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OPINION

From “The Origin of the World” to #SendNudes: Social Media and Censorship of Art

Your Post Has Been Deleted

We removed your post because it doesn't follow our **Community Guidelines**. If you violate our guidelines again, your account may be restricted or disabled.

Community Guidelines

We want to keep Instagram a safe place for everyone, and we created these guidelines to support and protect our community on Instagram.

[Learn more](#) about what we remove.

Date: July 19, 2019 Author: centerforartlaw0 Comments

By Hannah Tager.

WARNING: this article contains explicit content.

In April of 2019, Instagram deactivated the account of American feminist art pioneer Betty Tompkins. The social media platform barred Tompkins from creating a new one after the artist posted a photograph of her painting *Fuck Painting #1* (1969), an artwork owned by the Centre Pompidou in Paris. Only after a formal report by Tompkins and a barrage of complaints from her followers did Instagram reinstate the artist's original account, providing no further information regarding its earlier deactivation.

Tompkins's 2019 experience is not unique. Both emerging and established artists are reporting more and more cases of censorship by social media platforms like Facebook and Instagram, which was acquired by Facebook, Inc. in 2012. The quantity of these take downs is hard to ascertain, but members of the [museum](#), [artist](#), and [academic](#) communities have been repeatedly censored by the sites. Online platforms develop and enforce terms of service and algorithms to deter the circulation of pornography, inadvertently catching artists and their works in the cross-fire, and raising legal and artistic concerns regarding the effectiveness and legality of such terms. In the most drastic of cases, [Facebook censored a photograph of the "Venus of Willendorf,"](#) a 30,000 year old limestone figurine, in 2017. In another instance, [a French teacher sued Facebook](#) in 2018 for deactivating his account after he posted a photograph of Gustave Courbet's painting "L'Origine du Monde" (1866). Such incidents

prompt one to postulate, when it comes to applying community guidelines to artwork, where does the line of caution end and that of censorship begin?

Jurisdiction Over Artistic Content on Facebook, Inc. Platforms

The jurisdiction over these so-called “provocative posts” is multi-faceted. In some cases, privately-owned service providers, such as Facebook or Instagram, determine the sensitivity of an image. In other cases, national obscenity and child pornography laws may apply. While American social media platforms act as popular social forums, they are run by companies that set their own terms and conditions . These private enterprises do not, for the most part, qualify as a designated public forum as defined by the First Amendment.¹⁾ Artists who create accounts on these sites agree to their terms, thereby consenting to Facebook, Inc.’s evaluation of their posts, and effectively conceding their First Amendment rights. While polemical posts like those of the far-right conspiracy theories of Alex Jones, the host of the radio program Alex Jones Show and owner of the website Infowars, are protected by the First Amendment, Facebook, Inc. can quickly [“remove content for violating \[their\] policies.”](#) Platforms can remove content that does not align with corporate guidelines while also being legally protected from user content and not being held responsible for hosting or facilitating online speech, as determined by Section 230 of the Communications Decency Act of 1996, which states that “[n]o provider or user of an interactive computer service shall be treated as the

publisher or speaker of any information provided by another information content provider.”²⁾ This statute means that service providers are not responsible for their users’ content, cannot be forced to censor or review user content, and cannot be sued when users cross the line.

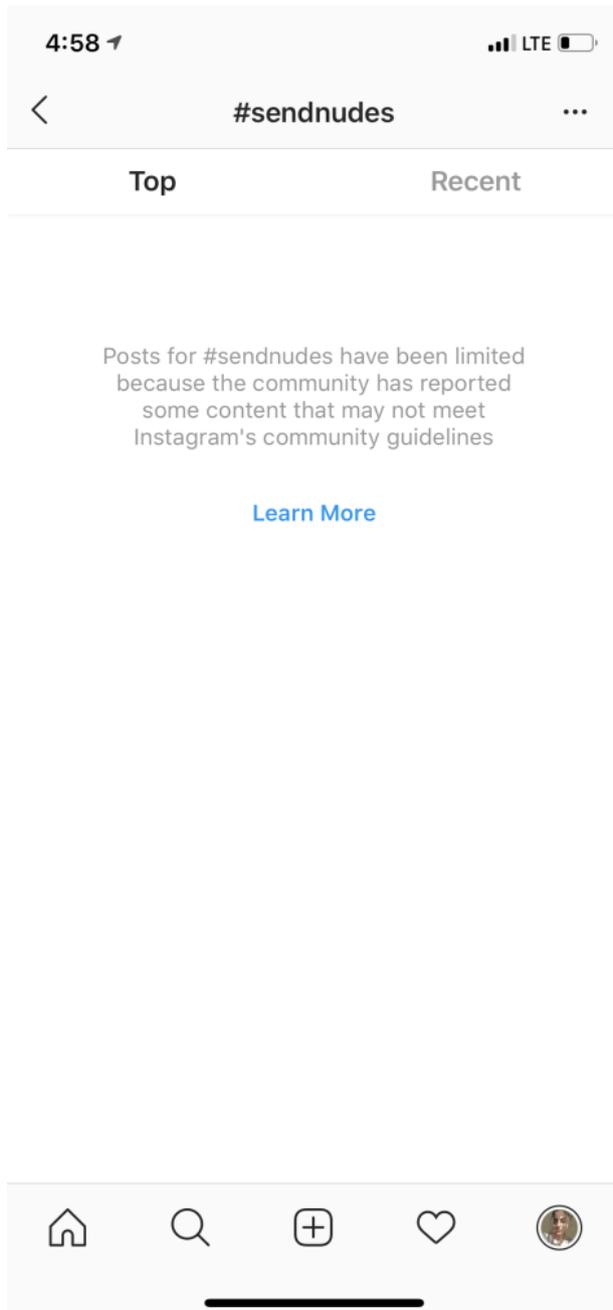
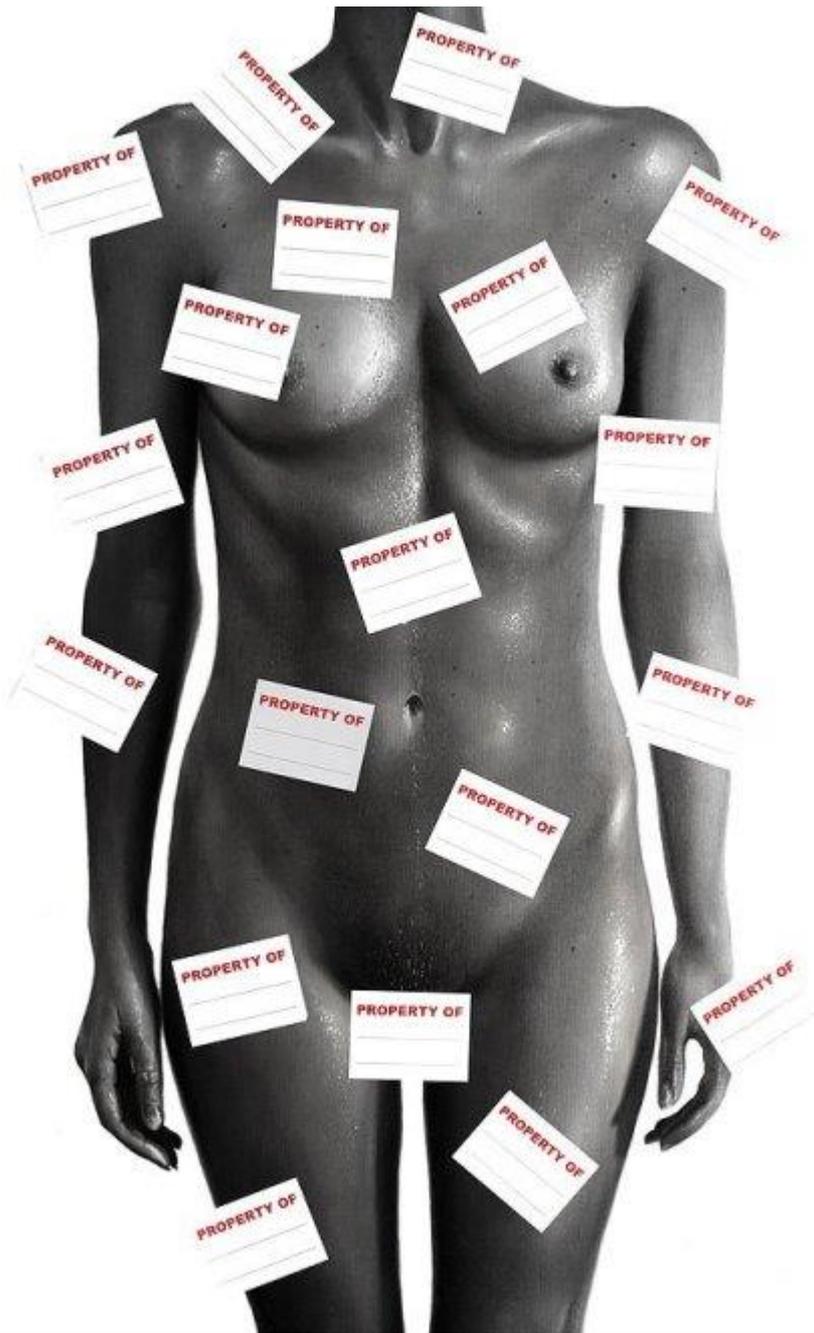


Photo provided by Author.

Nowadays, obscenity statutes and precedent are rarely enforced, as attorney Kevin Goering, partner at Mintz & Gold LLP, noted in an interview with the Center for Art Law in June.³⁾ Additionally, as artists ranging from Courbet to Tompkins have so flippantly proven, the line, if one even exists, where art ends and obscenity begins is difficult to determine. For such reasons, judges and juries of obscenity trials are caught in their own kind of Zeno's paradox as they try to find such a line and determine the presence, or lack thereof, of a quality that is undefined by the law. "Obscene" is an exceedingly nuanced label, and the words that are heard often in obscenity cases, such as *appropriate*, *decent*, *lascivious*, are more dependent on context and personal judgment than any codified definition.



"property of" by Kit King. Courtesy of the artist.

History of Obscenity Law

Today, the word "obscene" lacks a clear definition in a legal context; nevertheless, in cases concerning art, the courts are granted the responsibility of judging the obscene aspects of a work. In 1988, the artist Richard Serra

sought to enjoin the United States General Services Administration (GSA) from removing his site-specific and highly controversial sculpture "Tilted Arc" from Federal Plaza in lower Manhattan. The Second Circuit granted summary judgment against Serra and ultimately declared that a "consideration of aesthetics is a legitimate government function."⁴⁾ In these cases when the court must make aesthetic judgements, judges are usually "awarded extraordinary latitude in their determination," writes Art Historian and Attorney Joan Kee in her book *Models of Integrity*.⁵⁾ This leeway is probably best epitomized by Supreme Court Justice Potter Stewart famously stating in 1964 in a decision regarding the banning of an "obscene" film, "I know it when I see it."⁶⁾ The 1958 French drama "The Lovers/Les amants" directed by Louise Malle, won the Special Jury Prize at the 1958 Venice Film Festival yet faced strong push back in the United States for being "obscene." Acceptance of such intuition whilst allowing for leniency, and the dogmatic holdings of the courts has left some artists without a clear understanding of a term often thrown at their work.

US federal law prohibits the possession of obscenity with the intent to sell, distribute, send, ship, import, and transport the materials for the purpose of distribution.⁷⁾ In addition, federal law also prohibits the production of obscenity with the intent to sell or distribute it.⁸⁾ Finally, the broadcast or distribution of obscenity by radio, cable, or subscription television is also prohibited.⁹⁾ While statutory law provides some insight into the repercussions of the proliferation of "obscene" material, the determination of whether

material is obscene or not is guided primarily by common law precedent. A history of seminal obscenity cases in the United States provides some hints for contemporary artists and art aficionados as to what social media posts could be deemed obscene by the law.

Until the mid-20th century, the US was greatly influenced by Victorian-era legal standards from Britain, and abided by the 1868 *Hicklin* standard, which stated that material is obscene if it tends "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."¹⁰⁾ With the publication of *Ulysses* in 1934, the *Hicklin* standard was overturned in the United States, and a new standard was established that did not deal solely with an isolated passage or part of a work, but rather sought to determine "whether a publication *taken as a whole* has a libidinous effect."¹¹⁾ This holistic evaluation of obscenity in art was further developed in *Roth v. United States* (1957) where the court held that obscenity depended on whether the "average person, applying contemporary community standards," would consider the material in question to appeal to the prurient interest "as a whole."¹²⁾ This case, which concerned the circulation and mailing of erotic magazines and photographs by New York publisher Samuel Roth, also established that "obscenity is not within the area of constitutionally protected speech or press."¹³⁾

The *Roth* ruling was further refined in the 1966 case, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of*

Massachusetts, 383 U.S. 413 (1966). The book in question was thought to be obscene, but, in a 6-3 decision, the Supreme Court disagreed, outlining a three-part test for obscenity derived from the *Roth* test: whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."¹⁴⁾ This test evolved into what came to be called the *Miller* Standard. The now-infamous standard came about after the defendant, Marvin Miller, sent unsolicited mailings to advertise the sale of "adult" materials. In *Miller v. California* (1973), the Supreme Court stated that obscenity in art should be determined based on the following three-prong test: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state laws, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁵⁾ Since the establishment of the *Miller* Standard, a majority of obscenity cases have focused on determining the relevant contemporary community standard, the first prong of the *Miller* three-part test.¹⁶⁾

A more recent case, *City of Cincinnati v. Contemporary Arts Center* (1990), considered the obscenity of seven Robert Mapplethorpe photographs.¹⁷⁾ The Contemporary Arts Center ultimately prevailed and argued that

Mapplethorpe's entire career and artistic oeuvre should be considered rather than an isolated image, thus revisiting the "taken as a whole" principal first outlined in the *Ulysses* case. With respect to Instagram, the Contemporary Arts Center's argument could potentially be extended and applied to the social media platform; that is to say, one could argue that an artist's entire account should be considered as a whole before censoring individual images.

Obscenity Involving Minors

While the law grants some leeway in labeling general nudity in artwork obscene, rules are much stricter for artworks featuring nude minors. Federal statutes specifically forbid obscenity involving minors, as defined in 18 U.S.C. § 1470. In addition, 18 U.S.C. § 1466A, forbids any person to knowingly distribute, receive, or possess "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that — (1) (A) depicts a minor engaging in sexually explicit conduct; and (B) is obscene; or (2) (A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse." As written, this statute provides a two-pronged, more inclusive alternative to the *Miller* test, implicating any work that depicts a minor engaging in a sexual act or lacks serious literary, artistic, political, or scientific value.¹⁸⁾

Additionally, in the important 1982 First Amendment case *New York v. Ferber*, the Supreme Court declared that images that represent child nudity

may be banned without first having to be deemed obscene, journalistic images included.¹⁹⁾ While Facebook launched in 2004, the 1982 decision still governs the company's platforms. For such reasons, as quoted below, Facebook Inc.'s policies regarding child nudity are much harsher and well defined than those that concern "obscene" imagery. Facebook, Inc. platforms also require a user to be at least 13 years old to be able to create an account.

Community Guidelines of Facebook, Inc. Platforms.

Along with upholding the law, by which Facebook, Inc. mandates users abide, the company enforces its own set of community guidelines for determining what can and cannot be posted with regards to nudity and explicit imagery.

In [Facebook's Policy Rationale for Adult Nudity and Sexual Activity](#), the company states, "We restrict the display of nudity or sexual activity because some people in our community may be sensitive to this type of content. Additionally, we default to removing sexual imagery to prevent the sharing of non-consensual or underage content." Facebook also notes that its "nudity policies have become more nuanced over time." They "understand that nudity can be shared for a variety of reasons, including as a form of protest, to raise awareness about a cause, or for educational or medical reasons. Where such intent is clear, [they] make allowances for the content. For example, while [they] restrict some images of female breasts that include the nipple, [they] allow other images, including those depicting acts of protest, women actively

engaged in breast-feeding, and photos of post-mastectomy scarring. [They] also allow photographs of paintings, sculptures, and other art that depicts nude figures.”

Facebook’s policy regarding nudity in art, however, is explicitly flexible, and the wording “other art that depicts nude images” remains open to interpretation. The current policies regarding art were revised in 2018 in response to the incident concerning the Courbet painting. In 2011, the French schoolteacher Frédéric Durand-Baïssas sought €20,000 in damages from Facebook when the social media platform deleted his account after he posted a photograph of Courbet’s “L’Origine du Monde” (1866) painting, which depicts female genitalia. Since then, Facebook’s policies in theory allow for the posting of paintings, sculptures, and “other art” that features nude imagery.

Instagram’s policies, while differing slightly in their wording, are, for the most part, a reflection of Facebook’s guidelines. In [“The Short”](#) summary of its policies, Instagram writes, “Post only your own photos and videos and always follow the law. Respect everyone on Instagram, don’t spam people or post nudity.” The following appears in the platform’s [extended policies](#) regarding nudity:

“We know that there are times when people might want to share nude images that are artistic or creative in nature, but for a variety of reasons, we don’t allow nudity on Instagram. This includes photos, videos, and some digitally-created content that show sexual intercourse, genitals, and close-ups of fully-nude

buttocks, . . . [and] some photos of female nipples, but photos of post-mastectomy scarring and women actively breastfeeding are allowed. Nudity in photos of paintings and sculptures is OK, too.

Instagram echoes the sentiments of its social media predecessor when it comes to nudity. Facebook's clause, however, also includes "other art that depicts nude figures," which Instagram's policy lacks. Additionally, Instagram's policies explicitly prohibit the posting of nude photographs while allowing for nudity in photos of paintings and sculptures.

Both platforms allow for a kind of peer-review, and offer [built-in reporting options](#) to flag posts. Users can "Report" a picture and label the image "It's inappropriate." In an effort to combat revenge porn, Facebook, Inc. also uses an [AI algorithm](#), trained on "previously confirmed non-consensual intimate images," to flag an image or video that "contains nudity or near nudity." A "specially-trained member of [their] Community Operations team" then reviews all flagged content. If you believe your account has been wrongfully deactivated or a post has been deleted, you can also "[Report a Problem](#)" on Facebook or Instagram, although it appears that Facebook, Inc. is faster to remove than reactivate.

Artists' Experiences with Facebook, Inc. Censorship

Kit King, an established Canadian artist whose Instagram [@kit_king](#) boasts more than 347,000 followers, works predominantly with oil paints to create

large scale hyper-realistic paintings. King's work has been reproduced in numerous magazines and online publications, and her paintings have appeared in galleries, museums, and art fairs around the world. She wrote this June in an email to the Center for Art Law, that, although she has "never once broken the guidelines" and makes "a point to adhere to the rules and regulations," her paintings have been removed from both Instagram and Facebook.²⁰⁾ To prevent suspension, King went so far as to censor her nude paintings with black bars and blurred parts, but these posts were still removed.

Instagram's policies are particularly detrimental for King, who depends on Facebook and Instagram to promote her shows and exhibitions. "My entire career is hinged on my Facebook and Instagram account. This is how I make every connection with galleries and collectors. I would have no job/source of income without it," the artist wrote. In one unfortunate incident, Facebook and Instagram removed every post promoting one of King's solo shows. "I was temporarily banned and couldn't not promote my exhibit. Needless to say, no one knew about it, and no one showed up and it tanked and not only was I out the 8 months it took to make the work, but I was out the thousands of dollars it took to ship my works to another country. It was devastating."

The artist Alphachanneling has confronted similar setbacks due to Instagram and Facebook censorship of the artist's posts. The artist's Instagram account, featuring watercolors and sketches of erotic art, was removed once, and posts are still taken down often. The featured artworks, which the artist called "both

profane and profound” in an e-mail, have resonated with many and been reposted by rappers, sex workers, and art critics.²¹⁾ While @alphachanneling has more than 819,000 followers, the account is censored monthly, if not more frequently. “I exhibit my art primarily on Instagram. [It] is intrinsic to my art process as it lets me keep a continuous visual conversation going in micro moments that take only a few seconds of people’s visual attention,” the artist wrote. “[Instagram] completely facilitates interaction between artist and appreciator and flattens the hierarchies of galleries, curators, publishers and creators into a level landscape.” However, Instagram and Facebook’s censorship policies have complicated Alphachanneling’s relationship with the platform, as the artist describes: “Instagram is very much a tenuous platform. They can and frequently do shut down accounts at their own discretion, something like showing a nipple, etc[.], is all it takes.” In a practice now common among artists on Instagram, Alphachanneling has created a backup account, @alphachannelingz.



The Kiss” by alphachanneling. Courtesy of the artist.

Emerging artist Mia Boulukos, [@byboulukos](#), encountered trouble with Instagram after she started her series #SendNudes. The series, a selection of acrylic and oil paintings on canvas, features recreations of nude selfies sent to the artist by friends and strangers. Instagram has not taken down any of her

posts, but Boulukos has had issues marketing her work with the hashtag #sendnudes. The hashtag, when clicked, leads users to a blank page that reads, "Posts for #sendnudes have been limited because the community has reported some content that may not meet Instagram's community guidelines." In an interview with the Center for Art Law, Boulukos said, "It is unfortunate that I can't use that hashtag to my advantage in any way. Although I get it—I mean, you don't want certain things circulating around the internet."^[22] The artist was also unable to advertise her recent exhibit with the hashtag posted as text on an Instagram Story; she posted a pan of her installed works, and the story was deleted twice. "I was like—you're *not* looking at the photo. It wasn't even a photo of a nude, it was just the words," Boulukos said.



Mia Boulukos' studio at the University of Wisconsin. Photo courtesy of the artist.

Artists have also expressed frustration regarding a perceived gender bias of Facebook, Inc.'s censorship. Photographs of penises are prohibited on both platforms, but artists have noted that the removal of images of male genitalia

is less prompt.²²⁾ Due to Instagram and Facebook's reporting tool, user bias could also contribute to the disproportionate number of photos depicting femme or gender non-conforming individuals that are flagged as inappropriate.

Current Campaigns Against Facebook, Inc.'s Censorship

Artists have shared varying levels of success fighting Facebook, Inc. censorship via the platforms' reporting forms and through personal appeals. Some activists and artist have sought national campaigns to address the problem. Recently, the National Coalition Against Censorship (NCAC) launched the #WeTheNipple campaign, calling on Facebook and Instagram to get rid of their ban on all photographs of the naked human body. On Sunday, June 2nd, 2019, photographer and activist Spencer Tunick organized a 100-person protest with others from NCAC and the organization [Grab Them By The Ballot](#). Protestors lay naked outside of Facebook's headquarters in New York City, stripping off their clothes and using blown up images of male nipples to cover their genitalia. Following the protest, Instagram agreed to meet with members of the art world to "discuss the issue of nude photographic art and the harm done to artists, provide insights into the challenges Facebook has faced in developing its nudity policies, and explore ideas for a path forward," according to a [statement released by NCAC](#).

Alongside activism, recent rulings have also shed light upon obscenity laws and potential policy changes by Facebook, Inc. On June 19th, 2019, the Court delivered a [5-4 decision](#) in *Manhattan Community Access Corp. v. Halleck*.²³⁾ The case arose after the private non-profit community access channel Manhattan Neighborhood Network stopped playing a [video](#) that criticized the exclusive opening of the MNN El Barrio Firehouse Community Media Center. The producers of the video then went on to sue the network on First Amendment grounds, claiming that the public access channel functioned as a public forum for free speech purposes, with MNN thereby violating their free speech rights. The film makers won on appeal in the Second Circuit, but the Supreme Court ultimately found that that MNN could not be considered a state actor in how it operates, and, as such, was not bound to protect free speech rights as a state actor would be expected. As for the case's relevance with respect to Facebook, Inc., MNN's classification as a non-state actor lessens the chances of social media platforms being considered state actors that are subject to the First Amendment. The case could be seen as a major setback for artists looking to sue the company on constitutional grounds.

What to expect next?

Artists looking to take immediate legal action against the corporation for censorship are left in a grey area: while their work may be deemed apt for public consumption according to previous obscenity rulings, the policies of private companies (of which Facebook is but one) are, in effect, much stricter

than the law. For example, [the majority of states allow for women to go topless](#), whereas Facebook's policies prohibit the exhibiting of uncovered female nipples. By using Facebook, Inc.'s platforms and signing its terms of service, artists sacrifice their First Amendment protections, and have little basis on which to sue.

Communication may be the best solution in the debate over censorship. Recent developments signify that Facebook, Inc. is open to discussing its terms. Following the protest by NCAC and Grab Them By The Ballot, the company agreed to meet with members of the art world to "discuss the issue of nude photographic art and the harm done to artists, provide insights into the challenges Facebook has faced in developing its nudity policies, and explore ideas for a path forward," according to a [statement released by NCAC](#). A potential idea is to label or hashtag some artworks "Adult Content" but allow access to assenting users, just as museums often label some of their more provocative works. No official date for the meeting between Facebook, Inc. and NCAC has been set, but NCAC states that it will likely occur later this summer.

Additional Sources / Suggested Readings:

- <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity>
- <https://www.theartnewspaper.com/news/artists-take-stand-against-social-media-censorship>
- <https://www.ucpress.edu/book/9780520299382/models-of-integrity>
- <https://www.artsy.net/article/artsy-editorial-photographers-fighting-instagram-censorship-nude-bodies?fbclid=IwAR3VIX8RzGvzSn230Kohf-du9P0rf5EywgKybS7vxxlOPL6ab6IHkiNrsLM>
- Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America*, (Oakland, California: University of California Press, 2019)
- Judith B. Prowda, *Visual Art and the Law: A Handbook for Professionals*, (Surrey, UK:Lund Humphris in association with Sotheby's Institute of Art, 2013)

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Disclaimer: this article is intended for educational purposes only and the information contained herein should not be considered as legal advice.

References

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2. ↑ Communications Decency Act, 47 U.S.C. § 230 (1996).

3. ↑ Telephone Interview with Kevin Goering, Partner, Mintz & Gold LLP (Jun. 27, 2019)

4. ↑ *Serra v. U.S. General Services Administration*, 847 F.2d 1051 (2d Cir. 1988); *see also Claudio v. Unites States*, 836 F.Supp. 1219 (E.D.N.C. 1993). (Kee, 174).

5. ↑ Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America* 174 (University of California Press, 2019).

6. ↑ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

7. ↑ *See* 18 U.S.C. § 1460-63.

8. ↑ *See* 18 U.S.C. § 1465-66.

9. ↑ 18 U.S.C. § 1464, 1468.

10. ↑ *Hicklin*, [1868] L.R. 3 Q.B. 360, 371.

11. ↑ *United States v. One Book Called "Ulysses,"* 72 F.2d 705, 707 (2d Cir. 1934) (emphasis added).

12. ↑ *Roth v. United States*, 354 U.S. 476, 489 (1957).

13. ↑ *Id.* at 485.

14. ↑ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 418 (1966).

15. ↑ *Miller v. California.*, 413 U.S. 24 (1973) (citations omitted) (internal quotation marks omitted).

16. ↑ Judith B. Prowda, *Visual Art and the Law: A Handbook for Professionals*, 28 (Derrick Chong et al., 2006).

17. ↑ *City of Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc.2d 9, 15 (Ohio Misc. 1990).

18. ↑ Obscene visual representations of the sexual abuse of children, 18 U.S.C. § 1466A (2006).

19. ↑ *New York v. Ferber*, 458 U.S. 747 (1982).

20. ↑ Email from Kit King, Artist, to Hannah Tager, Summer 2019 Intern, Center for Art Law (Jun. 19, 2019, 03:05 PM EST) (on file with author).

21. ↑ Email from Alphachanneling, Artist, to Hannah Tager, Summer 2019 Intern, Center for Art Law (Jun. 22, 2019, 08:37 EST) (on file with author).

22. ↑ Anny Shaw, [Artists take stand against social media](#), *The Art Newspaper*, May 28, 2019, at 313.

23. ↑ 587 U.S. ___, 2* (2019), *supra* note 1.
