

## They Can't Take that Away from Me: An Indemnification Solution to Unmerited VARA Claims

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### INTRODUCTION

Artist Cady Noland rose to prominence during the art market boom of the 1980s with mixed-media installations that employed found imagery to comment on the darker side of American social identity.<sup>1</sup> Her work has garnered the highest price ever paid at auction for the work of a living female artist.<sup>2</sup> Despite critical and commercial success, Noland has expressed deep concern over what she considers the improper handling and presentation of her art by collectors, auction houses, and museums. She has likened the auction process to “cutting up a writer’s words and throwing them up in the air,” further stating, “[i]f I had known that everything would be flipping at auction, I would have made works that were impervious.”<sup>3</sup>

Noland’s idiosyncratic behavior likely would have remained art world gossip had she not become embroiled in several highly publicized lawsuits. Noland stopped creating new works altogether in 2001 and refuses to facilitate any exhibitions devoted to her career. For nearly two decades, she has spent her time monitoring

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† This Note developed from a series of news articles written with Dr. Sharon Flescher, Executive Director of the International Foundation for Art Research and Editor-in-Chief of the *IFAR Journal*. See Marber & Flescher, *Avowals and Disavowals: When Can an Artist Say, ‘It’s Not Mine!’?* 17:2–3 *IFAR J.* 2–5 (2016); Marber, *Dismissed Disavowal: Court Closes Noland Log Cabin Case Without Addressing VARA Issue*, 17:4 *IFAR J.* 5–6 (2017); Marber & Flescher, *Conserved or Copied? Artist Cady Noland at It Again Over Log Cabin*, 18:2–3 *IFAR J.* 6–8 (2017).

1. Francis Summers, *Noland, Cady*, GROVE ART ONLINE (Oct. 12, 2000), <https://perma.cc/M6K5-TDGE>; *Noland, Cady*, BENEZIT DICTIONARY OF ARTISTS, <https://perma.cc/HTG6-W6CK>, last visited Oct. 24, 2017); Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 ST. JOHN’S L. REV. 47, 59 (2013).

2. Rain Embuscado, *The Most Expensive Living Female Artists in 2016*, ARTNET (Apr. 8, 2016), <https://perma.cc/V38E-LSV7>; Eileen Kinsella, *Who Are the Most Expensive Living Female Artists?*, ARTNET (Jan. 16, 2017), <https://perma.cc/W57K-3CWZ>.

3. SARAH THORTON, 33 ARTISTS IN 3 ACTS 326–27 (2014).

older works and recently appeared to have discovered a method that may halt continued resales.<sup>4</sup> In 2012, Noland began renouncing authorship of works that she is known to have created but which have allegedly deteriorated to the point that she no longer approves of them as “her art,” resulting in multiple legal actions.<sup>5</sup> Because an artist’s acknowledgement rather than her hand typically defines whether a work is considered “original,”<sup>6</sup> Noland’s disavowals have the potential to render her art unsaleable, inflicting financial harm upon the collectors who currently own the pieces.<sup>7</sup> Who should absorb this sudden loss in value?

This Note argues that market participants should be indemnified against legally baseless revocations of attribution by living artists. Noland justifies her disavowals under the Visual Artists Rights Act of 1990 (“VARA”), the American answer to the French concept of *droit moral* or moral rights.<sup>8</sup> Moral rights provide artists with control over the integrity and attribution of their art even after it has been sold. In a narrow set of circumstances, VARA permits a living artist to disavow her works if they have been modified so extensively as to be prejudicial to the artist’s reputation (excepting changes caused by aging or conservation).<sup>9</sup> But there is a dearth of case law defining terms like modification, prejudice, and reputation. Even among Noland’s disavowals there is variation: she revoked authorship of the aluminum print *Cowboys Milking* because she perceived wear on its corners, and of the wooden building façade *Log Cabin* because conservators allegedly rebuilt the entire piece without permission.<sup>10</sup>

Noland is one of relatively few artists to bring lawsuits under VARA, and research for this Note has uncovered no cases of an owner or other stakeholder suing an artist for improperly invoking VARA. Even if a party were to sue Noland for abusing VARA and successfully obtain an injunction forcing her to legally affirm authorship of a work, this would likely not remedy the market damage caused by her public disavowal. No matter the conclusion of a court, collectors are unlikely to invest millions of dollars in art unsupported by its creator. Unfortunately, moral rights law in the United States has not yet addressed this situation. This Note proposes that the indemnification solutions contained in the *droit moral* provide a possible solution to the problems that result when an artist disavows her art without legal cause.

4. *Id.*, at 327–28.

5. Marc Jancou Fine Art v. Sotheby’s Inc., No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. Nov. 13, 2012); Mueller v. Michael Janssen Gallery Pte. Ltd., 225 F. Supp. 3d 201 (S.D.N.Y. 2016); Complaint and Demand for Jury Trial, Noland v. Galerie Michael Janssen, No. 1:17-CV-05452 (S.D.N.Y. complaint filed July 18, 2017).

6. See, e.g., Mia Fineman, *Looks Brilliant on Paper. But Who, Exactly, Is Going to Make It?*, N.Y. TIMES (May 7, 2006), <https://nyti.ms/2kekBmv> (“‘We’re in a post-Conceptual era where it’s really the artist’s idea and vision that are prized, rather than the ability to master the crafts that support the work,’ said Jeffrey Deitch, whose SoHo gallery specializes in large-scale productions by contemporary artists.”).

7. *Jancou*, No. 650316-2012; *Mueller*, 225 F. Supp. 3d 201.

8. 17 U.S.C. § 106A; *Jancou*, No. 650316-2012 at 7; *Noland*, No. 1:17-CV-05452 at 6; see also Pierre Sirinelli, *Intellectual Property Law*, in INTRODUCTION TO FRENCH LAW 171–204, 180–85 (George A. Bermann & Etienne Picard eds., 2012) (providing an overview of *droit moral*).

9. 17 U.S.C. § 106A(a)–(c)(2).

10. See *Jancou*, No. 650316-2012; *Noland*, No. 1:17-CV-05452.

## I. MORAL RIGHTS IN THE UNITED STATES

Moral rights are not included in the Copyright Clause of the Constitution, which aims to financially incentivize creators to produce by preventing others from capitalizing on the creator's work.<sup>11</sup> Andy Author might be discouraged from writing *The Great Novel* if Roger Reproduction can make and sell copies without paying Andy. But can law prevent Edward Editor from editing and publishing the *Novel* in a way that contradicts Andy's wishes even if Andy is economically compensated? Such "moral" rights of the author are treated differently around the world.<sup>12</sup>

Historically, there have been two philosophical camps when it comes to protecting literary and artistic works.<sup>13</sup> The Common Law tradition, developed in England and adopted by the United States, focuses on the utilitarian benefits of copyright, while the Continental tradition (represented in this Note by France) seeks to ensure that a creator maintains some control over her work even after relinquishing chattel or economic rights. Although international norms have merged these two intellectual histories and forced the U.S. to expand the noneconomic rights afforded to authors by its laws, those laws still provide fewer protections than their European equivalents.<sup>14</sup>

### A. ORIGINS

Copyright law originated in the literary arts. With the introduction of the printing press to England in the fifteenth century, the monarchy soon realized the economic and political potential of controlling the burgeoning publishing industry. By 1710, England passed the first known copyright act, The Statute of Anne, upon which the U.S. modelled its earliest copyright legislation eighty years later. Like its British forbearer, the Copyright Act of 1790 protected the economic rights of publishers and authors by requiring formal registration of works in return for renewable copyright protection against unauthorized reproductions.<sup>15</sup> This utilitarian law was closely linked to the Copyright Clause of the Constitution, which empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>16</sup>

11. U.S. CONST. art. I, § 8, cl. 2.

12. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 14 (3rd ed. 2013).

13. *Id.* at 358.

14. *Id.* at 14. Language still evidences these distinct philosophies. For example, the French "translation" of copyright is not a translation at all: the equivalent term is *droit d'auteur* ("author's right"). Sirinelli, *supra* note 8, at 172, 180. See also Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 3 (1980) ("The French *droit d'auteur* is a concept far broader than American copyright, in fact French scholars dispute whether it can really be called a property right at all.").

15. GOLDSTEIN & HUGENHOLTZ, *supra* note 12, at 15–17.

16. U.S. CONST. art. I, § 8, cl. 2; see also GOLDSTEIN & HUGENHOLTZ, *supra* note 12, at 17.

Like the U.S., France passed early copyright legislation in the late eighteenth century to prevent unauthorized reproduction of creative works.<sup>17</sup> As a Civil Law nation, France does not traditionally rely on precedent to form legal doctrines. The *droit moral*, however, developed through case law in the wake of the French Revolution.<sup>18</sup> The *droit moral* (a term first used in 1878, from which “moral rights” is derived) encompasses a group of rights associated with authorial personality.<sup>19</sup> Contrary to the economic focus of Anglo intellectual property law, this Continental tradition is rooted in the notion that the fruits of one’s labor establish an inalienable authorial personality distinct from a physical object.<sup>20</sup> This is not to suggest that France did not have traditional economic protections, but rather that, “[i]n the view of French jurists, moral rights are not trifling interests which merely are appended to the law of copyright.”<sup>21</sup> It is a small wonder, then, that France was the primary proponent of the first “universal” authors’ rights agreement: The Berne Convention for the Protection of Literary and Artistic Works of 1886 (“Berne” or “the Convention”).<sup>22</sup>

## B. DEVELOPMENT

Although Berne was initially signed by ten countries, spanning much of Europe and its colonies, the U.S. was conspicuously absent for over a century. As of the Convention’s initial signing in the late nineteenth century, the U.S. had not entered many international agreements regarding copyright. Moreover, amendments to Berne prohibiting copyright formalities and requiring minimum moral rights may have made the Convention less and less appealing to the American utilitarian ethos.<sup>23</sup> The practical benefit of having uniform minimum protections for intellectual property in a globalizing world eventually drove the U.S. to join Berne in 1988 through the Berne Convention Implementation Act (“BCIA”).<sup>24</sup> Joining Berne

17. DaSilva, *supra* note 14, at 9; GOLDSTEIN & HUGENHOLTZ, *supra* note 12, at 19.

18. DaSilva, *supra* note 14, at 9; *see generally* *The Common Law and Civil Traditions*, THE ROBBINS COLLECTION (2010), available at <https://perma.cc/7CXP-5RLN> (explaining that common law is predominantly based on precedent, while civil law nations have codified legal codes).

19. MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS*, 419 (5th ed. 2007); Sirinelli, *supra* note 8, at 180.

20. *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 7–8 (1997); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 2 COLUM. VLA J.L. & ARTS 361 (1998).

21. DaSilva, *supra* note 14, at 4.

22. GOLDSTEIN & HUGENHOLTZ, *supra* note 12, at 33–34; Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 28, 1979, S. Treaty Doc. No. 99-27 [hereinafter Berne]. This is the current version of the act including previous revisions and amendments.

23. GOLDSTEIN & HUGENHOLTZ, *supra* note 12, at 36–38; Berne, art. 5(2) (“The enjoyment and the exercise of these rights shall not be subject to any formality”); Berne, art. 6bis (“to claim authorship; to object to certain modifications and other derogatory actions”).

24. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter BCIA]; *see* JULIE E. COHEN, ET. AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 34 (3d ed. 2010), cited in Samuel Jacobs, Note, *The Effect of the 1886 Berne Convention on the U.S. Copyright System’s Treatment of Moral Rights and Copyright Term, and Where it Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 171–74 (2016).

improved legal uniformity in a globalizing world. But the U.S. specifically *did not* implement new moral rights:

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States Obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.<sup>25</sup>

Congress paradoxically argued that existing law sufficiently protected the non-economic rights of creators, even though moral rights requirements historically prevented the U.S. from joining Berne.<sup>26</sup>

Moreover, there was clearly a dearth of moral rights protection afforded to artists in the U.S. In 1934, John D. Rockefeller, Jr. destroyed a mural that his family had commissioned Diego Rivera to paint because of its explicitly communist imagery. At the time, Rivera had no legal recourse, but predicted that there would be “a justice that prevents assassination of human character.”<sup>27</sup> In 1947, the Seventh Circuit held that an artist had no implied right to credit when independently contracted to create magazine illustrations. The Seventh Circuit acknowledged the presence of moral rights in “certain foreign countries,” but stated that it was “not disposed to make any new law in this respect.”<sup>28</sup> By 1976, “[t]he moral right of the artist, still comparatively young even in the nation of its origin, [had] not reached anything like its full development” in the U.S.<sup>29</sup> The Second Circuit in *Gilliam v. ABC*, a case involving unauthorized editing of *Monty Python* films for television, resorted to using trademark law to find for the plaintiffs.<sup>30</sup> Nevertheless, the court asserted that trademark law “is not a substitute for *droit moral* which authors in Europe enjoy,” and “copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.”<sup>31</sup> Given this history, it is surprising that Congress consciously delayed “thorough and

25. BCIA § 3(b); see Jacobs, *supra* note 24, 171–74 (2016).

26. BCIA § 2(3) (“The amendments made by this Act, together with the law as it exists on the date of enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”); see also Jacobs, *supra* note 24, at 174.

27. See Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L. J. 701 (2005). Thurston argues that under VARA, Rivera would have—at the very least—been entitled to notice by the Rockefellers so that he could remove the mural before it was destroyed. At most, Rivera would have been entitled to injunctive relief and damages because the Rockefellers were threatening to destroy the integrity of his mural (a work of “recognized stature”), an act that could affect his artistic reputation and legacy. *Id.* at 702. See also *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949) (holding an artist had no recourse when the church for which he painted a fresco decided to paint over it).

28. See *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947).

29. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976) [hereinafter *Refrigerator of Buffet*].

30. *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

31. *Id.*

comprehensive” study of the moral rights issue until 1989, when a version of VARA was first proposed.<sup>32</sup>

One compelling explanation for the growing interest in moral rights and passage of VARA in 1990 was the expansion of the art market during the prior decade, when prices skyrocketed and artists became celebrities. The benefits of this boom, however, applied only to a small percentage of working artists, and many were left unprotected.<sup>33</sup> In proposing the bill, Senator Kennedy cited the lofty goal of “protect[ing] the fundamental freedom of expression” essential to artists like Michelangelo.<sup>34</sup> A prescient statement from an art dealer at the time, however, took the view that “the right of an artist to disclaim authorship of a work of art whether or not he created it is extremely dangerous,” and went on to cite the difficulties that occur when an artist “does not remember or wish to remember his/her own work.”<sup>35</sup> This was the same period in which Cady Noland came onto the scene, and her actions continue to address the tension between the moral rights of artists and economic realities of the market.

### C. VARA

Experience tells us that philosophical ideals regarding art inevitably clash with legal and commercial realities, and VARA is by no means a comprehensive system for protecting artists or resolving philosophical disputes about authorship. Nevertheless, for a very limited set of artists, VARA provides the rights of attribution and integrity articulated in Berne. While Berne requires that moral rights protect “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,” VARA protects only visual artists who create unique or limited edition paintings, drawings, prints, sculptures, and photographs.<sup>36</sup> Some scholars have questioned whether such limited protection renders VARA meaningless or even inhibits the creation of new works that copyright law should encourage.<sup>37</sup> Others have commented on what they perceive to be the lack of justification for privileging certain types of art in this manner.<sup>38</sup> Moral rights in the

32. *Copyright Moral Rights: Visual Rights Act (S. 1198) And Moral Rights in Other Still Visual Art Forms: Hearing on S. 1198 Before the S. Subcomm. on Patents, Copyrights, and Trademarks*, 101st Cong. 1 (1989) (statement of Hon. Dennis DeConcini, Sen. from Ariz.).

33. Bonneau, *supra* note 1, at 60.

34. *Copyright Moral Rights: Visual Rights Act (S. 1198) And Moral Rights in Other Still Visual Art Forms: Hearing on S. 1198 Before the S. Subcomm. on Patents, Copyrights, and Trademarks*, 101st Cong. 17 (1989) (statement of Sen. Edward Kennedy of Mass.).

35. *Copyright Moral Rights: Visual Rights Act (S. 1198) And Moral Rights in Other Still Visual Art Forms: Hearing on S. 1198 Before the S. Subcomm. on Patents, Copyrights, and Trademarks*, 101st Cong. 21 (1989) (statement of art dealer Gerald G. Stiebel, President of Rosenberg and Stiebel).

36. Berne, art. 2(1); 17 U.S.C. § 106A(a)(1)–(2). U.S. courts have declined to broaden the VARA’s scope to other media. *See, e.g.*, *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005) (declining to extend to preparatory photographs and paintings); *Cheffins v. Stewart*, No. 12-16913 (9th Cir. June 8, 2016) (declining to extend to applied or utilitarian art); *Pollara v. Seymour*, 150 F. Supp. 2d 393 (N.D.N.Y. 2001) (declining to extend to art made for promotional or advertising purposes).

37. *See Thurston, supra* note 27, at 713; *see also* Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009).

38. Bonneau, *supra* note 1, at 48.

U.S. are also waivable, creating market pressures that might actually harm artists; as one scholar has opined, “[purchasers] may negotiate prices downward if artists seek to assert their moral rights. This could lead to artists automatically waiving their moral rights, thereby creating inefficient transactions.”<sup>39</sup> Moreover, the ability to waive moral rights defeats the purpose of having laws inherently tied to the authorial personality of the artist.

### 1. The Integrity Right

VARA allows visual artists to enjoin: (1) the intentional modification of works, if such modification would be prejudicial to the artists’ reputations; or (2) the destruction of works of “recognized stature.”<sup>40</sup> This right does not apply to modifications that are the result of aging or non-negligent conservation.<sup>41</sup> In the quarter-century since VARA was enacted, most plaintiffs who have brought claims under VARA have sought damages or injunctions for violations of this integrity right.<sup>42</sup>

The integrity case most relevant to the Noland disputes is *Flack v. Friends of Queen Catherine*.<sup>43</sup> In *Flack*, the well-known American artist Audrey Flack was commissioned to create a sculpture of Queen Catherine of England to be placed on public land in New York.<sup>44</sup> This work was sponsored by the non-profit Friends of Queen Catherine (“FQC”). After Flack created a full-sized clay version of the statue to be cast in bronze, there was controversy over its subject’s connection to the slave trade. As a result, FQC lost its permission to place the sculpture in the originally planned site. FQC and associated defendants nevertheless agreed to cast the sculpture. But by the time they came to this agreement, the head of the clay maquette had been damaged. FQC declined Flack’s offer to resculpt the head for a fee and instead hired one of her assistants to complete the work, which he allegedly did quite poorly. Flack sued FQC in the Southern District of New York under VARA to prevent further modification or destruction of her work. Although the court held the assistant’s work to be conservation under VARA, it also held that the hiring of an

39. Thurston, *supra* note 24, at 715–17.

40. § 106A(a)(3)(B). *See, e.g.*, *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004) (artist’s VARA claim was dismissed because, although she had received some local attention, the court concluded her limited stature did not afford protection to every work she created).

41. § 106A(c)(1)–(2).

42. *See, e.g.*, *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226, 2003 WL 21403333 (S.D.N.Y. Jun. 17, 2003); *Cohen v. G&M Realty L.P.*, 988 F.Supp.2d 212 (E.D.N.Y. 2013). Both involve artists suing building owners or managers for damage to art incorporated into a structure.

43. 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

44. The New York borough of Queens is named for the seventeenth century Queen of England, Catherine (also known as Catherine of Aragon). *See generally* Nadine Brozan, *Here’s to Queen Catherine, Who Gave Queens a Name*, N.Y. TIMES, Oct. 11, 1990, <http://www.nytimes.com/1990/10/11/nyregion/here-s-to-queen-catherine-who-gave-queens-a-name.html>.

incompetent conservator could constitute gross negligence. The case eventually settled out of court.<sup>45</sup>

## 2. The Attribution Right

The second prong of VARA, the right of attribution, allows an artist to: (1) require that her name be displayed alongside works she created; and (2) disclaim authorship of works she (a) did not create or (b) created, but which have been modified to such an extent that the modification prejudices the artist's reputation.<sup>46</sup> There are two important exceptions to the right of attribution. First, modification resulting from the "passage of time or the inherent nature of the materials" does not constitute a modification that can support a disavowal. Second, unless gross negligence is found (as alluded to in *Flack*), a work cannot be disavowed for modifications made in the course of conservation or public presentation.<sup>47</sup> In practice, most art market participants would rather work with an artist extralegally than incur her disapproval. In the same auction from which *Cowboys Milking* was withdrawn, another Noland piece called *Oozewald* was auctioned with the following disclaimer:

Please note the stand with which the lot is being displayed is not the stand that Cady Noland designed for this work and this stand is not included in the sale of this lot. As a result, subsequent to the sale, the buyer will be provided with a new stand, which will be in accordance with Ms. Noland's copyrighted stand design for this lot, and which will be an integral part of the complete work.<sup>48</sup>

The work still sold for over six and a half million dollars.<sup>49</sup>

To help illustrate how the right of attribution under VARA could be employed by a party in a more traditional medium, consider the following hypothetical scenario of Polly Painter. Polly is just beginning her career and sells a still life depicting a vase of flowers on a table to Coco Collector. Coco wants to put the painting in a new frame, but the painting is one foot too long. Unbeknownst to Polly, Coco cuts off twelve inches from the bottom of the canvas.<sup>50</sup> The framed painting now depicts only a vase of flowers, because the bottom portion that included the table was removed by Coco. Ten years later, Polly has become famous for her still life paintings, especially those with vases of flowers on tables. Coco thinks that she can make a profit and attempts to resell the Polly Painter work as an original. Legally, Polly may object to this attribution and argue that the work is not a "Polly Painter"

45. *Flack*, 139 F. Supp. 2d 526; see Thomas & Charles Danziger, *Restoration Drama*, ART+AUCTION, Apr. 1, 2009.

46. § 106A(a)(1)–(2). Recently in the Seventh Circuit, Peter Doig was forced to prove in court that he did not paint a canvas for which he denied authorship. See Doig Memorandum of Law in Support of His Motion for Summary Judgment, Dec. 11, 2015, ECF No. 160-1.

47. § 106A(c)(1)–(2).

48. *Oozewald*, SOTHEBY'S, available at <https://perma.cc/SD8R-AYCV> (last visited Oct. 24, 2017).

49. *Id.*

50. This scenario is more common than one might imagine. Toulouse-Lautrec, Rembrandt, and Picasso paintings have been cut up to fit in frames or so that the pieces could be sold separately for more money. See MERRYMAN, *supra* note 19, at 439.

original because Coco intentionally modified the canvas so that it no longer reflects Polly's artistic vision—a vase of flowers *on a table*. Moreover, as Polly is now known for her depictions of vases on tables, selling this “early work” without the table might create misunderstandings about the trajectory of Polly's career and prejudice her artistic reputation. Coco still owns what remains of the physical canvas and may sell the work, but not as a “Polly Painter.” Although a potential buyer might still want to purchase the canvas, the work would probably not garner a price comparable to that of an original Polly Painter. This hypothetical illustrates a situation where VARA's right of attribution, if properly employed, would be useful to an artist.

Consider an alternative fact pattern in which Polly's invocation of VARA is arguably improper. Polly Painter is still just beginning her career and gifts her dear friend Coco Collector a still life. Coco cherishes the painting and keeps it just as it was originally conceived. Ten years later, Polly has become famous, but she and Coco have had a falling out. No longer sentimentally attached to the canvas, Coco decides to auction it and make a profit. But Polly tells the auction house she did not paint the still life and invokes her right under VARA to dissociate her name from the canvas for sale. As a result, the auction house refuses to sell the work, and Coco is stuck with an unmarketable painting by a former friend. Coco seeks counsel to advise whether she may sue Polly and argue that Polly wrongly invoked VARA and thus deprived her of the value of her property.<sup>51</sup> Unfortunately for Coco, there is no U.S. case law on the subject.

This hole in the law creates a gray area where artists' actions may cost collectors, galleries, and auction houses a substantial amount of money. Moral rights law in the U.S. has not adequately developed to provide a predictable resolution to what we might call the “Noland Problem”—i.e., the dilemma posed by an artist's arguably improper invocation of VARA depriving other market participants of the value of her art. From a purely legal perspective, VARA cases are fact specific: the qualities of the medium employed, history of conservation, and artistic reputation are elements that can be and have been interpreted in a court setting when artists have brought their own suits seeking validation of a moral rights claim. A collector should likewise be able to ask a court to make a *legal* determination of authorship to prove whether an artist's claim falls outside the scope of VARA. What VARA does not account for is the effect on the market; even if an artist is legally established as author of a work, that does not ensure a collector can recoup the value of a work if that value has been lessened by the artist's public statements. The French *droit moral* comes closer to anticipating such a scenario and may hold a solution for dealing with such cases.

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51. This fact pattern is based on a real incident that occurred with Lucien Freud in the United Kingdom (and thus does not fall under VARA), which did not result in litigation. See generally Kate Lyons, *BBC Says Painting is by Lucien Freud Despite His Denials*, GUARDIAN (Jul. 17, 2016), <https://perma.cc/X68D-CZNQ>.

## II. MORAL RIGHTS IN FRANCE

Like their United States counterparts, French courts do not appear to have considered a case where an artist is sued for improperly revoking attribution of their own work. But French moral rights law in general seems to favor an indemnification approach to conflicts between the economic rights of collectors and the authorial rights of the artist.

To examine the French regime, an analysis of the differences between VARA and the *droit moral* is helpful. France employs a dualist system in which the collective rights of authors (*droits d'auteur*) are divided into equally weighted patrimonial (economic) and moral rights.<sup>52</sup> Where VARA applies to a narrow range of visual art, the *droit moral* applies to all creative works, even in mediums not yet anticipated by a legislature, and includes works-for-hire.<sup>53</sup> In contrast to the American focus on unique fine art objects, the Continental tradition centers on the artist and does not privilege any medium. Moral rights in France are generally perpetual, inalienable, and may be transferred *causa mortis* to heirs.<sup>54</sup> In the U.S., moral rights are imprescriptible, yet tied to the life of the author and waivable by a signed, written instrument.<sup>55</sup>

The multiplicity of rights encompassed in the French Intellectual Property Code are of crucial significance to this Note. While VARA covers attribution and integrity, the *droit moral* is composed of four distinct rights contained within various provisions of the French Intellectual Property Code: (1) *divulgation* (publication or disclosure); (2) *paternité* (attribution); (3) *respect de l'oeuvre* (integrity); and (4) *retrait ou repentir* (withdrawal).<sup>56</sup> These four rights follow art from its creation, when it is within the artist's physical control, to the period after sale or transfer.

### A. DROIT DE DIVULGATION<sup>57</sup>

In France, the artist alone holds the right to decide whether, when, and how her work is made public. This is distinct from the right of withdrawal, discussed *infra*, which applies after an artist has already alienated the chattel embodying the work.

52. Sirinelli, *supra* note 8, at 180.

53. Code de la propriété intellectuelle [hereinafter CIP] art. L112-1 (Fr.) (“The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose”); 17 U.S.C. § 101 (“A work of visual art does not include—(B) any work made for hire”). See also *Carter v. Helmsley-Spear, Inc.* 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd* 71 F.3d 77 (2d Cir. 1995), cert. denied 116 S. Ct. 1824 (1996) (declining to apply VARA to works-for-hire). CIP art. L111-1 (“the existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded...”).

54. CIP art. L121-1.

55. § 106A (d)(1); (e)(1).

56. Sirinelli, *supra* note 8, at 180; CIP.

57. CIP L121-2 (“The author alone shall have the right to divulge his work”); Sirinelli, *supra* note 8, at 180. There is no equivalent provision to *le droit de divulgation* in VARA, but U.S. courts have arguably employed its philosophy by, for example, restricting even the “fair use” of unpublished manuscripts for news reporting. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 Duke L. J. 455, 499, n. 176 (1991) (citing, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1986); *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987)).

This principle was famously illustrated in an 1898 case involving American painter James McNeill Whistler, who was living in France at the time. The French court held Whistler was not compelled to turn over a portrait with which he was unsatisfied, but was required to pay his patron damages.<sup>58</sup> *Whistler* represents an important theme throughout French moral rights law: artists are given broad freedom regarding their work, but are often required to indemnify a harmed party, usually a collector or gallery, acknowledging the economic loss that can occur from an artist failing to complete or deliver a work. This indemnification solution was also used in *L’Affaire Rouault*, where a dealer stored many unfinished works by the French painter Georges Henri Rouault. After the dealer died, Rouault’s heirs argued that they owned the works. The French court held that because Rouault had not yet publicly disclosed these works, his heirs still could enforce Rouault’s moral rights if they paid back any advances the dealer had provided Rouault.<sup>59</sup> The French solution does not appear to address the equitable remedy of specific performance. Even in the U.S., however, it is unlikely that an artist could be legally required to create a contracted-for work, as distinguished from being required to deliver a completed work. In any event, VARA does not apply to works-for-hire (many commissions would fall in this category), and the moral rights that it codifies are waivable.

#### B. DROIT À LA PATERNITÉ<sup>60</sup>

The French right of attribution is phrased in generally positive terms. An author may require that her name appear alongside her work and related promotional materials. French artists also enjoy the right to prevent a third party from associating their name with the artists’ work (i.e., Andy Author could prevent Edward Editor from claiming credit for *Novel*). The right of attribution is inalienable, and the statute only provides authors with a limited ability to renounce it.<sup>61</sup>

The text of the French right of attribution notably does not cover an artist removing her name from a work of art, disavowing, or unattributing a work that she previously admitted to creating. Under the statute, unlike in the U.S., the right to remove one’s name from a work of art is not couched in terms of “attribution.” Accordingly, based on a strict statutory reading, Noland could not deny attribution of her work under French law.

In court, however, the French right of attribution is applied similarly to VARA, as demonstrated by the 1935 case *Valdo-Barbey v. Opera-Comique*.<sup>62</sup> Mr. Gheusi, director of the Opera-Comique, contracted with Mr. Valdo-Barbey to create scenery

58. See DaSilva, *supra* note 14, at 18 (citing Tribunal civil de la Seine [CA] [regional court of appeal], Paris, 1e civ., Mar. 20, 1895, D.P.2. 465).

59. See DaSilva, *supra* note 14, at 19 (citing Cour d’appel [CA] [regional court of appeal] Paris, 1e civ., Mar. 19, 1947, D.P. 20).

60. CIP art. L212-1 (“An author shall enjoy the right to respect for his name [and] his authorship[.]”). See also Sirinelli, *supra* note 8, at 181.

61. Sirinelli, *supra* note 8, at 181; CIP L121-1.

62. ALFRED VANOUIS, LETTER FROM FRANCE 9–10 (Gertrude Rosenstein, trans. 1947) (citing Court of Paris, 1st ch., Nov. 20, 1935, *Valdo-Barbey v. Theatre of the Opera Comique*, Gaz. Des Trib., issue of Apr. 29–30, 1936, Gaz. du Palais, issue of Jan. 29, 1936).

and costumes for a production. Five years later, Gheusi revived the production and on the playbill continued to attribute the scenery and costumes to Valdo-Barbey. But without consulting Valdo-Barbey, Gheusi had substantially altered the scenery and costumes. The court granted Valdo-Barbey's request that his name no longer be associated with the work because the scenery and costumes now employed no longer represented his original intention for the production.<sup>63</sup> Valdo-Barbey essentially invoked his right to disavow the costumes and scenery because he believed Gheusi destroyed the integrity of his original work.

### C. DROIT AU RESPECT DE L'OEUVRE<sup>64</sup>

*Valdo-Barbey*, although grounded in the right of attribution, primarily focused on Gheusi's impermissible destruction of both the scenery's and costumes' integrity. The right of integrity in France is philosophical: an author may assert the duty of others to respect the integrity of her work.<sup>65</sup> Prior to the enactment of VARA, John Henry Merryman frequently wrote on the French right of integrity to advocate that the U.S. adopt moral rights, and often used as an example a case involving the French artist Bernard Buffet. Buffet painted multiple sides of a refrigerator to be auctioned as a single work for charity. Later, Buffet discovered that the work had been dismantled and that its panels were being sold separately as his original works. To prevent the sale of individual panels, Buffet sued and convinced a French court that the dismantling of a single artistic unit is a violation of an artist's right of integrity.<sup>66</sup> *Buffet* presents a straightforward fact pattern in which an artist properly invokes *le droit au respect de l'oeuvre*. Compare *Buffet* to an incident that occurred in the U.S. twenty years later, but before VARA was enacted.

In 1982, Isamu Noguchi faced a similar problem to Buffet's, but had no legal recourse. His enormous sculpture, *Shinto*, was commissioned for and built in the lobby of the New York Bank of Tokyo Trust building in 1975. Noguchi was paid \$20,000. Without permission, the bank removed the site-specific piece and cut it into storable-sized pieces several years later. The bank then donated the pieces of *Shinto* to a museum in Florida. Noguchi refused to restore the piece (a restored *Shinto* could have been worth as much as \$150,000 at that time). Nevertheless, the museum accepted the gift with its reduced value and installed it without Noguchi's help. Although there was no lawsuit, Noguchi testified at hearings that led to early moral rights legislation passed in New York in the years prior to VARA. As with Noland's *Log Cabin*, Noguchi considered *Shinto* to have been destroyed without consultation, and his public statements against the work had huge effects on its

63. *Id.*

64. CIP art. L121-1 ("An author shall enjoy the right to respect for his ... work."); *see also* Sirinelli, *supra* note 8, at 181.

65. *Id.*

66. *Refrigerator of Buffet*, *supra* note 29, at 1023 (citing Buffet v. Fersing, Cour d'appel [CA] [regional court of appeals] Paris, 1e civ., 1962, S. Jur. 570, 571).

market value.<sup>67</sup> As Amy Adler notes, however, the right of integrity assumes that the living artist has the best knowledge of her own work.<sup>68</sup>

#### **D. DROIT DE RETRAIT OU DE REPENTIR**

The “right of withdrawal” or *droit de retrait ou de repentir* seems to have been drafted with literature in mind:

Notwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee. However, he may only exercise that right on the condition that he indemnify the assignee beforehand for any prejudice the reconsideration or withdrawal may cause him. If the author decides to have his work published after having exercised his right to reconsider or of withdrawal, he shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined.<sup>69</sup>

Pursuant to this provision, Andy Author has the right to withdraw *The Great Novel* from circulation on the condition that he indemnifies Edward Editor against damage caused by the decision. If Andy has a change of heart and wants to republish *Novel*, he must do so with Edward under the terms of their original agreement. In theory, this law would give authors unprecedented control over publication. But as moral rights scholar Russell DaSilva points out, the realities of authors’ abilities to pay such indemnifications makes use of *le droit de retrait ou de repentir* unlikely. DaSilva states of these rights: “both their existence and their application in the courts are disputable. Before 1957, the rights had been discussed by French jurists, but virtually never applied in the courts.”<sup>70</sup> Merryman, however, notes the “potential utility [of Art. L121-4] in connection with works of visual art.”

DaSilva writes of one instance in which *le droit de retrait ou de repentir* has been considered in connection with a disavowed work of visual art in France.<sup>71</sup> An artist alleged a painting was a forgery of his work and removed the allegedly fake signature from the canvas. The court held the artist liable for damages under two rationales. First, if the painting was indeed a forgery, the artist still had no right to damage another person’s property. Second, if the painting was not a forgery and the artist simply wanted to retract his name from the work, without evidence that the work had

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67. Grace Glueck, *Art People; Noguchi and ‘Shinto’ Again*, N.Y. TIMES (Feb. 14, 1982), <http://www.nytimes.com/1982/02/12/arts/art-people-noguchi-and-shinto-again.html>; Josh Barbanell, *New State Law Gives Artists Right to Sue to Protect Work*, N.Y. TIMES (Aug. 14, 1983), <http://www.nytimes.com/1983/08/14/nyregion/new-state-law-gives-artists-right-to-sue-to-protect-work.html>.

68. Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009).

69. CIP art. L121-4; see *Refrigerator of Buffet*, *supra* note 29, at 1028. Withdrawal provisions also exist in Italian and in German law. In Italy, the right of withdrawal is limited to withdrawal from “commerce” to protect the reputation of the author when “circulation of the work is found to be seriously injurious to his ideals and personal interests.” See VALERIA FALCE, *INTELLECTUAL PROPERTY LAW IN ITALY* 50 (2014).

70. DaSilva, *supra* note 14, at 23.

71. *Refrigerator of Buffet*, *supra* note 29, at 1028.

been improperly modified, he was not permitted to exercise his right of withdrawal after selling the painting.<sup>72</sup> It is clear that even in France where moral rights are well established, artists do not have a unilateral withdrawal right for unmodified works after they have been sold, and must compensate the owner for damages caused by a disavowal.

VARA states that an artist “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.”<sup>73</sup> Practically, this might amount to an injunction preventing a collector or museum from displaying a disavowed work with an attribution to the artist (although enforcement would seem to be difficult on private property). The law does not, however, address the situation in which an artist publicly revokes her name from a work that has not been modified to a prejudicial extent. Under traditional canons of statutory interpretation, that would seem to imply there is no such right in the U.S.<sup>74</sup> This is further supported by the fact that the U.S. has not historically interpreted moral rights broadly in any form, and VARA itself is a very narrowly applicable piece of legislation. Consequently, if an artist disavows for reasons not listed under VARA, she should not be permitted to invoke its legal protections.

The following section explores the details of the Noland cases and how French law may provide a solution to this problem currently vexing U.S. courts and the art world.

### III. THE NOLAND CASES

Noland has been involved in a number of lawsuits relating to her disavowal of works. In *Jancou v. Sotheby's*, Noland revoked attribution of a work whose condition had not been considered by a court.<sup>75</sup> Noland was attempting to prevent the sale of a work at auction, which resulted in financial injury to the collector. This case calls for a reexamination of VARA and development of a method for compensating the collector who may never recoup the difference between the value of an acknowledged work and that of a work rejected by its author. The cases of *Mueller v. Janssen* and the recently filed *Noland v. Janssen* present more complex, even philosophical issues. What is the role of “authenticity” in conceptual art? To what extent can a work be conserved before it is no longer “original”? Such questions are no longer relegated to the field of art history, but implicate law and economics as well.

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72. See *id.* at 25 (citing Cour d'Appel [CA] [regional court of appeals] Paris, Apr. 19, 1961, Gaz. Pal. 2.218).

73. § 106A(a)(2).

74. *Expressio unius est exclusio alterius*, MERRIAM-WEBSTER, <https://perma.cc/CZV8-ZFQF> (last visited Oct. 25, 2017) (“[A] principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded[.]”)

75. *Marc Jancou Fine Art v. Sotheby's Inc.*, No. 650316-2012, 2012 WL 7964120 (N.Y. Sup. Ct. Nov. 13, 2012).

### A. JANCOU V. SOTHEBY'S

In September 2011, the New York gallery Marc Jancou Contemporary (“Jancou”) consigned Noland’s 1990 aluminum print, *Cowboys Milking*, to Sotheby’s.<sup>76</sup> The work, with an estimated value between \$250,000 and \$350,000, was featured prominently in Sotheby’s November 2011 auction catalogue.<sup>77</sup> Employing a common industry practice, Sotheby’s publicly displayed *Cowboys Milking* prior to the auction, which provided Noland and her attorney an opportunity to view the work in person. After visiting Sotheby’s and seeing the work, Noland objected to the inclusion of *Cowboys Milking* in the upcoming auction and invoked her “statutory right” under VARA to disclaim authorship of the work, demanding it be withdrawn.<sup>78</sup> “Noland’s declaration abruptly propelled the object from high-value work of art to ... some sort of eternal limbo.”<sup>79</sup>

Noland argued the condition of *Cowboys Milking* materially differed from when it was created.<sup>80</sup> Prior to consignment, Jancou’s conservator reported the work was in good condition, except for slight deformations on its corners that he was unable to correct. When *Cowboys Milking* arrived at Sotheby’s, the auction house noted: “[s]ome bending of the aluminum at 3 of the corners [and] there are some small areas of bending/indentation in the aluminum; ex: along the left side near the upper corner, and also along the bottom edge near center.”<sup>81</sup> Sotheby’s was allegedly unaware of prior conservation before they accepted the work from Jancou, and would later claim the damage was done by Jancou’s conservator. While the record does not clearly account for how these deformations occurred, *Cowboys Milking* had been transported between New York, Chicago, and Cologne since 1990. Some minimal amount of wear is to be expected upon such a widely travelled piece. Neither Jancou’s conservator nor Sotheby’s concluded that the minor damage warranted concern.

After unsuccessfully trying to dissuade Noland from her disavowal, Sotheby’s withdrew *Cowboys Milking* shortly before the auction.<sup>82</sup> Sotheby’s initiated no legal challenge to Noland’s VARA claim, even though the modifications in question arguably do not appear to have been the result of intentional destruction or negligent handling, but rather “the passage of time or the inherent nature of the materials.”<sup>83</sup>

Jancou sued Sotheby’s and Noland in New York state court for breach of contract and fiduciary duty and tortious interference, respectively. The court dismissed both of Jancou’s claims on summary judgment, and an appellate court affirmed. The New

76. Complaint at Exhibit A, *Jancou* (No. 650316-2012). The consignment agreement indicates *Cowboys Milking* was estimated to sell for, at a minimum, \$150,000 more than Jancou originally paid.

77. Affirmation of Charles G. Moerdler, Exhibit 2, *Jancou* (No. 650316-2012).

78. Answer to Amended Complaint at 7, *Jancou* (No. 650316-2012).

79. Martha Buskirk, *Marc Jancou, Cady Noland, and the Case of the Authorless Artwork*, HYPERALLERGIC (Dec. 9, 2013), <https://perma.cc/YEU4-5GC7>.

80. Answer to the Amended Complaint at 2, *Jancou* (No. 650316-2012).

81. *Jancou*, slip op. at 2. Christie’s allegedly declined to auction *Cowboys Milking* because of questions about its condition. But the complaint contains no allegations that either the conservator or Sotheby’s was grossly negligent. Complaint, *Jancou* (No. 650316-2012).

82. *Jancou*, slip op. at 2–4.

83. See 17 U.S.C. § 106A(c)(1)–(2).

York Supreme Court asserted that determination of *Jancou* did not require the court to interpret VARA. Instead, the court concluded that the issue was “whether, in the face of the artist’s objection under VARA to the use of her name as the author of the print, there is any material issue of fact as to whether Sotheby’s failed to comply with its contractual and fiduciary obligations to plaintiff.”<sup>84</sup> Per the consignment agreement between Jancou and Sotheby’s, the auction house maintained the right to “withdraw any Property at any time before sale if in [its] sole judgment (a) there is doubt as to [the Property’s] authenticity or attribution.”<sup>85</sup> Noland’s disavowal permitted Sotheby’s to claim “doubt as to the authenticity or attribution” of *Cowboys Milking* as the basis for withdrawing the work. John Cahill, a well-known New York art lawyer, argues that *Jancou* shows how VARA’s statutory ambiguities allow auction houses to withdraw controversial works without repercussion.<sup>86</sup>

Jancou still owns *Cowboys Milking*, but it is unlikely the print can be sold as a “Cady Noland.”<sup>87</sup> Adler assessed the consequences of *Jancou*: “We don’t know whether the damage rises to [destruction] and whether this artwork is no longer a Cady Noland or if it is merely a Cady Noland that was diminished in value.”<sup>88</sup> In its current form, VARA is simply ill-equipped to govern the complexities posed by challenges to the primacy of authorship. In *Against Moral Rights*, Adler argues VARA is based on an antiquated definition of art and asks: “Does the artist know what’s best for his art? Is he the right person to entrust with the enforcement of moral rights? Should his intent govern the ‘meaning’ of the piece?”<sup>89</sup> Adler’s thoughtful inquiry also leads to additional questions such as whether an artist should be able to object if a well-known contemporary art gallerist, conservator, and auction house collectively believe that a work of art is in good condition, and whether a party could stop an artist from objecting to such a belief. There are also monetary considerations. Under moral rights regimes, art is given an elevated status that may conflict with its presence in an economic market. Sonya G. Bonneau acknowledges the contradiction inherent to VARA, which “both denies the economic side of art and attempts to redress it.”<sup>90</sup>

In the end, Jancou lost not only the potential profit from a sale of *Cowboys Milking* through the 2011 Sotheby’s auction, but likewise a portion of the (if not the full) value of the work as an asset for future sale. VARA provides no solution to this problem, and Jancou has not taken the step of suing Noland for an improper invocation of the law. Even if Jancou were to gain a successful court ruling that the work was an “original” Noland, the value of the work would likely still be diminished. In such situations, were there an indemnification provision in VARA, artists would have to think more carefully before publicly expressing concerns about

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84. *Jancou*, slip op. at 3.

85. *Id.*

86. See Tracy Zwick, *Sotheby’s and Jancou Battle in Appeals Court over Cady Noland Artwork*, ART IN AMERICA (June 7, 2013), <https://perma.cc/P6VQ-P7KM>.

87. See Buskirk, *supra* note 79.

88. See Zwick, *supra* note 86.

89. See Adler, *supra* note 37, at 271.

90. Bonneau, *supra* note 1, at 95.

a work of art for fear of being liable for the market value. Even if VARA contained such a provision, however, if settlement of a dispute could not be established through negotiation, litigation costs could pose a barrier to enforcement of either party's rights: on one hand, the art in question would need to be valuable enough to make litigation worthwhile for the owner, and on the other, many artists lack the financial resources to challenge attribution in court.

### B. MUELLER V. JANSSEN GALLERY

Like *Cowboys Milking*, the subject of the second legal dispute involving Noland was also produced in 1990. This work, *Log Cabin*, is a wooden façade on which American flags have been superimposed, fabricated to Noland's design and specifications.<sup>91</sup> In 1990, *Log Cabin* was first exhibited at and sold by Galerie Max Hetzler to German collector Wilhem Schurmann on November 15 of that year.<sup>92</sup> From 1992 to 2005, *Log Cabin* was on loan to German museums, the last of which exhibited the work outdoors for a decade. During this period, *Log Cabin* "suffered significant damage and deterioration due to its material composition, the inherent nature of its wood and other physical components, and the effects of weather, seasonal changes in climate, time, and other natural elements."<sup>93</sup> Noland allegedly approved of displaying the work outside and treating the wood to protect it.<sup>94</sup> In 2010, a condition report indicated that "the only way to ensure the long-term viability/existence of the artwork would be to replace the rotting logs with new ones."<sup>95</sup> Thus, *Log Cabin* was reconstructed according to Noland's original plans. The restored work was included in the 2011 exhibition "Cady Noland / Santiago Sierra" at KOW Berlin. At the time, Noland requested an image of *Log Cabin* be removed from KOW's website because she objected to her work being shown in context with Sierra, but evidently did not know about the conservation at that point.<sup>96</sup>

In 2014, Schurmann sold *Log Cabin* to prominent Cleveland art patron Scott C. Mueller for \$1.4 million. The lawsuit surrounding this transaction involved several parties: Marisa Newman, Brett Shaheen, and Galerie Michael Janssen ("Janssen"). Marisa Newman, through her eponymous New York art advisory, brought *Log Cabin* to the attention of Brett Shaheen, an Ohio art dealer who advised Mueller. Eventually, Schurmann sold *Log Cabin* to Mueller through Janssen, a Berlin-based gallery. Because of *Jancou*, Newman and her attorney advised Mueller to include a buy-back provision in his contract with Janssen in the event Noland "affirmatively

91. Complaint, Exhibit A at 10, *Mueller v. Michael Janssen Gallery Pte. Ltd.*, 225 F. Supp. 3d 201 (S.D.N.Y. 2016). In this way, *Log Cabin* is a conceptual work of art. See generally, Tate, *Conceptual Art* (last visited Feb. 26, 2017), <https://perma.cc/VW8C-4WK4>. Conceptual art was a movement that emerged in the 1960s and takes many forms, but is unified by the ideological underpinning that the idea behind the work of art is more important than the finished, physical product.

92. Marber & Sharon Flescher, *Conserved or Copied? Artist Cady Noland at It Again Over Log Cabin*, 18:2-3 IFAR J. 6-8 (2017).

93. Complaint, Exhibit A at 11, *Mueller*, 225 F. Supp. 3d 201 (No. 1:15-CV-04827).

94. *Id.*

95. *Id.*

96. *Id.* at 10.

refuses to acknowledge or approve the legitimacy of the work; seeks to disassociate her name from the work; or claims that her moral rights . . . have been violated.”<sup>97</sup> In his complaint, Mueller alleges that Newman “provided guidance that this [possible event] was an unlikely concern” and represented that Noland had approved all auctioned works “except the Jancou work.”<sup>98</sup> Further, in direct response to the question of whether Noland could challenge *Log Cabin* under VARA, Newman responded: “considering the fact that the re-fabrication was based on [Noland’s] original blue print, it is hard to imagine how they could prejudice her honor or reputation (a type of prejudice represented to invoke an artist’s rights under VARA).”<sup>99</sup> Likewise, Newman annotated a photograph of *Log Cabin* with the phrase: “exactly the same nothing to argue about.”<sup>100</sup> The agreement also represented Janssen and Schurmann had sufficient capital to pay expenses in the event that the buy-back clause was triggered.<sup>101</sup> Pursuant to the agreement, Mueller wired the full amount of money to Janssen. Before *Log Cabin* was shipped to the United States, Shaheen (with Janssen’s permission) informed Noland of the conservation that had occurred. Noland promptly called Shaheen to tell him “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.”<sup>102</sup>

The story of *Log Cabin* was further complicated when Janssen failed to return the full purchase price to Mueller. In 2015, with *Log Cabin* still in Schurmann’s German storage facilities, Mueller sued in the Southern District of New York. In his complaint, Mueller claimed breach of contract against Janssen, unjust enrichment against Shurmann, and breach of fiduciary duty as well as unjust enrichment against Newman. Additionally, Mueller brought an individual claim against the owner of Galerie Michael Janssen for conversion.<sup>103</sup> Although claims against Shurmann and Newman have been dismissed, the case against Janssen remains pending.<sup>104</sup>

Noland initiated her own lawsuit in July 2017, seeking damages and injunctive relief against Janssen, KOW, and their art advisor, Chris D’Amelio. She alleges negligence on the part of owners of *Log Cabin* for allowing it to deteriorate to the point it required drastic conservation and discarding of the original materials. Further, Noland claims *Log Cabin* as it currently exists is an unauthorized replica of her work with which the defendants are associating her name. She is thus invoking both the integrity and attribution provisions of VARA. Noland seeks impoundment of the “fake” *Log Cabin* and all images of it currently in defendants’ possession, or proof of its destruction by defendants, and damages of up to \$150,000 if a court finds willful infringement. The parties, courts, and reporters seem to have overlooked one

97. Complaint at 4, *Mueller*, 225 F. Supp. 3d 201 (No. 1:15-CV-04827).

98. First Amended Complaint at 4, 10, *Mueller*, 225 F. Supp. 3d 201 (No. 1:15-CV-04827).

99. *Id.* at 9–10.

100. *Id.* at 10.

101. *Id.* at 4.

102. Complaint at 5, *Mueller*, 225 F. Supp. 201 (No. 1:15-CV-04827).

103. *Id.* at 2, 8.

104. Kate Lucas, *Suit Over Cady Noland Artwork Ends Without Significant Ruling on VARA*, GROSSMAN LLP ART L. BLOG (Jan. 3, 2017), <https://perma.cc/DL6K-JHXP>.

crucial fact in the *Log Cabin* dispute. VARA was enacted in 1990, but did not become effective until June 1, 1991.<sup>105</sup> Works transferred prior to that effective date are not protected by VARA—thus, *Log Cabin* is not even covered by the statute and Noland’s case should be dismissed on statutory grounds.<sup>106</sup>

Nevertheless, Noland’s suit opens a cascade of questions of fact and theory. Is *Log Cabin* as it currently exists a conserved original or an unauthorized replica? And if it is considered conserved, was the conservation negligent? Defendants allege the work was both initially constructed and then conserved according to Noland’s specifications by the same company. If this is true, and the structure was never “original” to Noland’s hand, was reconstruction according to her plans improper? If you replace all of the planks in a boat one by one, is it the same boat? Since the Renaissance, master-artists have employed studio assistants while presenting finished works under only the master’s name. Andy Warhol revolutionized the modern notion of authorship by directing others to create his works with traditionally commercial techniques in “The Factory.” The same year Noland began disavowing art, the Warhol Foundation ceased authenticating works because it was too difficult to distinguish whose hands created a “Warhol,” a task made more demanding by the immense amounts of money at stake.<sup>107</sup> Contemporaries of Noland, such as Jeff Koons, use industrial fabricators to create their art. If an artist can claim authorship of a work she did not physically create, can she likewise deny authorship if the work was remade again?

These questions are emerging more frequently as conceptual works of art deteriorate. Dan Flavin, for example, became famous in the 1960s for his installations using common fluorescent lights of varying colors. Over time, the exact lights Flavin used were discontinued. During his lifetime, Flavin provided contradictory solutions to the conservation of his works. He said the works would expire when the lights did, but also worked with museums to replicate the original lights towards the end of his lifetime. Does this mean that once a Flavin expires, a collector or museum has lost the value of the work? Is replicating the lights producing an unauthorized copy? The fact that Noland is still alive and actively debating these questions allows us insight into an artist’s choices, but, as Adler asks, should the artist’s desires supersede all else?<sup>108</sup>

105. “The rights created by section 106A of title 17, United States Code, shall apply to—(1) works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author, and (2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.” Judicial Improvements Act of 1990, Pub. L. 101–650, § 610, 104 Stat. 513.

106. Marber & Flescher, *supra* note 92. In the cases of *Jancou* and *Mueller*, where Noland did not actually bring a legal claim, but only verbally announced her rights under VARA, the issue of dating is not as important, although this provides further evidence that she shouldn’t have been making these claims. *Marc Jancou Fine Art, Ltd. v. Sotheby’s Inc.*, No. 650316-2012, slip op. at 2, 4 (N.Y. Sup. Ct. Nov. 13, 2012); *Mueller v. Michael Janssen Gallery PTE., Ltd.*, 225 F. Supp. 3d 201, 204 (S.D.N.Y. Dec. 2, 2016).

107. Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L. REV. 218, 231 (2012).

108. Adler, *supra* note 37, at 271.

France has a clear stance on the matter: the artist's opinion is primary and supersedes even contractual agreements. From the U.S. perspective, the answer is less clear. What constitutes negligent conservation? When is the integrity of a conceptual work of art compromised? These are the questions posed by Cady Noland, and they are not purely theoretical: legal disputes have already cost collectors, galleries, and auction houses hundreds of thousands of dollars.<sup>109</sup> The outcome of the Noland series of disputes, if not settled, will be one of the few opportunities for courts to work out these issues. As Merryman wrote, "The history of artists' rights has yet to be written."<sup>110</sup>

#### IV. CONCLUSION

Cady Noland is an artist of recognized stature whose works garner high prices at auction and whose words about her own work hold great sway in the artistic community. By invoking VARA through disavowals of works arguably altered only through conservation, Noland renders collectors unable to sell her disavowed works, as evidenced by Sotheby's withdrawal of *Cowboys Milking* from auction and the cancelled sale of *Log Cabin*. Even if these collectors were to challenge the invocation of VARA and request that a court enjoin Noland to authenticate the works, buyers might still question their "authenticity" or only be willing to pay a reduced price. Thus, Noland has lowered the value of another person's property—potentially without cause. In exploring these issues in the context of both French and United States law, this Note proposes an indemnification solution based on prevailing market prices *if* a court determines that an artist improperly invoked VARA—for example, describing standard conservation or normal, minor wear and tear as "mutilation." This indemnification solution would serve to dissuade artists from misusing the law, and potentially remedy the harm done to market participants. Some might argue that this further disenfranchises the artist who already has little legal protection, but such measures would likely only be warranted in the relatively rare situations where works of living artists are of a sufficient value to warrant litigation.

Appropriation artist Richard Prince is already employing this indemnification strategy extralegally. In 2014, Prince created a *New Portrait* based on an Instagram photograph of Ivanka Trump having her hair and makeup done and sold the painting to the Trump family for \$36,000. After the election of Donald Trump, Prince returned payment for the Ivanka portrait and tweeted: "This is not my work. I did not make it. I deny. I denounce. This is fake art."<sup>111</sup> Art critic Jerry Saltz has speculated, "perhaps all the living artists in the Kushner-Trump collection might

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109. See *Jancou Fine Art, Ltd. v. Sotheby's*, No. 650316-2012 (N.Y. Sup. Ct. Nov. 13, 2012); *Mueller v. Michael Janssen Gallery PTE. Ltd.*, No. 1:15-CV-04827 (S.D.N.Y. Dec. 2, 2016).

110. MERRYMAN, *supra* note 19, at 419.

111. See Randy Kennedy, *Richard Prince, Protesting Trump, Returns Art Payment*, N.Y. TIMES (Jan. 12, 2017), <https://nyti.ms/2k6EM1S>.

disown their work, say it is ‘fake,’ making it instantly worthless.”<sup>112</sup> First Amendment issues aside, political objections to a collector are certainly not statutory grounds for disavowal under VARA. And even though Prince may consider any association with Trump prejudicial to his reputation, he did not allege the work had been modified as VARA requires. Nevertheless, Prince essentially indemnified the Trump family for the potential loss in value his disavowal could have on the painting. The Prince situation may serve as an example for future disputes, where the indemnification solution could be utilized. However, there is lively debate about how Prince’s disavowal will affect the art market and how it relates to VARA.<sup>113</sup> Many commentators speculate that Prince’s actions will actually raise the value of the work, rather than render it unsaleable on the secondary market as Noland’s disavowals did.<sup>114</sup>

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112. Jerry Saltz, *Richard Prince Just Showed Artists a Way to Fight Trump. And May Have Cracked Open a New Contemporary Art Code Too.*, VULTURE (Jan. 13, 2017), <https://perma.cc/V52H-FX55>.

113. See e.g., Marion Maneker, *Richard Prince Has Kenny Schachter & a Bunch of Lawyers Worried*, ART MARKET MONITOR (Jan. 17, 2017), <https://perma.cc/449Y-53LM>.

114. See e.g., Benjamin Sutton, *Richard Prince Disowns His Ivanka Trump Portrait, Possibly Increasing Its Value*, HYPERALLERGIC (Jan. 13, 2017), <https://perma.cc/WP6V-55HX>.