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What Was 5Pointz and What Does It Mean For the Visual Artists Rights Act?

BY [SOPHIA SOLOFF](#)/ ON MARCH 21, 2017

Jonathan Cohen, better known by his “tag”[\[1\]](#) Meres One[\[2\]](#), is a freelance artist whose work has brought him much success and fame. His clientele include sports teams and banks, and his works have been featured in music videos, newspapers, and galleries.[\[3\]](#) In 1993, Cohen approached Jerry Wolkoff[\[4\]](#) and asked for permission to use the outside of his warehouse complex to showcase artwork.[\[5\]](#) Wolkoff agreed, and thus 5Pointz, which The New York Times penned as a “Graffiti Mecca,” was born.[\[6\]](#) As the embodiment of a controversial art form typically associated with vandalism, crime, and disjointedness, 5Pointz managed to defy traditional stereotypes.[\[7\]](#) The media, artists, and observers alike have defined the buildings and the art as a type of ‘community,’[\[8\]](#) one that broke from traditional notions of solitariness that are typical in graffiti and street art culture.[\[9\]](#) Its very name, signifying the coming together of New York’s extremely diverse and sometimes conflicted five boroughs,[\[10\]](#) promotes the aspects of inclusiveness, community, and cohesiveness that have transformed street art in recent years.

For the first few years, artists would produce works on the warehouse’s exterior walls, and although Cohen was seen as in charge, he functioned solely a painter, not a manager.[\[11\]](#) Then, in 2002, Cohen took over as the curator and manager of the aerosol arts program Wolkoff had established.[\[12\]](#) Wolkoff gave Cohen secured space in the warehouse to store materials[\[13\]](#) and placed only three restrictions on the art: no political statements, no religious statements, and no pornography.[\[14\]](#) Cohen exercised almost complete control and influence over 5Pointz and under his guidance, it did not take long for 5Pointz to become a much-respected artistic institution and internationally recognized tourist attraction.[\[15\]](#) Artists hoped to be lucky enough to have their works included on the space, and, in turn, tourists flocked to view the art.[\[16\]](#) As The New York Times put it, “[b]lanketed with giddy images, drawing street artists from around the world, 5Pointz was a decades-old legal haven considered both a ‘United Nations of Graffiti’ and a semi-rebellious statement in a city some feel is growing too antiseptic.”[\[17\]](#)

After all the success, there was, however, an impending problem: Wolkoff was planning to rip the building down to create high-rise luxury apartment towers.[\[18\]](#) The building’s attractive location in Long Island City, at a time where more and more residents were moving there, made the apartment towers a smart and profitable investment.[\[19\]](#) Cohen and other 5Pointz artists, knowing the planned construction signaled the end of their art, flocked to court to ask the

Judge for a preliminary injunction preventing Wolkoff from demolishing the building.^[20] But they were not successful, and artists, aspiring artists, fans, spectators, and tourists woke up on the morning of November 19, 2013 to find 5Pointz whitewashed. Over night, their years of artwork painted over with simple streaks of white paint.^[21] ANIMALNewYork, a website that has been described as “a graffiti and street art site,”^[22] documented the demolition and later posted a minute-long video that was time-lapsed. The video shows demolition of 5Pointz between September and December 2015.^[23]

In their complaint for an injunction, Cohen and his co-plaintiffs argued that their works should have been afforded protection under VARA.^[24] To the art world’s surprise, this was the first suit that “a court has had to determine whether the work of an exterior aerosol artist – given its general ephemeral nature – is worthy of any protection under the law.”^[25] Judge Block went on to address VARA and ultimately had to look at four elements: (1) the art was a work of visual art; (2) the art was of recognized stature; (3) the art was or will be destroyed; and (4) the art was copyrightable.^[26] Block interpreted parts 1 and 3 effortlessly, deciding that graffiti is a work of visual art and if at any point Wolkoff decided to tear down his warehouse their art would indefinitely be destroyed.^[27] The question of recognized stature, part 3, was the wild card, and left room for Judge Block to interpret what recognized stature really means and if Cohen and the other artist’s works could be protected^[28].

The court received plentiful and strong evidence of what most would consider reaching stature, specifically at the preliminary injunction hearing.^[29] At this hearing, “[t]he Court heard testimony from three of the seventeen plaintiffs, the defendant Gerald Wolkoff, who is the principal owner of the defendants’ real estate development companies, and purported expert witnesses from each side. The Court also received as evidence a number of exhibits That they claim were works of ‘recognized stature.’”^[30] Marie Flageul^[31] cited 5Pointz as a public attraction, a place that was the backdrop of many photo shoots and was even featured in twelve minutes of a movie.^[32] The *Cohen* court ultimately did not grant the preliminary injunction to the artists.^[33]

The court’s holding stems from evidence that Cohen and the other plaintiffs were aware of, and accepted, the temporary status of their art.^[34] It is unclear why this knowledge grants them a lesser degree of protection under VARA, because VARA was specifically created to support moral rights.^[35] Another distressing point is the Court used 5Pointz’s transience as a reason to not be afforded protection under VARA, while at the same time holding that “[s]ince, as defendants’ expert correctly acknowledged, VARA protects even temporary works from destruction.”^[36] This leaves the masses with authoritative, though not binding, information that could lead to a slippery slope. The still unanswered future question is what the courts would hold if VARA did apply to protect temporary graffiti art, since here the argument was not successful. As seen in *Cohen*, VARA is in much need of amendment. While there has been such scholarship on what the shape these amendments would form, Congress has yet to amend any parts of the statute.

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[1] Chad, *The Words: A Graffiti Glossary, Art Crimes*, <https://www.graffiti.org/faq/graffiti.glossary.html>.

[2] <http://5ptz.com/meres/Bio.html>.

[3] *Id.*

[4] Christopher Cameron, *5Pointz Unvarnished: The Developer's Side*, *The Real Deal*, (May 1, 2014), http://therealdeal.com/issues_articles/5pointz-unvarnished-the-developers-side/.

[5] See Plaintiff's Original Complaint at 40, *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) (No. CV13-5612), 2013 WL 5726692 [hereinafter Plaintiff's Original Complaint].

[6] Cara Buckley, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, *The New York Times* (November 19, 2013), http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html?_r=0.

[7] Leigh Silver, *Remembering 5Pointz: A Community Reminisces on What Was So Much More Than Just a Legendary Graffiti Spot*, *Complex*, (November 9, 2014), <http://www.complex.com/style/2014/11/remembering-5-pointz>.

[8] *Id.*

[9] *Id.*

[10] *Cohen*, 988 F. Supp. 2d at 214.

[11] Bruce Wallace, *Remembering 5Pointz: A Five-Story Building That Told Plenty More*, *NPR*, (November 21, 2013), <http://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more>.

[12] See Plaintiff's Original Complaint at 42.

[13] *Id.* at 43.

[14] *Id.* at 44.

[15] Robert Tutton, *In a Brooklyn Lumber Yard, 'Graffiti Mecca' 5Pointz Lives On*, Curbed NY, (September 29, 2015), <http://ny.curbed.com/2015/9/29/9916136/in-a-brooklyn-lumber-yard-graffiti-mecca-5pointz-lives-on>.

[16] Cara Buckley, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, The New York Times, (November 19, 2013), http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html?_r=0.

[17] *Id.*

[18] *Id.* at 3.

[19] *Id.* at 4.

[20] See Cohen, 988 F. Supp. 2d at 214.

[21] *Id.* at 1.

[22] Andy Cush, *Animal New York, the Grimeiest Website in NYC, Shuts Down After 12 Years*, Gawker, (July 15, 2015), <http://tktk.gawker.com/animal-new-york-the-grimeiest-website-in-nyc-shuts-dow-1720634772>.

[23] Aymann Ismail, *Watch the Months-Long Demolition of 5 Pointz in a One-Minute Timelapse*, Animal New York, January 8, 2015, <http://animalnewyork.com/2015/watch-months-long-demolition-5-pointz-one-minute-timelapse/>.

[24] Cohen, 988 F. Supp. 2d at 214.

[25] *Id.* at 214.

[26] Rebecca E. Hatch, *Cause of Action for Destruction of "Work of Visual Art" of "Recognized Stature" Under Visual Artist Rights Act (VARA)*, 17 U.S.C.A. §106A, 63 Causes Of Action 2D 649 (July 2015).

[27] Cohen, 988 F. Supp. 2d at 227.

[28] *Id.* at 226.

[29] Cohen, 988 F. Supp. 2d at 215.

[30] See Cohen, 988 F. Supp. 2d at 214–15.

[31] *Id.* at 219.

[32] *Id.* at 17.

[33] *Id.* at 214.

[34] See Cohen, 988 F. Supp. 2d at 214.

[35] Brett Sirota, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 Hofstra L. Rev. 462 (1992).

[36] Cohen, 988 F. Supp. 2d at 227.