TABLE OF CONTENTS

Introduction	XXV
Preface to the Third Edition	xxvii
Acknowledgments	xxxiii
Table of Photographs and Images	xxxv
Chapter 1 Legal and Other Definitions of Art	1
A. How NFTs and Blockchains Have Moved the Art V	World 1
B. General Definitions of Art	1
What Is Art?	2
C. Customs Definition of Art in Historical Context	2
United States v. Perry	3
Notes	4
United States v. Olivotti & Co.	5
Notes	7
Brancusi v. United States	7
Notes	9
Question	10
D. Artist vs. Artisan	11
Consmiller v. United States	11
Mayers, Osterwald & Muhlfeld, Inc. v. Bendl	er 13
Notes	14
E. Art Reproductions and Replicas	15
Gregory v. United States	15
Notes	17
Elder & Co. v. United States	18
Note	20
F. What NFTs Have Taught Us About the Valuation of	of Art 20
1. NFTs and Their Role in the Art World	20
2. Valuation of Art Without Regard to Aesthetics,	
Artistic Talent, and Quality of Expression	22
3. Scarcity	28

хi

xii	Tab	le of Contents
	4. Provenance	30
	5. Attribution to a Particular Artist	31
	6. Popularity and Historical Significance	34
	7. Potential for Growth in Price	37
PA	RT I ARTIST'S RIGHTS	39
Ch	apter 2 Copyrights	41
A.	Historical Overview	41
В.	Authorship of Copyrightable Subject Matter—17 U.S.C. §102	43
	1. Subject Matter of Copyright	43
	2. Authorship in the Era of Generative Art and Artificial Intelligence	e 43
	3. Forms of Generative Art	44
	4. Random Generation Is Not Authorship	47
	5. Copyrightable Art Must Be Designed and Created by a Human Even If Machines and Algorithms Do the Actual Rendering of the Expression	48
	6. Generative Art Produced by Artificial Intelligence	50
C.	Obtaining a Copyright: Expression and Fixation	51
	What Can't You Protect with a Copyright?	53
	Creativity and Originality	54
	Case Study: Photography	55
	Burrow-Giles Lithographic Co. v. Sarony	55
	Kaplan v. Stock Market Photo Agency, Inc.	58
	Mannion v. Coors Brewing Co.	61
	Notes and Questions	65
F.	Standard of Creativity and Originality	66
	Bleistein v. Donaldson Lithographing Co.	67
	Notes and Questions	68
	Originality Issue: Tribal Tattoos	69
G.	Case Studies of Fixed and Tangible Expression	70
	Copyrightability Issue: Wildflowers Installation Kelley v. Chicago Park District (2011)	71
H.	The Work, Copies of the Work, and Copyright	74
	1. The Work	74
	2. The Copyright Is Not the Same as the Work	75
	3. Copies of the Work	75

Table of Contents		xiii
	4. The Presumption That the Copyright Stays with	
	the Creator of the Work	76
	5. The "Digital Divide" in the Rights of an Owner of a Physical Copy vs. Digital Copy of a Work	76
I.	Limitations on Copyrightability: The Merger and Scènes à Faire Doctrines	79
	Satava v. Lowry	82
	Mattel, Inc. v. Goldberger Doll Mfg. Co.	85
	1. Total Concept and Feel of Doll Faces	88
	2. Working with Scènes à Faire and Merger	89
	Notes and Questions	90
J.	Limits on Copyrightability: Useful Articles and Functional Works	92
,	Esquire, Inc. v. Ringer	93
	Notes and Questions	95
K.	Duration of Copyright and the Public Domain	100
	International Protection	103
Μ.	Works Made for Hire and Copyright Ownership	106
	Community for Creative Non-Violence (CCNV) v. Reid	108
	Case Study: Bratz Dolls: Mattel, Inc. v. MGA Entertainment, Inc.	111
	Who Is an Employee?	112
	Notes and Questions	117
N.	Transfer of Copyright	119
O.	Bundle of Rights Protected	120
P.	Section 113 Rights in Visual Art	121
Q.	Preemption of State Law Claims	122
	Sturdza v. United Arab Emirates	122
R.	Steps of a Copyright Infringement Suit	125
	Step 1: Does the Owner Have a Copyright?	126
	Step 2: Have the Protected Elements of the Work Been Copied?	127
	Step 3: Have the Elements of Infringement Been Met?	128
	Case Study: De Minimis Use: Ringgold v. Black Entertainment	
	Television	130
	Actual De Minimis Uses	131
	Problem: Copying in a Different Medium	131
	Substantial Similarity in the Infringement Analysis	132
	Step 4: Does the Defendant Have a Fair Use Defense?	132
	Step 5: Damages and Remedies	132
	Notes and Ouestions	134

xiv	Table of Co	ontents
S.	Fair Use	135
	1. Classic Fair Uses under Section 107	137
	Campbell v. Acuff-Rose Music, Inc.	137
	2. Campbell's Effect on the Fair Use Factors	141
	3. News Reporting Using Other People's Copyrighted Footage	143
	4. News Reporting Using On-the-Scene Photographs of Disaster	144
	5. Use of Unpublished Memoirs for Political Commentary	146
	6. Parody—The Granddaddy of Fair Use Exceptions	147
	Parody Example 1: Elsmere Music v. NBC	147
	Parody Example 2: Leibovitz v. Paramount Pictures	148
	Modern Transformative Fair Uses	149
	Case Study: Transformation Without Parody—A Successful Satire: <i>Blanch v. Koons</i>	150
	Case Study: Applying Your Own Bold Style as Transformation: Cariou v. Prince	152
	Case Study: A Green Light for Transformation: Seltzer v. Green Day	155
	Artistic Style Does Not Equal Transformation: Andy Warhol Found. for Visual Arts v. Goldsmith (2021)	156
	Lessons on How to Be "Transformative"	161
	A Post-Transformative Circuit?: Kienitz v. Sconnie National LLC	163
	Notes and Questions	165
T.	Small Claims Copyright Court: The CASE Act of 2020	168
Ch	napter 3 Trademark Rights	169
A.	Background Principles of Trademark Law	170
	1. The Fundamental Goals of Trademark Law	170
	2. Duration of Trademarks, and Incontestable Marks	171
	3. Sources of Trademark Law	172
В.	Requirements of Marks	172
	Two Pesos, Inc. v. Taco Cabana, Inc.	172
	1. Trademarks and Service Marks	173
	2. Functionality vs. Distinctive Appearance	174
C.	Strength of Marks	175
	1. Fanciful Marks	176
	2. Arbitrary Marks	176
	3. Suggestive Marks	177

Tab	Table of Contents	
	4. Descriptive Marks and Secondary Meaning or Association	177
	5. Generic Words	178
D.	Protectable Attributes of Trademarks	179
	1. Personal Names	182
	2. Flags, Seals, Emblems, and Other Public Symbols	183
E.	Federal, State, and Common Law Protection of Marks	185
	1. Common Law Protection	185
	2. State Registration and Protection	186
	3. Federal Registration: The Principal Register and Protection	186
	4. Supplemental Register	188
	5. Classifications	188
	6. Domain Names and Cybersquatting	189
F.	Assignments, Assignments in Gross,	
	and Naked Licensing	191
G.	Requirements of an Infringement Claim	192
	Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions	192
	Notes and Questions	196
Η.	False Endorsement and False Designation of Origin	197
	False Endorsement Hypothetical	198
	False Designation of Origin	199
	Dastar Corp. v. Twentieth Century Fox Film Corp.	200
	Notes and Questions	205
I.	Trademark Infringement	207
	1. Elements of Infringement	207
	2. Remedies	210
J.	Affirmative Defenses and Avoidances	211
	Abandonment	212
	Genericization	213
	Laches	214
	Acquiescence	214
	Mark Owner Inaction as Proof of Laches or Acquiescence	214
	Unclean Hands	215
K.	Trademark Dilution	215
	1. State Anti-Dilution Laws	216
	2. Federal Trademark Dilution Act	216
L.	Trade Dress	219
	Case Study: Strategic Placement of Color: Louboutin v. Yves	
	Saint Laurent	991

Table of Contents
1

	Case Study: Secondary Association with a Specific Shade of Color:	996
	Qualitex Co. v. Jacobson Products Co., Inc.	222
	Diamond Direct, LLC v. Star Diamond Group, Inc.	223
	Hartford House, Ltd. v. Hallmark Cards, Inc.	224
	Case Study: Trade Dress and Artistic Style? Romm Art Creations Ltd. v. Simcha Int'l Arts, Inc.	227
		229
M	Notes and Questions Fair Use	
IVI.		230
	 Nominative, Classic, and Comparative Uses and News Reporting Parodies and Other Forms of Comment and Criticism 	231
N.T		232
IN.	NFT Cases That Reveal the Factors of Infringement, Dilution, and Fair Use	234
	Yuga Labs v. Ryder Ripps	235
	2. Nike v. StockX	23'
	3. Hermès Int'l v. Rothschild	239
	4. Miramax v. Tarantino	242
	5. Conclusions on the Encounters of NFTs and Trademarks	243
Ch	napter 4 Moral Rights and Economic Rights	245
A.	Droit Moral	246
	1. The Right to Create	247
	Case Study on the Right to Create: Dubuffet and Renault Corp.	248
	National Historic Shrines Foundation, Inc. v. Dali	250
	Notes and Questions	251
	2. The Right to Disclose and to Determine Completeness	252
	3. The Right to Withdraw	259
	Notes and Questions	260
	4. The Right of Attribution (Paternity)	262
	Vargas v. Esquire, Inc.	263
	Notes and Questions	266
	5. The Right of Integrity	267
	Gilliam v. American Broadcasting Companies	275
	Notes and Questions	280
В.	American States' Art Preservation Acts	281
	Serra's Tilted Arc and Site-Specific Art	283
	Kelley v. Chicago Park District	285
	Notes and Questions	287

Table of Contents	xvii
C. Visual Artists Rights Act of 1990	287
1. Visual Art under VARA	288
Notes and Questions	289
2. Right of Attribution	289
3. The Right of Integrity	290
Carter v. Helmsley-Spear, Inc.	291
The Right of Integrity and Murals	297
Case Study: Ruscha Mural	298
Notes and Questions	299
4. Works of Recognized Stature	301
Notes and Questions	305
5. Duration	306
6. Unfinished Works	306
Massachusetts Museum of Contemporary Art Foundation v. Büchel	306
D. Droit de Suite	320
1. The French Concept of Droit de Suite	320
2. Other Continental Approaches to Droit de Suite	321
3. The European Union Directive on the Resale Right of 2001	322
E. Economic Rights in the United States	324
1. Arguments Against Adoption of a U.S.A. Resale Royalty Statute	324
Jeffrey C. Wu, Art Resale Rights and the Art Resale Market: A Follow-Up Study	324
2. The California Resale Royalty Statute	327
3. NFTs to the Rescue?	328
a. Tokens on a Blockchain	329
b. The Mechanism of Smart Contracts that Pay Resale Royalties	332
c. Will NFT Smart Contracts That Order the Payment of Resale Royalties Be Preempted?	334
Royaldes be Freempted:	334
Chapter 5 Right of Publicity	337
A. The Right of Publicity as a Property Interest	339
Zacchini v. Scripps-Howard Broadcasting Company	339
Notes and Questions	343
1. Copyright Preemption of Publicity Claims	344
2. Breadth of the Right of Publicity Property Right	345
3. Privacy and Publicity Law	346
B. News and Newsworthiness	348
C. The Post-Mortem Right of Publicity	350

D.	Defining the Boundaries of Publicity Rights and Artistic Expression	354
	Simeonov v. Tiegs	354
	Comedy III Productions, Inc. v. Gary Saderup, Inc.	357
	Hoepker v. Kruger	362
	ETW Corp. v. Jireh Publ'g, Inc.	368
	Notes and Questions	374
E.	Current Trends in Right of Publicity Law	376
	1. Name, Image, and Likeness (NIL) Licensing	376
	Indicative Cases: Virtual College Football Players: Hart v. Electronic Arts, and In re Ncaa Student-Athlete Name & Likeness Licensing Litigation	c 377
	2. Other Forms of Rights Licensing	379
	Case Study: I "Doubt" That's Nirvana: No Doubt v. Activision, and Love v. Activision	379
	3. Statistics, Facts, and Public Interest Information	381
F.	Fair Use of Celebrity Names, Images, and Likenesses	382
	Balancing Test: Cardtoons LC v. Major League Baseball Players Assoc.	383
	Relatedness Test: Rogers v. Grimaldi	385
	Transformative Test: Comedy III Productions v. Gary Saderup, Inc.	386
	Transformation or Homage?	389
	Transformative Mockery: Winter v. D.C. Comics	390
	Artistic Expression Alone: Simeonov v. Tiegs	391
	Predominant Purpose Test: Doe v. TCI Cablevision and C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media	392
	Picking and Choosing: Application of Fair Use Tests in Publicity Cases	394
	Parks v. LaFace Records	395
	ETW Corp. v. Jireh Pub.	390
	Hoepker v. Kruger	396
	Kirby v. Sega of America, Inc.	39'
	Romantics v. Activision Pub., Inc.	398
G.	The Future of the Right of Publicity	398
Ch	apter 6 First Amendment Rights	40 3
A.	Censorship of Symbolic Expression	406
	Stromberg v. California	40%
	West Virginia State Board of Education v. Barnette	408

Tab	ele of Contents	xix
	Tinker v. Des Moines Independent Community School Dist.	411
	Flag Burning as Symbolic Communication: Texas v. Johnson	
	and United States v. Eichman	412
	Morse v. Frederick	413
В.	Censorship of Obscenity	418
	Regina v. Hicklin	418
	Notes	419
	Roth v. United States	419
	Note and Questions	423
	Miller v. California	424
	Amy Adler, What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression	428
	Note and Questions	430
C.	Evidentiary Issues for Censorship of Obscenity under <i>Miller</i>	430
	1. Community Standards	430
	2. Taken as a Whole	433
	Cincinnati v. Contemporary Arts Center	433
	Note and Questions	435
	3. Pandering and Prurient Interest	436
	Note and Questions	436
D.	Censorship of Child Pornography	437
	Osborne v. Ohio	437
	Note and Questions	440
	Amy Adler, Inverting the First Amendment	440
	Ashcroft v. Free Speech Coalition	447
	Note and Questions	455
	Current Issues: Extreme Violence (as in Video Games) as Obscene Speech? <i>Brown v. Entertainment Merchants</i>	
	Association	456
E.	Content-Neutral Regulation and Censorship of Art	457
	1. Origin of Content-Neutral Time-Place-Manner Restrictions	
	on Expression	457
	United States v. O'Brien	457
	2. Regulation and Censorship of Art on Government Property	461
	a. Installations in and on Government Property	461
	Serra v. U.S. General Services Admin.	461
	Note and Questions	466
	Claudio v. United States	467
	Note and Ouestions	472

Х	XX	Table of Contents

	Case Study: Kara Walker and the Newark Public Library	472
	Pleasant Grove City, Utah v. Summum	473
	Government Speech and Place and Manner Restrictions: Newton v. LePage	474
	sorship of Art through Licenses, Regulations	
on S	Selling, and Permit Schemes	475
	Current Case: Street Sales and Street Performances: Chase v. Ocean City, MD	477
	Current Controversy: The Off-Again Ban on L.A. Murals	478
	Public Official Helps Ban Private Art Show	478
	Gang Injunction to Clean Up Taggers	479
	Flying Dog Brewery Is Not Shot Down by Licensing Agency: Flying Dog Brewery v. Michigan Liquor Control Commission	480
	Tattoo Parlor Denied a Business Permit: Coleman v. City of Mesa	481
4. Ind	irect Censorship of Art through Government Funding Restrictions	482
	National Endowment for the Arts v. Finley	482
	Note and Questions	488
	Brooklyn Institute of Arts and Sciences v. City of New York	488
	Note and Questions	500
	United States v. American Library Association, Inc.	502
	Note and Questions	506
5. Priv	rate, Non-Governmental Censorship	508
	Nelson v. Streeter	509
	Note and Questions	513
PART II	ART MARKETS	515
Chapter 7	Art Galleries, Dealers, and Clients	517
A. Artists	Selling Art	518
1. The	e Constant Search for New Venues for Sales	518
2. Cyb	erspace: The Web 2.0 World	520
3. Met	averse: The Web 3.0 World	521
4. The	e Disruptive Effect of NFTs	522
B. Auther	nticity and Fraud in the Physical World and Metaverse	524
	State of New York v. Wright Hepburn Webster Gallery, Limited	524
	Notes and Questions	528
C. Artists	, Dealers, and Galleries	532
1. Def	ining Responsibilities of Dealers and Gallerists	532
	Nakian v. DiLaurenti	532
	Notes and Questions	534

ıar	ole of Contents	XXI
	2. Types of Arrangements with Dealers and Galleries	538
	Matter of Friedman	539
	Matter of Rothko's Estate	544
	Notes and Questions	547
	3. The Contract's Contents	548
	Sherri L. Burr, Selling Art Through Commercial Art Dealers	548
	Notes and Questions	553
	Pelletier v. Eisenberg	553
	Basquiat v. Baghoomian	555
	Notes and Questions	558
	4. Contracts with Public Entities	559
	Note	563
D.	The Commission	563
	Wolff v. Smith	563
	Notes and Questions	565
E.	Intra-Gallery Disputes	567
	Gmurzynska v. Hutton	567
	Campbell v. Lopez	570
	Notes	573
Ch	napter 8 Auctions	575
A.	Introduction	577
	Sherri L. Burr, Introducing Art Law	577
	Foxley v. Sotheby's Inc.	579
	Notes and Questions	585
В.	How Auctions Work	586
	1. Types of Auctions	586
	2. Bidding Methods	587
	William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh	589
	Notes and Questions	593
	3. The Reserve Concept and Withdrawing Goods or Bids	594
	Cristallina S.A. v. Christie, Manson, & Woods	595
	Notes and Questions	602
C.	The Auctioneer's Role	604
	Callimanopulos v. Christie's Inc.	606
	Notes and Questions	608
	Ewert v. eBay, Inc.	608
D.	Auction Houses	610
	Notes	611

XXI	II Ta	ble of Contents
E.	Warranties	611
	Weisz v. Parke-Bernet Galleries, Inc.	612
	Notes and Questions	616
F.	New York City Decides to Amend Its Auction Laws by Ending Th	hem 617
G.	Antitrust Problems	618
	United States v. Taubman	619
	Notes and Questions	624
Ch	apter 9 Museums	627
A.	The Legal Entity	629
	1. The Trust Form	629
	Georgia O'Keeffe Foundation (Museum) v. Fisk University	630
	In re Barnes Foundation	635
	Notes	636
	Jeffrey Toobin, The Battle for the Barnes	636
	Notes and Questions	638
	2. The Corporate Form	638
	Notes	639
	3. Private-Governmental Partnerships	639
	The Brooklyn Institute of Arts & Sciences v. City of New York	639
	4. Tax Status	642
	Georgia O'Keeffe Museum v. County of Santa Fe	642
В.	Trustee/Director Liability	645
	1. Self-Dealing	646
	2. Conflicts of Interest	647
C.	The Role of the Museum in Society	648
	Commonwealth of Pennsylvania v. Barnes Foundation	648
	Notes	651
D.	Acquisitions	651
	1. Determining Goals	652
	2. Gifts	652
	3. Loans	653
	a. Permanent Loans	653
	b. Adverse Possession	654
E.	Collection Management	656
	Guggenheim v. Lubell	656
F.	Deaccession	660
	Notes	662

Table of Contents		xxiii
PART III	INTERNATIONAL PRESERVATION OF ART AND CULTURAL PROPERTY	663
Chapter 10	0 International Movement of Art During War	665
A. Four V	ignettes of Looting in Wartime	668
	The Case of Napoleon	668
	The Nazi Campaign to Loot the Art of Europe	668
	Soviet Trophy Brigades	670
	The Gulf Wars in Iraq and Kuwait	671
	Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg	673
	Notes	679
B. Interna	ational Law Guidelines	679
1. The	Lieber Code	680
2. The	Hague Conventions of 1899 and 1907	680
	Notes	681
C. World	War II: The Hague Convention Tested	681
	Orkin v. Taylor	682
	Notes and Questions	687
	Republic of Austria v. Altmann	690
	Notes	697
	Notes	701
D. Challer	nges in Asia	701
	Notes and Questions	703
Chapter 1	1 International Preservation of Art and Cultural Property	705
A. Dispute	es over Art and Cultural Property	706
1. The	Marbles of the Parthenon (The Elgin Marbles)	706
	Notes and Questions	707
2. The	Indian High Court	709
	Sehgal v. Union of India	709
B. Nation	al Regulation of Cultural Property	711
1. Gen	eral Export Restrictions	711
2. Imp	ort Restrictions	712
C. The Ul	NESCO Treaty	712
D. Pre-Co	lumbian Art	715
	United States v. McClain	716
E. Africar	and Asian Nations	723
1. Egy _l	otian Cultural Property	723

xxiv	Table of Contents
United States v. Schultz	723
2. The Bust of Nefertiti and the Rosetta Stone	729
3. Active Destruction of Cultural Property by Governments	732
Chapter 12 Native American and Indigenous Peoples' Art	733
A. Historical Background	733
Navajo Nation v. U.S. Dep't of Interior	735
Note	740
B. Who Is Native American?	741
Bonnichsen v. U.S.	741
Notes	748
Livingston v. Ewing	749
C. Repatriation of Native American Art and Burial Goods	756
Thorpe v. Borough of Thorpe	756
Note	761
Pueblo of San Ildefonso v. Ridlon	761
Notes	764
Idrogo v. United States Army	765
Notes	769
D. Theft of Native American Art	769
Chilkat Indian Village v. Johnson	769
Notes	773
Table of Cases	777
Index	787