

Graffiti Artists “Tag” Developer in Court: Graffiti Art Protected Under Visual Artists Rights Act in Advisory Verdict

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Earlier this month, in *Cohen et al v. G&M Realty LP et al.*, a jury impaneled in the U.S. District Court for the Eastern District of New York found that a developer violated the Visual Artists Rights Act of 1990 (“VARA”) when it whitewashed the famous exterior aerosol (or “graffiti”) art in the space commonly known as 5Pointz. The jury verdict is advisory and will serve as a recommendation for Senior U.S. District Court Judge Frederick Block in issuing his final ruling. The focus of the trial was whether the 49 distinct works of graffiti art were of “recognized stature” that would entitle them to protection from destruction under VARA. As the Court previously acknowledged in the

case, the meaning of “recognized stature” is undefined by the statute and there is a dearth of case law on the subject. Accordingly, the Court’s upcoming ruling may provide helpful guidance regarding this question.

The case received wide media coverage because the buildings, located in Long Island City, had become the repository of the largest collection of graffiti art in the United States, and consequently developed into a significant tourist attraction. The impetus for this mecca of graffiti art began in the 1990s when the exterior walls of the buildings, then known as the Phun Phactory, became a place for distasteful graffiti. To control this problem, in around 1996, the developer reached an agreement with an aerosol artist to oversee the graffiti that would be placed on the buildings, provided that there would be no religious, political or obscene content posted. In 2002, this “curator” role was passed to another aerosol artist who would ultimately become the lead plaintiff in the lawsuit, Jonathan Cohen. The quality of the graffiti art vastly improved. The site became known as 5Pointz, representing the five boroughs of New York, and evolved into a magnet for high-end works by internationally-recognized graffiti artists. 5Pointz became a popular tourist attraction and Cohen conducted hundreds of tours each year.

In 2013, the owner of the buildings announced his plan to demolish 5Pointz to make way for a 1,000 unit luxury apartment complex. The plaintiffs filed suit for injunctive relief to prevent the destruction of their graffiti art that adorned the exterior of the buildings. While the preliminary injunction motion was pending before the Court, the buildings were painted over or “whitewashed,” destroying the graffiti art. The Court reluctantly ruled that it had no authority to preserve 5Pointz as a tourist site and thus could not halt demolition of the buildings by issuing a preliminary injunction. However, the Court found that if the plaintiffs could prove the works of graffiti art were protected from destruction under VARA, they could recover monetary damages. As a result, the plaintiffs proceeded with the lawsuit to recover damages for the destruction of their works.

VARA was enacted into law in 1990 and amended existed copyright law to add protections for two “moral rights” of artists: the rights of *attribution* and *integrity*. *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 215 (E.D.N.Y 2013). Moral rights are distinct from other rights conferred by copyright law, resting upon the “belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.” *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995). The right of attribution generally consists of the right to be recognized by name as the author of a work or to publish anonymously or pseudonymously, to prevent the work from being attributed to someone else. The attribution right also prevents the use of the author’s name on works created by others, including distorted editions of the author’s original work. The right of integrity “allows the author to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred.” *Id.* VARA specifically prohibits such intentional distortion, mutilation, or other modification of a work of visual art that would be prejudicial to the author’s honor or reputation. In some international jurisdictions, the integrity right also protects artwork from destruction. *Id.* By enacting VARA, Congress provided this right to protection against destruction of works of visual art, but only if the works are of

“recognized stature.” Money damages may be awarded for destruction of such works, *Cohen*, 988 F. Supp. 2d at 216-17. The appropriate level of damages is set in the more general provisions of the Copyright Act, which authorizes statutory or actual damages.

As the Court noted earlier in the 5Pointz case, to make the requisite showing of “recognized stature” plaintiffs generally will need expert witnesses to testify. *Cohen v. G&M Realty L.P.*, 2017 U.S. Dist. LEXIS 50943, at *6 (E.D.N.Y. Mar. 31, 2017). The parties thus presented dueling experts to opine on the issue. The jurors ultimately found that some of the works were of recognized stature. The jurors also determined that many other works were “distorted, mutilated, or modified in a way that would be prejudicial to the author’s honor or reputation.” The jury panel suggested damages ranging from a few thousand to tens of thousands of dollars for each violation.

Due to the sparse jurisprudence on the issue of “recognized stature,” we expect that the Court’s final ruling will provide useful direction as to the confines of a viable VARA claim for destruction of works of art. For the same reason, however, it is likely that the Court’s decision will be appealed to the Second Circuit. The TMCA will be monitoring the case and will keep you posted with any key developments.