

## *Freedom to restore and moral rights*

### **Dialogue between Sharon Hecker, art historian, and Giuseppe Calabi, lawyer**

#### **Prologue**

Can a living artist deny her own work on the grounds that, following a restoration that she has neither carried out nor authorized, the work can no longer be traced back to her?

This question emerged in a recent case decided by an American federal court in a complex dispute between a German gallery and one of its clients and Cady Noland, a well-known American artist.

In 1990 the collector bought a wooden sculpture entitled *Log Cabin Façade* from the artist. The sculpture represents, in real size, the facade of a cabin made of wooden logs.

A few months later, the collector asked the artist for permission to paint the sculpture so that it could be placed outdoors, thus protecting it from the weather. The artist agreed to the collector's request and from 1995 to 2000 the work was exhibited outdoors in a museum in Germany.

Over the years, the logs and all the wooden components of the work have seriously deteriorated to such an extent that the collector, on the advice of a restorer, contacted the same American supplier used by the artist and had trunks similar to the original ones sent to Germany, which was restored (perhaps it would be better to say reconstructed), replacing the new logs and all the wooden components of the work, but faithfully following the design of the original façade.

After the restoration, the collector, through a German gallery, tried to sell the work in the United States, but met with the opposition of the artist, who repudiated the work, effectively preventing its sale.

#### **Giuseppe Calabi:**

Noland brought a claim against a collector and gallery owner before a US District Court in New York alleging the infringement of the provisions introduced in 1990 by the Visual Artists Right Act (VARA), which give the artist the right to prevent the use of his/her name as the author of a work in the event that someone makes changes to his/her work that are harmful to his/her honor or reputation (moral right).

This is not the first time that the artist takes an active role in the protection of her moral right: the case between an American collector and Sotheby's is well known, in which the auction house decided to withdraw a work by Noland (*Cowboys Milking*, 1990) from the auction, following a request by the latter, who had denounced that due to a poorly executed restoration, the work could no longer be considered "her" work. The question was resolved in favor of Sotheby's as the mandate to sell gave it the right to withdraw a lot if there were doubts about its authenticity or attribution.

In our case, the artist also denounced the violation of her copyright, claiming that although the work had been reconstructed in Germany, the gallery had sent photographs and drawings of the work to the potential American buyer and the logs used for the reconstruction came from an

American supplier. Based on this allegation, the plaintiff tried to meet the territorial test universally required in copyright laws of many jurisdictions, including the US.

The question is delicate: the judgment does not clarify what was the degree of accuracy by which the collector had the work restored and whether the result of the restoration was so poor as to offend the honor and reputation of the artist. Certainly it would have been advisable to involve the artist and ask the artist for permission to restore the work or the indication of a restorer trusted by the artist after having ascertained the serious damage caused by the fact that for 5 years the work had been exhibited in a place open to the weather and climatic changes. Moreover, the collector had asked Noland for permission when he decided to paint the work.

In Italy as well, artists often ask to be involved in restorations, and article 21 of the Italian copyright law gives them the moral right to oppose any modification that could be detrimental to the artist's honor and reputation, just like the aforementioned US provisions. In Italy this right also belongs to relatives (spouse, descendants and ascendants: art. 23 of the Italian copyright law), while in the United States it ceases with the death of the artist.

Regardless of the technical aspects on which is the applicable law (American or German law, where the reconstruction of the work took place), it seems to me that there is a fundamental contradiction in this case: on the one hand, an artist can argue that a poorly restored work can no longer be attributed to her hand and, for this reason, she repudiates it; on the other hand, how can this argument be consistent with the allegation that the sale of that work or the prodromal activities to the sale (purchase of the trunks necessary for the reconstruction and sending photographs in support of a possible sale of the restored work) constitute a violation of the artist's copyright, i.e. the artist's right to control the reproduction (even photographic) of his/her works ?

In other words, if the artist claims that the restored work is no longer "her" work and, therefore, cannot be exhibited and sold as such, can she simultaneously claim that the (reconstructed) work is an unauthorized reproduction and therefore constitutes a violation of her copyright?

The artist could also argue that the reconstructed work could be considered a "derivative" work or as our copyright law states a "creative elaboration" of the original work and therefore (regardless of the injury to her honor and reputation) would require her authorization.

The federal court decided in favor of the collector: the motivation is complex, but the point of moral law is based on the fact that the VARA came into force after the creation of the work and, therefore, the artist would not be entitled to the rights granted by VARA.

However, the lesson learned from this case is that if you want to sell a work by a living artist or an artist who passed away less than 70 years ago (such is the duration of the copyright) or wish to reproduce it (for example, in an auction catalog) or make photographs of the work available to potential buyers, you should ask the prior permission of the artist or his/her heirs, who thus exercise control over the market for the artist's work. And if they notice a poorly executed restoration, they can also repudiate the work.

### **Sharon Hecker:**

Unlike literature and music, artworks are very special physical objects whose identity exists in a delicate, perhaps unusual space between "work of art" and "material commodity". If we treat art

as if it were the same as any other physical object that can be sold, bought, owned, damaged and sometimes be in need of repair, without considering other artistic factors and the often physically intangible mind, heart, and soul of the maker that is part of the work, then we reduce the artwork merely to the most basic material constituents that make it up. It is an error, I think, to see art this way. I believe that it is the message this sad story sent back to the artist: that her artwork was treated as simply made up of logs that can easily be replaced.

Let us think more about why this way of thinking may be deleterious to an artist. From an art-historical perspective, there are always three aspects to be considered: one is the materials used to make the work, another is the particular know-how or skill that goes into putting these materials together in its own particular way (this may be dependent on people's abilities as well as on historical moments where certain techniques were available), and a third, extremely delicate part is the artist's creative thinking as she is working with these materials and all the specialized skills she chooses in order to bring forth something more: a meaningful creation. Ideally, all three aspects go into the making of an artwork and they exist in constant dialogue with each other.

For example, when a sculptor makes a bronze cast, there is the bronze material, the know-how or skill of the various technical specialists involved in a foundry process, and there is the artist making continuous decisions about how the final work should look and how the object created produces greater meaning.

Let us imagine a different scenario: when the artist is alive, we might actually consider it a wonderful thing to have the luxury and benefit of returning to speak to them about a work of theirs when it has become damaged. A sophisticated collector might even be thrilled if an artist, looking back on a previous work, restores it somewhat differently at a later date—THAT itself is a creative act and it is a priceless gift to be so privileged to take part in that vital, exciting moment of change. The damaged work, in this case, moves into a new dialogue with its maker and can even gain a new, richer kind of life. As a writer, I myself sometimes have the rare opportunity to revisit an old text of mine, change assertions I made that I no longer agree with, make adjustments where I now see fit. After an artist dies, however, this process of restoration dies with the artist. In some lucky cases, there is an heir or a trusted craftsman who can guide the restoration with respect. This can only last for a generation, however.

Often, we, as art historians, working with conservation scientists, find artworks that have been "creatively restored". The question arises as to where we draw the line between the artist's original intentions and the posthumous restoration. At what stage can art history no longer accept a restored work to be by the artist? This is the same question that Noland poses by disowning the work during her lifetime. And for this reason, more and more artists are no longer issuing Certificates of Authenticity to owners. They do not wish to 'seal in' authenticity forever and under any circumstances.

While it is correct to restore damaged work, the approach that was used in the Noland case seems misguided. If we consider artworks to be art, then we must respect the living artist, who can be free change her mind, disapprove, be unsatisfied with how her creation has been restored, and be displeased that it was conducted without consulting her. If collectors consider artworks to be merely a commodity and piece of personal property, feeling that they can do with the artwork whatever they wish, they lose a priceless opportunity to in some way, themselves, be part of the creative process.

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