The 5Pointz Case: Damages awarded against property owner for whitewashing street art

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# Abstract

*Cohen v G&M Realty LP, [unreported, EDNY 2018]* awarded damages in the amount of $6.75million to 21 graffiti and street artists, following the destruction via whitewashing of 45 artworks on the ‘graffiti mecca’ 5Pointz, in New York, in November 2013. The damages were awarded on the basis of the Visual Artists Rights Act (VARA) 1990, which protects works of recognised stature. Statutory damages were awarded in the highest amounts due to the wilful actions of the defendant.

# Single Sentence Summary

*Cohen and Ors v G&M Realty LP and Ors [unreported, EDNY 2018]* (Cohen II)awarded $6.75million in damages to the artists of 45 works of street art which were destroyed or damaged by the property owner in November 2013.

# Legal Context

The Visual Artists Rights Act 1990 (VARA) grants rights to authors of works of visual arts, allowing them, among other things, to prevent destruction of a work of recognized stature (17 U.S. Code § 106A). Where a work is part of a building, and it is possible to remove it, the owner of the building may do so provided they have given written notice to the author (or made a good faith attempt to do so) and 90 days have elapsed without the author, or their agents, removing the work (17 U.S. Code § 113).

# Facts

5Pointz was an abandoned warehouse complex owned by the defendants. The claimants are a collection of graffiti artists whose works were painted on 5Pointz, with the permission of the landlord. The landlord indicated that he wished to demolish the warehouses and build luxury high-rise buildings instead, so the plaintiffs sought recognition of the site as a local landmark. When application was denied, the plaintiffs sought an injunction under VARA to prevent him from doing so. Before the litigation was concluded, the defendant whitewashed all the works of aerosol art in the 5Pointz warehouses, and prevented the artists from entering the premises to retrieve their work. 21 of the artists whose work had been whitewashed sought damages under VARA for the destruction of their works of visual arts, claiming that 49 of the pieces in the 5Pointz structure were of recognised stature, and thus eligible for VARA protection.

# Analysis

5Pointz, a curated exhibition of aerosol art, was the subject of an extended course of litigation. When site owner Gerald Wolkoff indicated that he wished to redevelop the site, artists involved in the collective sought to protect their works, firstly through applying to have the site recognised as a local landmark, and then by resorting to VARA. VARA was implemented in 1990 and grants some moral rights to artists of visual works. These rights exist independent of copyright assignment or ownership of a physical artwork, and include the right to prevent distortion, mutilation, and destruction of a visual work (17 U.S. Code § 106A (a)(3)(A-B)). The plaintiffs originally sought an injunction to prevent destruction of the site, stating that the works were of recognized stature. Their application for an interim injunction was denied, with a written judgment to be issued ten days later (Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013) [Cohen I]). In the time between the denial of the injunction and the judgment, the defendant whitewashed all works from the site. The action then necessarily became an application for damages following the destruction of the works, on the basis that the works were of recognised stature and thus eligible for VARA protection.

The case required the court to consider firstly whether works of aerosol art were eligible for protection as works of recognised stature, and secondly whether aerosol art was too temporary or ephemeral to fall under the ambit of VARA. The Court found that 45 of the 49 works at issue were of sufficient stature to receive VARA protection, excluding two on the basis that VARA does not cover work for hire, and two on the basis that they had not achieved sufficient ‘buzz’ (Cohen II: 34). Regarding the others, however, it found that there was sufficient recognition by fellow aerosol artists, art experts, and social media, to agree that these works had achieved recognized stature, and thus would be eligible for the protection of VARA. Not all of the works were intended to be long-term or achieve such status, but were selected to retain their position in the ever-changing 5Pointz landscape. Their long-standing positions in the curated exhibition was ‘powerful, and arguably singular, testament to their recognized stature’ (Cohen II: 30). Further, evidence adduced by art appraisers for the claimants, including the appropriately named Renee Vara, testified as to the status and quality of the works (Cohen II: 14). The nature of the artworks, ie aerosol art, did not preclude them from being eligible for VARA protection. The defendant argued that aerosol art was by nature excluded from VARA protection due to its temporary and ephemeral nature. The Court did not accept this argument, stating that § 113(d) specifically contemplates artworks which are attached to a building (as aerosol art is) and the works were therefore protected by VARA in the absence of a written waiver of VARA rights, as was the case here.

The Court further held that all of those works of recognised stature had been mutilated or destroyed in such a way as to trigger liability under VARA for damages. Given the difficulty of quantifying actual damages, the Court awarded statutory damages. Damages were awarded in line with damages for copyright infringement. In normal circumstances, the range for damages is $750 to $30,000. However, in cases where destruction is wilful, the maximum damages award is $150,000 (Cohen II: 39-40). Given the claimants’ works were whitewashed in the middle of the night, without warning to the claimants, and that the defendant was aware of the artists’ attempt to protect their works under VARA (Cohen II: 41), the Court found that the conduct was wilful in all 45 cases. When determining the amount of damages to be awarded, Block J placed a great deal of emphasis on the deterrent effect of the award on the infringer and on third parties. Taking this into account, the Court awarded the maximum statutory damages for each of the 45 works, totalling US$6.75million.

# Practical Significance

This case raises several interesting points for the future. First is the acknowledgement that aerosol art is worthy of protection under VARA. This is perhaps not as significant as it might be, given that the artworks were placed with the permission of the property owner, and thus this does not touch on the potential of illegally placed artworks to gain protection under VARA. However, it is an important acknowledgement of aerosol art as a legitimate genre of visual art.

Secondly, it further emphasises the importance of taking VARA provisions into consideration for property owners – had Mr Wolkoff issued 90 days’ notice of destruction of the building to the artists, he would then have been able to raze the buildings and build his high-rise at will. This fact was noted in the judgment, which also commented that had the artworks stood until permits for building were obtained, this would likely have attracted a substantial amount of public interest (Cohen II: 50). However, Mr Wolkoff’s destruction of the artworks without notice led to his substantial liability for wilful damages, given his awareness of the intention of the artists to claim VARA protection.

However, while the award of damages in this case was intended to deter property owners from destroying works without notice, there is also the possibility that it will deter property owners from permitting the placement of the artworks at all. This interesting contrast between the protection of moral rights on one hand and the deterrence of permitting the creation of artworks on the other may lead to some interesting results in future.