



Murals And Morals: Federal Court Awards Millions For Willful Destruction Of Building Artwork

By David R. Ellis

In an unusual case involving a little known provision of the U.S. Copyright Act, a federal appeals court in New York ruled that a real estate developer had violated the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A, (“VARA”) by destroying the artwork of a variety of aerosol graffiti artists who had created and displayed their work at a site in Queens, New York. *Castillo v. G&M Realty L.P.*, No. 18-498-CV (2d Cir. 2020).

According to the court, in 2002, the developer, Gerald Wolkoff undertook a project to install artwork in a series of dilapidated warehouse buildings that he owned in Long Island City, across the East River from Manhattan. Wolkoff engaged Jonathan Cohen, a distinguished aerosol artist, to turn the warehouses into an exhibition space for graffiti artists. Cohen and other artists rented studio spaces in the warehouses and filled the walls with



aerosol art, with Cohen serving as curator. Under Cohen’s leadership, the site, known as 5Pointz, evolved into a major global center for aerosol art. It attracted thousands of daily visitors, numerous celebrities, and extensive media coverage.


One of the features of the project was the concept of “creative destruction.” Some art at the site achieved permanence, but other art had a short lifespan and was repeatedly painted over. The walls were divided into “short-term rotating walls,” where works would generally last for days or weeks, and “longstanding walls,” which were more permanent and reserved for the best works at the site. During its lifespan, 5Pointz was home to approximately 10,650 works of art.

In May 2013, Cohen learned that Wolkoff had sought municipal approvals to demolish 5Pointz and build luxury apartments on the site. Cohen applied to the New York City Landmark Preservation Commission to designate 5Pointz as a site of cultural significance in order to prevent its destruction, but he was unsuccessful, as were his efforts to raise money to purchase the site.

At that point, Cohen and numerous other 5Pointz artists sued under VARA to prevent the site’s destruction. VARA, which was added to the Copyright Act in 1990, grants visual artists certain “moral rights” in their works, including the right to prevent modifications of artwork that are harmful to their reputations and to prevent destruction of their artwork if the work has achieved “recognized stature.” Under the statute, an artist who establishes a violation of the law may obtain actual damages and profits, or statutory damages, which may be enhanced if the artist proves that the violation was willful.

Early in the litigation, the plaintiffs applied for temporary injunctive relief, which a district judge denied in a brief order, telling the parties that he would soon issue a written opinion. That night, Wolkoff began to destroy the artwork. He banned the artists from the site and refused to permit them to recover any works that could be removed. Several nights later (and before the district court’s written opinion could be issued), Wolkoff deployed a group of workmen who, at his instruction, whitewashed the art.

On November 2013, the judge issued an opinion denying the preliminary injunction, stating that, although some of the 5Pointz




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paintings may have achieved recognized stature, resolution of that question should be reserved for trial. He also decided that, given the transitory nature of much of the work, preliminary injunctive relief was inappropriate and that the monetary damages available under VARA could remediate any injuries proved at trial.

After extensive discovery, a three-week trial was held, which included testimony from 29 witnesses and the admission of voluminous documentary evidence.

A district judge issued his opinion in February 2018. He found that 45 of the works had achieved recognized stature, that Wolkoff had violated VARA by destroying them, and that the violations were willful. The judge observed that the works “reflect[ed] striking technical and artistic mastery and vision worthy of display in prominent museums if not on the walls of 5Pointz.” His findings emphasized Cohen’s prominence in the world of aerosol art, the significance of his process of selecting the artists who could exhibit at 5Pointz, and the fact that, while much of the art was temporary, other works were on display for several years.

Where a violation of VARA is established, the statute permits the injured party to recover either actual damages and profits or statutory damages between \$750 and \$30,000 per work, and up to \$150,000 per work if the artist proves that a violation was “willful.” Here, the judge awarded statutory damages, finding that such damages would serve to sanction Wolkoff’s conduct and to vindicate the policies behind VARA.

Moreover, the judge found that Wolkoff had acted willfully. His finding was based on Wolkoff’s awareness of the ongoing VARA litigation and his refusal to afford the artists the 90-day opportunity provided by the statute to salvage their artwork,

some of which was removable. The judge rejected Wolkoff’s assertion that he whitewashed the artwork to prevent the artists from engaging in disruption and disorderly behavior at the site. Instead, the judge found that Wolkoff acted out of “pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art.”

He also found that Wolkoff had lied in an affidavit that the demolition of 5Pointz had to be completed by the beginning of 2014, with construction to commence in April 2014, because Wolkoff acknowledged at trial that he did not apply for a demolition permit until March 2014. The judge stated that he would have granted the preliminary injunction if Wolkoff had testified earlier that demolition could be delayed until March. The judge thus awarded the maximum amount of statutory damages, \$150,000 for each of the 45 destroyed works, for a total of \$6.75 million, and the appeals court affirmed the award.

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