

ANOTHER WIN FOR 5POINTZ:



View of the front of 5Pointz. Queens, New York City, USA. January 2013. Photograph ©Ezmosis via Wikimedia Commons.

DESTROYING STREET ART AND GRAFFITI DOES NOT ALWAYS PAY OFF

Enrico Bonadio & Olivia Jean-Baptiste
City University of London; Queen Mary University of London

The decision of the US Court of Appeals in the 5Pointz case has been long-awaited. It was finally given on February 20, 2020. It confirmed the earlier 2018 ruling from the District Court of New York which for the first time had protected street and graffiti artists under the Visual Artists Rights Act (VARA). VARA is a piece of legislation introduced in the US in 1990 to give visual artists moral rights, including the right to prevent destruction of their works.

RECAP

Jerry Wolkoff, the defendant in this dispute, allowed his property to be used by street and graffiti artists for many years. The complex became notable to the extent it was regarded as the 'Graffiti Mecca' or 'United Nations of Graffiti'. In the 1990s the property owner had agreed to allow the derelict factory to be used as a showcase for local graffiti talent. The previously called Phun Factory was renamed 5Pointz in 2002 by what would become his *de facto* curator, Meres One (real name: Jonathan Cohen). Under the artist's watchful eye, it evolved into an appreciated 'aerosol art centre' and became famous the world over – a huge draw for graffiti aficionados and tourists alike.

The structure was knocked down in 2014 by Mr. Wolkoff to build luxury condos. The year before the demolition, 21 artists that had painted at 5Pointz had tried to prevent the planned demolition of the warehouse buildings and consequent destruction of their artworks, but the court refused to issue an injunction to prevent the building owner from tearing down the site. Mr. Wolkoff not only had been approving the art on his building for many years, but also profited from it, as the value of the complex went up from \$40 million to \$200 million as soon as the variance and the green light to build the condos were obtained.¹ Destroying 5Pointz – as also stressed by Judge Frederic Block in the first instance proceedings² – permitted the owner to realise that gain.

After the demolition, the 21 graffiti and street artists sued for damages under VARA. The first instance decision condemned Mr. Wolkoff's actions, finding that 45 murals (out of 49 pieces identified in the complaint) had 'recognised stature' and that the property owner had illegally destroyed them, awarding the artists a staggering sum of \$6.7 million in damages. The artworks in question included both graffiti lettering pieces (4) and figurative works of street art (27), with the remaining murals (18) being a mix between lettering and pictorial elements.

The property owner expectedly appealed the decision. Yet, in a stunning affirmation of the first instance decision, the Court of Appeals totally confirmed the first instance ruling, siding once more with the street and graffiti artists and confirming the \$6.7 million damages award. The 32 page appeal judgement rejected all defences brought by the owner of the site, firmly placing the artists' rights within the scope of the law and Mr. Wolkoff's actions outside of it. In other words, the decision makes clear once again that ignoring the moral rights of artists, including street and graffiti artists, will have consequences, and they may be costly.

RECOGNISED STATURE

The most important issue of the case was whether the 5Pointz artworks satisfied the 'recognised stature' requirement under VARA. This criterion acts as a filter, so that only works of high quality or a particular status are protected from destruction. This provides a necessary balancing exercise between artists' rights and property rights within the law.

A key element of recognised stature was established in the seminal case of *Carter v. Hemsley Spear*³, where it was held that this requirement is a sort of gatekeeping mechanism. What the *Carter* case required was not that the work of art reached the level of a masterpiece and was widely admired:

A plaintiff need not demonstrate that his or her artwork is equal in stature to that created by artists

such as Picasso, Chagall [...] Nor must the trier of fact personally find the art to be aesthetically pleasing⁴

Conversely, the recognised stature requirement aims at preventing lawsuits over minor artistic outputs. Thus, to reach the required threshold, it was held in *Carter* that:

a plaintiff must make a two-tiered showing: (1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognised' by art experts, other members of the artistic community, or by some cross-section of society.

In complying with these obligations, artists should rely on expert testimony (Chused, 2018). But in the *5Pointz* case both the first instance judge and the Court of Appeals embraced a generous interpretation of this requirement, confirming that expert testimony is not the sole relevant determination when it comes to verifying whether a work is of recognised stature.⁵ Indeed, in the first instance proceedings, Judge Block refused to apply the methodology proposed by the expert for the property owner who 'used an unduly restrictive interpretation of recognised stature that was more akin to a masterpiece standard' and would end up protecting just works mentioned in academic publications.⁶ In other words, following this approach – Judge Block noted – only works made by artists like Caravaggio and Rembrandt would reach that level.⁷ It was instead stressed that to reach the recognised stature requirement it was enough for the 5Pointz artists to show their professional achievements, including evidence of the appearance of their works in movies and online videos, on TV, blogs, and social media, as well as other media.⁸ Judge Block also added that even under the most restrictive of evidentiary standards the pieces would still qualify as works of recognised stature. The Court of Appeals confirmed this point, adding that:

(t)he most important component of stature will generally be artistic quality. The relevant community [to be taken into account when it comes to verifying whether the required level of stature is met] will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists.⁹

Both parties – Mr. Wolkoff and the 21 artists – fiercely battled over the issue of expert testimony. The site owner claimed that the artists' expert assessment was misguided because she had based her testimony on images rather than having visited 5Pointz before destruction. The Court of Appeals did not agree, recognising the impracticability of this line of argument and affirming instead that the quality of a work assessed by an expert after it has been destroyed can be probative of its pre-destruction quality, status, or caliber.¹⁰ Indeed, if the Court were to accept Mr. Wolkoff's assertion here, it would have had the effect of unduly limiting the chances of meeting this requirement. The option of using images for expert review – the Court of Appeals confirmed – is an essential part of analysing artworks.

Another argument made by the property owner was focused on the temporary nature of the works at 5Pointz, which would allegedly vitiate any route to obtaining recognised stature.¹¹ Yet, the Court of Appeals was not impressed by this argument. Although street and graffiti art are known to be ephemeral, the court noted, VARA does apply to temporary forms of art:

We disagree. We see nothing in VARA that excludes temporary artwork from attaining recognised stature. [...] The statute does not adopt categories of 'permanent' and 'temporary' artwork.¹²

The court consolidated the judgement on this issue by discussing previous ephemeral artworks of high repute. More precisely, it noted that in 2005 the well-known artists Christo Vladimirov Javacheff and Jeanne-Claude Denat (collectively known as 'Christo') installed 'The Gates', a temporary installation of gates adorned by saffron coloured flags across Central Park, in New York City. The installation stayed for less than two weeks. Nevertheless, the court noted that the installation could be considered as having recognised stature and, if needed, would have been protected against destruction under VARA.¹³

The court backed up such arguments by referring to Banksy. Remarkably, the consideration of Banksy's celebrity also formed part of the assessment of stature at 5Pointz. While the British artist was not involved with any of the works at the site, Banksy's art was used to form a theoretical argument. Indeed, the Court of Appeals noted that:

A Banksy painting at 5Pointz would have possessed recognised stature, even if it were temporary [...] the temporary nature of the art is not a bar to recognised stature.

The court also emphasised the fact that Banksy had appeared beside notable figures such as former US President Barack Obama and Apple founder Steve Jobs on *Time Magazine*; and also recalled the moment when, in 2018, Banksy famously shocked and captivated onlookers at a Sotheby's auction with his self-destructing artwork 'Girl with Balloon'.¹⁴ These comments do not come as big surprise. VARA's role after all is to protect any work of cultural value. If there were mandated lifespans for protected art, many cherished works would be left vulnerable to illegal manipulation or destruction. In other words, the court stressed that if there is opportunity for cultural evaluation there is also potential for legal protection against prejudicial and destructive treatments of artworks, irrespective of their lifespan.

Mr. Wolkoff also argued that because the artists were aware that the 5Pointz buildings may eventually be destroyed, they should have expected the potential destruction of their works. This argument was also rejected as VARA expressly states that because of the possibility of salvaging removable works (and several murals at 5Pointz could have been removed relatively easily), property owners are obliged to allow for a 90 days' notice to facilitate such attempts¹⁵: which Mr. Wolkoff did not do.

Another factor considered by the Court of Appeals is the context in which the 5Pointz pieces were placed. The site had gained notoriety and became a star feature of the graffiti scene in New York, also gaining recognition globally. This was a crucial factor, particularly in regard to establishing the reception by the community. Evidently, the location of the art is relevant when considering its position in the law, which protects artists' moral rights (Chused, 2018). After all, context is crucial also for works of fine art exhibited in museums, as the Court of Appeals correctly pointed out:

Appearance at a major site – e.g. The Louvre or the Prado – ensures that a work will be recognised, that is, seen and appreciated by the public and the art

community. The appearance of a work of art at a curated site such as a museum or 5Pointz means that the work has been deemed meritorious by the curator and therefore is evidence of stature.¹⁶

This part of the appeal's ruling echoes what the first instance judge had already highlighted as an important factor, namely the artistic and social importance that 5Pointz had acquired throughout the years, which was manifested on the one hand by the brilliant supervision and selection skills of its curator, Meres One¹⁷, and on the other, by the fact that the site had become an attraction for New York visitors, with busloads of tourists, schoolchildren, and married couples visiting it constantly.

The Court of Appeals also held that because Jonathan 'Meres One' reviewed a plan for each artwork before allowing it to be painted, the case for recognised stature was strengthened.¹⁸ The curation of 5Pointz followed a system of conscientious consideration determined by Meres One, who constantly presided over the site and enforced social norms so that both long-term and short-term graffiti was created. This structured system carried extra weight in the appeal case in favour of the artists and their claim that their pieces were worthy of obtaining recognised stature.

WILFUL CONDUCT

The Court of Appeals also found that Mr. Wolkoff's illegal activity was wilful. Indeed, he was aware prior to the whitewashing that the artists were pressing VARA claims, evincing the deliberate choice to violate the law. A decision that – the court confirmed – served no apparent purpose and has been perceived as nothing more than a malicious display of power. Importantly, the whitewash was not at all necessary to begin construction of the apartments. It was just an act of 'pure pique and revenge', to use the words of Judge Block in the first instance decision, also highlighted by the Court of Appeals.¹⁹ Mr. Wolkoff could have allowed the artworks to remain visible until demolition began, giving the artists time to photograph or to recover their works where possible.²⁰ Instead, he destroyed the works immediately after the district court denied the preliminary injunction and before the same court could finalise its promised written opinion (as mentioned, he also did not serve the required 90-day notice which would have allowed artists to save some of their pieces).

Moreover, when his behaviour was questioned by the court in the first instance proceedings, the property owner offered a weak explanation, citing that he had feared the artists would attempt to access the property illegally to gain possession of their works. However, the Court of Appeals noted that there was no evidence confirming this circumstance.²¹ Also, as also noted by Judge Block in the first instance proceedings, Mr. Wolkoff did not help his cause when he later reminded the court that he 'would make the same decision today'.²²

It is clear such a wilful disrespect of an important legal provision pushed Judge Block to award the artists the maximum amount of damages (Bonadio, 2018a), and the Court of Appeals to confirm the award. Mr. Wolkoff had many opportunities to change course. He had been warned at the start of the first instance proceedings, and before the whitewashing, that there was a potential for high damages if the artworks then deemed protectable under VARA were going to be destroyed. Perhaps it was his certainty that street art and graffiti would not be covered by US moral rights law that made him act so misguided – in defiance of the legal advice of even his own lawyers.²³

CONCLUDING REMARKS

The appeal decision in *5Pointz* confirms once again that society's attitude towards street art and graffiti is progressively changing. Practitioners of a type of art that has long been considered by wide sectors of society as of minor artistic value have been given a form of legal protection which was originally designed with traditional fine artists in mind. In other words, what this case confirms once more is that – in the eyes of the law – the gap between street and graffiti art and fine art is narrowing, which may contribute towards changing the perception that members of the general public have of these unconventional forms of creativity.

The *5Pointz* case seems to mark a defining moment in the evolution of graffiti and street art, which have long been considered as temporary art forms (Bonadio, 2018b). Artists within these scenes appear more interested in trying to preserve their works (Chused, 2018). And the high damages award may persuade many artists to bring legal complaints against property owners where their pieces are unjustifiably destroyed or threatened with destruction.

The *5Pointz* case has also confirmed the importance of protecting artists' moral right of integrity. The enforcement of such (private) rights has also the potential of protecting the interest of the general public in preserving valuable art (Bonadio, 2020). US lawmakers' debate surrounding the introduction of VARA is quite revealing in this regard. During the legislative process which led to the final act, it was noted that 'society is the ultimate loser when the works are modified or destroyed'²⁴; that moral rights protect both 'professional artists who build their future on the integrity and authenticity of [art] in public and private collections, and [...] the public [by] preserving its cultural legacy'²⁵; and that the rationale for such protection is the need to preserve important works of art that eventually become 'an invaluable part of American culture'.²⁶ This important feature of moral rights has also been highlighted by the Court of Appeals in *5Pointz* when citing *Carter*: 'VARA protects 'the public interest in preserving [the] nation's culture''.²⁷

There seems therefore to be a coincidence between the self-interest of artists in taking action to save their works by relying on the moral right of integrity and the public interest in the preservation of works of art (Merryman, 1976; Sax, 2001; Swack, 1998). This correlation is epitomised, with particular reference to street and graffiti art, by the 'gift to the public' narrative. Many people within local communities believe that by placing art in their area, artists give them something to enjoy and to reflect upon. Thus, when artists rely on moral rights' law to attempt to save their pieces, they are trying to ensure that their gift is maintained, in furtherance of a public interest (Bougdanos, 2012).

Enrico Bonadio is Reader in Intellectual Property Law at City, University of London. He is interested in the intersection between street art, graffiti, and copyright (amongst other topics). He edited *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019). In 2018 he also published an edited book entitled *Non-Conventional Copyright – How Far Copyright Boundaries Can Be Stretched?* with Nicola Lucchi (Edward Elgar, October 2018). Bonadio has been a Visiting Scholar at Melbourne Law School (University of Melbourne, 2013), City University New York (CUNY Law School, 2016), University of Tel Aviv (2018 and 2019) and Keio Law School in Tokyo (2019). He is a Solicitor qualified to practise in England and Wales as well as in Italy. He practiced as an IP and copyright lawyer for several years, and frequently appears in the media as an IP expert. His research has been covered by BBC, CNN, *The New York Times*, *Newsweek*, *Politico*, *Reuters*, *The Wall Street Journal*, *The Washington Post*, *Bloomberg*, *The Conversation*, and *The Independent* amongst other media outlets.

Olivia Jean-Baptiste is an Intellectual Property Law LLM student at Queen Mary University of London, and recipient of the BLACA/Stationers' Company Copyright Law Award. She holds an LLB degree from City, University of London where she was awarded the Bristows Prize in Intellectual Property Law. Her dissertation focus is on the copyright protection of street art and graffiti. She has previously written on the copyright protection of virtual reality and augmented reality art.

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- 1 As far as the increase in the value of the site is concerned, see also Bonadio E. (2018) 'Graffiti Gets VARA Protection: the 5Pointz Case'. *European Intellectual Property Review*, 40(6): 409–413.
- 2 See page 46 of the first instance ruling which states how Mr. Wolkoff benefitted from the artist's activities as the price of the site increased.
- 3 *Carter v. Hemsley Spear* (1995) 861 F Supp 303 (SDNY 1994) and 71 F.3D 77 (2nd Cir 1995), underlining the requirements of recognised stature.
- 4 *Carter v. Hemsley Spear* (1995) 861F. Supp. page 325 emphasises that the court will not make an aesthetic judgement on the work.
- 5 Indeed, in the first instance proceedings Judge Block endorsed the case of *Martin v. City of Indianapolis* (which had affirmed that the *Carter* test 'may be more rigorous than Congress intended'); and recalled that in *Martin* the requirement in question was satisfied by merely relying on newspaper, magazine articles, and various letters including a letter from an art gallery director. What *Martin* confirms – Judge Block reminded in the first instance decision – is that 'expert testimony is not the sine qua non for establishing that a work of visual art is of recognised stature' (see page 29 of the first instance ruling).
- 6 See page 31 of the first instance ruling, the defendant's expert testimony was flawed, in addition to the restrictive approach the expert's reliance on social media was questioned by the judge who stated her lack of findings defied credibility.
- 7 See page 32 of the first instance judgement which highlights the issues with the final conclusion of the defendant's expert.
- 8 See page 31 of the first instance judgement which affirms the existence of accolades recognising 5Pointz outside of the site.
- 9 See page 23 of the appeal judgement, confirming that a respected aerosol artist's opinion will be sufficient for a finding of stature.
- 10 See page 22 of the appeal ruling in which the court reaffirms the works' recognition.
- 11 See page 17 of the appeal ruling which confirms no error was made in the District Court regarding the admissibility of temporary works.
- 12 See page 16 of the appeal ruling where it is unequivocally stated that VARA does not exclude temporary works from being protected under VARA.
- 13 See page 19 of the appeal judgement which discusses the lifespan on a work will not a bar to protection where there is opportunity for the work to be viewed and evaluated.
- 14 See page 18 of the appeal judgement, also noting that in recent years street art, much of which is temporary, has emerged as a major category of contemporary art.
- 15 If the artwork incorporated in the building is not removable without damaging the piece, the property owner is still able under VARA to destroy it under the condition that artists have waived their moral rights through a written instrument signed by both the artist and building owner: see 17 U.S.C. § 113(d)(1)(b).
- 16 See page 24 of the appeal judgement which discusses how stature is established holistically, including consideration of the site.
- 17 See page 23 of the appeal judgement, confirming that a respected aerosol artist's opinion will be sufficient for a finding of stature.
- 18 See page 25 of the appeal judgement which establishes that when the curator is distinguished his selection of the work is especially probative.
- 19 See page 29 of the appeal judgement which stresses that statutory damages were awarded to sanction Mr. Wolkoff's conduct.
- 20 In the first instance proceedings Judge Block noted that: 'The shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes during those 10 months and gaze at the formidable works of aerosol art for the last time. It would have been a wonderful tribute for the artists that they richly deserved' (see pages 49–50 of the decision).
- 21 See also page 26 of the appeal judgement which discusses Mr. Wolkoff's 'bad behaviour' and highlights Mr. Wolkoff's testimony as a deliberate choice to violate VARA.
- 22 See page 27 of the appeal ruling. In the first instance proceedings, the property owner also argued that he had whitewashed the art to prevent additional conflict and to reduce 'the pain of seeing the painted walls being pulled down'. He even added that he cried when the site was torn down. Yet, Judge Block was highly sceptical about that being true. See pages 40–45 of the first instance decision.
- 23 The murals painted at 5Pointz were authorised by the property owner. Would the decision have been different if the artists had painted at 5Pointz without Mr. Wolkoff's authorisation? The issue is not entirely clear under US law. In the case of *Ron English et al. v. BFC & R. 11th Street LLC* it was held that protecting illegally created pieces 'could effectively freeze redevelopments of vacant lots by placing artwork there without permission. Such a construction of the statute would be constitutionally troubling, would defy rationality and cannot be what Congress intended in passing VARA'. Yet, in the subsequent case *Pollara v. Seymour*, the court clarified that the ruling in *Ron English* only applied to illegal works that could not be removed without destroying them, therefore suggesting that in case of illegal works that can be removed without harm, VARA does apply, and artists can thus save them from destruction. In *Pollara*, the Court added that 'there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner'. This point confirms that US courts have not taken a clear stance when it comes to interpreting the right to prevent destruction in case of illegally produced works.
- 24 136 Cong. Record H3111-02 (daily ed., June 5, 1989, statement of Rep. Kastenmeier). See also the statement by Hon. Ralph Oman, Register of Copyrights: '[D]estruction of works of art has a detrimental effect on the artist's reputation, and [...] also represents a loss to society', quoted in H.R. Rep. No 101–514, 6915.
- 25 H.R. Rep. No. 514, 101st Cong., 2d Sess. 6 (1990), statement of artist Weltzin Blix.
- 26 101 Cong. Rec. H2690 (daily ed. June 13, 1990), statement of Rep. William; see also H.R. Rep. No. 101–514, pt. 2, 6916 (1990), stressing the benefits 'not only to individual visual artists, but also to the American culture to which these artists make such a significant contribution; see also the statement by Professor Jane Ginsburg, H.R. Rep. No. 101–514 (1990), 6924: 'protecting the works [...] against destruction or mutilation [...] may enhance the creative environment in which artists labor. [...] Equally important, these safeguards enhance our cultural heritage. [...] The integrity right helps preserve artworks intact for all of us to enjoy'.
- 27 See page 14 of the appeal ruling which states the underlying goal of VARA is the protection of the nation's culture.