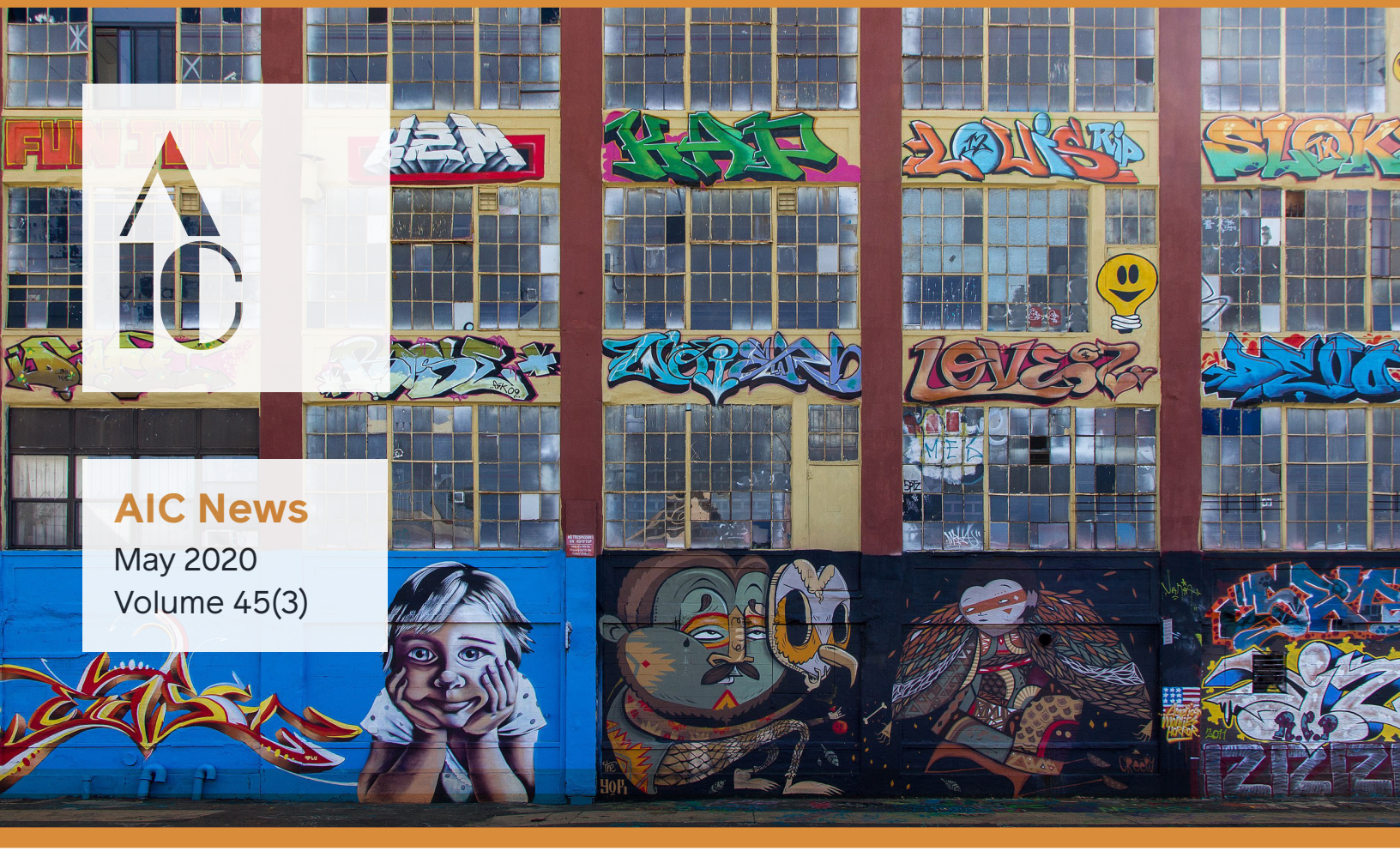

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A graffiti covered wall at 5 Pointz, June 2011. Photo by Petter Lindgren, Wikimedia.

VARA and the Conservation Profession

By Christopher J. Robinson for CAN!

The Visual Artist Rights Act (VARA), codified as part of the Copyright Act, 17 USC § 106A *et seq.*, (effective 1990), provides moral rights protections to artists for their paintings and drawings, and limited-edition prints, sculptures and photographs. Because of the power of its remedies, all conservators should be aware of the act's provisions, not just to protect themselves against disputes with artists, but also on behalf of collectors, galleries, auction houses, and insurance companies, whose property may be seriously impacted by a conservator's work.

There are two basic rights. First, a right of **attribution** which protects artists' right to have their name associated with their works, and to disassociate or disavow works that are not by them.[1] Second, a right of **integrity** which allows the artist to prevent, or obtain damages for, the intentional distortion, mutilation, or other modification of a work by the artist or the intentional or grossly negligent destruction of a work of recognized stature.[2] Unlike copyright, the rights are personal to the artist and so expire on the artist's death. And unlike copyright, they apply only to the original physical work of art, not to any copy or reproduction of it. VARA does not protect a work for hire, nor any work created before 1990, unless the earlier work is still in the possession of the artist. It can be waived subject to strict written requirements. The remedies are the same as those under the copyright act – statutory or actual damages, injunctions, and attorney's fees to the prevailing party.

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VARA and the Conservation Profession

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Conservators may be implicated in VARA disputes in several ways.

To begin, conservation may be implicated in the determination of whether a work has been effectively destroyed or merely modified or damaged. Conservators are used to preparing reports on the amount and reversibility of damage to artwork for use in an insurance claim or to assess the amount of damages in a negligence dispute. Note that these reports apply to moral rights cases as well. When the City of Los Angeles whitewashed Kent Twitchell's iconic mural of the *Old Lady of the Freeway* in 1986, the US$175,000 settlement under the state moral rights precursor to VARA was tied in part to the estimated cost to repair the work.[3]

But in VARA litigation, the conservator's estimate of the scope of the damage and possible remediation may also determine whether the plaintiff has any claim at all. Under the statute, a plaintiff claiming that a work of art has been destroyed must establish that it had "recognized stature" (i.e., had merit that was recognized by members of the artworld or the relevant community), whereas a plaintiff claiming that the work was merely damaged or altered in some way has no such burden. We can see the unexpected impact of this distinction in the 2004 *Scott v. Dixon* decision.[4] Linda Scott, the sculptor of the well-known *Stargazer Deer* on the east end of Long Island, sued the owners of Scott's smaller replica of that work alleging that they had violated her right of integrity under VARA by damaging the work in moving it from their garden and storing it improperly. Plaintiff's expert, evidently hoping to maximize damages, testified that the rust and malformation of the metal sculpture could not be reversed and thus the work was destroyed. Defendant's expert testified that any damage could be repaired. Unfortunately, because the judge credited the plaintiff's expert, plaintiff was then required to show that the destroyed sculpture had recognized stature, which she could not. Accordingly, judgment was granted to the defendant and the plaintiff got nothing.

Elsewhere in VARA, condition and conservation are explicitly addressed. Key exceptions to VARA rights are those for general wear and tear and for damage in conservation. 17 USC § 106A(c) states that:

> (1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).
>
> (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

Thus, the fact that a work requires conservation because of general wear and tear or the inherent nature of the materials used does not give rise to any VARA liability on anyone's part for the work's physical condition. Similarly, no change to the work in the course of conservation (including any damage or even destruction) can support a claim under the right of integrity unless it were caused by gross negligence. Note that the statute is deliberately silent as to whose gross negligence counts – if the restorer were grossly negligent, then the restorer may be liable. But the owner of the work may be

Notes

These are expanded upon in the References section.

[1] 17 USC § 106A(a) (1) and (2).

[2] 17 USC § 106A(a)(3).

[3] Latimes.com/archives/la-xpm-1992-03-20-ca-4301-story.html

[4] 309 F.Supp.2d (EDNY 2004)

liable independently if his choice of conservator were grossly negligent or if the misguided restoration work was done at the specific direction of the owner.

This was the situation in a 2001 case *Flack v. Friends of Queen Catherine Inc*.[5] Flack had been hired by the Friends group to design a monumental sculpture of Queen Catherine of Braganza for a site in Queens on the East River overlooking Manhattan. The Friends contracted with a foundry, Tallix, to create four progressively larger bronze sculptures culminating in the 35 ft. tall figure for the site. The work stalled, and when revived it was discovered that the huge clay model for the head of the sculpture had been damaged by exposure to the elements on the foundry grounds. Although Flack offered to repair the clay head for an additional fee, Tallix at the Friends suggestion hired one of Flack's assistants (David Simon) to do the work. But that assistant was not up to the task and, having no training in conservation, allegedly botched the job.

Flack sued the Friends organization, its president, and Tallix, but notably not the assistant who had done the "conservation" work itself. Flack's theory was that hiring Simon was grossly negligent because the defendants knew that Simon worked only as her assistant, had never undertaken any significant work without her supervision, had no experience in dealing with the special difficulties of sculpting a monumental work designed to be seen from below, and had no conservation training at all. The defendants countered that they had hired Simon only to repair the face, and any modification that took place as a result was exempt from VARA under the preservation exception. On an early motion to dismiss, the Court agreed that Simon's work was primarily one of conservation, but found that the complaint alleged sufficient facts that, if true, stated a claim for violation of Flack's VARA right of integrity for gross negligence. The case was then settled before the issue could be litigated further. Although Simon was not a named defendant in the case, conservators would be wise to include in their contracts indemnification for claims under the VARA integrity right unless the conservators specifically were adjudged to have been grossly negligent in carrying out their assignment.

It is often forgotten, however, that the wear and tear and conservation exceptions are only to VARA's right of **integrity**, 17 USC. § 106A(a)(3). They do not apply to the right of **attribution** under 17 USC. § 106A(a)(1) and (2). A work therefore may have degraded through no fault of the owner simply because of the inherent nature of the materials used by the artist.

In such a case an artist may invoke their attribution right and claim that the work is so changed as to be no longer a work by them. Similarly, conservators should be aware that the work they do to restore or preserve a painting, drawing, sculpture, print or photograph, may prompt the artist to disavow the work completely on the grounds that it has been modified or distorted such that its very existence is injurious to the artist's reputation. Though the conservator acting under a client's instructions may evade liability, the owners of the work may find themselves with a completely unmarketable work of art.

Relatively few artists have gone so far as to disavow their own work, but this is a problem that has the potential to seriously undermine the contemporary and modern art market.[6] No work of art is entirely stable, and at what point does the fading of a pigment or the crumbling of organic matter in a sculpture become so pronounced that the artist may exercise his VARA disavowal right and the work's value essentially plummets to zero? However talented a restorer may be, many significant artists will only permit restoration work to be carried out by a particular practitioner authorized by the artist or the artist's gallery. While this may help prevent some of the worst restoration abuses that provide fodder for the internet, it also creates monopolies that raise costs and stifle opportunities for talented newcomers. While it may give the artists comfort that their works are being cared for by expert restorers who have gained extensive expertise in particular art practices specific to the individual artist, it removes the benefit of that experience from others.

Notes

These are expanded upon in the References section.

[5] 139 F. Supp.2d (S.D.N.Y. 2001).

[6] Insurance companies are already having to deal with the loss in value of damaged works due to the **potential** of disavowal by the artist

The problem impacts not only collectors and restorers, it occurs in other parts of the artworld, for example the auction world and in real estate.

When Sotheby's was consigned a Cady Noland work on aluminum, the artist objected to its sale based on damage to the corners and threatened to exercise her VARA rights and disavow it. Sotheby's invoked its standard consignment terms which permitted it to withdraw from a sale any work where in its discretion "there is doubt as to the [work's] authenticity or attribution." The consignor sued both Sotheby's and Noland, arguing that the damage was minimal and that the artist's mere assertion was insufficient to cancel the sale. But he lost in the lower court and on appeal on contractual grounds – the artist's assertion and the threat of litigation was sufficient for Sotheby's to justify the withdrawal under its consignment contract, without examination of the merits of the artist's claim.[7]

Another intersection of VARA with the conservation profession is in the statutory provisions for works of art incorporated into buildings. Under the buildings exception,[8] the creator of any work of visual art that is incorporated into the fabric of a building (for example, a mural or sculpture) has no VARA right of integrity in that work of art if its removal may damage or destroy it and the artist and building owner have acknowledged that fact in a signed writing. If the work of art **can** be removed without damaging it, the building owner may still go ahead and destroy it without liability only if he makes reasonable efforts to give the artist 90 days' notice of removal and permit the artist, at the artist's expense, to reclaim it. Thus, a case may turn on whether an incorporated work may or may not be removed without damaging or destroying it.

This scenario arose in the recent 5Pointz case, where a group of graffiti or aerosol artists sued a developer who wished to demolish an old factory complex in Queens, New York, to build a large residential development. There was testimony that the works could have been safely removed, but building owner failed to give the artists the 90 days' notice they were entitled to before whitewashing them, resulting in a US$6.7 million judgment against him.[9] These days most artworks can be successfully, if expensively, removed from the fabric of a building, but such a determination typically requires expert testimony from a conservator that removal is possible (or would have been possible if the work is already destroyed).

Although VARA is a narrow statute, it packs a punch. Conservators of fine art take note.

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Notes

These are expanded upon in the References section.

[7] *Marc Jancou Fine Art Ltd v. Sotheby's et al.*, 2012 NY Slip Op 33163(U) (NY Co. Nov. 13, 2012); aff'd, 107 A.D.3d 637 (1st Dept. 2013).

[8] 17 USC § 113(d) https://www.govinfo.gov/app/details/USCODE-2011-title17/USCODE-2011-title17-chap1-sec113

[9] See *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020)

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VARA, The Visual Artists Rights Act of 1990. 17 USC § 106A(a)(1) and (2). https://www.govinfo.gov/content/pkg/USCODE-2011-title17/pdf/USCODE-2011-title17-chap1-sec106A.pdf

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