
PREFACE TO THE THIRD EDITION

The Third Edition of *Art Law: Cases and Materials* marks a significant change in the art world that is believed to be enduring: the transformation from a completely physical, “in real life” art world to a growing and expanding virtual art world of NFTs (non-fungible tokens), extended reality experiences of art and culture, online and in the metaverse art galleries and art sales, and the ability of digital and three dimensional media artists and creators to bypass traditional gatekeepers of art fair organizers, art contest juries, art critics, dealers, gallerists, and museums and sell directly to the public for dizzyingly high prices. Through NFTs and blockchain-hosted art exchanges, United States artists are now able to set their own resale royalty rates and automatically receive royalties when their works are resold through these exchanges. The art world universe has become the art world metaverse.

The changes brought about by the rise of the metaverse built on blockchain technologies and extended reality appear in every chapter of the casebook:

- Chapter 1—Legal and Other Definitions of Art: NFTs and the markets for digital art have changed how artists, collectors, and the general public view and interact with the art world. NFTs have disrupted the calculation of what is art and who is an artist and challenge the centuries-old systems of valuation of art even though they apply the same basic factors of scarcity, provenance (authenticity), attribution to a particular artist, popularity, historical significance, and potential for growth in value.
- Chapter 2—Copyrights: NFTs and metaverse art have not yet changed the rules of copyright, but they have thrust an entirely new class of creators and content owners into a crypto community that disfavors law and champions copying. NFTs sometimes provide copyright rights but sometimes do not. NFT art often is hugely repetitive and derivative and sometimes is created from original source material without the original copyright-holder’s knowledge or consent. NFTs have made digital art a popular and expensive art investment, but this pushes to the forefront the uncomfortable uncertainties of how the law treats digital works under the copyright first sale doctrine. The sparks have begun to fly from encounters of enthusiastic crypto natives who want to bring their open source, free for all, copy everything mentality and complete lack of knowledge as to the copyright laws to a world currently governed by intellectual property laws. Meanwhile, copyright law itself has experienced some expansion, retraction, and redefinition through the ongoing interpretation of the originality doctrines, merger and *scènes à faire*, the creativity requirement in the case of artificial intelligence art creations, and the continuing definition and reinterpretation of the transformative test in copyright fair use law. The Ninth Circuit issued *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, which took a narrow view

of transformation when ComicMix created a mash up of Dr Seuss’s “Oh the Places You’ll Go!” book and the “Star Trek” television series, called “Oh the Places You’ll Boldly Go!”; the court found the mash-up was not transformative because Dr. Seuss’s art, plot, character types, and story arc were still very apparent in the new work. The Second Circuit also rolled back transformation when it evaluated Andy Warhol’s treatment of Lynn Goldsmith’s photographic portraits of the now deceased rock star, Prince, in *Andy Warhol Foundation v. Goldsmith*. Although Warhol’s instantly recognizable treatments have, in other contexts, been identified as quintessentially transformative of the image of the celebrities he has used in his paintings and silkscreens, in this case the Second Circuit found insufficient transformation. The tale is not ended, as the U.S. Supreme Court has taken the case on certiorari in the 2022-2023 term, and we await what could be the most important copyright fair use case since *Campbell v. Acuff Rose Music*.

- Chapter 3—Trademark Rights: In recent years, trademark law has moved through the acceptance of racist speech and slander as a valid trademark—but too late for the Washington Redskins, who wound up changing their name to the Washington Commanders—to the acceptance of obscenity as a mark, but finally draws the line at the “N word,” not because it is outrageously racist and insulting, but because it is not distinctive enough to function as a mark. Trademark law continues to strongly protect famous marks from the threat of dilution, tarnishing, and blurring, and still draws a tight line against attempted criticisms and parodies that involve trademarks and the companies they stand for. Trademarks are caught up in the building of the metaverse by crypto natives who want to draw on trademarks as iconic, symbolic, and highly communicative examples of verbal and visual sources, and also by major brand holders who want to make sure that whatever the metaverse is or becomes, it will be plastered with trade and service marks.
- Chapter 4—Moral Rights and Economic Rights: Moral rights continue to make news both in the United States and abroad. The arc of United States law under the Visual Artists Rights Act (VARA) seems to be turning toward a broader recognition of moral rights claims for integrity, but the right of attribution under VARA has not progressed much in recent years. In Europe, moral rights continue to play a regular role in the handling of decisions concerning public art. The biggest change in economic rights has been the use of NFTs to enable American artists to list and sell art works linked to smart contracts that set a rate for the payment of resale royalties and automatically issue the royalty payment whenever these art works are resold on an exchange that supports transactions “on chain” with the blockchain where the art is registered. Thus, American artists have achieved what Congress would never deliver and which the courts had taken away from California law.
- Chapter 5—Right of Publicity: The right of publicity is a mainstream cause of action now, and with new and different uses and misuses of names, images, and likenesses possible on the threshold of the metaverse—deep fakes created with the Unreal Engine 5, unauthorized uses in false endorsement situations, lookalike avatars and profile pictures (PFPs)—the future

is going to be bright and litigious. Amateur athletes have won the right to engage in name and image licensing at the same level as the pros, but the border patrol of trademark and publicity lawyers policing the boundaries of trademark and publicity rights will make sure the athletes do not profit off the names, uniforms, logos, and merchandise of the athletes' institutions of learning who have their own intellectual property to protect.

- Chapter 6—First Amendment Rights: The First Amendment freedom of expression and free exercise of religion continues its robust march through the Roberts Court. With each of the recent terms, the court has expanded the liberties of speech and religion, but not necessarily in ways that advantage artists and creators. Since the second edition of the text, the Supreme Court issued *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which recognized artistic expression in cake decorating, but recognized even greater rights in free exercise of religion and the right not to be compelled to speak even if it discriminated against others' free speech and equal protection rights. In *NetChoice v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022), the Supreme Court voted to vacate a stay allowing a lower court's injunction of a Texas state law forbidding social media platforms from censoring and removing the speech of participants on their platforms to remain in effect. This is a roundabout way of saying the Supreme Court acted to prevent states from promoting free and unencumbered speech on social media platforms, but that may not be such a bad thing when the speech that the platforms sought to remove was Russian propaganda, hate speech, QAnon and 4chan conspiracy chatter, and other subversive fake news. Less speech, yes, but perhaps less harm, too, and these are private social media platforms not the government doing the censorship. In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022), the Supreme Court held that the Bremerton, Washington school district burdened an assistant coach's rights under the Free Exercise Clause by suspending him for his decision to persist in praying quietly at midfield at the school's football stadium after football games. The Court held that despite the very public setting, the employee engaged in private speech, not government speech attributable to the school district, and that the coach's very public display of his private religious exercise was not an impermissible government coercion of students to also pray openly and publicly, especially the players on the coach's own team. And finally, we cannot escape noting the demise of the civil rights protections represented by the penumbra of privacy rights emanating from the First Amendment and other amendments now threatened by the overturning of *Roe v. Wade* by *Dobbs v. Jackson Women's Health* in June 2022.¹
- Chapter 7—Art Galleries, Dealers, and Clients: The business of art and the roles played by galleries and dealers in getting artists connected to their clients has been disrupted in fundamental ways by the growth of NFTs and

1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022), *overruling Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

blockchain-supported exchanges. A whole new category of artist—digital artists and designers—now can sell their works at blue chip level prices. By all accounts, there is a tremendous amount of art changing hands on the blockchains, and much of it has bypassed the gatekeepers of dealers and gallerists. Artists have found new ways of connecting directly to clients who have real or virtual money to spend on art and are showing their works in virtual galleries and exchanges in the worlds that are developing into the metaverse.

- Chapter 8—Auctions: The auction business is thriving in 2022, seemingly in spite of or in defiance to the slowing economic recovery from the COVID-19 crisis and the cryptocurrency rollercoaster of value fluctuations. It seems unheard of that Christie’s and Sotheby’s will not set new records for every Spring and Fall auction season—and that only refers to the “in real life” auction market. The 24/7 auction world of digital art and NFTs seems robust and continuing, and even if the dizzying heights of the 2021 market are not sustained, the art-consuming public’s imagination is no longer fixed on the traditionally recognized blue chip artists and high-quality, three-dimensional “in real life” artworks. In 2021-2022, new records have been set at auction for twentieth century art, American art, art by living artists, photography, and digital art.
- Chapter 9—Museums: Museums have been navigating a stormy sea, first having been brought to a standstill operationally and economically by the worldwide COVID-19 lockdowns, then to begin to emerge into a new world of competition for attention with the online galleries and virtual museum experiences of the metaverse. The battle for the hearts of visitors and donors is buffeted by outcries about insensitive collecting and non-restoration practices, by complaints against deaccessioning even when necessary to navigate the museum’s financial straits, and by the growing expectations that museums will be more racially and gender representative in their exhibitions and collection practices.
- Chapter 10—International Movement of Art During War: Sadly, the movement, looting, or destruction of art and cultural property in wartime has only expanded in 2022. For the first time since World War II, a major European nation’s art and cultural heritage is under attack from another major European power as Russia attempts to invade and regain hegemony over Ukraine. Previously, world press headlines featured the looting, destruction, and unlawful and unsupervised excavation in the birthplace of civilization known as Mesopotamia and the Fertile Crescent from Syria’s civil war and the general unrest of Iraq, but these stories have been replaced by news from the civil wars in Yemen, Ethiopia, and the civil unrest in Burma. In Afghanistan, the Taliban have returned to power, which reawakens the worries concerning the destruction of figurative art and cultural heritage that happened the last time the Taliban was in control of Afghanistan. In the crypto community, the National Art Museum of Ukraine and other organizations outside Ukraine have raised funds by selling NFTs and other tokens to help the Ukrainian government fight the Russian invasion.

- Chapter 11—International Preservation of Art and Cultural Property: The ongoing efforts to protect cultural property in areas not engaged in active warfare have not lessened even as the COVID-19 crisis has pulled attention from the subworld of looting and smuggling and the general risks of global warming, environmental degradation, and destruction of cultural sites. The pandemic caused lockdowns and interruptions in worker mobility that brought an end to most tourism revenue. The workforce displacement, reductions in staff, and general losses in revenue have led to security issues and increases in theft and looting. Ancient claims, such as Greece’s claim for restoration of the Parthenon Marbles and Nigeria’s claim for restoration of the Benin Bronzes, are being pursued with new vigor as the cultural world continues to wrestle with the concept of universal encyclopedic museums versus the right of nations, peoples, and cultures to reclaim exclusive possession of works tied to their history, heritage, and religions. Blockchains and the crypto community play a role here, too, as NFTs have been used to raise money for preservation and other needs by the Government of India and by major cultural institutions (British Museum, Uffizi Gallery, Hermitage) to offset losses from the COVID crisis.
- Chapter 12—Native American and Indigenous Peoples Art: First Nation and indigenous peoples have sustained significant challenges to their communities from the COVID-19 crisis. These communities’ poor access to testing, vaccines, preventative healthcare, and active medical treatment have only been exacerbated by the crisis. The protection of native and indigenous cultural property under the Native American Graves Protection and Repatriation Act (NAGPRA) continues, and litigation appears sporadically in federal courts, but there is a trend in the outcomes of reported cases that courts are very willing to dismiss these suits on procedural grounds at the first opportunity. It appears that community voices and demands have at least as good and perhaps a better chance of achieving results in the preservation and repatriation of native and indigenous cultural property than resorting to the court system.