

Supreme Court Cert Denial Closes Book on Storied VARA Dispute

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As you may recall from our prior posts regarding the [advisory jury verdict](#) and

subsequent district court ruling in the 5Pointz litigation (*Cohen et al v. G&M Realty LP et al.*), in 2018, Judge Block in the U.S. District Court for the Eastern District of New York held that a developer whitewashing famous exterior aerosol (or “graffiti”) art, in the space commonly known as 5Pointz, constituted a willful violation of the Visual Artists Rights Act of 1990 (“VARA”), and awarded the artists \$6.75 million in damages.

In February of this year, the Second Circuit affirmed the district court’s decision. As the Second Circuit explained, the crux of the parties’ dispute on appeal was whether the works at 5Pointz were works of “recognized stature,” because VARA gives “the author of a work of visual art” the right “to prevent any destruction of a work of recognized stature” and provides that “any intentional or grossly negligent destruction of that work is a violation of that right.” The appellate court concluded that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community. It went on to note that the most important component of stature will generally be artistic quality; the relevant community will typically be the artistic community—i.e., art historians, art critics, museum curators, gallerists, prominent artists, and other experts. The appellate court stated that recognized stature is necessarily a “fluid concept.” Applying the above-mentioned standard, and evaluating the evidence submitted at trial, the Second Circuit held that the district court’s findings supporting its “recognized stature” ruling were not clearly erroneous, and thus must be upheld. In doing so, the appellate court also rejected the developer’s argument that temporary works, such as graffiti art that may later be painted over with new art, cannot achieve recognized stature.

The Second Circuit also agreed with the lower court’s findings of willful violation, and its maximum statutory damages award resulting therefrom. Among other reasons, both the lower court and Second Circuit were persuaded that the whitewashing of the works was done without any genuine business need to do so, but rather was an “act of pure pique and revenge” toward the artists that had sued him to preserve the work.

In July of this year, the developer filed a petition for writ of certiorari with U.S. Supreme Court, arguing that the imposition of liability on a finding that the works were of “recognized stature” violated the Due Process Clause of the Fifth Amendment because the undefined statutory term is unconstitutionally vague. Based on the same vagueness argument, the developer also argued that the finding of willfulness, and accompanying maximum statutory damages, also violated the Fifth Amendment.

Earlier this month, the U.S. Supreme Court denied the petition for writ of certiorari. As is typical, the Court did not provide any reasoning for the denial, which leaves in place the lower court’s \$6.75 million damages award.

The Supreme Court’s denial closes the book on a lengthy chapter in art law history. The rulings of the lower courts can be seen as a strong recognition of graffiti and street art as a major category of contemporary art that may enjoy protection under VARA.