Developer “Tagged” with $6.75 Million Damages Award for Willfully Destroying Graffiti Art of Recognized Stature

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by Benjamin Greenberg

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We previously posted about an advisory jury verdict rendered in the 5Pointz litigation (*Cohen et al v. G&M Realty LP et al.*), a case involving the whitewashing of the famous exterior aerosol (or “graffiti”) art in the space commonly known as 5Pointz. In November, the advisory jury panel found that the developer’s actions violated the Visual Artists Rights Act of 1990 (“VARA”). On Monday, the presiding judge agreed, ruling that the developer’s whitewashing of the works of art, without giving statutorily-prescribed notice and an opportunity to salvage the works, did indeed violate the artists’ rights under VARA by intentionally destroying their works of “recognized stature” with respect to 45 of the 49 works of graffiti art at issue in the case.

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In determining damages, the court agreed with the developer's appraisal expert that because of the unique challenges and costs of selling artworks at 5Pointz—which were the size of a building wall—the works did not have a provable market value. As a result, the court did not award actual damages. The court proceeded, however, to award statutory damages. Pursuant to 17 U.S.C. § 504(c), statutory damages may be no less than $750 and not more than $30,000 for each work, as the court considers just. If the plaintiff proves that the violation was willful, statutory damages may be up to $150,000 for each work. In determining the appropriate measure of statutory damages, the court found that the artists sustained their burden to prove that the violations were willful. The court then undertook a multi-factor analysis to determine the appropriate measure of damages, including consideration of, among other factors, the infringer's state of mind, the deterrent effect on the infringer and third parties, and the conduct and attitude of the parties. During the trial, the developer left a distinct impression with the court that he was "singularly unrepentant. He was given multiple opportunities to admit the whitewashing was a mistake, show remorse, or suggest he would do things differently if he had another chance. He denied them all." This undoubtedly played an important role in the court's ultimate determination to award the $150,000 maximum amount of statutory damages for each of the 45 distinct works, totaling $6.75 Million in total damages awarded to 21 different artists.

The court closed its decision on a somber note, stating "[t]he shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes during those 10 months and gaze at the formidable works of aerosol art for the last time. It would have been a wonderful tribute for the artists that they richly deserved."

The court's thorough 51 page opinion provides useful guidance on artists' rights under VARA, and the meaning of "recognized stature" of a work that entitles it to protection under VARA. Due to the dearth of authority on the meaning of "recognized stature," and the substantial award to the artists, it is likely that the decision will be appealed to the Second Circuit. The TMCA will continue to monitor this case and keep you updated with any interesting developments.