P's identity 2. Appropriated P's name and likeness for D's benefit, economic or otherwise (NY- for advertising purposes or purposes of trade) 3. No consent 4. Injury
- B. Defense. Tests for protected use under right of publicity: balance 1stA (societal and personal interests) vs. person's interest in controlling his right to publicity
 - a. Comedy III v. Saderup (CA)- is product containing celebrity's likeness so **transformed** that it has become primarily the D's own expression rather than the celebrity's likeness (transformativeness)?
 - i. Does marketability derive primarily from the fame of the celebrity? If no, no publicity problems. If yes, not dispositive.
 - ii. Must contribute something more than merely trivial variation – ct may give more emphasis to parody rather than serious use (Saderup)
 - iii. Ex: 3 stooges shirt isn't transformative enough – punishes realism?
 - b. NY statute asks if P's likeness was for "advertising purposes or purposes of trade" - includes protection for ancillary uses (advertising in connection with a use protected by the 1stA)
 - i. Not enough that it's used for profit – focuses on nature of work but ct shouldn't make value judgments (Hoepker)
 - ii. Hoepker- trinkets, billboards, catalogs all for non-trade purposes- used to give art to masses – "ancillary"
 - c. ETW Corp (6thCir)- balancing test: balance magnitude of speech restriction (societal and personal interest embodied in 1stA) vs. P's intellectual property right/market effect
 - i. Right to publicity must yield to 1stA
 - ii. Commercial speech gets less protection under 1stA (mention Warhol, Marukami)
 - iii. Celebrities have come to symbolize certain ideas – valuable means of expression in our culture

1ST A RESTRICTING FREEDOM OF EXPRESSION

A. Steps:

- a. Is there gov't action?
- b. Is the item/speech/act protected?
 - a. Is it art? Expresses ideas
 - b. Argue art shouldn't get protection
- c. Is there an exception to 1st A?
 - a. Funding exceptions- limited resources, if it's not content based
 - b. Child porn, obscenity, hate speech, fighting words, threats, imminent incitement to lawless action

B. When is art protected?

- a. It is protected:
 - a. **When it expresses ideas** (*Bery II*)
 1. **Factors:** individually created (compare Warhol, Duchamp), artist's motivation for creating (commerce v. art), vendor's being an artist/background, if artist is personally trying to convey a message, whether item contains elements of expression/communication that objectively could be understood (*Mastrovincenzo*)
 2. May require a particularized message- cts are split
 - a. *Matrovincenza*- particularized message here to underrepresented minorities in urban cities
 - b. *Close*- says message must be political/social (Counter: prob not good law after *Bery II*, content based discrimination)
 - c. *Hurley*- no particularized message or we'd exclude important works like *Jabberwocky* Lewis Carroll
 3. Low threshold for what is art:
 - a. Photos, paintings, prints and sculptures always express ideas (*Bery II*)
 - b. Selling art expresses ideas, trying to reach out to people who can't afford galleries (*Bery II*)- doesn't matter it's for profit (*Mastrovincenza*)
 - c. Rummaging through Rauschenberg's trash (took trash, created art)? Warhol's factory produced art? Murakami's Louie Vuiton store?
 - d. *Buchel*- makes art from collected ct docs from his litigation
 - b. Policy: The law requires art to "express ideas" because it must participate in the marketplace of ideas, the quest and strengthening of truth through a freedom to exchange (John Stewart Mills, Adler)
- b. What art isn't protected:

- a. Craft isn't usually protected (*Bery II*)- unique v. mass produced? Utility? Sexist/classist?
- b. Aesthetically pleasing but doesn't have sufficiently expressive qualities (jewelry maker, silversmith)(*Matrovincenza*)
- c. Fashion
- d. Commerce (see policy sheet)
- e. Text vs. image (see policy sheet)
- f. Just altering someone else's art isn't speech (*Wojnarowicz*)
- c. Gov't CANNOT regulate art when:
 - a. Can't censor work it thinks offensive, morally improper, dangerous (content discrimination)- can't suppress ideas indirectly or directly
 - 1. Content discrimination must pass strict scrutiny (*Pleasant Grove*)
 - 2. Indirectly- tax exempt status, mailings (*Speiser, Hannegan*)
 - 3. Counter: isn't this what all speech restriction is? Obscenity is content based. We can't argue that speech restrictions are based on, not the content but the action it provokes, cts have rejected that rationale (*Ashcroft*- rejecting seduction rationale)
 - b. Can't go onto private property w/o invitation and seize a painting (*Nelson v. Streeter*- painting of mayor, caused unrest in black community- shouldn't make artist pay for others unrest)
- d. Gov't CAN regulate art:
 - a. Reasonable time, place, manner restrictions– no content discrimination + narrowly tailored to serve significant govt interest + leave open ample alternative channels for communication (*Serra*)
 - 1. *Piarowski*- person was administrator and art wasn't political (teacher's controversial art moved to 4th floor)
 - 2. *Serra* (tilted arc) – can regulate display/location of art based on its aesthetic qualities and suitability for public viewing (but this was gov't owned art)- **doesn't matter that it's site specific**
 - b. It's gov't owned – gov't should be allowed to control its expression (*Serra*)
 - 1. *Pleasant Grove City* (Ps want religious monument, park disagrees)- 1stA doesn't apply to govt restriction of govt speech, only govt restriction of private speech
 - 2. Counter: not all govt speech should be in govt control (racist mayor statue- Sanford Levinson article)
 - c. Through funding restrictions (see museums and funding section)
 - d. Doesn't participate in "marketplace": not art, child porn, obscene, hate speech
- e. War photography- should we censor?
 - a. Desensitizes, families don't consent, shock overwhelms you it can't enlighten you, have psychological effects
 - b. Govt policy- can't photo casualties with discernible faces

- c. DOD v. ACLU- 2nd Cir ruled photos depicting abuse of suspected terrorists should be released- Solic Gen asked SCOTUS to review, then delay judgment- worried it will affect current war
 - f. Standard for preliminary injunction: irreparable harm and either a) likelihood of success on the merits or b) sufficiently serious questions going to the merits to make them a fair ground of litigation and a balance of hardships tipping decidedly in its favor
 - a. Loss of 1stA freedoms, even for min time, is irreparable injury
 - b. Can't be remote/speculative fear of retaliation (*Brooklyn Inst of Art*- city already cut off funding and sued to evict them)
- C. Obscenity – not protected by 1stA (no marketplace of ideas, which is a quest for truth- John Stewart Mills)
 - a. *Miller* test (CA statute adopted by fed'l). Elements:
 - a. **Average person applying contemporary community standards would find that the work, taken as a whole, applies to the prurient interest**
 - 1. Prurient- has a tendency to excite lustful thoughts (*Roth*)- jury's finding of prurience is still reviewed by ct (*Jenkins*)
 - 2. Sex and obscenity isn't synonymous (*Roth*)
 - b. **Work depicts sexual conduct, defined by applicable state law, in a patently offensive way; AND**
 - c. **Whether the work taken as a whole lacks serious literary, artistic, political, or scientific value (LAPS)** – “reasonable person”/objective standard (not local standards) (*Pope*)
 - 1. “Taken as a whole”- photo exhibit isn't a whole, photo by itself is a whole (*Cincinnati v. Contemporary Arts Center*)
 - 2. What has “serious value”? 3 approaches from Adler: artwork is original, artwork reflects the sanctity and solemnity of art, artist's intentions to create art
 - 3. Adler's critique: allows jury to disregard art experts as an “unreasonable minority”, Postmodern Art doesn't want to be seen as “serious” (ex: trash installations, Jeff Koons “Made in Heaven” tacky art, Duchamp “recycling” objects and recontextualizing, Levine's re photography)
 - b. Why isn't obscenity protected by 1stA?
 - a. It's not speech- speech participates in the marketplace of ideas- doesn't contribute to society (appeals to the body not the mind) (*Roth*)
 - b. State interest in restricting obscenity- quality of life, total community environment, public safety, tone of commerce in city centers (*Paris Adult Theatre*)
 - c. Constitutionality of other statutes
 - a. *American Booksellers Ass'n v. Hudnut*- struck down pornography statute that defined pornography as “the graphic sexually explicit subordination of women,

whether in pictures or words”- didn’t reference offensiveness, prurient interest, or serious artistic value- making porn illegal is unconst unless it’s obscene

- b. Must be sufficiently clear, or it will have chilling effect on speech (*Redrup*)
- d. History of obscenity law
 - a. *Regina v. Hicklin*- test: whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall
 - b. *Roth v. US*- test: whether an average person applying contemporary community standards would say that the material taken as a whole appeals to the prurient interest
 - c. *Memoirs v. Massachusetts*- changes test to require something to be UTTERLY without social value

D. Child pornography – not constitutionally protected

- a. Child Protection Act – bans using child in a sexual performance (adopted *Ferber* NY statute). Definitions:
 - a. “*Sexual performance*”- performance which includes sexual conduct of a child under 16
 - b. “*Sexual conduct*” intercourse, bestiality, masturbation, sadomasochistic abuse, or *lewd and lascivious exhibition of the genitals*
 - c. “*Lascivious exhibition of genitals*” (Dost test- don’t need to have all factors)- whether:
 - 1. Focal point is on genitals/pubic area
 - 2. Setting of the act is sexually suggestive (place or pose)
 - a. *Knox*- child play areas, like playground, are particularly appetizing to pedophiles
 - 3. Unnatural pose, inappropriate attire, considering age of child
 - 4. Whether the child is fully or partially clothed, or nude
 - a. *Knox*- doesn’t require full/partial nudity at all
 - 5. Whether it suggests sexual coyness/willingness to engage in sex
 - 6. Whether the visual depiction is designed to elicit a sexual response in the view- **most important prong** but not necessary
 - a. *Knox*- should be examined in the context of pedophilic voyeurs
 - b. Seems to punish reaction (*Ashcroft* rejects seduction rationale, fake child porn case)
 - c. Talk about artistic value prong here! (there isn’t one, but argue about it)- *Sally Mann*
- d. Criticism:
 - 1. No value prong
 - a. For a value prong:

- i. Justice Brennan's concurrence in *Ferber* - child isn't stigmatized by his photo being shared if it contributes to artistic community
 - ii. Would allow Sally Man- distinguish b/t abuse and non-abuse
 - b. Against a value prong:
 - i. Justice O'Connor- artistic quality doesn't affect whether child is being harmed
 - ii. Dry up the market (though ct rejects this arg for fake child porn cases)
 - iii. Mackinnon- with porno, why should value matter? Either way women are subordinated, how does art outweigh the interest in protecting them?
 - 2. Seems more worried about punishing behavior (elicit a sexual response- rejected in *Ashcroft*) than protecting children (Adler- "thought crime")
 - 3. The more we obsess over this, the more attention we give it (Kinder porn)
 - 4. Should we restrict it to abuse cases?- no harm if child wasn't abused, would protect Sally Mann
 - 5. If we're worried about victims, then why not outlaw porno? (MacKinnon says it's a civil rights issue, Hudnut protects porno as speech) why prosecute "victims" of sexting?
 - e. Photography as particularly vulnerable (see policy sheet)
 - b. Why child porn can be regulated more than obscenity (i.e., why *Miller* doesn't apply to child porn)(*Ferber*)
 - a. Use of children in sexually explicit materials is harmful to them emotionally/mentally- for this reason, non-live/photo sex stuff is protected if they aren't obscene
 - 1. Virtual child porn is ok (*Ashcroft v. Free Speech Coalition*- don't hurt children)
 - b. More compelling state interest in protecting sexual exploitation of children
 - c. Value of this work is minimal- evil outweighs the expressive interests
 - d. Ads/sales integral to production- must stop production to stop demand (*Ferber*)
 - c. CANNOT regulate: fake child porn (*Ashcroft*) – no child harm- rejects concept that this will help dry up real child porn market, and "seduction" rationale (too indirect)
 - a. Rejected "appears to be minor" and "conveys the impression" language as overbroad
 - d. CAN regulate: mere possession (Osborne)- may need a mens rea element for possession offenses (Osborne) Rationale: protects children, dries up the market
- E. Hate Speech- can be art, doesn't have to be speech

- a. Major bans on 1stA: 1) Fighting words- when the only logical response is non verbal 2) Incitement to imminent lawless action- directed or likely to incite it 3) Threats 4) Obscenity
- b. Matsuda definition of hate speech: 1) message of racial inferiority 2) message directed against historically oppressed group 3) message is prosecutorial, hateful, degrading – doesn't want to suppress "victim's story" though
 - a. Reasons to regulate: harms individuals, subordination of groups (same as Mackinnon)
 - b. Criticism: only involves racial, not sex or gender minorities- trouble with victims who try to reclaim (Kleeblat's Nazi art show, recontextualizing racist everyday objects), equates identity and intent, too all encompassing (would include Mapplethorpe in its definition)
- c. Adler's criteria for telling if hate speech is subversive or oppressive:
 - a. Intent (MacKinnon says intent is irrelevant, Matsuda says it will help protect victim's story)
 - 1. Ex: Dave Chappelle and Ali G- meant to criticize but just incited
 - 2. Ex: Kleeblat's Nazi exhibit- lost relatives in Auschwitz but very Nazi charged
 - b. Effect (multiple effects? What if community disagrees? Relevance of intent on effect?)
 - c. Context (located in Jewish Museum vs. neo-Nazi collection- does that matter?)
 - d. Artistic status
 - 1. Mapplethorpe- vulnerable under Mackinnon and Matsuda
- F. Compare to Feminist Anti-Pornography movement- we can't tell what's subversive, so ban it all- inspires subordination and violence against women, civil rights issue
 - a. Harms:
 - a. Harm of production- coercion, taking advantage
 - b. Harm of marketing- creates need, stereotypes, psychological harm like child porn
 - b. No marketplace of ideas: free speech of men overcomes free speech of women- pornography as an ACT rather than speech (like "Whites Only" and threats)
 - c. Her definition: women presented as sexual objectives who enjoy humiliation or pain, sex objects experiencing pleasure in assault, tied up or physically hurt, body parts are exhibited such that women are reduced to those parts, penetrated by objects, etc.
 - d. Counter: MacKinnon wants to criminalize b/c of underlying act and its effect on people- this isn't how we regulate speech though, those are irrelevant criteria
 - a. Mapplethorpe would fall under this
 - b. Female artists that reclaim the art- la Chicolina?
 - e. Compare: *Hudnut*- regulating porn is akin to viewpoint discrimination, we don't ban things because they incite responses- we protect porn for the same reason we protect art, because it incites a response (see Ashcroft- harm of seduction is too attenuated)

MUSEUMS, FUNDING and PUBLIC ART

A. Gov't funding of art

- a. NEA- funding priorities are “artistic and cultural significance, giving emphasis to American creativity and cultural diversity” and to encourage “public knowledge, education, understanding and appreciation of the arts”
 1. Act directs the Chairperson to ensure that “artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards and respect for the diverse beliefs of the American public” (constitutionality upheld, but just discretionary *NEA v. Finley*)
- b. Selective gov't funding- FACTORS (reconcile *Finley* and *Brooklyn Inst*)
 1. Was money taken away (not ok- *Brooklyn Institute*), or just not granted (ok- *Finley*)?
 2. Motivation- retaliatory punishment vs. resource allocation (punish specific viewpoint- *TX v. Johnson* flag burning)- gov't can't prohibit expression of an idea because it's offensive/disagreeable (*Brooklyn Inst.*)
 3. Did gov't fund the exhibit, or museum in general?
- c. Gov't CAN deny funding- limited resources (*NEA v. Finley*- *Congress can selectively fund a program to encourage certain activities it believes to be in the public interest*)- isn't under any obligation to provide benefits (*Brooklyn Institute of Art*- threatens to take away museum lease for Mary dung painting)- can use funding to espouse a viewpoint without being required to give equal time to opposing view (*Rust*)
 1. Scalia concur on *Finley*- gov't can do what it wants with its money, even discriminate
- d. Gov't CANNOT take away funding: use its funding to restrict certain points of view or create a coercive effect, suppress dangerous ideas (*NEA v. Finley*)
 1. Can't censor work it thinks offensive, morally improper, dangerous (*Bklyn Institute*)- can't suppress ideas indirectly or directly
 - a. Indirectly- deny tax exemption, mail privileges (*Speiser, Hannegan*)
 2. Can't use funding to retaliate (*Brooklyn Institute*)
- e. Funding controversies: Serrano's "Piss Christ", Mapplethorpe (*Frohnmeier/Wyatt* letters- F asks NEA to withdraw funding, Wyatt refuses), "Meet the New Willie Horton" (gov't restricts funding for documentary about gay black men), Karen Finley ("We keep our victims ready", smears chocolate on herself)
- e. Censorship began with Culture Wars- hot button issues (AIDS, gay rights, crime issues, race wars- art was an easy target- people don't care as much about losing art, worried about gov't waste, related to politics, evokes strong emotion, art as elitist, mocking normal Americans)

B. Museum self-censorship

- a. Examples: “Sensation” exhibit (Mary with dung- some art institutions signed letter protesting Giuliani but some couldn’t sign it), Enola Gay (perspectives, then changed to impartial/science), “Back of the Big House” (employees thought it was racist- curator not told- Karen DeWitt article), David Levanthal (racist black toys- artist protests if he was black it would be allowed), Freud exhibit (not critical enough)
- b. Museum curator censorship
 1. **VARA** exempts curatorial decisions (lighting, placement, etc.)
 2. Elizabeth Brown- peeping Tom towards belly button- thinks it’s obscene and voyeuristic- is this ok? Her job is to interpret/illustrate art (Barbara Gamarekian article)
- c. Problem with museum self-censorship
 1. Won’t aid in educating public if it just displays publically accepted works (“Museums in society”)
 2. Corp funding- cut back in funding causes museums to appease public/donors – strings attached/reputational harm (“Sensation” exhibit- some art institutions signed letter to protest Giuliani but some couldn’t)(Historical Shows on Trial- museums give into special interest groups)
 3. Causes paranoia in relations b/t American museums and their funding sources (Robert Hughes article)
 4. Only allows controversial exhibits when it’s socially acceptable/patriotic (Ex: art critical of Japanese internment- “Historical Shows on Trial”)

C. Museum structure

- a. Accessibility- museum must be accessible to public at reasonable times or tax exempt status may be terminated – but reasonable regulations for admissions of the public don’t destroy the charitable nature of a gift where it is otherwise found to be so (*Barnes Found.*)
- b. Trust forms
 1. Charitable trust
 2. Public trust
- c. Corporate form/charitable corporation

AUTHENTICATION and LOOTED ART

A. How do we determine authenticity?

- a. Connoisseurship- what does expert in the field say?
 - i. Pollaks-3 best experts disagreed about authenticity
 - ii. Perls in Calder case- even when ct doesn’t believe, art world does
- b. Provenance- tracing work from artist’s hands to owner’s hands
 - i. Monitored and kept by humans (Portrait of Wally)
- c. Scientific Evidence

- i. Pollaks- scientific evidence of splatter patters suggests it's not Pollak- but could just be him experimenting with paint
 - ii. Kuros statue- technology isn't convincing
- B. Who determines authenticity? Law v. Art World
 - a. Law
 - i. Question of law determined by ct by preponderance (*Greenberg*- Calder mobile) – if it's a fake, ask where the original is
 - 1. Ct determined which expert was more reliable- Perls had better rep, but Silverman spent more time examining it- sided with Perls, said it was authentic
 - ii. Hearsay from artist saying it's not his work isn't enough for summary judgment (*Herstad v. Gertrude Stein*-get back at wife?)
 - b. Art World
 - i. *Greenberg case*- art world goes with Perls every time- so ct's ruling is moot
 - ii. *Kirby*- Wildenstein made statements about painting being a fake and no one would buy it- happens behind the scenes
 - iii. *Lawsuit against Andy Warhol Foundation*- alleges that they are improperly authenticating works to control the market demand and prices, bd members are economically interested in the outcome, doesn't need to justify its decisions if it says work is inauthentic - says it's not "authentic" of Andy wasn't doing the on spot supervision (even though he dated, dedicated, and signed it)
- C. Do we care if something is authentic?
 - a. Authenticity matters
 - i. Merryman- magical "aura"
 - ii. You're buying status, a connection to the artist, rarity, buying the process through which it was discovered and forgeries have no history (Walter Benjamin article- forgeries will never be as good as originals because of all the dirt and grime originals get through time)
 - b. If you can't tell, what's the harm?
 - i. *Greenberg case*- copy is almost perfect forgery
 - ii. Rembrandt- was it him or his students? One student was so good art market doesn't know if it's authentic
 - iii. Statue of David and Lascoix cave paintings- people were degrading the art so govt built exact replicas
 - iv. Keita- mgr was doing the editing/cropping and they were selling- why do we care who did it? (history of person = contextualize how we look at it?)
 - c. No art is ever "authentic"
 - i. Warhol- can you ever have an "authentic" Andy Warhol?- modern art shuns authenticity
 - ii. Koons affidavits- every work is based off another

- d. Getty kuoros- could be an outstanding work of art or a fake- so museum displays it anyways
 - e. Temple at Ise- rebuilt every 20 yrs
 - f. Restoration- does this preserve original work? Or does this change the authenticity?
 - i. Is restored Flack statue “authentic” still?
 - ii. Is Sistine Chapel after it’s been cleaned?
- D. Theories for recovering for mistake
- d. Mutual mistake:
 - 1. Mistake was a basic assumption on which the contract was made
 - 2. Mistake had a material effect on the agreed upon exchange of performances between the parties AND
 - 3. Adversely affected party didn’t assume the risks of the mistake- can claim if you didn’t appraise it that you assumed the risk of the mistake
 - e. Others: expert failed to exercise reasonable care, product disparagement (Kirby), breach of contract, common law fraud, false advertising, defamation, Lanham Act, Sherman Act, criminal prosecutions
 - 1. Curator or appraiser may be held liable only if there’s a duty to give correct info + appraiser knows the words will be acted on
 - 1. No relationship/appraisal contract + didn’t know appraisal would be liable (thought person owned sculpture already- *Struna*- no claim)
 - 2. Product disparagement (NY standard from *Kirby*-found no whisper campaign about painting expert thought was damaged). Elements:
 - 1. Falsity of statements (Ex: made false statements about authenticity of painting so no one would buy it)
 - 2. Publication to a third person (Ex: notation in catalog that it was damaged- eventually put in catalog without notation but seller still suspects there were rumors)
 - 3. Malice, and
 - 4. Special damages- losses having economic value, pled in specific detail, that are an immediate consequence of the remarks (Ex: Kirby didn’t meet causation and couldn’t name specific customer that was lost)

D. Looted Art

- a. Who owns art?
 - 1. Cosmopolitanism- world owns art – access is more important than ownership- Cuno says cultural property is just a modern construct (Ex: Krater is 2500 yrs old, state is 170)- Merryman, Greeks can just use reproductions (Elgin Marbles)
 - 1. Rejects “Byronism” - romanticizing art and distorting its value harms helpful dialogue (Merryman)
 - 2. Should look at who can preserve the art best (Merryman)
 - 3. “Owners” can also be destroyers- Taliban

2. Nationalism (belongs to country of origin)- Stone, we must respect how cultural identity is created and preserved in art, cultural art is like site specific art it loses part of its meaning when it's moved (me)
 1. Merryman- may be "magical" to country of origin
 2. Ex: MOMA returns krater
 3. America returns Nazi era art to countries of origin
 4. Cotter article- Peace Corps sets up local museums to preserve local art
- b. Why loot art? – for same reasons we want to protect art (see policy sheet)
 1. Way to control people/culture
 1. Hitler's "degenerative art"
 2. Acts of war and subordination/power
 1. Taliban destroy Buddah
 2. Americans destroying Saddam statue (Hector Feliciano book)
 3. Nazis stealing art from Jews (Wally)
- c. American law
 1. Can't transfer a bad title
 2. WWII resolution- America would return Nazi era art to countries of origin
 3. Washington Conference Principles- should encourage people to come forward with claims, encourages nations to develop procedures
 4. UNESCO- can't import stolen art
 5. Statute of limitations issues. 3 approaches:
 1. Discovery rule- starts when you discover location/should have discovered the location of property
 2. Demand and refusal rule (NY)
 3. Actual discovery (CA)- runs when claimant finds out where property is
 6. In Europe, may acquire ownership via acquiescence (Elgin Marbles)