U.S. Law's Artificial Cabining of Moral Rights: The Copyrightability Prerequisite and Cady Noland's *Log Cabin*

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INTRODUCTION

Elsewhere in this Issue, Regan A. Smith, General Counsel and Associate Register of Copyrights for the U.S. Copyright Office, reviews a number of copyright applications that have "test[ed]" the "creative spark necessary to register a copyright interest," including the Office's final decision to refuse copyright to an artwork by the artist Cady Noland, entitled *Log Cabin Façade* (hereinafter "*Log Cabin*").[1]

This sculpture—which "look[s] like the front of a log cabin" with "perpendicular side supports" made of "interlocking logs," the resulting structure "embellish[ed] with American flags draped over one of the window openings"—is also conceptual in nature, "deal[ing] with the failed promise of the American Dream."[2] Noland's work has been "extensively critiqued in many art-related publications," commands significant prices in the secondary market, and is included in "the permanent collections of major art museums including New York's Museum of Modern Art and the Whitney Museum of American Art."[3] A different version of *Log Cabin* has been called one of Noland's "grandest" works.[4]

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* Co-Chair, Art Law Group, Pryor Cashman LLP. This Article does not constitute legal advice nor represent the views of that firm. This Article was inspired by topics discussed at the 2019 Kernochan Center Symposium at Columbia Law School on Oct. 4, 2019, "Exploring Copyrightability and Scope of Protection," in which the author participated as a panelist.

1. Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J. L. & ARTS 343, 343 (2020). *See* Letter from Karyn A. Temple, Acting Reg. of Copyrights & Dir., U.S. Copyright Office, to Andrew Epstein, Esq., Counsel for Cady Noland, 4 (May 25, 2018), https://perma.cc/2RPT-DW35 (describing *Log Cabin* as "a simple representation of a standard log cabin facade with joinery" expressing "simple . . . rote designs . . . of a log cabin," ultimately concluding that the work contained insufficient "original and creative artistic or graphic authorship" for registration).

2. Memorandum in Opposition to Defendants' Motion to Dismiss Second Amended Complaint [hereinafter "OMTD SAC"], Exhibit 10 (Second Request for Reconsideration), Noland v. Janssen, No. 17-CV-5452(JPO) (S.D.N.Y. Apr. 2, 2018), ECF No. 53-10. Pryor Cashman LLP represents Defendants in this pending litigation.

3. Second Amended Complaint [hereinafter "SAC"] at 6, *Noland*, No. 17-CV-5452(JPO), ECF No. 71.

4. Andrew Russeth, *This American Life: Cady Noland's Art Feels More Prescient, Incisive, and Urgent Than Ever*, ARTNEWS (Mar. 27, 2019), https://perma.cc/L6UH-L3QE (discussing *Log Cabin Blank with Screw Eyes and Cafe Door (Memorial to John Caldwell)*).

Discussing *Log Cabin*, Ms. Smith notes that the Office must "apply the same standards regardless of [the] commerciality or artistic reception" of a work, and acknowledges that it is "sometimes placed in the odd position of asking, 'This work may be art, but *is it copyrightable?*'"[5] In her remarks at the Kernochan Symposium, Ms. Smith argued that "it would be wagging the dog" for the Copyright Office to "flip that question," that is, to make a determination regarding the copyrightability of a work based on its status or recognition *as art*.[6]

Unacknowledged during these remarks was the fact that a peculiar provision of the Copyright Act conditions one type of protection on *exactly such a determination*: Under § 106A, the author of a "work of visual art" has the right to "prevent any destruction of a work of recognized stature."[7] This provision, codifying the "[r]ights of certain authors to attribution and integrity," was inserted into the Copyright Act in 1990 as the result of the passage of the Visual Artists Rights Act ("VARA"), itself an attempt to bring U.S. copyright law into compliance with the Berne Convention's mandate that member countries must recognize "moral rights."[8] Moral rights are a "foreign concept" to U.S. copyright law, "akin to rights of personality or personal civil rights."[9] And yet, in order to be recognized as eligible for moral rights protection, an artwork must be "subject to copyright protection" generally.[10]

In currently pending litigation, Noland has sought to exercise the rights of attribution and integrity in relation to *Log Cabin*; in this context, the Office's denial of registration has resulted in complex legal arguments with both philosophical and practical implications.[11] Against the backdrop of the *Log Cabin* controversy, this Article probes the conflict between the values and objectives underlying moral rights versus the "dominant," economic theory of pre-existing copyright law. A critical question emerges: whether the "safeguards" imposed by limitations on the scope of copyrightability logically apply to the grant or denial of certain core moral rights protections for the single, original "copy" of an artwork.[12] Concluding that they do

5. Smith, *supra* note 1, at 347 (emphasis added).

6. Regan A. Smith, Remarks at the 2019 Kernochan Center Symposium (Oct. 4, 2019).

7. 17 U.S.C. § 106A(a)(3)(B) (2012); *see also* Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935 (2000).

8. *See* David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J 985, 986–87 (2014).

9. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42 (1998).

10. 17 U.S.C. § 101 (2016) (defining "work of visual art" as that term is incorporated into 17 U.S.C. § 106A).

11. *See generally* Noland v. Janssen, No. 17-CV-5452(JPO), 2019 WL 1099805 (S.D.N.Y. Mar. 8, 2019).

12. *See* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 320, 374 (2018) [hereinafter Adler, *Why Art Does Not Need Copyright*]. For the purpose of this Article, these limited-scope or "core" moral rights protections should be understood as comprising (1) the right to prevent (a) the intentional modification of an artwork that would be prejudicial to the artist's reputation, and/or (b) the destruction of that artwork, and (2) the right to disclaim authorship of an artwork which has been modified to an extent that it prejudices the artist's reputation. Items (1)(a)–(b) are properly considered subsets of the "integrity" right, and item (2) a subset of the "attribution" right. *See generally* Liemer, *supra* note 9, at 47–52; *see also* Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 266–67 (2009) [hereinafter Adler, *Against Moral Rights*].

not, this Article argues that recognition of an object as "artwork" by the relevant artistic community *should* "wag the dog" with respect to the artwork's entitlement to such core moral rights protections, irrespective of its copyrightability.

I. *LOG CABIN*'S LEGAL HISTORY

The saga of *Log Cabin* has been ongoing since at least 2014, when Noland learned that certain wooden elements of the work had been replaced following their deterioration as a result of the work's display outdoors.[13] In response, Noland attempted to disavow the work;[14] a secondary market purchaser to whom a sale of the work was pending consequently exercised a rescission option under the governing agreement and sued various parties in connection with the transaction.[15] The purchaser's case was disposed in 2016,[16] and in 2017, the artist filed the present lawsuit in connection with *Log Cabin*, bringing claims under, *inter alia*, VARA and the Copyright Act against a German collector (the original owner of the work, who had acquired it from Noland's dealer twenty-seven years earlier) and two German galleries.[17] Read liberally, Noland's Third Amended Complaint ("TAC") asserts that:

(1) Although the artist's original execution and sale of the work predated VARA's effective date of June 1, 1991, she subsequently created a derivative work eligible for VARA protection, by "authoriz[ing]" its purchaser to stain it a darker color brown;
(2) Defendants' conservation of *Log Cabin* violated Noland's VARA integrity right, and she is entitled to exercise her VARA attribution right to disavow the "distorted" or "mutilated" work;
(3) Defendants' conservation of *Log Cabin* also effected an unauthorized "copy" of the work, thereby violating Noland's exclusive reproduction right;
(4) Defendants' display of the conserved work violated Noland's exclusive display right; and
(5) Defendants' limited dissemination of certain images of the work to one or more prospective buyers (or other parties involved in the marketing of the conserved work for sale) violated Noland's exclusive reproduction right.[18]

The Southern District of New York had previously dismissed Noland's claims on the basis of her failure to assert a domestic predicate act justifying extraterritorial

13. Third Amended Complaint [hereinafter "TAC"] ¶¶ 25, 27, 53, *Noland*, No. 17-CV-5452(JPO), ECF No. 90. The conservation sourced components from her original supplier using the artist's original specifications. *Id.* ¶¶ 30–31.

14. *Id.* ¶ 54, Ex. D.

15. Complaint, Mueller v. Michael Janssen Gallery Pte. Ltd., No. 15-CV-04827(NRB) (S.D.N.Y. June 22, 2015).

16. Mueller v. Michael Janssen Gallery Pte. Ltd., 225 F. Supp. 3d 201 (S.D.N.Y. 2016).

17. Complaint, *Noland*, No. 17-CV-5452(JPO), ECF No. 1; Amended Complaint, *Noland*, No. 17-CV-5452(JPO), ECF No. 7.

18. *See* TAC, *supra* note 13, ¶¶ 6, 22–24, 64, 67, 79.

application of the U.S Copyright Act to defendants' conduct in Germany.[19] In the TAC, Noland sought to remedy this defect by alleging that the distribution of the marketing materials constituted an independent copyright infringement that occurred in the United States.[20]

At the time of press, defendants' motion to dismiss Noland's TAC remained pending. In support of this motion, defendants argue that the newly alleged domestic conduct would *not* constitute an independent infringement, because it is a "fair use" in support of the defendant artwork owner's "first sale" right, and because it didn't actually "further" or give rise to the alleged foreign conduct.[21] Defendants accordingly posit that even if *Log Cabin* is copyrightable, defendants' conduct abroad remains outside the jurisdiction of the District Court.

If defendants prevail on the motion to dismiss, Judge Oetken's ruling is likely to turn on the question of whether there was a domestic predicate act, on an application of existing "fair use" precedent, or both. Such a dismissal would *not* require the District Court to address the thornier questions presented by the case, including under what circumstances the conservation of an artwork crosses a line into reproduction or otherwise prejudices the artist,[22] or how an artist's integrity rights might conflict with the rights afforded to the work's owner under the "first sale" doctrine.[23] Similarly, an opinion in the defendants' favor is not likely to address the question of whether *Log Cabin* is copyrightable.

By contrast, if Noland's complaint survives dismissal, in order for her to assert a cognizable claim, *Log Cabin* would, *inter alia*, need to be recognized as copyrightable.[24] Defendants have repeatedly argued that because *Log Cabin* is not subject to copyright protection, neither the alleged creation of an unauthorized "copy" nor the display or distribution of photographic reproductions of such "copy" can constitute infringements.[25] Moreover, unless Judge Oetken overturns the

19. Noland v. Janssen, No. 17-CV-5452(JPO), 2019 WL 1099805, at *5 (S.D.N.Y. Mar. 8, 2019).

20. TAC, *supra* note 13, ¶¶ 35–41.

21. *See* Memorandum in Support of Defendants' Motion to Dismiss Third Amended Complaint [hereinafter "MTD TAC"] at 7, *Noland*, No. 17-CV-5452(JPO), ECF No. 94 (citing 17 U.S.C. §§ 107, 109(a); Stern v. Lavender, 319 F. Supp. 3d 640, 681 (S.D.N.Y. 2018)).

22. *See* Richard Chused, *Temporary Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUTER & TECH. L.J. 1, 62 (2019) (noting that the case "raises questions like . . . [u]nder what circumstances does a restoration . . . prejudice the honor or reputation of the artist?"); *see also* Susan Hapgood, *Remaking Art History*, 78 ART IN AM. 114, 116–17, 119 (1990) (discussing pre-VARA controversies including refabrication for exhibition of works by Carl Andre and Donald Judd, characterized by artists as a "gross falsification" and a "forgery," respectively; noting that "[t]he crucial issue . . . is how one views the original work . . . [h]ow much . . . needs to be replaced for it to be considered refabrication instead of conservation treatment?").

23. MTD TAC, *supra* note 21, at 20–22; *see also* Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 407 KY. L.J. 547, 548 (2018–2019); Adler, *Why Art Does Not Need Copyright*, *supra* note 12, at 263.

24. Noland's TAC accordingly seeks a declaratory judgment that *Log Cabin* "is a work of art having sufficient originality under the U.S. Copyright Act to be registered with the U.S. Copyright Office." TAC, *supra* note 13, ¶ 88.a.

25. *See* MTD TAC, *supra* note 21, at 13; Memorandum in Support of Defendants' Motion to Dismiss Second Amended Complaint [hereinafter "MTD SAC"] at 15, *Noland*, No. 17-CV-5452(JPO), ECF No. 75.

Copyright Office's finding that *Log Cabin* is not "subject to copyright protection," the artwork's uncopyrightability provides an independent basis to dismiss Noland's VARA claims.[26]

However, a closer look at those claims reveals that the rationale behind the denial of copyright protection does not logically extend to the denial of moral rights protection, and that recognition of a work's context *is* relevant to the moral rights analysis (where it is, in fact, already an explicit prerequisite for certain VARA protections).

II. DISCUSSION

While prior scholarship on the copyrightability challenges faced by postmodern artworks has emphasized the importance of an artwork's historical context, it has also implicitly accepted the flawed premise that goals of copyright protection and moral rights protection are linked. As a result, it has sought to remedy the "problem" of uncopyrightability, rather than the problem of corresponding ineligibility for moral rights.

A. THE "PROBLEM" OF, AND PREVIOUSLY PROPOSED "SOLUTIONS" TO, UNCOPYRIGHTABILITY OF POSTMODERN ARTWORKS

Legal scholars have repeatedly recognized that certain historically important works of postmodern art would not be copyrightable under various existing legal doctrines, including such works' status as (1) ideas not eligible for protection pursuant to the idea-expression dichotomy;[27] (2) utilitarian objects not separable from their pictorial, graphic, or sculptural features;[28] (3) the only (or one of a very limited number) possible expression of a concept, pursuant to the merger doctrine;[29] and (4) existing for only "transitory duration," thus failing to satisfy the fixation

26. "Where the Copyright Office denies registration . . . courts nonetheless make an independent determination as to copyrightability." Aqua Creations USA Inc. v. Hilton Hotels Corp., No. 10-CV-246(PGG), 2011 WL 1239793, at *3 (S.D.N.Y. Mar. 28, 2011); N.Y. Mercantile Exch., Inc. v. Intercontinentalexchange, Inc., 497 F.3d 109 (2d Cir. 2007). Defendants have also argued that *Log Cabin* is ineligible for VARA protection because (1) it was executed and sold prior to VARA's effective date; (2) the specific conduct alleged to have modified the artwork is expressly exempted by VARA; and (3) the alleged modifications are not prejudicial to Noland's reputation. *See* Memorandum in Support of Defendants' Motion to Dismiss First Amended Complaint at 15–18, *Noland*, No. 17-CV-5452(JPO), ECF No. 48.

27. *See* Cristin Fenzel, *Still Life with "Spark" and "Sweat": The Copyrightability of Contemporary Art in the United States and the United Kingdom*, 24 ARIZ. J. INT'L & COMPAR. L. 541, 551–52 (2007) (noting that "[i]n minimalist art, the idea itself may constitute a work . . . [b]ecause copyright law only protects original expression, artists like Opalka, Malevich, Haacke and Klein are out of luck . . .").

28. The question of utilitarian objects most directly impacts "readymade" works like Duchamp's *Fountain*. *See infra* notes 35–36 and accompanying text. *Log Cabin* cannot properly be considered a readymade, because it was fabricated at Noland's direction (albeit in the form of the façade of a classic log cabin).

29. *See* Lori Petruzzelli, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 125 (1995) (discussing Minimalist works, including Malevich's *White on White*, which takes the form of a white square in a white field).

requirement.[30] These doctrines have developed as "safeguards" against improper encroachment on the free speech rights of secondary users and against artist monopolies on ideas or forms that might thwart societal innovation.[31]

Linked to postmodernist copyrightability challenges are "the radical changes that occurred in art and art-making by the late 1960s," during which "many artists were challenging the institutional structures which circumscribed their practice," resulting in a "progressive de-emphasis of material aspects of art, such as uniqueness or permanence, and an increasing interest in the conceptual aspects of art-making."[32] *Log Cabin* must be viewed in the context of, and as responsive to, this historical analysis.[33] Although it has a physical form, it is composed of familiar materials used to create commonplace imagery; its originality lies in the intangible concepts, theories, or ideas underlying its execution and Noland's broader artistic practice.[34]

In an effort to remedy the perceived problem of uncopyrightability of postmodern art, scholars have identified a variety of "solutions." For example, using Duchamp's *Fountain* as an illustration, J. Alex Ward has suggested that the combination of a utilitarian object plus its "artistic context" should be recognized as subject to a copyright protecting the "placement of the urinal into that context, but not to the urinal itself."[35] Ward explains that such a copyright would "bar artworks which place

30. *See* Megan Carpenter & Steven Hetcher, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2228–30 (discussing works by Andy Goldsworthy which interact with uncontrolled elements of nature such as tide, current, and temperature, and thereby "invoke[] transience as key to his artistic approach," as well as works by James Turrell which "are comprised of light and ephemeral in nature"; concluding that both artists' practices may "preclude copyright protection for [their works] *per se*").

31. *See* U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES, A REPORT OF THE REGISTER OF COPYRIGHTS 28 (2019), https://perma.cc/XG2A-XZDT [hereinafter REGISTER'S REPORT] (citing discussion in *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003), of the idea-expression dichotomy as a free speech safeguard). *See also id.* at 325 (discussing inverse principle that "[c]opyright gives authors a limited monopoly over their works, and by doing so, the law overcomes the threat that cheap copies presumably pose to innovation").

32. Hapgood, *supra* note 22, at 119 (citing Lucy R. Lippard & John Chandler, *The Dematerialization of Art*, ART INT., Feb. 1968, at 31–36; LUCY R. LIPPARD, SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT FROM 1966–1972 (1973)); *see also* Adler, *Why Art Does Not Need Copyright*, *supra* note 12, at 285 (discussing Duchamp's 1917 "assault on the sacred boundary between art and everyday objects" as an "act of metaphorical destruction" and an "attack[]" on "the category of 'art' itself").

33. *See* Martha Buskirk, *Cady Noland, Redux*, THRESHOLDS, April 2019, at 1 (discussing *Log Cabin* in context of "the paradigm shift represented by Marcel Duchamp's readymade gesture—the artist's ability to establish a work through a declarative statement—[which] has become a core principle in a contemporary art market where object-centered evidence of authenticity is increasingly irrelevant").

34. *See* MTD SAC, *supra* note 25, at 8 (noting that *Log Cabin*'s "*concept*—that of selling a generic, manufactured utilitarian object as a unique work of fine art—is a provocative take on the 'readymade' concept previously explored by . . . Duchamp, echoed more recently by Minimalist artist Dan Flavin. . . . [t]he [w]ork also resonates in the context of American politics, raising questions about nationalism, territorialism, and land settlement"); *see also* Julia Halperin, *Art Dealers Strike Back at Artist Cady Noland in an Increasingly Philosophical Legal Dispute About a Restored Sculpture*, ARTNET NEWS (Apr. 5, 2018), https://perma.cc/7QRR-P532.

35. This seminal work consisted of a urinal placed sideways on a pedestal. J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. & ARTS 159, 181. Ward notes that copyrightability determinations based, in part, on context would require an assumption that not *all* elements of a work must be fixed, as context may "itself be an uncopyrightable concept," though he hedges

the same or similar readymades into the same or similar context, but would not bar the manufacture of the readymade itself."[36]

Another variant on this proposal is Glen Cheng's suggestion that "art status" should be adjudicated based on an aesthetic theory which prioritizes a work's historical definition,[37] and that as a result, readymades and pure-color works should be recognized as having "thin" copyright protection.[38] According to Cheng, while a readymade necessarily "derive[s] significant value from material in the public domain,"[39] its "original contribution" may be its creator's intent to foster "philosophical and introspective discussion between artworks reflecting on other artworks and even themselves as real objects-turned art."[40]

Like Ward, Cheng anticipates the criticism that "exten[sion of] copyright protection to ever-increasingly minimalist forms of art could significantly stifle innovation."[41] Accordingly, he posits that this "thin" protection would extend only to "deliberate copying" (as in the case of an artist copying the exact size, shape, and color of Klein's *Blue Monochrome*) and further proposes that the Copyright Act be amended to specifically exempt the "infringement" of readymades by individuals using identical objects for their conventional utilitarian purpose,[42] with compulsory licenses granted to "manufacturers who seek to enter a product market of a good that

that an artist could "fix" the contextualization of a work by photographing its physical placement and/or "supplementing" with a "written description" of such context. *Id.* at 182. One wonders what, then, would actually be copyrighted—the "context," or the actual photograph, or the work of *literary* authorship comprising the explanation?

By contrast, another scholar has theorized that where an artwork is acquired by a purchaser as a set of plans, diagrams, or schematics, the realized (that is, fabricated and installed) construction made from those plans would be a "derivative work" of the instruction set—"expressive items that . . . are based on the original but have 'recast, transformed, or adapted' it." Chused, *supra* note 22, at 15 (citing 17 U.S.C. § 101 (2017)).

36. Ward, *supra* note 35, at 186.

37. Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 UCLA ENT. L. REV. 113, 149–50 (2012). *See also* Robert Kirk Walter & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community Practice Standard*, 109 NW. U.L. REV. 343, 376–79 (2015) (advocating for courts' evaluation of artworks to be guided by the "community of artistic practice from which the works in question hail").

38. Cheng, *supra* note 37, at 115, 160 (discussing Yves Klein's Minimalist masterpiece *Blue Monochrome*, "consist[ing] of a . . . canvas whose surface is entirely covered in one shade of blue," the value of which lies in the artist's "commit[ment] to abstract representation of an idea via the presentation of a single color"); *id.* at 158–60 (discussing application of "thin copyright" concept derived from *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co*., 499 U.S. 340, 349 (1991)); *see also* Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity*, 25 COLUM. J.L. & ARTS 1, 5, 19 (2001) (arguing that the bank at issue in *L. Batlin & Son, Inc. v. Snyder*, 526 F. 2d 486 (2d Cir. 1976), should have received "thin" copyright protection, which "would not in the slightest prevent others wishing to model directly from the public domain bank" on which it was based).

39. Cheng, *supra* note 37, at 159 (citing John C. Vaughn, *Comments on Rulemaking on Exemptions on Anticircumvention*, Comment 28, COPYRIGHT.GOV (Dec. 18, 2002), https://perma.cc/QS9C-SJPV).

40. *Id.* at 152–53.

41. *Id.* at 165.

42. *Id.* at 158–60; *see also* Katherine L. McDaniel & James Juo*, A Quantum of Originality in Copyright*, 8 CHI-KENT J. INTELL. PROP. 169 (2009) (stating that "'thin' copyright protection . . . prevents only virtually identical copying" and thus mitigates concerns that "allowing the registration of a so-called simple work could provide an improper monopoly on standard design elements and unduly curtail other creative works").

has subsequently become accepted by the [art world] as a readymade artwork."[43] Under such a compulsory license system, for example, the makers of utilitarian shovels resembling Duchamp's *In Advance of the Broken Arm* (a readymade consisting of a mass-produced snow shovel hung from a ceiling) would be free from liability for infringement of that artwork.

Both Ward and Cheng thus advocate for a copyright system that evaluates the context both of the *creation* of an artwork (where artistic intent and meaning are relevant to the creativity threshold for copyrightability) and of the making of subsequent *reproductions* (where the purpose and intent of the reproducing party are relevant to the question of whether the conduct constitutes infringement).

The application to *Log Cabin* of this theoretical formulation for creativity—comprising object plus "artistic context"—could arguably lead to a recognition of its copyrightability ("thin" or otherwise).[44] Such recognition is, however, perhaps the wrong end goal altogether, to the extent that Noland's concerns relate not to the control of reproductions, but to the integrity of the original work. Yet, proposals seeking to amend the standards for *copyrightability* to account for currently unregistrable works have largely failed to address the importance of moral rights other than as an ancillary benefit of copyright status, or to explore why these two rights regimes are bound together by the Copyright Act, and whether they should or must be.[45]

B. DISCORD BETWEEN TRADITIONAL COPYRIGHT INCENTIVES AND OBJECTIVES OF MORAL RIGHTS

In her article *Why Art Does Not Need Copyright*, distinguished scholar Amy Adler examines the "foundational premise of intellectual property law that copyright protection is essential for the progress of the arts" and that "uncontrolled copying would kill the incentives for artists to create," observing that "copies play almost no economic role in the art market, and when they do the role is trivial," such that in reality, "copyright provides no significant monetary incentive for visual artists to create."[46] Elaborating that very few contemporary artists command a significant reproduction market, Adler reasons that most contemporary artists rely on the first

43. Cheng, *supra* note 37, at 167.

44. Indeed, the political, philosophical, and presentational contexts for *Log Cabin* are precisely what drive its art historical significance. Noland's work "powerful[ly] critique[s] . . . the state of American nationalism and identity." *See* OMTD SAC, *supra* note 2, Exhibit 11 (Institute of Contemporary Art, Boston, Objectification Process). When *Log Cabin* was initially presented in the United States, Noland directed that the exhibition be undertaken by gallery employees "dress[ed] up in Wild West costumes," including holsters and chaps. *See* Russeth, *supra* note 4.

45. *See* Cheng, *supra* note 38, at 161 ("One of the most important benefits of copyright protection is that the author of the copyrighted work becomes eligible for protection of his 'moral rights' over the work," including the "fundamental rights . . . to prevent destruction or defacement."). One notable exception is Carpenter & Hetcher, *supra* note 30, at 2224, 2271 (discussing proposal for VARA to cover artworks otherwise uncopyrightable due to their use of live and impermanent media).

46. Adler, *Why Art Does Not Need Copyright*, *supra* note 12, at 320, 323. *See also* Petruzzelli, *supra* note 29, at 115, 118 (noting that "post-modern art continues to thrive without economic incentives").

sales of their works—sales of the original "copy"—to generate revenue.[47]

Moral rights under U.S. federal law, of course, do not focus primarily on an author's *economic* entitlement in relation to a creation, but rather on a variety of *reputational* concerns. Unlike the broader provisions of the Copyright Act, VARA "focuses upon the physical object itself, and does not curb reproductions, displays, commentaries and the like."[48] Moral rights instead provide protections for an author's personality rights in relation to, and the physical sanctity of, the original "copy" of an artwork.[49]

Cady Noland's attempt to disavow *Log Cabin* has been described as an "engineered . . . challenge to the status of the artwork as a commodity subject to be freely traded on the market," with the objective of "ruin[ing its] market value."[50] In doing so, another journalist has argued, Noland "has formed another kind of art, an intervention that is (performance) art as poison pill."[51] While perhaps an extreme example, the purpose of Noland's attempted exercise of the attribution right is fundamentally distinct from that served by an exercise of any § 106 right.[52]

Where an artist like Noland seeks to *de*-value an artwork or take it out of market circulation entirely, the "safeguards" discussed in Section II.A of this Article are simply inapplicable, as their objectives—of preserving free speech rights and preventing artist monopolies—are irrelevant. Noland's efforts with respect to *Log Cabin* illustrate the flawed premise of linking § 106A eligibility to the requirement that such works be "subject to copyright." Affording protection against alteration of the *original copy* of an artwork does not deter from the Copyright Act's fundamental

47. Adler, *Why Art Does Not Need Copyright*, *supra* note 12, at 334–36 (citing John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 107 (1993)); *see also* Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 572, 612 (2000) (noting that intellectual property laws "are largely irrelevant to the production of unique [art]works, even when their production is economically motivated," since "the economic-incentive model assumes that the protected work is sold in multiple copies"); Bradley & Frye, *supra* note 23, at 552 ("[F]or many artists, copyright is essentially irrelevant . . . it giv[es] them the exclusive right to reproduce and distribute their work. But most artists don't sell copies, they sell originals . . .").

48. Gorman, *supra* note 38, at 10–11; *see also* 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:23 (1994).

49. REGISTER'S REPORT, *supra* note 31, at 6 (moral rights are "non-economic rights that are considered personal to an author," based on the central idea that "a creative work . . . actually expresses the personality of the author"). *See also* Liemer, *supra* note 9, at 49 (goal of attribution right is "to protect the personal association between the artist and her art . . . "); *id.* at 44 (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").

50. Frazer Ward, *Refusals, Disclaimers, and Denials: Cady Noland's Recent "Work,"* 14 PERFORMANCE PARADIGM 1, 3–4, 13 (2018). Disavowal functions as de-authentication, and Adler notes that authenticity is a "powerful" art market norm: "[E]ven works that experts have called 'fabulous' and 'beautiful' . . . became worthless once declared inauthentic. Indeed, an art-world declaration that a work is inauthentic is the equivalent of an economic death sentence, rendering a work unsalable . . . ." Adler, *Why Art Does Not Need Copyright*, *supra* note 12, at 322, 345–46.

51. Seph Rodney, *The Art of Cady Noland as Poison Pill*, HYPERALLERGIC (July 21, 2015), https://perma.cc/5SQT-KQP5.

52. Noland has been criticized as "abusing" VARA by invoking it when "arguably improper," thereby "depriv[ing] collectors of the value of her property." *See* Sinclaire Marber, *They Can't Take That Away From Me: An Indemnification Solution to Unmerited VARA Claims*, 41 COLUM. J.L. & ARTS 319, 320, 327, 338 (2018).

"public benefit" objective.[53]

C. RETHINKING THE STANDARD FOR VARA ELIGIBILITY: UNCOUPLING COPYRIGHTABILITY AND MORAL RIGHTS

If we accept that the above-discussed copyrightability "safeguards" do not further the distinct goals of moral rights, and conversely that the protections afforded by moral rights do not inhibit the goals of the broader Copyright Act, then the logical question remains: What *should* be the eligibility criteria for the specific moral rights protections at issue in a case like that of *Log Cabin*? While reference to the historic context of an artwork is likely unworkable as a copyrightability metric, VARA already incorporates a context-based eligibility standard for certain of its protections.[54] Indeed, VARA's reference to an artwork's "recognized stature" within the relevant artistic community already serves as an additional "sub-boundary that applies to an artist's right to prevent the destruction" of an artwork.[55]

Numerous commentators have criticized "recognized stature" as having been subject to overly narrow judicial application, or otherwise posing too high a bar.[56] Moreover, VARA protections are already limited, by media, to a narrower category of "works of visual art" than those that qualify for copyright protection;[57] are nontransferrable;[58] and also enjoy, with limited exceptions, a shorter term than copyright,[59] resulting in the statute being criticized as weak, anemic, and insufficient.[60] In response to these criticisms, the Register of Copyrights' report

53. *See id.* at 326.

54. *See* Petruzzelli, *supra* note 29, at 145.

55. Keshawn M. Harry, *A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTELL. PROP. L. 193 (2001). For the statutory text, see 17 U.S.C. § 106A(a)(3)(B) (2012). *See also* Carter v. Helmsley-Spear Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (establishing standard for "recognized stature" including, *inter alia*, recognition by art experts and other members of the artistic community), *rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995); Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 439 (E.D.N.Y. 2018) (considering mainstream and social media recognition of the disputed artworks); REGISTER'S REPORT, *supra* note 31, at 78–79 (advocating for consideration of artwork "within the appropriate community and context for that particular medium").

56. *See* Art Law Committee, *Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017 Notice of Inquiry*, N.Y.C. BAR (Mar. 27, 2017), https://perma.cc/PN64-T3T2; *see also* Robinson, *supra* note 7, at 1963; Martina Hinojosa, *Challenges for Emerging Art Forms Under the Visual Artists Rights Act*, 11 J. TELECOMM. & HIGH TECH. L. 433, 447 (2013) (suggesting recognized stature is too high a bar as it "limits protection to those artists who have achieved a certain level of fame"); Harry, *supra* note 55, at 194–95 (arguing that "recognized stature" may be "too effective a gate keeper," since "[a]rt commentators . . . are not able to testify about the recognized stature of a piece of visual art in the future" and recognized stature can "decrease or increase" over time).

57. *See* 17 U.S.C. § 101 (2016) (including in the definition of "work of visual art" paintings, drawings, prints, photographs, or sculptures existing in a single copy or in a limited edition of 200 or fewer copies or casts, but excluding posters, maps, models, applied art, audiovisual works, books, advertising, and other forms of expression); Nicoline A. van de Haterd, *Vermeer v. Pollock: A Case for the Expansion of Moral Rights in the United States*, 57 DUQ. L. REV. 145, 164–66 (arguing for expansion of § 101's definition of "work of visual art," including to nonvisual works).

58. 17 U.S.C. § 106A(e)(1) (2012).

59. *Id.* § 106A(d)(1) (limiting term of protection to life of the author).

60. Bernard J. Pazanowski, *Controversy Over Football-Field-Sized Exhibit Supports Artist's VARA*

Authors, Attribution, and Integrity: Examining Moral Rights in the United States recommended that "Congress consider a statutory amendment to ensure that the recognized stature provision . . . supports the overall goals of VARA," including by "reflect[ing] that the recognition of a work of art can originate from . . . the local community where the art resides."[61]

Yet the same report devoted a scant two paragraphs to the question of whether VARA should apply to uncopyrightable art,[62] mostly in response to a comment the Office received from Chapman Kelley, the creator of the artwork found uncopyrightable in *Kelley v. Chicago Park District* due to its lack of human authorship and fixation.[63] Concluding simply that "[e]xtending VARA to non-copyrightable works could require a statutory amendment and would threaten the creation of the very kind of 'mutant copyright' warned against by the Supreme Court in the *Dastar* case," the Copyright Office further justified its rejection of this proposition on the basis that VARA's personality-oriented rights should not be granted to works "lacking sufficient original, *human* expression for copyright protection."[64]

With great respect for the Office (not least the esteemed representatives who generously shared their insights at the Kernochan Symposium), I submit that the U.S. Supreme Court's concerns as expressed in *Dastar* addressed "limit[ing] the public's 'federal right to copy and to use' expired copyrights," and that such concern arose in an inapposite context: an attempted claim under the Lanham Act for *un*accredited copying in the form of "reverse passing off."[65] As discussed above, the core moral

Suit Against Museum, 78 U.S.L.W. 1469 (2010); Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 452 (2009); *see also* Shipley, *supra* note 8, at 1048; *but see* Adler, *Against Moral Rights*, *supra* note 12 (arguing that moral rights are outmoded and unnecessary given contemporary art's basis in or focus on destruction, rather than form).

Other pre-existing limitations on the field of artworks protected by VARA include its effective date of June 1, 1991 (which precludes protection for many important modernist works), and the statute's relatively broad enumerated exceptions to the types of actionable modification. *See* 17 U.S.C. § 106A(c) (2018). It is these limitations, the defendants in the *Log Cabin* case argue, that would prevent the work there at issue from being eligible for VARA protection even if it *were* copyrightable, *see supra* note 26, thereby illustrating the principle that copyrightability itself need not be used as a "gatekeeper" for moral rights protection.

61. REGISTER'S REPORT, *supra* note 31, at 80. In upholding the District Court for the Eastern District of New York's grant of damages to a group of aerosol artists whose works were destroyed by a property developer, the Second Circuit recently adopted just such a broader test for "recognized stature," that is, recognition "by *a relevant community*" that a work is "of high quality, status, or caliber that has been acknowledged as such." Castillo v. Cohen, 950 F.3d 155, 166 (2d Cir. 2020) (emphasis added).

62. REGISTER'S REPORT, *supra* note 31, at 70–71.

63. 635 F.3d 290, 292 (7th Cir. 2011).

64. REGISTER'S REPORT, *supra* note 31, at 71 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003), and referencing the *Kelley* court's characterization of the disputed work in that case). The "lack of human authorship" justification for a nonextension of rights rooted in "personhood" applies only to a very narrow category of artworks incorporating natural or mechanical elements and does *not* apply to a large majority of postmodern works facing copyrightability challenges, whether on the basis of the idea-expression dichotomy, status as a utilitarian object (*i.e.*, readymade), or the merger doctrine. Notably, *Log Cabin* is among the ranks of historically important works for which a lack of human authorship was not the bar to copyrightability.

65. REGISTER'S REPORT, *supra* note 31, at 42–44.

rights on which this article focuses—the rights to prevent prejudicial modification to or destruction of an artwork and to *disavow* a prejudicially modified artwork—do not undermine such federal rights. No copying is implicated,[66] and no privilege should be accorded to public "use" that irreparably destroys the kind of unique work that Congress has recognized as embodying its author's personality.[67]

III. CONCLUSION

While the "recognized stature" standard would benefit from clarification through statutory amendment, I believe that VARA's goals of "protecting the moral rights of visual artists and in turn, preserving their contributions to culture" would best be served in the case of core integrity and attribution claims by eliminating the copyrightability prerequisite in favor of such a refined standard—or a similar community-based standard.[68] Copyrightability and moral rights need not be linked,[69] and tying eligibility for VARA protection instead to an artwork's regard in the relevant community would be consistent with Congress' original intent for the

66. *See id.* at 61–62 (discussing Congress' understanding that "when an original work of visual art is modified or destroyed, 'it cannot be replaced'" and that visual artists have a particular need "to protect and control the uses of their works, which tend to exist in single copies," thus "not[ing] the important relationship between a single copy of a work that embodies an artist's personality and moral rights protection").

67. Amy Adler identifies an interesting, albeit relatively rare, exception to this presumption: In some cases, artists make "a new work of art by attacking an old one." Adler, *Against Moral Rights*, *supra* note 12, at 284 (discussing "French performance artist [Pierre Pinoncelli] using a hammer to attack the venerated 1917 sculpture *Fountain* by Marcel Duchamp"); *see also* Hakim Bishara, *"It Tasted Like $120,000," Says Artist Who Ate Maurizio Cattelan's Infamous Banana Artwork*, HYPERALLERGIC (Dec. 9, 2019), https://perma.cc/86TZ-33BJ (discussing performance artist David Datuna eating installation work by Maurizio Cattelan consisting of a single banana affixed to a wall at Art Basel Miami Beach; interestingly, Datuna described the work as "not a banana," but "a concept" and "all about ideas," likening Cattelan to Duchamp, and further characterizing his own action as "performance art"). In these rare instances, a court might weigh the recognized stature of *both* the original work and the subsequent work-via-destruction, in order to determine whether the integrity of the former was violated.

68. REGISTER'S REPORT, *supra* note 31, at 80. While this shift would likely result in the ineligibility of works by emerging postmodern artists whose works have not yet achieved community recognition, I submit that it would nevertheless be a vast improvement over the current state of affairs.

69. *See* Carpenter & Hetcher, *supra* note 30, at 2271 (noting VARA's language providing for rights as distinct from copyright); Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 874 (2007) (stating that although "in most . . . countries, moral rights protection attaches to works that are subject to copyright protection," certain "[i]nternational instruments that attempt to situate intellectual property rights within the discourse of human rights do *not* necessarily require a work to be copyrightable in order to receive moral rights protection" (citing International Covenant on Economic, Social and Cultural Rights, art. 15(1)(c), Jan. 3, 1976, S. Exec. Doc. D, 95-2, 993 U.N.T.S. 3, 5)); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975–78, 987–1000 (2007).

The disconnect between VARA and § 106 rights is actually baked into the relevant statutory provisions: § 106A(a) provides that the integrity and attribution rights are "independent of the exclusive rights provided in [S]ection 106," and § 106A(e)(2) notes that "[o]wnership" of VARA rights "is distinct from . . . any exclusive right under a copyright in that work." Section 106A(b) goes further, actually contemplating VARA rights being held by the author of a "work of visual art . . . *whether or not [such] author is the copyright owner*" (emphasis added).

definition of VARA-protected works.[70] VARA's other gatekeeping mechanisms would continue to sufficiently restrict its application, such that the inapt standard of copyrightability need not also thwart meritorious moral rights claims.

70. *See* H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915 (noting intention for courts to "use common sense and generally accepted *standards of the artistic community* in determining whether a particular work falls within the scope of the definition") (emphasis added).