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The Curious Case of Cady Noland and the Disappearing Cabin

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THE CURIOUS CASE OF CADY NOLAND AND THE DISAPPEARING CABIN

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I. INTRODUCTION

An artist creates a work, sells it, and lives happily ever after with a check in pocket—right? Or are artists afforded some rights to the quality of their work even after the sale?

In July 2017, the renowned artist Cady Noland filed a lawsuit in the Southern District of New York seeking the destruction of *Log Cabin Blank with Screw Eyes and Café Door* (*Log Cabin*), a wooden sculpture formerly attributed to the artist that had since been disavowed by Noland and the subject of various legal disputes.¹ *Log Cabin*, created by Noland in 1990, was purchased by German art collector Wilhelm Schürmann the same year, and was installed on view outdoors in 1995 at the Suermondt-Ludwig-Museum in Aachen, Germany.² The piece, which was displayed outdoors for approximately ten years, was evaluated by a conservator in 2010; this conservator recommended that all of the logs should be replaced.³ As a result, “the entire edifice” of the piece was replaced, and the original was discarded.⁴ Noland was allegedly informed about the refurbishment of her work for the first time after the newly conserved *Log Cabin* was sold by Galerie Michael Janssen to Scott Mueller, a collector in Ohio, in July 2014.⁵ Shortly after the sale, Noland faxed Mueller to disavow the piece, writing that the *Log Cabin* he had purchased was not an “artwork,” and that it had been repaired without her consultation and consent.⁶

What might seem to be a purely symbolic gesture from Noland to signal her displeasure with the galleries and conservators who altered her work without consulting her had significant economic ramifications for all involved. By disavowing her work, or refusing to have her name associated with the work, Noland stripped *Log Cabin* of its economic value.⁷ In addition, Noland is currently suing the gallery involved in the restoration of her work for violation of her moral rights and copyright under the Visual Artists Rights Act (VARA), a

¹ Isaac Kaplan, *Cady Noland Sues Seeking Destruction of Artwork “Copy” She Disavowed*, ARTSY.NET (July 21, 2017, 12:11pm), <https://www.artsy.net/article/artsy-editorial-cady-noland-sues-collector-galleries-destroy-artwork-copy-disavowed>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Eileen Kinsella, *Cady Noland Disowns \$1.4 Million Log Cabin Artwork Sparking Collector Lawsuit*, ARTNETNEWS.COM (June 25, 2015), <https://news.artnet.com/market/cady-noland-log-cabin-lawsuit-311283> (stating that Noland is “one of the most expensive living female artists”).

statute affording artists control of their work after sale or transfer of a copyright.⁸ Noland's complaint raises questions pursuant to her rights under VARA that have not been conclusively addressed by the courts yet, including what constitutes negligent restoration under VARA; what intellectual property rights remain after disavowal; and how conservation of art intersects with the artist's copyright in her work.⁹ This Note will address the distinction between moral rights and intellectual property rights; the moral rights afforded to artists in the United States; the rights afforded to Noland after the sale of *Log Cabin*; and the tension between an artist's right to the integrity of her work, and the responsibilities of a gallery and auction house to maintain, restore, and conserve the works that they hold.

II. BACKGROUND

Art, literature, and other original works of authorship have traditionally enjoyed certain protections not afforded to standard consumer goods under a variety of intellectual property doctrines.¹⁰ These rights have traditionally included an artist's copyright, which protects artists from those who would unscrupulously reproduce their work.¹¹ Artists also enjoy a set of protections related to how others might exploit their work and reputation for their own gain.¹² Moral rights aim to protect society's interest in an artist's ability to create work that reflects her vision and ethos by allowing an artist a right to put her name to her work and to prevent any distortion or mutilation of that work.¹³ "The key concept to remember is that moral rights are not traditional property rights and do not purport to protect property interests. Rather, they are a separate set of rights, more like rights of personality or civil rights, which protect the artist's unique extension of herself."¹⁴ Moral rights may protect an artist's financial interests by allowing the author to take credit for her work and thus profit from its sale.¹⁵ However, moral rights are not entirely economic in purpose.

Moral rights seek to protect the artist's creative process by protecting the artist's control over that process and the finished work of art. If artists feel more secure about the treatment they as creators and their creations will receive, they

⁸ Complaint, *Noland v. Michael Janssen Gallery Pte., Ltd.*, No. 1:17-cv-05452-JPO (Filed 07/18/17) <https://www.courtlistener.com/recap/gov.uscourts.nysd.477664.1.0.pdf>.

⁹ *See id.*

¹⁰ Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 263-264 (2009).

¹¹ See 17 U.S.C. § 106.

¹² See Susan P. Leimer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 44-45 (1998).

¹³ *Id.* at 42.

¹⁴ *Id.* at 44-45.

¹⁵ *See id.* at 44.

are more likely to create. Recognizing moral rights is one way a society can encourage artists to create.¹⁶

When one buys a typical consumer good, such as a chair, he or she may typically do whatever she pleases with it, precluding the manufacturer from any sort of continued interest.¹⁷ For works that are protectable under moral rights laws, the rights of the artist take precedence over the property rights of the consumer based on idea that art transcends commerce, and that art is “connected to personhood, to dignity, to something that [cannot] be commodified.”¹⁸ Art differs from your typical consumer good because it is an extension of its creator’s personhood.¹⁹ To incentivize the emotional labor and vulnerability required to produce visual art, an author retains control over the work she has created even after it is sold, and the author is no longer bound in privity to the purchaser.²⁰

The United States enacted VARA in 1990.²¹ Tacked onto The Copyright Act of 1976, VARA was passed to bring the United States into compliance with the Berne Convention for the Protection of Literary and Artistic Works, which required member nations to, at minimum, protect the rights of integrity and attribution.²² VARA trains its focus onto a relatively limited class of artists, granting moral rights to authors of “a work of visual art.”²³ To qualify for moral rights protection under VARA, the author must produce an original or limited edition painting, drawing, print, sculpture, or still photographic image.

A painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.²⁴

¹⁶ *Id.*

¹⁷ Adler, *supra* note 9, at 263.

¹⁸ Isaac Kaplan, *How Much Control Do Artists Have over a Work after It's sold?* ARTSY.NET, (June 21, 2016 1:22pm), <https://www.Artsy.net/article/artsy-editorial-do-artists-have-the-right-to-disown-their-work>.

¹⁹ Leimer, *supra* note 12, at 43.

²⁰ Adler, *supra* note 10, at 264.

²¹ 17 U.S.C. § 106A (1990).

²² Leimer, *supra* note 12, at 46.

²³ 17 U.S.C. § 106A(a) (1990).

²⁴ 17 U.S.C. § 101(A).

Reproductions, such as a mass-produced print of a painting, are not entitled to the rights of integrity or attribution.²⁵ An author of such a work is then granted the rights of attribution and integrity to her work for the duration of the author's life.²⁶ An artist may waive her moral rights, but may not transfer her moral rights to another party.²⁷ VARA specifies that an artist's moral rights over her work are distinct from her property rights; an artist who transfers her copyright does not waive her rights to attribution and integrity, and an artist who waives her moral rights does not also transfer ownership of the work or its copyright.²⁸

"The right of attribution, also known as the right of paternity, gives the artist the right to have her name accurately associated with her work,"²⁹ and to prevent the use of her name as the author of any work that she did not create.³⁰ In practice, an artist may insist that her name appear on the art and sue if his or her name is elided from the work.³¹ This right creates a "chain of title" from the creative process to the production of the work itself, allowing an artist to be credited for her work.³² This right also protects the artist's economic interest in being able to sell work under her name and to build a portfolio of works representative of her creativity.³³

The right of integrity is directly linked to the maintenance of an artist's reputation, allowing the artist to prevent her work from being distorted, mutilated, or modified without her permission.³⁴ The artist maintains this right after she transfers ownership or copyright in the work to another party; as such, any new owner must consult the artist before making any changes to the work.³⁵ The statute distinguishes modifications of visual art as a result of: the passage of

²⁵ See David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 Miss. L.J. 985, 1002 (2014).

²⁶ 17 U.S.C. § 106A(d) (1990).

²⁷ *Id.* § 106A(e)(1).

²⁸ *Id.* § 106A(e)(2).

²⁹ Leimer, *supra* note 11, at 47. See also 17 U.S.C. § 106A(a)(1)(A) (1990)

³⁰ 17 U.S.C. § 106A(a)(1)(B) (1990).

³¹ Leimer, *supra* note 12, at 47–48.

³² *Id.* at 49.

³³ See Leimer, *supra* note 12, at 50.

³⁴ 17 U.S.C. 106A(a)(3):

[T]he author of a work of visual art . . . shall have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

³⁵ Leimer, *supra* note 12, at 50.

time, the inherent nature of the materials, and conservation or public presentation from impermissible modification—so long as the modification was not caused by gross negligence.³⁶

The right to integrity also encompasses the artist's right to disassociate from her work when that work has been irrevocably compromised.³⁷ An artist may disavow his or her work when that work is materially altered in a manner that the artist considers prejudicial to her reputation.³⁸ For instance, if an auction house damages the pedestal of a sculptor's work in an egregious or noticeable way, then that artist may demand that the work be removed from auction under her name.³⁹ This disavowal can be as informal as an email or fax that demands disassociation from a work; no court order, process, or notice to the consignor or owner of the work is needed.⁴⁰

These narrow protections work in conjunction with the United States Copyright Act to protect an artist's economic interest in profiting off of her work, and to maintain artistic integrity in the context of the artist's brand or reputation.⁴¹ For the most part, the art world defers to the artist's wishes in these matters, with "contracts and . . . convention" supporting artists' rights to attribution and integrity.⁴² For instance, Cady Noland was able to disavow *Log Cabin* on the basis that it had been damaged in a way that was prejudicial to her reputation, despite the fact that an independent appraiser had found the work to be in good condition.⁴³

The statute suggests that courts addressing VARA claims should first embark upon a "three-step analysis to determine whether the artist's" work is eligible for

³⁶ 17 U.S.C. § 106A(c)(1)(2) (1990).

³⁷ *Id.* § 106A(a)(2):

An author of a work of visual art shall have the right to prevent the use of his or her 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.

³⁸ *Id.*

³⁹ Kaplan, *supra* note 17.

⁴⁰ *Id.* (explaining that Noland's lawyer sent the auction house selling Noland's work an email stating that "irrespective of the consignor's wishes, Sotheby's will withdraw 'Cowboys Milking' from auction. The current condition of the work materially differs from that at the time of its creation."); *see also* Kaplan, *supra* note 1 (recounting Noland's fax to Mueller disavowing *Log Cabin*, writing "'this is not an artwork' and noting that it was 'repaired by a conservator [sic] BUT THE ARTIST WASN'T CONSULTED.'" (emphasis in original)).

⁴¹ *See* Leimer, *supra* note 11, at 44 (discussing purposes of moral rights, generally).

⁴² Kaplan, *supra* note 17 (quoting Amy Adler); *see also* Kaplan, *supra* note 1 (describing a clause in Noland's purchase agreement with Mueller stipulating that he was entitled to reverse the sale should Noland disavow *Log Cabin* within twelve months of purchase).

⁴³ Kaplan, *supra* note 1.

VARA protections, and thus if “moral rights adhere in the artwork.”⁴⁴ First, the court must determine whether the work in question is subject to copyright protection;⁴⁵ second, the court must ascertain “whether the work qualifies as ‘a work of visual art’ under the [statute’s] narrow, two-pronged definition”; and third, the court must ask “whether any of the statutory exceptions apply” under 17 U.S.C. § 106A(c).⁴⁶ One such relevant exception is the modification of work in concert with a larger conservation effort.⁴⁷ VARA protects restorations and conservation efforts unless such efforts could be considered an exercise of gross negligence.⁴⁸ This “gross negligence” provision has been applied against buyers who have hired someone who lacks proper training in conservation to modify an artwork.⁴⁹

If the work meets the first two criteria, and no statutory exceptions apply, it is eligible for VARA protection.⁵⁰ If the work is indeed eligible, “then the court should determine whether there is a violation of or threat to the rights of attribution and/or integrity, determine the extent of damages resulting from the violation, and [award] appropriate equitable relief to prevent further harm to the artist’s reputation or the art work.”⁵¹

Noland’s current complaint regarding the violation of her copyright and her right to integrity is not her first brush with litigation under VARA. In 2011, Noland demanded that Sotheby’s auction house withdraw her work *Cowboys Milking*, an aluminum slab printed with images of cowboys, cabins, and a map of the state of Montana, from auction after inspecting the work and finding that all four corners of the work were damaged.⁵² While an inspector for the auction house had determined that the work was “in very good condition overall,”

⁴⁴ Nathan M. Davis, Note, *As Good As New: Conserving Artwork and the Destruction of Moral Rights*, 29 CARDOZO ARTS & ENT. L.J. 215, 229 (2011).

⁴⁵ *Id.*; See 17 U.S.C. § 102(a)(5) (2018).

⁴⁶ Davis, *supra* note 44, at 229. See also 17 U.S.C. § 101(2018).

⁴⁷ 17 U.S.C. § 106A(c)(1990):

Exceptions:

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

⁴⁸ *Id.* §106A(c)(2).

⁴⁹ See Davis, *supra* note 62, at 232 (discussing the possibility of selecting a sculptor for conservation rather than a conservator resulting in gross negligence).

⁵⁰ Davis, *supra* note 45, at 229.

⁵¹ *Id.*

⁵² Kaplan, *supra* note 17.

Noland asserted that, due to the damage to each corner of the work, *Cowboys Milking* as it stood in Sotheby's in 2011 materially differed from the piece she sold in 1990.⁵³ As auction houses have the right to withdraw a work from auction if doubts are raised about its authenticity, Sotheby's pulled Noland's piece after receiving an email from her lawyer stating that she considered the piece to be materially altered and demanding its removal. Pre-sale appraisals estimated that the work would be sold from \$250,000 to \$350,000.⁵⁴

Following Sotheby's decision to pull the work from auction, the consignor of the work, Mark Jancou, filed suit for breach of contract and tortious interference with contractual relations against Sotheby's and Noland in the New York state court system.⁵⁵ Noland and Sotheby's both filed counterclaims and motions for summary judgment.⁵⁶ These motions for summary judgment were granted, and Noland withdrew her counterclaim.⁵⁷ Jancou appealed the trial court's decision to grant Sotheby's motion, but the appellate court upheld the trial court's decision in a two-paragraph order.⁵⁸ In the court's estimation, Noland's actions clearly fell under the rights and privileges offered to her by VARA.⁵⁹

Noland's current case in the Southern District of New York hinges on what she believes to be an infringement of her copyright, in addition to a violation of her moral rights.⁶⁰ Noland's *Log Cabin*, as discussed earlier, is an edifice of a log cabin that was intended to be displayed outdoors.⁶¹ The gallery housing the work replaced pieces of wood on the façade that had begun to rot or decay over time,

⁵³ *Id.*; See also 17 U.S.C. § 106A(a)(2) (1990).

⁵⁴ Kaplan, *supra* note 17. See also Martha Buskirk, *Marc Jancou, Cady Noland, and the Case of Authorless Artwork*, HYPERALLERGIC (Dec. 9, 2013), <https://hyperallergic.com/97416/marc-jancou-cady-noland-and-the-case-of-an-authorless-artwork/> (stating "Sotheby's complied, citing a provision in their consignment agreement allowing them to withdraw a work at any time if, among other things, 'there is doubt as to its authenticity or attribution'").

⁵⁵ Buskirk, *supra* note 41.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Tracy Zwick, *Sotheby's Wins in Dispute with Jancou Gallery Over Cady Noland Artwork*, ARTINAMERICAMAGAZINE.COM (Aug. 29, 2013), <https://www.artinamericamagazine.com/news-features/news/sothebys-wins-in-dispute-with-jancou-gallery-over-cady-noland-artwork/>.

⁵⁹ *Marc Jancou Fine Art, Ltd. v. Sotheby's, Inc.*, 107 A.D. 3d 637 (Ny. App. Div. 2013); see also 17 U.S.C. § 106A(a)(2) (1990):

[T]he author of a work of visual art shall have the right to prevent the use of his or her 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.

⁶⁰ Complaint, *Noland v. Galerie Michael Janssen, et al.*, No., 1:17-cv-05452-JPO (S.D.N.Y. July 18, 2017).

⁶¹ See *supra* text accompanying notes 1–4.

more or less preserving the work.⁶² According to Noland, this conservation work was done without her consent.⁶³ *Log Cabin* was sold to Scott Mueller, an Ohio art collector, for \$1.4 million in 2014.⁶⁴ As the piece was being shipped from the gallery in Germany to the United States, Noland was alerted by Mueller's art dealer, Brett Shaheen, to the restoration efforts that the gallery undertook while it housed the piece.⁶⁵ Noland called Shaheen and orally disavowed the work.⁶⁶

After Noland disavowed *Log Cabin*, Mueller sued Michael Janssen and art advisor Marisa Newman in the Southern District of New York for the return of his \$800,000 original transfer.⁶⁷ Both Janssen and Newman filed motions to dismiss, each of which was granted. Mueller's claims against Janssen were dismissed since they were only filed in the Southern District of New York and not simultaneously filed in Janssen's native Germany, where *Log Cabin* had been displayed and restored.⁶⁸ The court dismissed Mueller's claims against Newman, stating that there was no breach of contract or unjust enrichment, and that Newman did not owe a fiduciary duty to Mueller.⁶⁹

Noland's current suit is filed in the Southern District of New York against: Willhelm Schurmann, the collector who bought *Log Cabin* shortly after its creation; KOW Gallery of Berlin, which had displayed *Log Cabin* in a 2011 exhibition; art advisor and dealer Chris D'Amelio; Galerie Michael Janssen; and Michael Janssen, who sold *Log Cabin* to Mueller.⁷⁰ Noland alleges "some, if not all, members of this group were involved in the decision to refabricate the work in 2010."⁷¹

⁶² Kinsella, *supra* note 7 (describing a condition report prepared by the gallery recommending that "the only way to ensure the long-term viability/existence of the artwork would be to replace the rotting logs with new ones").

⁶³ See Complaint, Noland v. Galerie Michael Janssen, et al., No. 1:17-cv-05452-JPO (S.D.N.Y. July 18, 2017).

⁶⁴ Eileen Kinsella, *Judge Throws Out Lawsuit Over \$1.4 Million Cady Noland Artwork After Artist Disavows It*, ARTNETNEWS.COM (Dec. 13, 2016), <https://news.artnet.com/art-world/judge-dismisses-cady-noland-lawsuit-782264>.

⁶⁵ *Id.*

⁶⁶ *Id.* (stating that Noland informed Shaheen that "any effort to display or sell the sculpture must include notice that the piece was remade without the artist's consent, that it now consists of unoriginal materials, and that she does not approve of the work").

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Complaint, Noland v. Galerie Michael Janssen, et al., No. 1:17-cv-05452-JPO (S.D.N.Y. July 18, 2017).

⁷¹ Julia Halperin & Eileen Kinsella, *Cady Noland Sues Three Galleries for Copyright Infringement Over Disavowed Log Cabin Sculpture*, ARTNET (July 21, 2017), <https://news.artnet.com/art-world/cady-noland-copyright-infringement-log-cabin-1030649>.

Noland's claim has two main prongs. The first is that the defendants violated her moral rights under VARA when they negligently restored her work without her consent.⁷² Specifically, Noland stated that "the collector who loaned *Log Cabin* to a German museum was 'either negligent or indifferent to the work' and 'failed . . . to protect the work from rot, deterioration and exposure to the elements.'⁷³

The second prong of Noland's lawsuit alleges that the defendants infringed her copyright by hiring a conservator to repair *Log Cabin* without consulting her.⁷⁴ In essence, the lawsuit suggests that "by discarding the rotting logs and wooden elements that made up the cabin's facade and replacing them with new ones, the conservator essentially destroyed the original work and created an unauthorized reproduction."⁷⁵ Noland's attorney went so far as to state "[w]ood can be restored, even rotting wood," but that this restoration effort was "a forgery."⁷⁶

At the time of writing, Noland has filed a Second Amended Complaint, Janssen has filed a Motion to Dismiss Noland's Second Amended Complaint, and his co-defendants have filed memoranda in support.⁷⁷ Noland has filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss her Second Amended Complaint.⁷⁸

III. ANALYSIS

Since VARA's enactment, very few cases involving the statute and its application have been litigated;⁷⁹ as such, many of the more attenuated claims

⁷² *Id.*; 17 U.S.C. § 106A(a) (1990):

[T]he author of a work of visual art . . . (3) . . . shall have the right - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

⁷³ Halperin, *supra* note 56; *see also* Complaint, Noland v. Galerie Michael Janssen, et al., No. 1:17-CV-05452-JPO (S.D.N.Y. July 18, 2017).

⁷⁴ Complaint at 8, Noland v. Galerie Michael Janssen, et al. No. 1:17-CV-05452-JPO (S.D.N.Y. July 18, 2017).

⁷⁵ Halperin, *supra* note 56.

⁷⁶ *Id.* (quoting Andrew Epstein).

⁷⁷ Noland v. Galerie Michael Janssen, et al., No. 1:17-CV-05453-JPO (S.D.N.Y. Apr. 17, 2018).

⁷⁸ *Id.*

⁷⁹ Nathan M. Davis, Note, *As Good As New: Conserving Artwork and the Destruction of Moral Rights*, 29 CARDOZO ARTS & ENT. L.J. 215, 229 (2011).

that Noland puts forth in her complaint are relatively novel. In particular, Noland's copyright claim regarding the reconstruction of her work has never been conclusively addressed in a court of law.⁸⁰ Despite the novelty of her claim that the conservation of her work was a violation of copyright, Noland has standing to bring claims against the gallery and the other defendants under VARA because the work in question is a sculpture, made in a single copy, and was not made for hire.⁸¹ As an author of a visual work of art, Noland has the right to claim attribution and integrity in her work.⁸²

Noland alleges that the gallery housing her work was negligent in its failure to prevent the wood from decaying in its time at the gallery, and that this failure resulted in the distortion of her work such that their actions violated her moral rights.⁸³ However, there is no specific allegation of a negligent conservation effort by the parties.⁸⁴

As such, Noland's case falls outside of the ambit of the typical negligent conservation claim, because, while the damage to her reputation directly stems from a conservation effort, she does not claim that the conservation itself was negligent. For example, in *Flack v. Friends of Queen Catherine Inc.*, the Southern District of New York denied a motion to dismiss an artist's VARA claims involving the re-sculpting of a clay model of a commissioned brass sculpture, where the re-sculpting was done by an "assistant" untrained in conservation.⁸⁵ Though the parties eventually settled, the court indicated that it would at least entertain the notion that the skill level of the conservationist matters, and that those who alter a protected work are subject to a certain standard of care.⁸⁶

Even setting aside cases like *Flack*, Noland's moral rights claim is not likely to succeed because VARA provides that "[t]he modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A)."⁸⁷ The statute does not consider the placement of a work of visual art that is distasteful to the artist or prejudicial to their reputation a violation of the artist's moral rights, so Noland would be unlikely to succeed upon an argument centered upon her opposition to the work's display outdoors.⁸⁸ Wood can decay or otherwise change in appearance upon exposure to the elements, and as

⁸⁰ *Id.* at 230–32 (citing *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001)).

⁸¹ 17 U.S.C. § 101(A)(1990).

⁸² 17 U.S.C. § 106A(a)(1)–(2)(1990).

⁸³ Complaint at 2–3, *Noland v. Galerie Michael Janssen, et al.*, No. 1:17-CV-05453-JPO (S.D.N.Y. Apr. 17, 2018).

⁸⁴ *Id.*

⁸⁵ *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001).

⁸⁶ *Id.*

⁸⁷ 17 U.S.C. § 106A(c)(1) (1990).

⁸⁸ *See id.* § 106A(c)(2).

Noland cannot claim that the placement of a work violates her rights to attribution or integrity, she is unlikely to succeed on the merits of a moral rights claim concerning the damage done to her work while it was displayed.⁸⁹

Noland's claims regarding the infringement of her copyright also raise interesting questions about the intersection of moral rights, copyright, and conservation. VARA was enacted under the wider umbrella of the United States Copyright Act, but the rights afforded to authors of visual art are distinct from the rights afforded copyright holders generally.⁹⁰ 17 U.S.C. §§ 106A(b) and 106A(e)(2) both distinguish moral rights from copyright. Specifically, the statute states that only the author of a visual work may lay claim to moral rights in that work, regardless of whether or not the author is the copyright holder.⁹¹ Further, the statute distinguishes between transfer of copyright and transfer of moral rights, stating that an artist's transfer of ownership or copyright in an artwork to another party does not constitute a transfer of his or her moral rights under the statute, and that the reverse applies.⁹² Absent a written waiver of copyright or other property rights, the waiver of an artist's moral rights does not constitute a waiver of such.⁹³ The statute does not specify whether or not an artist's copyright or property rights change when she invokes her moral rights within the context of the distortion, mutilation, modification, or destruction of the work.

While Noland's copyright claim is somewhat novel, as her work was more or less reproduced onto itself during the conservation efforts, it has a higher

⁸⁹ The statute is silent on the necessity of consent for alterations or conservation done to an artist's work. Thus, any speculation as to the success of a VARA claim under a theory that failing to obtain consent could be considered under the gross negligence exception to 17 U.S.C. § 106A(e)(2) is beyond the scope of this paper.

⁹⁰ *Id.* § 106A(a): "Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art . . ."

⁹¹ *Id.* § 106A(b):

"Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners [sic] of the rights conferred by subsection (a) in that work."

⁹² *Id.*

⁹³ *Id.* § 106A(e)(2):

Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer or ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

likelihood of success than her VARA claims. Authors are afforded the exclusive right to reproduce a copyrighted work in copies, to prepare derivative works based upon the copyrighted work, and to display the work publicly.⁹⁴ A finder of fact could certainly term the restoration as an unauthorized reproduction, as the restoration allegedly involved replacing all of the original wooden components of the work without Noland's consultation.⁹⁵ When addressing the sculptor's copyright claims in *Flack*, for example, the court found that the conservator impermissibly copied the artist's work when he attempted to restore and rebuild a clay mold that the artist had built to later be cast in bronze.⁹⁶ The artist successfully claimed that the conservator's "rebuilding of the clay face by using pictures of the original constituted the infringing creation of a derivative work or reproduction," despite the defendants' arguments that the reproduction was authorized in a prior agreement that permitted the defendants to make smaller models of the artist's work.⁹⁷ Finding no such implied authorization for the conservator to copy Flack's original work, the court found that the contract did not create a license for the conservator to create a modified sculpture, which would be otherwise violative of Flack's copyright rights.⁹⁸

Noland alleges that she was not made aware of the damage that *Log Cabin* had sustained or the conservation efforts that the gallery undertook to save the structure until after all of the original wooden components had been replaced and discarded.⁹⁹ Under the statute and the court's interpretation of similar facts in *Flack*, Noland's claim that the various parties violated her copyright will likely survive a motion to dismiss.

While it seems counterintuitive that Noland might retain copyright over her work after disavowing it, the statute clearly states that intellectual property rights and moral rights are two different animals.¹⁰⁰ Thus, while Noland is no longer the artist behind *Log Cabin*, she could successfully seek and claim damages from the defendants for the copyright to her former work, regardless of whether she refuses to claim *Log Cabin* as such.

⁹⁴ *Id.* §§ 106(1)–(6).

⁹⁵ Complaint at 5, *Noland v. Galerie Michael Janssen, et al.*, No. 1:17-CV-05453-JPO (S.D.N.Y. July 18, 2017).

⁹⁶ *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 536–37 (S.D.N.Y. 2001).

⁹⁷ *Id.* at 536.

⁹⁸ *Id.* at 537.

⁹⁹ Complaint at 7-9, *Noland v. Galerie Michael Janssen, et al.*, No. 1:17-CV-05453-JPO (S.D.N.Y. July 18, 2017).

¹⁰⁰ 17 U.S.C. § 106A(b).

IV. CONCLUSION

At the time of this writing, the fate of Cady Noland, the defendants charged in her complaint, and the moral and intellectual property rights over *Log Cabin* are yet to be determined. Should this case follow in the footsteps of many VARA cases, it will likely be dismissed or settle before the court can conclusively state how attorneys should interpret the VARA in connection with consent, conservation, and copyright. While one should rarely wish for drawn-out litigation on other persons, perhaps the curious case of Cady Noland and the new *Log Cabin* will be the judiciary's opportunity to delineate firmer conservation, integrity, and copyright principles.