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5Pointz Ruling Explores 'Moral Rights' Copyright Damages

By **Xiyin Tang** (March 28, 2018, 5:36 PM EDT)

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There are many remarkable and, rather peculiar, aspects of Cohen v. G&M Realty (or, the "5Pointz" litigation), a closely watched case for many in the copyright and art law communities. Cohen is one of the few cases to interpret the "recognized stature" provision of the Visual Artists Rights Act of 1990 ("VARA"), which prohibits the destruction of "a work of recognized stature" — including works that are incorporated in or made part of buildings.[1] In addition to the prohibition on destruction, VARA also provides that the author of a work of visual art shall have a right of attribution, or, the right to claim authorship of a work or otherwise prevent the use of her name with any work of visual art she did not create, as well as the right of integrity, which prohibits any "intentional distortion, mutilation, or modification" of a work.[2]

VARA was a required component of the U.S.'s being a signatory to the Berne Convention, an international copyright treaty which those in the music and motion pictures industries were eager to join due to piracy of music and films abroad. VARA was, however, an odd, and rather unwanted, bedfellow, foisted upon the United States as part-and-parcel of these other, unrelated protections it sought. For Europe's moral rights statutes are built on ideals of personhood and paternity, ideals which viewed a work of art as somehow an extension of the artist's soul and person, and deserving of protection far beyond its utilitarian value. U.S. copyright law — even those protecting the so-called "fine arts" — on the other hand, are grounded in economic and market principles. Therefore, upon VARA's passage, many in the art and copyright law communities had criticized the so-called "moral rights" statute as being antithetical to the economic principles of U.S. copyright law, and further as being fundamentally at odds with basic property law principles. VARA's prohibition on destruction, especially, was criticized from both practical and philosophical perspectives. On a practical level, the idea that someone may own a work of art yet not have the ability to do what they wish with it — including dispose of it as they saw fit — seemed tyrannical and farcical. From a philosophical standpoint, and as art law scholars like Amy Adler have pointed out, the history of modern art has been rife with instances of creative destruction. Destruction was the point of many canonical works of art, like Robert Rauschenberg's famous work Erased de Kooning, where Rauschenberg painted over another work by the modernist master Willem de Kooning.

Those fears more or less bore out in predictable fashion in Cohen.

The basic facts of the 5Pointz litigation are well known. 5Pointz refers to the name of the "graffiti

mecca" site in New York City which started out as a "largely dilapidated" factory warehouse in a "crime infested" neighborhood.[3] Before one of the plaintiffs, Jonathan Cohen, took over as the site's de facto curator and artist-in-residence, graffiti had littered the walls, but "there was no control over the artists who painted on the walls of the buildings or the quality of their work."[4] Cohen not only oversaw the site and its rotating roster of artists, but he also cleaned the site and tidied its appearance.

Anyone who understands the vital role artists play in the gentrification of a neighborhood should not be surprised by what happened next. "Over time, crime in the neighborhood dropped and the site became a major attraction drawing thousands of daily visitors, including busloads of tourists, school trips, and weddings. Movie, television, and music video producers came," and the site was featured in a Hollywood film.[5] The neighborhood was gentrifying; real estate prices were crawling up.

So it should come as no surprise, then, that the defendant eventually decided it was time to turn the old warehouse into luxury condos. The property value, at that point, had risen to $200 million, thanks, in part, to a necessary variance Wolkoff had secured. The plaintiffs accordingly brought suit.

Many will undoubtedly find the decision notable for its holding that graffiti, or "aerosol art," constitutes a work of "visual art" entitled to protection under VARA. Many others will also find the decision notable for the seeming disconnect between acknowledging graffiti's ephemerality — the court had in fact referred to 5Pointz as a "site of creative destruction" — while simultaneously and quixotically ensured its permanence by prohibiting its destruction. That graffiti, of all mediums, was at the heart of Cohen made VARA's critics' ominous warnings even more pertinent, for the court explicitly acknowledged that "most artworks had short lifespans and were repeatedly painted over by successive artists."[6] That would seem, anyway, to be the point of graffiti art, a form of art built on art-as-trespass, conducted often in elusive night, usually without permission from the property owner. Ironic, then, that Wolkoff had essentially legalized a form of illegal art through his invitation to artists to come onto his site — only to find himself liable for his eventual decision to whitewash the walls of his own warehouse.

Yet the decision is perhaps most notable for the outsized damages award — the very maximum statutory damages permitted under the Copyright Act for each graffiti work, totaling $6,750,000. This award is even more remarkable when considering the fact that the court had also found that the "plaintiffs failed to establish a reliable market value for their works."[7] Indeed, plaintiffs' own expert had testified that each work was worth between $50,000 to $80,000; the court's ultimate award of $150,000 in statutory damages per work exceeds that.

Some may read Cohen as portending the overreach of the Copyright Act's statutory damages provision, signaling that statutory damages need bear no discernible relation to actual damages. However, a better reading of the decision is the court's award of a different type of copyright damages — one rooted not in economic value, but, appropriately for the moral rights statute, in moral retribution.

Those who believe that statutory damages awards should bear some relation to actual harm will no doubt be discouraged by this result. And indeed, the court's rhetoric in its analysis of the factors to be considered in awarding statutory damages eschews economic logic, instead taking on a moralistic tone as to the psychological effect defendant's white-washing of plaintiffs' artworks had on plaintiffs' state of mind.[8] But we should remain wary of such an overbroad interpretation of the court's decision, remembering instead that this is, after all, a decision interpreting a moral rights statute. The entire point of the European moral rights laws that VARA is modeled after is that art is not commerce. The court makes this point clear when it noted that "[i]f potential infringers believe that they can violate VARA at will and escape liability because plaintiffs are not able to provide a reliable financial valuation for their

works, VARA will have no teeth."[9] Unlike in a regular copyright infringement case, in other words, VARA is uniquely positioned to award unrepentant plaintiffs, sympathetic defendants who felt that the removal of their artworks had been akin to a bodily violation (the height of European moral rights rhetoric), and, above all, bad facts.

For in the final analysis, it may be that the court endorsed an economic reckoning, after all. Cohen may be remembered less for what it had to say about VARA and more for the picture it paints of a city undergoing inevitable gentrification. 5Pointz, and the neighborhood of Long Island City in which it was located, was once dilapidated and crime-infested, fit for warehouses more so than billionaire residences. Then the artists moved in and, through their creativity, transformed a run-down site into a destination worth visiting — a familiar tale to any urbanist who understands the power of a creative class in transforming a neighborhood from run-down to up-and-coming. The damages award may have been near $7 million, but, and as the court repeatedly points out, Wolkoff's gains in property value far outweighed that. In this well-worn story of artist as gentrifier, the artist finally gets some compensation for making a once cast-aside neighborhood desirable. When the skyline shifts from dilapidated warehouses to towering luxury condos, $7 million may not be such a large sum to pay in the grand scale of things, after all.

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[1] 17 U.S.C. § 106(A).

[2] Id.

[3] Slip op. at 6.

[4] Id.

[5] Slip op. at 6.

[6] Slip op. at 7.

[7] Slip op. at 15.

[8] (see slip op. at 18)

[9] Slip op. at 19.