

ARTS Law Memo

Old Courthouse Bans Video Installation

Remember Ronald Reagan's Secretary of the Interior James Watt? In 1983, he created an international furor when he banned The Beach Boys from performing in the nation's capital because he thought the band would attract the "wrong element." The Beach Boys!

Secretary Watt came to mind a few weeks ago when Frank Mares, chief of museum services and interpretation at the Jefferson National Expansion Memorial, withdrew permission for artist Krzysztof Wodiczko to bring his multi-media project to fruition on the Old Courthouse's eastern facade.

The courthouse, the Gateway Arch, and the Museum of Westward Expansion are operated by the National Park Service under the name Jefferson National Expansion Memorial.

This issue of *Arts Law Memo* describes the installation project, explains the public forum doctrine, and encourages arts organizations to adopt freedom of expression policies.

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THE ST. LOUIS PROJECTION

MIT professor Wodiczko is internationally renowned for his large-scale slide and video projections on architectural facades and monuments. During the last decade, he has realized more than 70 public projections in Australia, Austria, Canada, England, Germany, Holland, Ireland, Israel, Italy, Mexico, Poland, Spain, Switzerland, and the United States.

His latest work, The St. Louis Projection, was planned in conjunction with the Apr. 14 groundbreaking of the new Sam Fox Art Center on the

Washington University campus. Wodiczko collaborated with university faculty and students from the Schools of Art and Architecture to create the piece. It examines the causes and shattering effects of violence through audio testimony by local residents who have lost someone to crime. Accompanying the speakers' broadcast voices are larger than life projected video images of their hands. Powerful stuff.

But about a week before the event, negotiations with Mares apparently broke down over the question of content. Mares said the project evolved into something different from what he believed it would be and declared that it no longer fit the themes necessary for exhibits at the Old Courthouse. Acceptable projects, he said, must tie into topics like westward expansion, the Louisiana Purchase, Lewis and Clark, and the first two Dred Scott trials. Those trials were held in the courthouse in 1847 and 1850.

Scott, you may recall, was a slave who filed suit to win his freedom. His legal battle ended in the U.S. Supreme Court, which made one of the most infamous decisions in its history when it ruled that the federal government did not have the power to prohibit slavery in its territories. The decision contributed to rising tensions between free and slave states just before the Civil War.

Located just two blocks west of the Arch, the Old Courthouse is one of the oldest standing buildings in St. Louis. Today, the building houses a museum charting the history of the City of St. Louis and restored courtrooms.

PUBLIC FORUM DOCTRINE

Would the park service's content-based restrictions hold up in an active courtroom? The answer would likely depend on what is known as the public forum doctrine. That doctrine asserts that the First Amendment does not guarantee access to property simply because it is

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing Arts Law Memo and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national volunteer lawyers for the arts network.

This issue was written by VLAA Executive Director Sue Greenberg.

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The First Amendment applies to artistic expression, verbal as well as non-verbal, just as it applies to political and other speech.

It is a shield that protects against government restriction or punishment of expression, particularly when the government discriminates on the basis of content. A content-neutral regulation must be both viewpoint neutral — not based on the message’s ideology — and subject-matter neutral — not based on the message’s topic.

When a government action seems to infringe on freedom of expression, there is one key question to consider: Is the action content-based or content-neutral? If the action is content-based, the government’s action will be subjected to strict scrutiny, and will rarely be sustained. If the action is content-neutral, it is subjected to a less demanding standard, and is more likely to be upheld.

Censorship technically refers to action taken by federal, state, or local government employees acting in their official capacity. The First Amendment does not apply to conduct by a private entity, such as a gallery or theatre, unless that entity is deemed a “state actor,” engaged in an activity that is traditionally performed by the government. Generally, receipt of government funds does not convert a nonprofit arts organization into a state actor.

owned or controlled by the government.

Regulations that completely ban expression in non-public forums are usually permitted. Examples of non-public forums include prisons, courtrooms, military bases, and governmental office buildings.

Traditional public forums are places that have historically been more or less free speech zones, such as streets, sidewalks, and parks. The government cannot ban expression in this kind of forum, but it may impose regulations on time, place, and manner when the regulation is content-neutral and narrowly tailored to serve a compelling government interest.

In a 1984 case, for example, the U.S. Supreme Court upheld a National Park Services regulation that prohibited camping in certain parks in the heart of Washington, D.C. against a First Amendment challenge by protesters. They were participating in round-the-clock demonstrations calling attention to the plight of the homeless.

Public property also may be a designated or a limited public forum. A designated property is specifically opened by the state for expressive activity by the general public. Making a public school available for meetings by

community groups is an example of this kind of forum. Speech restrictions in a designated forum would be subject to strict judicial scrutiny.

Limited public forums are properties that are open to expressive activity by certain groups or for discussion of certain subjects. Content-discrimination that preserves the purposes of a limited forum may be permissible as long as it is viewpoint-neutral and reasonable in light of the purpose of the forum. But the limitations must be clearly defined and not merely left up to the unguided discretion of a government employee.

As the U.S. Supreme Court noted in a 1951 case involving city council permits to use a park for Bible talks, when a regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited “merely because public officials disapprove the speaker’s views.”

To determine the forum type, the courts examine both policy and practice. While Mares would likely argue that the Old Courthouse is a limited public forum, the record would probably demonstrate that the Jefferson National Expansion Memorial hosts a

variety of activities that are not directly related to westward expansion or Dred Scott.

More importantly, Wodiczko’s poignant subject matter is certainly compatible with the Old Courthouse’s complicated past. It’s not hard to imagine the exasperated Polish-born artist trying to make this point to the federal bureaucrat.

So, with the activities planned in conjunction with Sam Fox Arts Center groundbreaking activities rapidly approaching, Wodiczko decided to look for a new site. He approached the Saint Louis Art Museum, which declined his request using the rather unconvincing excuse that the piece was “site specific” to the Old Courthouse.

Thankfully, the downtown St. Louis Public Library agreed to host the project. Designed by Cass Gilbert, the monumental building appeared anthropomorphic during the project, as if it was speaking to the community.

The role of libraries and museums as custodians of democratic values and champions of lifetime learning is well-recognized. But these institutions provide far more than content. They are trustworthy resources with a long history of equitable access.

Libraries are effective knowledge navigators and provide expertise to help people learn. Museums accompany objects of known authenticity with respected scholarship. They encourage examination, analysis, and questioning. What could be needed more in this bewildering era of new technologies, increasing diversity and divide, and uncertainty?

The Saint Louis Art Museum and the Jefferson National Expansion Memorial missed an important opportunity to cast off stodginess and underscore their essential role as educational institutions.

In contrast, the public library affirmed its public service mission. It also reminded us that correcting a wrong is always the right thing to do. Perhaps the library officials simply followed the example of First Lady Nancy Reagan who personally invited The Beach Boys to play on the Mall in Washington, D.C. in 1984.

Freedom of Expression Policies

Freedom of speech is the first freedom mentioned in the First Amendment: “Congress shall make no law...abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The Constitution’s framers believed that freedom of inquiry and of expression were the hallmarks of their new democratic society.

But historically, particularly during times of national stress — real or imagined — free speech rights come under enormous pressure. And after more than a decade of attacks on government funding agencies, museums, theatres, libraries, Hollywood, music lyrics, photographers, alternative spaces, and performance artists, self-censorship may seem preferable to losing funding or mounting a debilitating campaign to defend controversial art.

Assaults on the arts often succeed because they push “hot buttons” — subjects that arouse powerful emotions and deeply held beliefs. Those hot buttons include sex, especially homosexuality; religion, especially sacred symbols; race, especially works which associate race with violence; and patriotism, especially expression involving the American flag.

Threats fly under many banners. Challenges may come from the public, governmental employees acting in their official capacities, or members of your own organization. They may come from the right or from the left. They can take the form of an orchestrated effort or a single complaint.

When facing a challenge, your organization may be tempted to base its decision-making on fear or political correctness rather than on aesthetics. Mishandling a controversy can damage your organization’s goodwill in the community and compromise its mission.

As the *Mirroring Evil: Nazi Imagery/Recent Art* exhibit at New York’s Jewish Museum demonstrated, preparation is key. The 2002 show, which featured works by thirteen internationally recognized artists who make new and daring use of imagery taken from the Nazi era, was accompanied by extensive educational programs, non-polarizing forums for discussion, and a major catalogue.

The Jewish Museum enjoyed a good pre-existing relationship with the media. It distributed a press guide that included a discussion of how the show differed from the 1999 Sensation exhibit at the Brooklyn Museum, which featured Damien Hirst’s vivisected livestock and Chris Ofili’s Virgin Mary adorned with elephant dung. The museum also made its articulate museum director and curator available to discuss the works of art and the greater issues they raised about how a younger generation of Jews is challenging the “Holocaust industry.”

Despite these efforts, scores of protesters called the exhibit offensive and insensitive. After meeting with a group that included Holocaust survivors, museum officials agreed to add a disclaimer and an additional exit so that visitors could leave the exhibit before they encountered what were considered the three most disturbing pieces.

Some controversies cannot be anticipated. So VLAA encourages every arts organization — not just those that present cutting-edge work — to put a discussion about freedom of expression on a board-meeting agenda. The thought-provoking discussion will be a stimulating experience and a welcome change of pace from meetings that are so often dominated by financial concerns.

Articulating and publicizing the importance of freedom of expression to the mission of your organization helps educate the community about your overall goals, objectives, and procedures. More importantly, if a challenge occurs, it is easier to defend your position by showing that it is consistent with your formal policy.

An accompanying plan should outline procedures for handling controversies, including community preparation through outreach and education, advance communication with key stakeholders, and a media strategy. Having a designated media spokesperson — usually the chief executive — will help avoid inaccuracies and ensure that your organization’s message is consistent.

DRAFTING A POLICY

The First Amendment provides a powerful framework for a freedom of expression policy because it is based on the belief that democracy relies on the participation of individuals and communities with divergent points of view.

These questions may help you formulate a policy that is tailored to your organization’s mission and balances artistic freedom with the desire to avoid upsetting audiences and donors:

- What are the traits that characterize your organization’s standards of quality?
- How do you guard against narrow or culturally biased standards?
- Are your aesthetic decision-making practices clear?
- Has the threat of a controversy ever affected your decisions?
- To whom is your organization accountable?
- Does your venue have public access that presents special concerns?
- Does the composition of the audience — such as children — make a difference?
- How have the artists associated with your organization achieved the delicate balance between freedom of expression and the right of others to object to the artists’ work?
- How do you respond to complaints from your audience?
- Is your organization willing to include warning labels on its promotional materials? Segregate artworks that some visitors may find offensive? Risk alienating supporters of provocative work?
- Do you need a crisis response plan?
- How have other organizations in your community responded to censorship threats?
- Does your organization have a responsibility to support local, regional, and national cultural organizations that are under attack?

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Regional Arts Commission's Freedom of Expression Policy

The Regional Arts Commission has an abiding commitment to preserving and enhancing freedom of speech, thought, inquiry, and artistic expression. The Commission's responsibility for and dedication to securing the conditions in which freedom of expression can flourish extends to all forms of artistic expression, including the visual arts, design, literature, media, and the performance of theatre, music, and dance. Programs seeking funding from the Commission undergo a thorough evaluation, including review by citizens knowledgeable in the arts field, artists, Commission staff and the 15 members who make up the governing body of the Regional Arts Commission. The final determination of funding for programs rests solely with the Commission. The Regional Arts Commission recognizes that the right of artists to exhibit or perform does not preclude the right of others to take exception to particular works of art.

Arts-Related First Amendment Links

The Free Expression Policy Project (fepproject.org) provides research and analysis on difficult censorship issues, and seeks free speech-friendly solutions to the concerns that drive censorship campaigns. Among the think tank's many resources is *Free Expression in Arts Funding: A Public Policy Report* (2003), a survey of free-expression policies among state and local arts agencies, including ways of anticipating and dealing with attacks on controversial art. The free publication includes background on the arts funding wars of the 1990s and candid interviews with agency officials.

Although the National Campaign for Freedom of Expression is now defunct, The First Amendment Project, a nonprofit, public interest law firm and advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition, has posted the *NCFE Handbook to Understanding, Preparing for, and Responding to Challenges to Your Freedom of Artistic Expression* on its site (thefirstamendment.org). It's a great guide, and it's free, too.