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Libby Merritt

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# Graffiti Gains Recognized Stature in Multi-Million Dollar Victory for Artists

BY [LIBBY MERRITT](#) / ON MARCH 15, 2020



Image by [Nigel Morris](#) from [Flickr](#)

In 2002, developer Jerry Wolkoff invited aerosol artists to transform a series of dilapidated warehouse buildings that he owned in Long Island City, New York. Among those was distinguished aerosol artist Jonathan Cohen, enlisted as the curator to turn the warehouse into an exhibition space for artists and fill the walls with aerosol art. The site became known as "5Pointz," to represent the confluence of the five NYC boroughs and attracted global attention for aerosol art, drawing thousands of daily visitors and significant media coverage.<sup>[1]</sup>

In 2013, Cohen and other artists learned that Wolkoff sought to demolish 5Pointz to build luxury apartments on the site. Cohen applied to the New York City Landmark Preservation Commission to have 5Pointz designated a site of cultural significance, but the application was unsuccessful.<sup>[2]</sup> The group of artists proceeded by filing a lawsuit in federal court, seeking to prevent the destruction of the artwork. On the night of November 12, 2013, after the court denied plaintiffs' application for a preliminary injunction, Wolkoff proceeded with his

destruction of the artwork and banned the artists from the site. Over the next few days, Wolkoff had whitewashed the art entirely.

The lawsuit filed by Cohen and other 5Pointz artists relied on the Visual Artists Rights Act of 1990 (VARA), the first federal copyright legislation granting moral rights to artists.<sup>[3]</sup> Among other protections, the statute grants authors of a “work of visual art” (photographs, paintings, sculptures, etc.) the right to prevent any intentional distortion, mutilation, or modification that would prejudice the author’s honor or reputation, and to prevent the destruction of a work of art if it is of “recognized stature.”<sup>[4]</sup>

By decision dated February 12, 2018, Judge Block held that 45 of the 49 works were of “recognized stature.” Judge Block noted that these works were selected for permanence and prominence by the 5Pointz curator, and were noted in films, television shows, newspaper articles, and on social media. According to Judge Block, Mr. Wolkoff’s whitewashing, without notice or a waiver of rights from the artists, was an infringement of the artists’ moral rights. The court found the whitewashing “willful,” and awarded maximum statutory damages in the amount of \$6,750,000.

On appeal, a panel of three judges unanimously affirmed Judge Block’s judgment in favor of the artists.<sup>[5]</sup> First, the Second Circuit held that Judge Block correctly determined that temporary artwork may achieve “recognized stature” under VARA and that the aerosol artists’ work had achieved that stature. Second, the court held that the district court did not err in finding the defendants willfully violated VARA or abuse its discretion in awarding \$6.75 million in statutory damages.<sup>[6]</sup>

In determining that the aerosol works at issue were of “recognized stature,” the Second Circuit reasoned 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.”<sup>[7]</sup> The court further stated that “[t]he most important component of stature will generally be artistic quality” and “[t]he relevant community will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.”<sup>[8]</sup> Applying this standard, the Second Circuit found no clear error in Judge Block’s determination that the artists demonstrated that their works achieved recognized stature.

The defendants argued that VARA does not apply to the aerosol works because the underlying protocol at 5Pointz was that the works were typically intended to be temporary. Rejecting this argument, the Second Circuit noted that nothing in VARA excludes temporary work from attaining recognized stature: “Wolkoff contends that the great majority of the works in question were temporary ones which, for that reason, could not meet the recognized stature requirement. We disagree. We see nothing in VARA that excludes temporary artwork from attaining recognized stature.”<sup>[9]</sup> According to the court, as long as the work meets the Copyright Act’s fixation requirement, it is conceivably eligible for VARA protection.<sup>[10]</sup>

Defendants also argued that there could be no VARA protection because the artists knew that 5Pointz may eventually be torn down, so they should have expected their work to be destroyed. For works incorporated into buildings that cannot be removed without being destroyed, the Copyright Act directs the property owner to obtain a written instrument signed by the artist and the building owner specifying that installation may subject the work to “destruction, distortion, mutilation, or other modification, by reason of its removal.”<sup>[11]</sup> If the work can be removed safely, then the property owner must give the artist written notice of the planned demolition and allow the artist 90 days to remove the work or pay for its removal.<sup>[12]</sup> Wolkoff ignored these requirements and chose to whitewash the building instead.

The Defendants also challenged the statutory damages award. The Second Circuit ultimately found that Judge’s Blocks decision to award the artists \$6.75 million (the maximum amount of \$150,000 in statutory damages for each of the 45 works) – was not an abuse of discretion. The Second Circuit analyzed each of the six factors considered in setting the amount of statutory damages: “(1) the infringer’s state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer’s cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.”<sup>[13]</sup> The court noted that the sixth factor weighed heavily in favor of the maximum damages award given Wolkoff’s misrepresentations to the trial court.

Wolkoff’s misrepresentations to the court and the unique nature of the demolished property in this case had a substantial impact on the outcome. Namely, Wolkoff testified that he stood to lose millions of dollars in credits and possibly the entire project absent prompt demolition but later admitted only a possibility that a delay would have caused him financial loss. At trial, the artists established that the property owner had not even applied for a demolition permit until four months after the whitewashing, and that the property owner suffered no loss for the delay. Judge Block noted that, had the property owner not made the material misrepresentations at the outset of the case, he would have granted the artists the preliminary injunction.

Wolkoff not only misled the court by making false statements at the preliminary injunction hearing, but also whitewashed the art without warning, ignoring the 90-day notice period under VARA. These willful violations warranted the court’s hefty award in favor of the artists.

The facts of this case are unique, and it is unclear whether or not they will have a wider impact. However, the notion that significant statutory damages can be awarded in a VARA case even where actual damages cannot be proven could change the nature of these disputes.<sup>[14]</sup> The 5Pointz trial was a first-of-its-kind case that to some extent depends artistic interpretation, so Wolkoff could pose additional challenge to VARA on appeal. A petition for review might be granted if the high court views the ruling as a slippery slope.<sup>[15]</sup> Regardless,

the award serves as vindication for Cohen and the other aerosol artists who believe their work should be cherished and protected rather than destroyed.<sup>[16]</sup>

*Libby Merritt is a second-year law student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal. Prior to law school, Libby worked as a paralegal at Frankfurt Kurnit Klein & Selz and obtained a master's degree in public policy from Brown University. Libby is presently interning with Cardozo's Advanced Indie Film Clinic providing pro bono, transactional legal services to independent filmmakers.*

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<sup>[1]</sup> Castillo v. G&M Realty L.P., No. 18-498-CV, 2020 WL 826392 at 3 (2d Cir. Feb. 20, 2020).

<sup>[2]</sup> Castillo v. G&M Realty L.P. at 4.

<sup>[3]</sup> 17 U.S.C. § 106(A)

<sup>[4]</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>[5]</sup> Castillo v. G&M Realty L.P.

<sup>[6]</sup> Amelia Brankov, *Second Circuit Affirms \$6.75 Million Damages Award to 5Pointz Artists*, (February 22, 2020) <https://ipandmedialaw.fkks.com/post/102fzev/second-circuit-affirms-6-75-million-damages-award-to-5pointz-artists>.

<sup>[7]</sup> Castillo v. G&M Realty L.P. at 13.

<sup>[8]</sup> Castillo v. G&M Realty L.P. at 14.

<sup>[9]</sup> Castillo v. G&M Realty L.P. at 16.

<sup>[10]</sup> Supra note 6.

<sup>[11]</sup> 17 U.S.C. § 2 113(d)(1)(B).

<sup>[12]</sup> 17 U.S.C. § 2 113(d)(2)(B).

<sup>[13]</sup> Castillo v. G&M Realty L.P. at 28.

<sup>[14]</sup> Donn Zaretsky, *5Pointz Ruling Upheld*, The Art Law Blog (February 22, 2020) <http://theartlawblog.blogspot.com/2020/02/5pointz-ruling-upheld.html>.

<sup>[15]</sup> Ephrat Livni, *5Pointz graffiti has now made an indelible mark on the law and art*, Quartz (February 21, 2020), <https://qz.com/1806323/5pointz-graffiti-has-officially-made-a-lasting-mark-on-the-law/>.

[16] Eileen Kinsella, *A Stunning Legal Decision Just Upheld a \$6.75 Million Victory for the Street Artists Whose Works Were Destroyed at the 5Pointz Graffiti Mecca*, Art Net News (February 20, 2020), <https://news.artnet.com/art-world/5pointz-ruling-upheld-1782396>.