

Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz

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INTRODUCTION

Graffiti has blossomed into far more than spray-painted tags and quickly vanishing pieces on abandoned buildings, trains, subway cars, and remote underpasses painted by rebellious urbanites. In some quarters, it has become high art. Works by acclaimed street artists Shepard Fairey,¹ Jean-Michel Basquiat,² and Banksy,³ among many others, are now highly prized. Though Banksy has consistently refused to sell his work and objected to others doing so, works of other

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1. Fairey became famous as the artist behind the “Hope” poster he made for Barak Obama’s presidential campaign in 2008. But he got his start doing street art and posting stickers around Providence when he was a student at the Rhode Island School of Design. His “Andre the Giant Has a Posse” sticker campaign using stylized images of the famous professional wrestler’s face, typically along with the word “Obey,” began in 1989. G. JAMES DAICHENDT, SHEPARD FAIREY, INC.: ARTIST/ PROFESSIONAL/VANDAL (2014).

2. Basquiat started as a graffiti artist, took the world by storm, and died of an overdose at the age of twenty eight. His works are now among the most valuable in the world. See, e.g., Robin Pogrebin & Scott Reyburn, *A Basquiat Sells For Mind-Blowing \$110.5 Million at Auction*, N.Y. TIMES, May 18, 2017, <https://nyti.ms/2rxoFOx>. For biographies, see ERIC FRETZ, JEAN-MICHEL BASQUIAT: A BIOGRAPHY (2010); DIETER BUCHHART, BASQUIAT (2010); LEONHARD EMMERLING, BASQUIAT (2003).

3. Banksy, who is compulsively reclusive, has made street art in often unlikely places all over the world. For a recent book about him, see WILL ELLSWORH-JONES, BANKSY: THE MAN BEHIND THE WALL (2012). For an online collection of his street art, see *80+ Beautiful Street Crimes Done by Banksy*, BORED PANDA, <https://perma.cc/9K52-D4QK> (last visited Aug. 24, 2017). The organization Pest Control conducts authentications of his work. *What Is Pest Control?*, PEST CONTROL, <https://perma.cc/TU64-D62S> (last visited Mar. 18, 2018). Many individuals, developers, organizations, and even cities now make efforts to preserve his works as they appear. See, e.g., *Banksy Behind Glass: Artwork Gets New Toronto Home*, CTV NEWS (Feb. 14, 2017, 10:11 AM), <https://perma.cc/9LXL-K9WA> (describing how a section of cement with a Banksy work was integrated into a new development).

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street artists have fetched substantial prices at auction.⁴ They use their publicly visible street art to develop artistic credibility, publicity, designer contracts, and sales-potential for works made on more traditional surfaces. Neighborhood businesses, commercial establishments, and warehouse owners across America seek out artists to paint large, complex pieces on their exterior walls to attract visitors, commerce, and new residents to the neighborhood. They have discerned that the arrival of creative souls will encourage residents, developers, and entrepreneurs to revitalize run-down buildings as lofts, studios, and galleries; to attract restaurants and other businesses to open; and ultimately to raise property values. Some artists have responded to the changing attitudes by integrating their art with public spaces in ways that are provocative, humorous, or socially critical. Although many may wish to preserve street art—no longer just the rebellious demonstrations of the oppressed or disgruntled—it still risks being destroyed in the blink of an eye. A recent article in *Artsy*, for example, highlighted ten creative souls who have reimagined the street art world. Following the lead of Banksy, their work has charted new paths in the world of public art made secretly and without permission. One of the featured artists was Michael Pederson, whose tiny work *Void 2* caught my eye. Pederson placed a tiny turnstile at the base of an exhaust or drainage pipe emerging from a building at street level, accompanied by a tiny sign with an arrow saying, “YOU MUST BE THIS TALL TO ENTER THE VOID.”⁵ LOL.

The emergence of graffiti and street art as a major, quickly evolving, internationally recognized art form has triggered novel and significant legal disputes for both artists and property owners. These legal tensions are evident in the recent judicial opinions and trial addressing the moral rights dispute between artists who used to paint at the 5Pointz industrial site in Long Island City, Queens and the developers who destroyed the graffiti covered buildings for construction of two large, architecturally lackluster apartment towers.⁶ A largely empty industrial complex during the early 1990s, the site became covered with graffiti as the decade progressed. All parties to the legal dispute agree that the primary owner of the complex, Gerald Wolkoff, allowed artists to paint on the buildings and create studios in the interior spaces beginning in about 1993. In 2002, to gain better management of the situation, Wolkoff orally agreed to allow Jonathan Cohen, one of the graffiti

4. One of many recent efforts to preserve a Banksy work led to high purchase offers from the person who owned the wall segment upon which it was painted. The offers all were rejected; the work was saved and publicly displayed. While Banksy's reactions to saving his works are not known, he certainly disfavors their sale. See Kenneth Turan, *'Saving Banksy' Investigates the Tension Between the Ethos of Street Art and a Desire to Preserve It*, L.A. TIMES, (Jan. 19, 2017), <https://perma.cc/7RYG-Z4V4>; Amie Tsang, *Hidden Banksy Art to Be Displayed by London Developer*, N.Y. TIMES, Aug. 23, 2017, <https://nyti.ms/2vYYoOp>.

5. Ilana Herzig, *These Ten Artists Are Challenging Our Idea of What Street Art Can Be*, ARTSY (Sept. 27, 2017), <https://perma.cc/GH7D-QRBG>.

6. 5Pointz was located at 45–46 Davis Street, one subway stop from Grand Central Terminal in Manhattan. HTO Architect designed the buildings, renderings of which are available online. Stephen Smith, *New Look: 22-24 Jackson Avenue, 5Pointz Redevelopment*, YIMBY (July 31, 2014, 7:00 AM), <https://perma.cc/4RBS-6Y3U>.

writers⁷ working at 5Pointz, to organize, control, and curate the creative endeavors of artists from all over the world seeking access to the site.⁸ After that 2002 oral agreement, Cohen changed the site's name from Phun Phactory to 5Pointz.⁹ He exercised his authority to gain control over access to the site, to establish rules barring painting without his permission, and to require visitors to obtain consent before undertaking onsite photography or filming.¹⁰ Although the 2009 collapse of an interior stairway in the complex led the city to end the presence of studios inside the structures, writing on the exterior and parts of the interior continued unabated. Under Cohen's watchful eye, the area became an internationally recognized graffiti center. The notoriety of the site was enhanced by its visibility from the heavily used 7 train as it passed nearby on an above ground portion of the New York City subway system. The fame and widely recognized quality of much of the art at 5Pointz provided widespread public support for litigation when Wolkoff's development plans were revealed and demolition of the old commercial buildings loomed. Many—artists, neighbors, and art lovers—decried destruction of the site.¹¹ Construction of the two new apartment buildings began in 2015 and is scheduled for completion in 2018.¹²

7. In street parlance, artists "write" graffiti. While this term likely derives from tags, it also applies to "pieces," larger, often pictorial work. See Susan Farrell, *Graffiti Q&A*, ART CRIMES, <https://perma.cc/MS7D-RS8K> (last visited Mar. 5, 2018).

8. Susanna Frederick Fischer, *Who's the Vandal? The Recent Controversy Over the Destruction of 5Pointz and How Much Protection Does Moral Rights Law Give to Authorized Aerosol Art?*, 14 J. MARSHALL REV. INTELL. PROP. L. 326, 331 (2015); Timothy Marks, Note, *The Saga of 5Points: VARA's Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281, 283 (2015). See also Second Amended Complaint at 7–10, *Cohen v. G&M Realty L.P.*, No. 13-CV-5612 (E.D.N.Y. June 17, 2014).

9. More formal names included "5Pointz: The Institute of Higher Burnin'" or "5Pointz Aerosol Art Center, Inc." To most it was simply 5Pointz. "5Pointz" was always prominently visible on the building, though its shape and coloring periodically changed. See, e.g., <https://perma.cc/34TZ-35XD> (last visited Apr. 9, 2017).

10. A large metal door on the site had the following prominently painted words spray-painted on it: "Welcome to 5Pointz. Painting with a permit!! Weekends: 12-7 PM. Weekdays by appt only. Email meresone@5ptz.com for info. NO photo shoots videos without permission. Check out our site 5ptz.com." Fred Hatt, *5 Pointz Posted Rules*, DRAWING LIFE BY FRED HATT (Oct. 20, 2013), <https://perma.cc/7MR9-CYMD>. "MeresOne" is the street name of Jonathan Cohen. *About*, MERES ONE ART, <https://perma.cc/4RTT-AFZ2> (last visited July 19, 2017).

11. See, e.g., Erik Badia & Katherine Clarke, *Demolition of Graffiti Mecca 5Pointz Draws Tourists and Artists in Mourning*, N.Y. DAILY NEWS (Aug. 22, 2014, 4:29PM), <http://www.nydailynews.com/life-style/real-estate/demolition-graffiti-mecca-5pointz-begins-article-1.1913624>.

12. Renderings of the two new forty-seven and forty-one story buildings may be found online. *22–44 Jackson Avenue*, HTO ARCHITECT, <https://perma.cc/5BCQ-RTLRL> (last visited July 19, 2017).



Rendering of the new apartment buildings, named 5Pointz after the graffiti site

After the demolition of 5Pointz in 2014, some of the evicted artists migrated to the Bushwick neighborhood of Brooklyn to join others already painting there.¹³ Bushwick is a prime, present day example of the growing importance of graffiti as a widely recognized art form.¹⁴ Its emergence as another internationally known graffiti zone is fascinating for both its aesthetic and legal implications. A variety of illegal street art proliferated in the area in the decades before and after the turn of the twenty-first century. It was not always a safe place to be. The Ficalora family has lived in the area for many years. Joseph Ficalora's father was killed during a 1991 robbery in the neighborhood. His family, owners of a steel fabrication business, remained in Bushwick, although that became more difficult for Joseph after his mother was diagnosed with brain cancer in 2008 and died in 2011. His efforts to eradicate graffiti around his business were constantly foiled. In 2013, during a period of deep frustration and depression, he began searching for information about street artists working in the area, hoping to find a way to alter the impact of their presence on the neighborhood.¹⁵ The search changed his life. He developed friendships with

13. In 2015, 5Pointz artists held an event at a furniture refinishing business, Brooklyn Reclaimed. Christopher Inoa, *The Spirit of 5Pointz Lives On at Brooklyn Reclaimed in Bushwick in New Street Art Curation*, UNTAPPED CITIES (June 30, 2015), <https://perma.cc/9E2V-NNJG>. Others moved to the Bronx and Jersey City. Leigh Silver, *Remembering 5Pointz: A Community Reminisces on What Was So Much More Than Just a Legendary Graffiti Spot*, COMPLEX (Nov. 19, 2014), <https://perma.cc/8VX4-6KG4>.

14. Legal art projects now exist in virtually every city in the United States. See, e.g., WYNWOOD WALLS, <https://perma.cc/XSY5-UHQB> / (last visited Aug. 7, 2017) (Miami, FL); BEYOND WALLS, <https://perma.cc/T2U3-L7HJ> (last visited Aug. 7, 2017) (Lynn, MA); MURAL ARTS, <https://perma.cc/3ZJT-MJZU> (last visited Aug. 7, 2017) (Philadelphia, PA); MURALS IN THE MARKET, <https://perma.cc/6XEA-R2FC> (last visited Aug. 7, 2017) (Detroit, MI); PUBLIC ART GROUP, <https://perma.cc/NSSC-57JA> (last visited Aug. 7, 2017) (Chicago, IL); OPEN WALLS, <https://perma.cc/L27L-H42S> (last visited Aug. 7, 2017) (Baltimore, MD). Museums celebrating the urban art scene are now opening internationally. See, e.g., the recently opened Urban Nation Museum for Urban Contemporary Art in Berlin, Germany. URBAN NATION, <https://perma.cc/J9AF-8NY6> (last visited Sep. 28, 2017).

15. Budd Mishkin, *One on 1 Profile: Founder of The Bushwick Collective Found Redemption in Street Art*, N.Y. 1 (Aug. 15, 2016, 1:30AM), <https://perma.cc/6D62-XG6X>.

some of the graffiti painters, learned about their craft, and gained respect for their talents. Eventually he invited them to paint on his property and encouraged other business owners to do the same. One of the first legal pieces made in Bushwick was written in April 2013 by Jay Miesel Fumero in honor of Ficalora's mother.¹⁶ Ficalora then became the local graffiti "curator." Within a year, the Bushwick Collective, a group of graffiti artists and local entrepreneurs, blossomed into a full-scale art and neighborhood improvement organization.¹⁷ It is now a vibrant entity working with neighborhood businesses and residents to bring in artists from all over the world to create major pieces.¹⁸

A walking tour through the area in September 2016 revealed a neighborhood festooned with dozens of public art pieces, many striking for their beauty, variety, color, and technique.¹⁹ The high level of detail in much of the work belied the fact that the images were made using only spray paint—no brushes were used. Below are two examples made by artists from Germany and France at the invitation of the Bushwick Collective.²⁰

16. See *The Bushwick Collective: Inspirational*, FUMEROISM (Dec. 22, 2016), <https://perma.cc/PP6F-9EKF>. The date was provided to me by Fumero. Email to Richard Chused from Jay Miesel Fumero (Aug. 3, 2017) (on file with author). In another email, he also told me that the piece lasted about a year before, in typical graffiti fashion, it was painted over. Email to Richard Chused from Jay Miesel Fumero (Aug. 4, 2017) (on file with author). An image of the work may be found in Amy O'Leary, *Bushwick Gets a Fresh Coat*, N.Y. TIMES, May 3, 2013, <https://nyti.ms/2IjyM2A>.

17. *Id.*

18. See *Bushwick Collective*, FACEBOOK, <https://perma.cc/YCP6-FRPN> (last visited July 17, 2017); BUSHWICK COLLECTIVE, <https://perma.cc/UK93-CQCZ> (last visited July 17, 2017). Bushwick Collective was also involved in some copyright problems when it cooperated with a McDonald's advertising campaign in the Netherlands featuring images of street work not painted by unassociated artists. Brian Boucher, *Not Lovin' It: Street Artists Slam McDonald's for Using Their Work in New Ad*, ARTNET NEWS (Apr. 19, 2017), <https://perma.cc/Y5QL-WU3F>.

19. For more information about walking tours of graffiti areas, see *The Bushwick Collective—A Street Art Gallery*, FREE TOURS BY FOOT, <https://perma.cc/H2L9-N9QN> (last visited Apr. 9, 2017).

20. Note, especially, that despite the mammoth sizes of these pieces, the details—down to individual hairs—are finely made. As sometimes happens with graffiti, taggers nonetheless added their street signatures, despite the works' qualities.



Bushwick Collective, 2016 (photos: courtesy of the author)

5Pointz and Bushwick are exemplars of the deep cultural contradictions inherent in street art in general and well-crafted graffiti in particular. Until recently, graffiti, by tradition, was virtually always painted over. An underlying assumption was that it *should* not be permanent. Its temporary nature was a deeply engrained element of its aesthetic. Writing graffiti was an act of rebellion, a rejection of the fetishizing of “great” art, and a celebration of the sometimes hasty, impermanent, but joyful act of creation. Since much of it was illegal and its creation entailed risk, the expectation

that it would be painted over or washed off was an accepted—no, *desirable*—canon of the culture. The temporal quality of the work made patently clear its rejection of traditional artistic genres. However, in recent decades, the increasingly artistic quality of pieces at 5Pointz and other locations created a desire for preservation (including among those who previously scorned the work). Entrepreneurs and real estate developers began to see that graffiti could spur economic development and new artistic movements—much to the consternation of some of the early writers. Some graffiti writers, attracted by the prospect of using graffiti as an entrée to more traditional art markets, became part of the commercial art world. These shifts in attitude conflict with the basic aesthetic core of “traditional” early graffiti writers. Rather than celebrating an act of rebellion, some street artists have gradually become more attuned to the same monetized instincts now governing major art galleries, auction houses, and museums. Part of the culture rebellious writers envisioned when they put tags on buildings and mailboxes and made large pieces on subway cars, tunnels, and underpasses during the 1960s and 1970s is now threatened. Indeed, artists working at 5Pointz before its demolition were aware of the cultural shifts and conflicts. Some of them rued the loss of risk-taking camaraderie common to the early years of street painting, even while welcoming their new-found ability to work in unhurried ways on large, legal wall pieces and to use their creations—still subject to destruction—to enter into the remunerative art world.²¹

The 5Pointz legal disputes and the growing cultural significance of neighborhoods like Bushwick pose three intriguing and interrelated issues about the status of graffiti in America. First, there are a number of intellectual and tangible property issues—the copyrightability of both legal and illegal graffiti; the impact of the Visual Artists Rights Act of 1990 (“VARA”) providing artists with control over the labeling, alteration, and destruction of work painted on a variety of outdoor objects and buildings; and the relationships between VARA, property law, and historic preservation ordinances and statutes.²² Second, building owners who allow graffiti to be painted on their walls now face legal and financial risks. If artists hold rights under VARA to resist the mutilation or destruction of their work, building owners wishing to preserve control over their property will have to hire lawyers to draft agreements in which artists waive their VARA rights. Since, under the Copyright Act, such waivers must be separate arrangements for each copyrighted work, contracts will have to be signed each time a new work is created on a building. If such waivers are not obtained and the work is made with permission of the property owner—as in the 5Pointz setting—artists retain rights to prevent mutilation or destruction of their work. That problem is at the core of the 5Pointz litigation.

21. A video documentary about 5Pointz with commentary by MeresOne and other painters highlights the culture clash. Riki Sakai & Ryan Resko, *Don't Bomb These Walls*, YOUTUBE (Dec. 3, 2013), <https://perma.cc/BY9H-GAU7>; see Jori Finkel, *After 'Hope,' and Lawsuit, Shepard Fairey Tries Damage Control*, N.Y. TIMES, Nov. 3, 2017, <https://nyti.ms/2zbQ3H3> (providing commentary on Shepard Fairey).

22. 17 U.S.C. §§106A, 113(d).

Finally, as noted above, the history and culture of graffiti has moved, at least in part, from the realm of rebellion to high art.²³ Graffiti has come of age and entered the stream of commerce. The notion that painting tags, posting decals, or making other artworks in outdoor spaces would grow into a major art form of “recognized stature”—in the language of VARA—was likely far from the minds of the Copyright Act’s drafters over half a century ago. Artistic tastes and movements continually evolve—sometimes in radical ways. But few could have imagined that street art, once routinely described as criminal vandalism, would emerge as heralded creativity. When such significant shifts occur in the culture of a creative genre, particularly difficult challenges arise within the legal community. Courts tend not to be deeply educated about the nature of artistic trends, the context of artistic movements, the tensions inherent in certain forms of creativity, and the ways such movements pose distinct legal issues. Graffiti is such an arena. Many judges deciding disputes involving new art forms often will search for easy ways to construe statutory language and unthinkingly apply ill-fitting cultural norms about creative movements to avoid facing issues arising in rapidly changing and dynamic artistic realms. Those tendencies are starkly evident in the preliminary injunction opinion rendered in *5Pointz*. Confronted with an effort by once disfavored artists to protect their artistic creations from demolition, the federal judge hearing the dispute found it difficult to use the language of copyright law in sophisticated ways that properly accounted for the history, culture, and dynamism of the graffiti world. The result was a woefully inadequate analysis of the legal issues in the dispute.²⁴ Telling that story, therefore, is a cautionary tale to courts about both the challenges facing the legal community from the rising importance of graffiti and the challenges that poses to property owners, and also the need to be careful and thoughtful in the ways they approach rapidly evolving creative worlds they know little about. Developing a deep understanding of rapidly developing artistic movements is critically important in applying old cases and statutory language to newly emerging problems. Ironically, the same judge who denied preliminary relief to the *5Pointz* artists wrote a much more logical opinion after the recent damages trial in the case.²⁵

This essay proceeds in four sections. The journey begins with the site’s story. The first three sections explore in detail the history and development of *5Pointz* and the contours of the moral rights litigation, which demolition of the buildings provoked. That is followed by a detailed review of the unsuccessful effort of the artists to obtain injunctive relief barring destruction of *5Pointz* and an appraisal of the damages trial that occurred after the demolition. The final section presents a first effort to work through the propriety of various limitations on moral rights in the United States that affect graffiti and the best way to balance the interests of artists and building owners in the quickly changing world of street art.

23. See generally, ROGER GASTMAN & CALEB NEELON, *THE HISTORY OF AMERICAN GRAFFITI* (2010) (for a comprehensive history); ERIC FELISBRET & LUKE FELISBRET, *GRAFFITI NEW YORK* (2009) (for a mostly illustrated book).

24. *Cohen v. G&M Realty, L.P. (5Pointz I)*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

25. *Cohen v. G&M Realty, L.P. (5Pointz II)*, No. 13-CV-05612, 2018 WL 851374 (E.D.N.Y. Feb. 12, 2018).

I. THE 5POINTZ CONFLICT

After the final plans to demolish 5Pointz were announced in 2013, a group of artists working there filed suit seeking to enjoin demolition of the site under VARA.²⁶ They additionally petitioned to have the 5Pointz complex designated as an historic site by the Landmarks Preservation Commission of New York City.²⁷ The landmark effort soon failed because the aesthetic features—the graffiti—which made the buildings historically important did not fulfill the statutory requirement that they be at least thirty years old.²⁸

The wisdom of this time standard is questionable, especially when a structure is facing demolition. Some buildings become architectural classics almost immediately. The Seagram Building at 375 Park Avenue, for example, designed by Mies van der Rohe and completed in 1958, was instantly recognized as a great building.²⁹ So was Lever House, a Skidmore, Owings & Merrill Building at 390 Park Avenue completed in 1952.³⁰ Gordon Bunshaft was the principal architect in charge of that design. Both were designated exactly thirty years after they were built and would surely have been landmarked earlier if that were possible. There are many other buildings in the city that gained stature quickly. Whether the artworks at 5Pointz were significant enough to lift the otherwise nondescript industrial buildings to an historically important level is unclear. Nevertheless, it might be wise to amend the preservation law to allow early designation for buildings of very special merit, perhaps with an automatic reappraisal process at the thirty-year mark to ensure that the original designation was appropriate.

Perhaps the best recent example of a demolition that might well have been forestalled with a more flexible historic designation process was the razing of the small but stunning American Folk Art Museum (“FAM”) on West Fifty Third Street by, of all developers, the Museum of Modern Art (“MoMA”). FAM opened to acclaim in 2001. It was, in the words of the distinguished New York Times

26. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A).

27. Laura B. Richardson, *The Making of the Moral Rights Case: The Factual and Legal Background of the 5Pointz Trial*, CENTER FOR ART L., Nov. 5, 2017, <https://perma.cc/N4HF-6W2Y>.

28. Artistic endeavors may be subject to preservation, however, if they meet the time requirement. Admin. Code of the City of N.Y. § 25-302(n) (Justia 2006), <https://perma.cc/5EW7-HKPQ> (defining “Landmark” as “any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter”).

29. Two of many articles about the building are Thomas W. Ennis, *Building is Designer’s Testament*, N.Y. TIMES, Nov. 10, 1957, <https://www.nytimes.com/1957/11/10/archives/building-is-designers-testament-seagram-building-marks-apex-of-mies.html>; Paul Goldberger, *Architecture View; His Buildings Have the Simplicity of Poetry*, N.Y. TIMES, Feb. 16, 1966, <https://www.nytimes.com,1986/02/16/arts/architecture-view-his-buildings-have-the-simplicity-of-poetry.html>.

30. See, e.g., Matt Tyrnauer, *Forever Modern*, VANITY FAIR, Oct. 2002, <https://perma.cc/LBS5-A7X7>; Paul Goldberger, *Architecture View; Lever House Awaits the Decision on its Future*, N.Y. TIMES, Nov. 11, 1982, <https://www.nytimes.com/1982/11/21/arts/architecture-view-lever-house-awaits-the-decision-on-its-future.html>.

architecture critic Michael Kimmelman, “a striking sliver of a building designed by Tod Williams and Billie Tsien,”³¹ two admired and decorated architects.³² The building went on the market only a few years after it opened due to financial problems at FAM. In a widely condemned decision, MoMA purchased the building only to raze and replace it with a high-rise apartment and museum structure next door.³³ Many thought MoMA should have integrated or repurposed the almost new building, which certainly should have been designated as historic early in its short lifetime. Regrettably, the preservation law did not provide any way to save it or to create legal pressure on MoMA to absorb it into its development plans.³⁴ Public pressure likewise failed, and the building was taken down.

The *5Pointz* moral rights claim under VARA, however, was far more powerful than the historic preservation claim. VARA was adopted as part of a multiyear legislative process allowing the United States to claim the right to participate in the Berne Convention for the Protection of Literary and Artistic Works—the primary international copyright agreement.³⁵ The convention mandates that each member nation adopt a moral right provision.³⁶ The U.S. provision, markedly less comprehensive than those in many other convention nations,³⁷ protects only works of “visual art”³⁸ for the life of the creator³⁹ and allows creators of works to waive their moral rights.⁴⁰ By contrast, other member countries protect a variety of additional creative endeavors in addition to works of visual art, extend the term of moral rights to periods beyond the life of the author, and place significant limitations

31. Michael Kimmelman, *Defending a Scrap of Soul Against MoMA*, N.Y. TIMES, May 12, 2013, <https://nyti.ms/2nnbLoj>.

32. *Select Awards*, TOD WILLIAMS BILLIE TSIEN ARCHITECTS PARTNERS, <https://perma.cc/X7EC-HFEQ> (last visited Sept. 28, 2017).

33. Robin Pogrebin, *Architects Mourn Former Folk Art Museum Building*, N.Y. TIMES, Apr. 15, 2014, <https://nyti.ms/2zsewXm>; Robin Pogrebin, *Critics Voice Objections to MoMA's Plan to Take Down the Folk Art Museum*, N.Y. TIMES: ArtsBeat (Jan. 9, 2014, 6:09 PM), <https://perma.cc/HWY9-7PQS>.

34. Although MoMA claimed it could not integrate FAM into its new architectural plan, the building now under construction at 53 West 53rd Street, designed by Jean Nouvel, is widely admired. See Nicolai Ouroussoff, *Next to MoMA, Reaching for the Stars*, N.Y. TIMES, Nov. 15, 2007, <https://nyti.ms/2GvkXh9>.

35. The United States acceded to the convention after adopting the Berne Convention Implementation Act, which became effective as of March 1, 1989 and lacked a moral right provision. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

36. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 8, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 99-27 (1986) (including the moral right “to claim authorship”).

37. See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009) (providing a comprehensive analysis of moral rights in the United States and internationally); see also Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519 (2011) (providing commentary on the weak nature of American moral rights law); see also Galia Aharoni, *You Can't Take It With You When You Die . . . Or Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes From Israel, France, and The United States*, 17 U. BALT. INTELL. PROP. L.J. 103 (2009).

38. 17 U.S.C. § 101 (defining a “work of visual art”).

39. 17 U.S.C. § 106A(d)(1).

40. 17 U.S.C. § 106A(e)(1).

on transfer or waiver of the rights.⁴¹ The reluctance of the United States to join the Berne Convention for much of the twentieth century stemmed in part from an important disagreement with much of Europe and other parts of the world about the justification for copyright law. The Berne Convention and its requirement for a moral rights provision arise from a sensibility that artistic endeavors should be protected because of the inherent value—a moral imperative—of creativity and the works it produces. Rather than using copyright to create markets for the primary purpose of distributing works to the greatest number of users—a deeply utilitarian instinct typically recited as the purpose for American law—most of the world grants copyright protection because of the intrinsic importance of the work of a creative soul.⁴² The weakness of America’s VARA provisions stems largely from a continuing antagonism toward treating artistic endeavors as inherently worthy exemplars of human creativity rather than as commercial objects.

The aspect of VARA most relevant to *5Pointz* protects works of visual art from mutilation or destruction. An artist—an “author” in the language of copyright law—has the right during life to prevent the subjection of a copyrightable “work of visual art” to “intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and to “prevent any destruction of a work of recognized stature.”⁴³ There are additional limitations particularly important to the *5Pointz* dispute applicable to works that are “incorporated in or made part of a building.” If an artist and building owner agree to the installation of a work in or on the structure and acknowledge in writing that it may be damaged or destroyed if it is removed, then the artist’s ability to control modification or destruction of the work is lost.⁴⁴ Even in settings where a work is installed in the absence of a waiver, the building owner is obligated to give notice of the intention to demolish or mutilate a work in order to give the artist a chance to remove it. In combination, these various provisions may provide relief to a graffiti artist when a work on a building is mutilated or destroyed if it is a copyrighted work, a work of “visual art,” a creation installed without a waiver, and, intentionally mutilated in a way that is prejudicial to the artist’s honor or reputation or destroyed when the work is of “recognized stature.”⁴⁵

41. French rights may last forever. In Israel, moral right is tied to the length of the copyright term, generally life plus seventy years. See Aharoni, *supra* note 37, at 106–14; see generally Kwall, *supra* note 37, at 37–47 (providing a summary of various European rules).

42. There is much literature about the purposes and economics of American copyright law. One of the classics is Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

43. 17 U.S.C. §§ 101, 106A(a).

44. 17 U.S.C. § 113(d).

45. This essay discusses only spray painted pieces of significant size—the type of work at issue in *5Pointz*. But there obviously are many forms of street art, including tagging, pasting graphic works in public places, and trash art. Even sculpture fits the bill, as demonstrated by the recent controversy over *Charging Bull* and *Fearless Girl* in New York’s financial district. See, e.g., Isaac Kaplan, *Fearless Girl Face-Off Poses a New Question: Does the Law Protect an Artist’s Message*, ARTSY (Apr. 13, 2017), <https://perma.cc/LW5J-95NV>. See also Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, U. C. IRVINE L.R. (forthcoming 2018).

II. ROUND ONE OF THE 5POINTZ LITIGATION: THE PRELIMINARY INJUNCTION CASE

A. THE JUDICIAL REFUSAL TO ENJOIN DEMOLITION OF THE 5POINTZ COMPLEX

In 2013, the 5Pointz owners filed applications with New York City to allow construction of a large apartment complex with over a thousand units of housing, including more than two hundred affordable units.⁴⁶ By October, the City Plan Commission and the City Council approved plans for the complex.⁴⁷ On October 10, 2013, Jonathan Cohen and sixteen other artists filed an action against Gerald Wolkoff and the business organization owners of 5Pointz, claiming that the imminent demolition of the complex would violate their rights under VARA.⁴⁸ The artists sought preliminary and permanent injunctive relief, along with a temporary restraining order, to prevent the defendants from mutilating or destroying their graffiti and from frustrating their ability to exploit copyright interests in the graffiti.⁴⁹

The artists received temporary relief to maintain the status quo shortly after filing the complaint, and a preliminary injunction hearing was held early in November 2013 before Judge Frederic Block of the United States District Court for the Eastern District of New York.⁵⁰ A week before the hearing, Judge Block entered a somewhat cryptic order asking that the parties “be prepared to address, *inter alia*: (1) the individual artist and creation date for each current work for which protection under VARA is claimed; (2) whether each such work is of ‘recognized stature’ within the meaning of VARA; and (3) the role played by plaintiff Jonathan Cohen in granting himself and the other plaintiffs permission to create works at 5Pointz, as well as his role in causing works to be whitewashed and/or painted over.”⁵¹

Designation of the artist and creation date for each work is a requirement for invoking copyright protection. Beyond that there was little to be concerned about with the first request in Judge Block’s order. The basic copyright term runs for the life of the author plus seventy years, well beyond the lifetime of any work at 5Pointz. It is also difficult to take seriously any argument that the large wall pieces involved

46. New York City land use law allows larger buildings to be constructed if units are affordable—offered at below market rental rates. The basic rules may be found at <https://perma.cc/X6Z2-66GB>.

47. Sarah Maslin Nir & Charles V. Bagli, *City Council to Decide Fate of Mecca for Graffiti Artists*, N.Y. TIMES, Oct. 8, 2013, <https://nyti.ms/2tYID18>; Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES, Nov. 19, 2013, <https://nyti.ms/2nFtkzc>. The funds were dependent upon at least 20% of the units being below market. *Id.*

48. Complaint at 34, *Cohen v. G&M Realty L.P.*, No. 13-CV-5612 (E.D.N.Y. Oct. 10, 2013). The group of seventeen original plaintiffs grew to twenty-one during 2017; Telephone Interview with Eric M. Baum, Attorney for the Plaintiffs (July 26, 2017).

49. Complaint, *supra* note 48, at 37–38.

50. The typical forum for copyright litigation in the Southern District had to give way to the Eastern District. 5Pointz was in Queens not Manhattan. The East River is the boundary line.

51. *Cohen v. G&M Realty, L.P. (5Pointz I)*, 988 F. Supp. 2d 212, 231 n.4 (E.D.N.Y. 2013). The order was issued on October 28, 2013, ten days before the hearing. Though not critical to the eventual result, the notion that Jonathan Cohen was the only person granting permission to make art at 5Pointz is partially inaccurate; Cohen organized and curated the work, but nothing could have been done legally without the acquiescence of Wolkoff.

in the *5Pointz* dispute were not original enough to qualify as pictorial, graphic, or sculptural works.⁵² In short, the first of the requirements for the *5Pointz* artists to obtain preliminary relief—that their work was copyrighted—was virtually impossible to undermine. It is not surprising, therefore, that even though Judge Block declined to issue preliminary injunctive relief for reasons discussed below, he did not do so because the works lacked federal protection under the Copyright Act.

Whether the work of the plaintiffs was of “recognized stature” and therefore protected from destruction was a major bone of contention at the injunction hearing. Both the judge’s order and the contours of the preliminary injunction hearing initially focused on the “recognized stature” standard. VARA’s terms on mutilation or destruction of a work of visual art are somewhat different. The mutilation provision of VARA in 17 U.S.C. §106A(a)(3) reads that an author may “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”⁵³ The destruction provision states that the author may prevent “any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”⁵⁴ The mutilation provision requires a showing of damage to “honor or reputation;” the destruction provision requires a showing that the work is one of “recognized stature.”⁵⁵ The court construed these categories as mutually exclusive. Once a work was destroyed, Judge Block opined, it was no longer subject to mutilation.⁵⁶ At the time of the injunction hearing, Wolkoff had not taken any action

52. Some contend that graffiti is not copyrightable when painted illegally, but such arguments are of dubious validity. See, e.g., Sara Cloon, Note, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. ONLINE 54 (2016); Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTEL. PROP. & ENT. L. 295, 307–11 (2013). Illegal work is not barred from protection. The United States Supreme Court has not directly spoken on the issue but has vigorously eschewed making content judgments in determining whether a work is protectable. See Marc J. Randazza, *Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights*, 16 NEV. L.J. 107 (2015). Even if its creation or publication involves illegal activity, nothing in copyright law bars criminal or civil prosecution for the illegal activity while still affirming the validity of any copyrights. Defamation claims may be pursued against authors and trespass charges may be brought against graffiti artists. Those obtaining judgments against graffiti writers may levy on the profits gained from intellectual property royalties or art sales. And, of course, the work at *5Pointz* was made with permission of the complex’s owner. Finally, the often-temporary nature of graffiti does not negate its protectable qualities on the ground that it is ephemeral or unfixed. To be available for copyright protection a work simply must be “fixed.” 17 U.S.C. § 101 defines a work as fixed in a tangible medium of expression, “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The expectation that a work of graffiti will be erased or painted over at some point in the future does not mean that its visibility is transitory. Holdings that materials stored in computer memory for short periods are “fixed” under the copyright statute make that quite clear. Indeed, in the process of discussing modern transitory art installations some have even argued that the limitation to “transitory” should be eliminated. See Megan M. Carpenter, *If It’s Broke, Fix It: Fixing Fixation*, 39 COLUM. J.L. & ARTS 355 (2016).

53. 17 U.S.C. §106A(a)(3).

54. *Id.*

55. *Id.*

56. Jury Charge at 10, *Cohen v. G&M Realty L.P.*, No. 13-CV-5612 (E.D.N.Y. Nov. 6, 2017).

to alter the graffiti. The only issue litigated was whether he was allowed to destroy them.⁵⁷ During the preliminary injunction hearing evidence was taken on stature, leading the court to conclude that at least some of the plaintiffs' works might meet the statutory standard if the case went to trial.⁵⁸

Despite reaching the conclusion that the stature of at least some of the 5Pointz graffiti provided a basis for going forward with the case, Judge Block denied the requested preliminary injunction. In reaching that conclusion, he relied heavily on the role of Jonathan Cohen and the transient (though not transitory) nature of the graffiti at 5Pointz. It is these points that raised the most interesting and difficult issues in this first stage of the litigation. Granting a preliminary injunction typically requires a showing that, among other things, irreparable harm will be imposed on the movant in the absence of interim relief. This became the linchpin of the hearing. In reviewing the role of Cohen in the operations at 5Pointz, Judge Block concluded that Cohen and the other artists knew the graffiti was impermanent and that its lifetime was dependent on both the actions of other painters working with Cohen's permission at the site and the redevelopment decisions made by the property owners. The two possibilities for the destruction of the art were not treated differently. "Cohen and his fellow plaintiffs," the court wrote, "undoubtedly understood that the nature of the exterior aerosol art on Wolkoff's buildings was transient, and that all of the works that he allowed to be painted on the buildings would last only until they would be demolished to make room for Wolkoff's housing project"⁵⁹

Two aspects of this conclusion became crucial to the court deciding that denial of a preliminary injunction would not cause irreparable harm. First, as noted, Judge Block heavily relied on the impermanent qualities of the work, remarking in his opinion that it was "Particularly disturbing . . . that many of the paintings were created as recently as this past September, just weeks after the City Planning Commission gave final approval to the defendants' building plans. In a very real sense, plaintiffs have created their own hardships."⁶⁰ In addition, the court concluded that monetary damages were a perfectly adequate remedy, noting that the city could have condemned 5Pointz if it thought the graffiti was important enough to save,⁶¹ that the artists could easily preserve their work digitally by taking photographs, and that graffiti, like traditional art, has an ascertainable value that can be used to measure damage amounts. In short, despite concluding that some 5Pointz graffiti was likely of recognized stature, Judge Block used its temporary quality and marketability to undermine its status as art worthy of VARA protection from destruction and to conclude that when balancing the interests of the parties, issuance of an injunction was inappropriate.

57. Whether Judge Block is correct about the mutually exclusive nature of the mutilation and destruction categories is not fully resolved in the case law. The complaint certainly raised the issue. *Complaint* at 34; Second Amended Complaint, *Cohen v. G&M Realty L.P.*, No. 13-CV-5612 (E.D.N.Y. June 17, 2014).

58. *5Pointz I*, 988 F. Supp. 2d at 220–23.

59. *Id.* at 224.

60. *Cohen v. G&M Realty, L.P. (5Pointz D)*, 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013).

61. The court also noted that the application to designate 5Pointz as an historic landmark was denied on August 20, 2013. *Id.* at 226, n. 9.

These conclusions were deeply erroneous. First, preliminary injunction relief typically is not dependent on whether some measure of damages will provide adequate relief to the plaintiffs. The typical rule requires that, “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”⁶² The first issue—likelihood of success—was never directly entertained in the opinion, perhaps because the plaintiffs raised quite serious moral right claims. Indeed, the court concluded that some of the graffiti probably qualified as works of recognized stature. In addition, the issue of adequacy of relief at law typically is taken up later in a permanent injunction hearing, not in a preliminary injunction hearing.

Second, and more importantly, the mere fact that an artist knows her work will last for only a short time is hardly grounds for diminishing its protection under VARA and denying preliminary injunction relief to protect it or the environment in which it is located. Though a particular aerosol work installed with permission might be destroyed, it is typically at the hands of another artist, not the property owner. Consider the work of the famous pair—Christo Vladimirov Javacheff and Jeanne-Claude Denat. Though they worked together as a team, their typical public relations moniker was simply “Christo.” They created installations all over the world, including New York City. Their plans to wrap several tall New York buildings were rejected by the owners, but other similar projects went forward.⁶³ A striking installation in Central Park—The Gates—was constructed during the winter in 2005 and remained up only for two weeks during February.⁶⁴ 7,503 orange draped gates were built over paths throughout the park. The barren winter trees allowed park strollers to see the bright orange gates far into the distance as paths ascended and descended hillsides. The experience of walking through The Gates was breathtaking. It is not done justice by photos.

62. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008).

63. *Wrapped Buildings, New York City*, CHRISTO AND JEAN-CLAUDE, <https://perma.cc/6SD6-237U> (last visited July 26, 2017) (showing plans for the rejected New York project); *The Reichstag*, CHRISTO AND JEAN-CLAUDE, <https://perma.cc/GVG5-BB6V> (last visited July 26, 2017) (showing plans for and images of a completed “wrapping” project in Berlin).

64. *The Gates*, CHRISTO AND JEAN-CLAUDE, <https://perma.cc/Y3HJ-5V3X> (last visited July 26, 2017).



"The Gates," 2005 (photos: courtesy of the author)

Temporary urban art installations are now common, often revealing surprise and artistic talent to those living, working, and walking through cities and towns around the world.⁶⁵ Sculptural works are regularly on display in various neighborhoods throughout New York City. One of the most interesting was a series of four thirty to forty meter-high temporary waterfalls constructed in 2008 by Olafur Eliasson, under the auspices of the Public Art Fund, at points along the East River and New York harbor.⁶⁶ They operated only between July and October 2008. An image of the installation under the Brooklyn Bridge is below.⁶⁷ If someone announced a plan to move or to bulldoze a row of Christo's gates or to pull down one of Eliasson's waterfalls at night, it is hard to imagine that a court would deny the artist an injunction under VARA.⁶⁸ It would (or should) make no difference that Christo or Eliasson could have obtained monetary damages to compensate them if their works were destroyed, or sought but failed to obtain landmark status for the installation, or

65. S.A. Rogers, *See What? 14 Amazing & Unexpected Urban Art Installations*, WEB URBANIST, <https://perma.cc/KR3G-LYMH> (last visited July 26, 2017).

66. The Public Art Fund, established in 1977, uses private donations to support a range of public art projects and installations in New York City. Over the years, it has arranged for dozens of projects. *See, e.g. Tatzu Nishi: Discovering Columbus*, PUBLIC ART FUND, <https://perma.cc/PY6N-4FH4> (last visited Aug. 30, 2017); *Ai Weiwei: Good Fences Make Good Neighbors*, PUBLIC ART FUND, <https://perma.cc/VJF3-X7B> (last visited Aug. 30, 2017). *See The New York City Waterfalls*, OLAF ELIASSON, <https://perma.cc/LC5K-2G4T> (last visited Aug. 27, 2017).

67. *Id.* Circle Lines, which regularly offers water tours around Manhattan, ran special trips to see all the waterfalls while they were operating. The views, especially after sunset, were spectacular.

68. This example assumes the art object is not installed on land without permission. That raises different questions taken up in Part II of this essay. It also assumes that the installations are works of visual art. That may be an issue with both *The Gates* and *Waterfalls*. Only if the work of Christo and Eliasson were deemed sculptural would it be covered by VARA. There are some cases concluding that installations like this are not covered. *See, e.g., Phillips v. Pembroke Real Estate*, 459 F.3d 128 (1st Cir. 2006) (holding that destroying art designed for a specific site by moving it to a different location is not covered by VARA). As the text makes clear, I think this decision is erroneous.

failed to convince the city to condemn the land or the installation, or preserved their work in digital images. And even digital imagery, the closest to actual preservation among Judge Block's suggestions, hardly compares in quality to an actual work of art or to the setting in which it is located.



"The New York City Waterfalls, Brooklyn Bridge," 2008 (photo: Public Art Fund)

In considering temporary installations like those of Christo and Eliasson, it becomes evident that VARA's most important aspects are *not* about either permanency or money. Moral rights are about protecting the integrity of works of art and recognizing the value of human creativity. And part of the value of a work's creativity—especially when installed in public places or as part of a large installation or collection of items—often includes its surroundings. Much art is site specific and depends on its placement and artistic neighbors to enhance the impression it makes on viewers. That certainly was true of the work of Christo and Eliasson, just as it was true at 5Pointz. Photographs cannot reconstruct the integrity of a site-specific work and damages cannot recover it. That is why protecting visual art's setting is often critically important to maintaining its integrity. There are hundreds, if not thousands, of images of 5Pointz graffiti posted online. But these photos cannot recreate the experience of being present at the site or of the relationships between the various wall paintings. None of the images approaches the sensation of being in the midst of a vast array of wall art in a large, open, courtyard space.

In a similar vein, Judge Block's opinion misunderstood the variable contours of the phrase "work of visual art" underlying the statute's moral right provisions. He wrote:

VARA only protects a *work* of visual art. 17 U.S.C. § 106A; *see also* 17 U.S.C. § 202 ("ownership of a copyright, or any of the exclusive rights under a copyright, is distinct from ownership of any

material object in which the work is embodied.”). The Court regrettably had no authority under VARA to preserve 5Pointz as a tourist site.⁶⁹

In some cases, this is correct. A painting on canvas is often largely unrelated to the space in which it is displayed. But there are exceptions that VARA must recognize, even for two-dimensional works. The Rothko Room at the Phillips Museum in Washington, D.C. is one example.⁷⁰ The space was developed between 1960 and 1966 by Duncan Phillips and has remained almost unchanged since its opening. Phillips added the fourth work shortly before he died in 1966. The artist had input about the arrangement of benches and the ambience in the room. Seating is limited. There is a sign just outside the room asking visitors to limit the number of people in the space to eight at a time in both raised traditional letters and in brail—leaving the fascinating impression that perceiving the atmosphere of the space does not depend only on sight. A meditative mood is created by the arrangement of the art and the intimate size of the space. The setting is as important as the four individual paintings. The space and the art interact in special ways. It is, for copyright purposes, a compilation consisting of four paintings and a room. The impact of the space is beautifully described in an essay by Phillip Kennicott, the art and architecture critic of the Washington Post, comparing the Phillips Rothko Room and the recent installation of ten Rothko’s in a new tower gallery at the East Wing of the National Gallery of Art in Washington. In describing the Phillips setting, he wrote:

In a short, circa 1895 unfinished essay on the artists Chardin and Rembrandt, Marcel Proust noted the strange friendship that seems to exist between the objects in Chardin’s still lifes, and genera scenes: “As happened when beings and objects have lived together a long time in simplicity, in mutual need and the vague pleasure of each other’s company, everything is amity.” Rothko didn’t paint the works in the Phillips room to be an ensemble, as he did the dark panels of the Rothko Chapel in Houston, and yet one senses amity between them. And the possibility that over time they have grown to resemble each other simply by proximity, rather like pets resemble their masters and long-married couples seem to grow alike in their dress and mannerisms.⁷¹

The Phillips space, like 5Pointz, carries the weight of a special space by the way it is used, composed, and curated.

Two other important examples of environments created with art and specific artists in mind confirm the important relationships that can arise between two-dimensional art and the spaces in which they are exhibited—the Rothko Chapel at the Menil Collection in Houston mentioned just above by Kennicott and the beautiful display of eight of Monet’s Water Lilies at the Musée de l’Orangerie in Paris. The Menil space contains fourteen dark paintings. The chapel creates an intense atmosphere, especially for those in mourning. It was designed with close collaboration between the architects and Rothko himself. A sculpture by Barnett Newman, *Broken Obelisk*, resides outside the chapel in the midst of a reflecting pool.

69. Emphasis in original.

70. *Rothko Room*, PHILLIPS COLLECTION, <https://perma.cc/N5F7-97PQ> (last visited July 28, 2017).

71. Phillip Kennicott, *Two Rooms, 14 Rothkos and a World of Difference*, WASH. POST, Jan. 20, 2017, <https://perma.cc/PNU5-F6TD>.

It also evokes the darkness and brokenness in the world. It is made of corten steel and consists of a pyramid with the pointed top of an upside-down obelisk balancing on top. The obelisk itself is incomplete—broken in a jagged way, some distance above where the points of the pyramid and inverted obelisk meet. It, like the paintings inside, is deeply thought provoking. Unfortunately, Rothko died the year before the chapel was completed.⁷² The architectural and artistic assemblage has provoked deeply insightful essays and writings. In a major compendium of essays about the life and work of Mark Rothko, Barbara Novak and Brian O’Doherty wrote of the mood created by the dark paintings in the Rothko Chapel. “The chapel paintings,” they wrote, “are a testament to Rothko’s faith in the power of art—‘imageless’ art—to meet, create, and transform an audience one by one, to place each person in contact with a tragic idea made urgent by the contemplation of death.”⁷³ And the author of the most complete and thorough analysis of the chapel, Sheldon Nodelman, noted that “its content is a collective one, enunciated by the whole, and that its individual members cannot be evaluated independently of their place in this whole and the patterns that assert themselves within it.”⁷⁴ The building was designed as a chapel. And so, Nodelman wrote, Rothko knew and accepted that the project,

[W]as religious. Rothko was a professed unbeliever who rejected all confessional orthodoxy or dogmatic constraint. But he also understood himself to be confronting, in his paintings, universal issues of human destiny that could only be described as religious. Such a conception of universal and essential content obviates the questions that might be raised as to how he, a resolute freethinker could undertake in good faith to paint for a specifically religious building—and moreover as a Jew of keenly felt identity, for a Christian one.⁷⁵

He was, in short, creating a place of thoughtfulness—one that has become a site where anyone may feel free to contemplate universal themes.

The Monet installation at the Orangerie has received similar compliments. After a long series of negotiations between the artist and the French government over Monet’s gift of the paintings and their installation at the Orangerie, eight works of varying lengths were installed in 1927—the year after Monet’s death.⁷⁶ Two large interior spaces were built in conformity with a design conceived by Camille Lefèvre, the architect of the Louvre, after consultation with the artist, to contain the works. The placement of the eight canvases, the interactions of their color palettes, and the shape and scale of the spaces create a unique and powerful viewing experience. In summing up the space, Michael Hoog wrote:

72. See Jacqui Shine, *The Rothko Chapel*, N.Y. TIMES MAG., Aug. 23, 2017, <https://nyti.ms/2vYg8JM>; Dominique de Menil, *On Commissioning Mark Rothko to Create a Sacred Space for Houston*, ROTHKO CHAPEL, <https://perma.cc/635P-87UV> (last visited Sept. 29, 2017).

73. Barbara Novak & Brian O’Doherty, *Rothko’s Dark Paintings: Tragedy and Void*, in MARK ROTHKO 265, 273 (Jeffrey Weiss ed., 1998).

74. See SHELDON NODELMAN, *THE ROTHKO CHAPEL PAINTINGS: ORIGINS, STRUCTURE, MEANING* 309 (1997).

75. *Id.* at 305. See also Nathan Dunne, *Going to the Chapel*, AEON (Oct. 31, 2014), <https://perma.cc/YV9S-2TRV>.

76. MICHAEL HOGG, *MUSÉE DE L’ORANGERIE: THE NYMPH...AS OF CLAUDE MONET* 19–54 (2006). The museum was closed between 2000 and 2006 and completely restored.

[T]he *Nymphéas* were defined by their own creator, at an early date and once and for all, not as the formal culmination of Impressionism, or even of his whole work (they are that too), but as a creation of another kind: they are not paintings for museums, but a door to contemplation and to the sacred. The rooms at the Orangerie are closer to a Romanesque cloister than to a gallery of Impressionist paintings.⁷⁷

Surely works of art—even those not painted on or otherwise embedded in a building—can carry space with them or interact in special ways when sensitively arranged. And just as surely, when spaces are designed by the artist or others specifically to enhance the viewing experience of a work, those spaces should be considered essential elements of the creativity visible on the canvases or other surfaces themselves. To narrowly construe the meaning of the words “work of visual art” in VARA by routinely separating works from the environment in which they have been carefully placed or from their proximity to other paintings is to miss this critical point. The *5Pointz* court’s focus on 17 U.S.C. § 202’s provision separating copyright in a work from the object on which it is fixed is therefore misplaced. That section simply recognizes that separate property rights exist in both an object embodying a copy of a creative work and in the artistic work itself. But VARA—and this is important—protects or limits both. It is, after all, mutilation or destruction of an object containing a copy of a creative work of art that is limited or barred by the statute. If the object extends beyond the physical limitations of a canvas or the border of a painting to include surrounding physical things, like a building, that must be taken into account.

In the case of *5Pointz*, the relationship of the graffiti to the space it occupied was central to the dispute. The entire “scene” was in many ways much more important than any particular work painted on the walls. Indeed, a more relevant statutory provision than 17 U.S.C. § 202 (cited by the court) is § 201(c), which protects copyrights in collective works. A collective work includes anthologies and other gatherings of a variety of items that are placed into an organized whole.⁷⁸ Each item in a collective work may be individually copyrighted, but the statute also grants protection to the collectivity provided its organization is original.⁷⁹ If each part of a collective work fulfills the definition of a work of visual art within the meaning of VARA, then why not grant moral rights protections to the collective work as a whole? If that assemblage fulfills the “recognized stature” provision of § 106A, then the installation should be protected from demolition. Certainly, the *5Pointz* setting was widely enough known and respected to be rationally considered as a “work” of recognized stature. The court’s focus on the status of a work of art in isolation missed connections between the work, its placement among other nearby artistic creations, and the environment in which it sat.⁸⁰ If we are to protect the integrity of artistic

77. *Id.* at 107.

78. 17 U.S.C. § 101.

79. § 201(c).

80. *See supra* note 68 (describing the unsound result in *Phillips v. Pembroke Real Estate*, 459 F.3d 128 (1st Cir. 2006)).

creativity—a central goal of moral rights law—then we must view the scope of creativity through the eyes of the artists.⁸¹

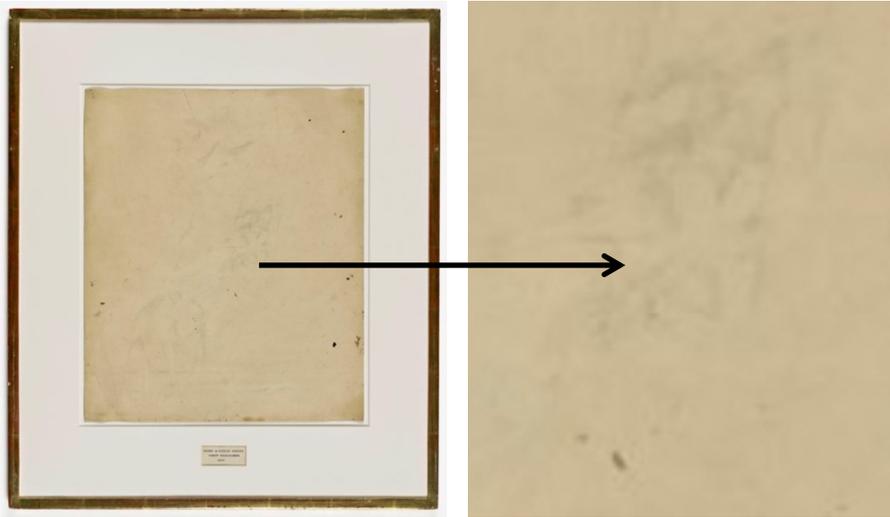
Judge Block ignored one more critically important VARA issue supporting the plaintiffs' claim that destruction of 5Pointz would cause them irreparable harm. After briefly mentioning the VARA provisions about artwork incorporated in or made part of a building, he largely ignored the very statutory language he referenced.⁸² In 17 U.S.C. § 113(d)(1), Congress provided that the author of a “work of visual art . . . incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work” loses protection against mutilation or destruction if “the author consented to the installation of the work in the building . . . in a written instrument . . . signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.” In short, when artwork becomes part of a building under a written acknowledgment of artistic risk signed by the authors of the copyrighted works—here the artists—and the property owner, the artists' moral rights dealing with mutilation or destruction are lost. In the absence of a written agreement, however, the artists retain remedies for mutilation or destruction under the act and the dispute rebounds to the question of whether mutilation would cause “damage to honor or reputation” or the works are of “recognized stature” and therefore protected from destruction. There was an oral agreement about graffiti between Cohen and Wolkoff giving Cohen curatorial-like authority over the area. Though Wolkoff emphatically claimed he told Cohen and others that artistic access would be ended when the site was redeveloped, and the court credited that point of view, nothing was in writing. In addition, the spoken agreement was general; it made no reference to specific artists, specific works of art, or even to rights held in the collectivity as required by the language of the statute. VARA clearly places a burden on property owners to protect their assets when dealing with art installations. Wolkoff's insistence that he told Cohen and others in 2002 that his permission to use the buildings for graffiti would end when he redeveloped the site should not have been a telling factor in deciding whether to grant

81. 17 U.S.C. § 106A(c)(2) might be thought to diminish the validity of the point that a work of visual art may include an environment as well as an individual painting. It provides: “The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.” This part of the moral rights statute was inserted at the behest of museums concerned about their curatorial independence. It does not fit nicely with the idea of a space rather than a single painting. But if read literally, the entire space, including placement and lighting if they were part of the installation, may be moved to a new place—an outcome that would not diminish the quality of the environment itself. In addition, the provision cannot apply to 5Pointz, which could not be relit or moved to another place. There is a very nice Note on the provision, although I think the author misses the possibilities of using the compilation provision to diminish its impact. Elizabeth Plaster, Note, *When Stuff Becomes Art: The Protection of Contemporary Art Through the Elimination of VARA's Public-Presentation Exception*, 66 DUKE L. J. 1113 (2017).

82. 17 U.S.C. § 113(d).

a preliminary injunction.⁸³ If he failed to demand a written understanding before allowing the painters to go to work, he—not the painters—put his buildings at risk. And that is as it should be. Developers are in a far better position to protect themselves legally than most artists. In the absence of an agreement in writing, artists should receive extra consideration when a court balances the interests of the parties. This certainly did not happen in *5Pointz*. Thought of slightly differently, it makes a difference if the temporal quality of a work of art arises because of the desires, understandings, or intentions of artists, or because of the desires, understandings, or intentions of the building owner. The court treated this issue as part of the same problem. But the moral rights provision treats them quite differently.

A noted event in the annals of art history sheds some final light on Judge Block's evaluation of irreparable harm in his preliminary injunction decision. In 1953, Robert Rauschenberg asked William De Kooning if he could have one of De Kooning's drawings to erase.



After some discussion, De Kooning agreed to the request!⁸⁴ But he did not immediately hand over a piece of art. Rather De Kooning spent some time searching for an appropriate drawing. He firmly believed that the piece had to be a significant one—a drawing that he would miss and that would be difficult to obliterate. An image of the work he later handed over to Rauschenberg is not extant, but it has been described as one with figures made using crayon, ink, pencil, and charcoal.⁸⁵ An

83. Judge Block seemed to give Wolkoff's statements significant weight. *Cohen v. G&M Realty, L.P. (5Pointz I)*, 988 F. Supp. 2d 212, 223 (E.D.N.Y. 2013).

84. The story is told by Rauschenberg in a video. San Francisco Museum of Modern Art, *Robert Rauschenberg's Erased de Kooning Drawing*, YOUTUBE (Oct. 1999), <https://youtu.be/nGRNQER16Do>.

85. The "original" of the erased drawing is at SFMOMA, which describes the work as "traces of drawing media on paper with label and gilded frame." See *Robert Rauschenberg, Erased de Kooning Drawing, 1953*, SFMOMA, <https://perma.cc/2KRX-HKE9> (last visited Sept. 13, 2017).

image of the resulting mostly erased work, along with a blown-up segment showing some of the residue left after the erasure, is above. At one point when asked about the event, Rauschenberg said that some thought of his act as vandalism, but he preferred to see it as “poetry.”⁸⁶ His evaluation has much merit. De Kooning’s decision to select a drawing from his studio collection and allow Rauschenberg to erase it was itself a creative act. Indeed, that was emphasized by the fact that De Kooning intentionally selected a piece he liked to give to Rauschenberg. Their interaction expressed a mutual understanding that creativity comes from some deep, unfathomable place, that sometimes the allure of art lies in the inability to discern its origins or meanings, that destruction can be part of a process of building or rebuilding, that art movements constantly reinvent themselves, and that art—like life—dies and is reborn continuously. Graffiti embodies a similar aesthetic.

This sort of event sets a baseline for VARA rules about mutilation and destruction of works of visual art. Rauschenberg’s descriptions of the event suggest that the request he made of De Kooning was a nerve wracking moment for Rauschenberg himself. But the decision to select a work and to allow its erasure was made by De Kooning, not Rauschenberg. While the event is unfathomable to some, its end result actually was not at all stunning. Artists often modify or paint over their own work, destroy earlier versions, layer one piece on top of another, and create *pentimentos*.⁸⁷ Their decisions may upset gallery owners and agents, but such decisions are for artists to make. Here De Kooning simply offered the right to destroy his own work to another artist. That norm is enshrined in VARA. The statute places the decision about destroying a work in the hands of the creator, not others acting outside of artistic expectations. That is presumptively true even when the art is placed on a building. It is worth remembering that making art—sometimes for the purpose of destroying it—has a long, distinguished history. Writers destroy manuscripts, directors impugn the memory of their movies with sequels, musicians remaster original recordings and set their guitars on fire or smash them. Some art is like children building elaborate sand castles on a beach while knowing full well they will be gone tomorrow.

The temporal quality of graffiti fits in the same mold, despite the fact that much of it is destroyed not by the artists but by others—public authorities, property owners, or other artists. Graffiti painters are aware of the phenomenon. How can this sit comfortably with a baseline VARA rule giving graffiti artists control over the mutilation or destruction of their work when it is on a building? The De Kooning

86. Robert Rauschenberg Discusses Erased de Kooning Drawing, 1953, ARTFORUM, <https://youtu.be/tpCWh3IFtDQ> (last visited July 27, 2017).

87. A *pentimento* is a change in a painting, as when an artist elects to move a figure or paint over part of the background. Such alterations are now often discoverable by use of various modern techniques to “read” the layers in painting. Sometimes the *pentimento* is visible in the surface of the painting itself. One of many famous examples is John Singer Sargent’s *Madame X*, now in the collection of the Metropolitan Museum of Art. See *Madame X (Madame Pierre Gautreau)*, METROPOLITAN MUSEUM OF ART, <https://perma.cc/MJ5C-TM49> (last visited Oct. 5, 2017). When first exhibited, the painting depicted its subject wearing a low cut black gown with one of the two straps slipped off her shoulder. It caused an uproarious scandal! Sargent then covered over the fallen strap and inserted another one in the “right” place. The figure herself also was moved around on the canvas as he made the original painting. *Id.*

gift to Rauschenberg provides the answer. The issue involves not only who mutilates or destroys a work, but the intention of the artist whose work is altered or obliterated. In De Kooning's case, he not only knew of Rauschenberg's plans, but also was perfectly willing to allow the erasure to occur. In fact, given the nature of the interactions between Rauschenberg and De Kooning, erasure may have become a condition of De Kooning's transfer of the work to Rauschenberg. De Kooning took an existing work and, in essence, reworked it by allowing Rauschenberg to alter it. The "destructive" event became an essential element of the work itself.

A very similar phenomenon is present in the culture of graffiti. There is a widespread understanding among street artists that their work is subject to being covered up. At 5Pointz before its destruction and in Bushwick currently, graffiti works—large and small—come and go with regularity—even ones widely recognized as top-notch work. There was and is no expectation that any work will last indefinitely. That artists continue to make new work anyway strongly suggests they have given permission to fellow artists and property owners of buildings with illegally made street art to mutilate or destroy their work. It also is part of the same process that is, like De Kooning's giving Rauschenberg permission to erase a work, built into the nature of the art. The works themselves, like Cristo's *The Gates* in Central Park and Eliasson's East River waterfalls, are placed in an environment where impermanence is assumed at the very moment of their creation or placement in public view. Impermanence is a characteristic deeply buried in the "aesthetic" of the art itself *by the artist*. Rebellion against authority, rejection of prevailing artistic norms, utilization of art to speak to other artists as much or more than it speaks to the general community, and use of art as a symbol of poverty threatening gentrification have been built into the graffiti world since its origins.⁸⁸

Furthermore, this sense of temporal fragility embedded in street art by the painters is not random. *The Gates* had a takedown schedule; its demise was not arbitrary. There was a "rule." That is true of virtually all temporary installations. And it also is true with graffiti. The impermanence of this work is not entirely unpredictable. The general public obviously has something to say about the longevity of work, especially when it is painted illegally without the permission of the building owner. There is an expectation that such graffiti will disappear at the behest of the owner of the buildings. The painters are aware that is going to happen and simply "go with it." Most cities and public transit systems now have systematic plans to remove painting. The surfaces of transit vehicles now allow for easy erasure. In addition, work, legal as well as illegal, will be covered over by the routine operations of the

88. As a resident of Washington, D.C. between 1973 and 2008, I watched graffiti spread through the city and felt the way middle and upper-class neighbors, to say nothing of myself, reacted to it. When the "Cool Disco Dan" tag began appearing all across the city in the 1980s, it heralded the arrival of graffiti to the nation's capital and the power centers it housed. Danny Hogg, the tag's painter, lived much of his life on the street. He recently died at a young age of complications from diabetes. Like many "elder statesmen" of graffiti he became something of a reluctant folk hero in recent years. See Maura Judkis, 'A Folk Hero': D.C. Street Art Legend 'Disco' Dan Dies at 47, WASH. POST, July 28, 2017, <https://perma.cc/LZR3-8LXW>.

graffiti culture as writers put up tags, throw-ups, and pieces.⁸⁹ But in most graffiti communities, legal or not, a set of unstated rules operates that include sensibilities about where work may be done and who, other than the owner of a building where illegal graffiti is placed, has the “right” to change or destroy a work. The rules vary from place to place and among different groups of writers, but there are some standards that are broadly accepted. Religious buildings, homes, cemeteries, memorial plaques and monuments, personal vehicles, and some public buildings are typically left alone.⁹⁰ Writers generally do not put a tag over a throw-up or a piece unless they have a good reason to disparage or “dis” the underlying work. Less experienced street artists commonly leave the work of more seasoned and better writers alone, but large pieces do get covered if an artist thinks s/he can make a better work. It is generally frowned upon to only partially cover other work, especially a piece. There is a clear hierarchy among artists on the street, although as in any informal community, there may be those who break the “rules.” When individuals become known as rule breakers, however, those writers can expect their work to be obliterated in short order. Self-policing avoids total chaos. In “curated” graffiti worlds like 5Pointz and the Bushwick Collective, the standards governing the actions of graffiti writers are more strictly controlled. Rule breakers are generally kept out, and those organizing the work allow for walls to turn over from time to time with the best walls left alone longer than less competently made compositions. Even the best of artists expects that his or her work in well-organized settings will eventually be covered. Tags on top of pieces in such areas, however, are not appreciated, and efforts are made to diminish the marring of work approved by the organized graffiti community.⁹¹

In short, painting—whether on illegal or legal spaces—comes with a built in and reasonably coherent sense of temporal fragility. It is part of the artistic project; it is an integral element of street art. And there is no real “rule” difference between legal and illegal graffiti. With the latter, graffiti writers know, expect, and accept the likelihood that building owners will often destroy their work. In cases of legal work, however, that is distinctly not so. The “common law understanding” is that the graffiti community, not building owners, make such decisions. It is those decisions that will lead to important work being over written. Even the original piece made by Fumero in honor of Joseph Ficalora’s mother as part of the founding of the Bushwick

89. “Tags” are typically quickly spray painted words that designate an artist. A “throw-up” is also typically a designation of an artist, but tends to be a bit larger and may have more than one color. A “piece” (short for “masterpiece”) is a large work commonly seen on retaining walls, sides of buildings, and similar spaces.

90. This category may be the most subject to variation. Police stations, given the risk, are unlikely targets. Walls in public transit areas or some park facilities are common targets. In some communities, schools are painted; in others they are not. But there often are understandings about this class of buildings in each painter community.

91. There obviously is no definitive source for these “rules.” But I think they summarize fairly well statements on the subject found online and explanations given to me by painters. The tags and throw-ups visible in the large piece displayed *supra* at p. 105 almost surely were unwanted.

Collective was left alone for only about a year.⁹² Despite the importance of the work to the Bushwick graffiti community, it was painted over.

The existence of “rules” is potentially telling in a case like *5Pointz*. Moral rights recognize that control over a work’s demise is under the auspices of the artistic community’s curator and conforms to the expectations of the graffiti artists, not the property owner—at least as long as the graffiti was originally placed with permission. The failure of Judge Block to grasp this point is what led to his error in writing that it was “[p]articularly disturbing . . . that many of the paintings were created as recently as this past September, just weeks after the City Planning Commission gave final approval to the defendants’ building plans. In a very real sense, plaintiffs have created their own hardships.”⁹³ The timing was not disturbing at all. It was merely an element of the conception built into the art itself. Things come and go. The court’s articulated disturbance over the timing of the pieces demonstrated its lack of comprehension of the art form itself. The timing of the works’ creation was part of the normal graffiti culture. Thus, the appearance of new work after the City’s approval of the building plans should not have been held against the interests of the plaintiffs.

In a related vein, limiting the destruction of a work of visual art has another value—historic preservation. VARA’s limitation of protection to unique works of visual art or those made with the permission of the author in two hundred or fewer copies certainly confirms that preservation motivated the legislation.⁹⁴ Mass-produced items, as the House Report on VARA indicates, are unlikely to raise preservation issues; the destruction of one copy leaves many others extant.⁹⁵ It might seem odd to suggest that barring destruction of temporary art may be justified for this reason, especially when graffiti and other artistic endeavors are typically short lived. But, as noted, destruction of work installed with the permission of a property owner is in the hands of the graffiti world. In addition, in cases like *5Pointz* involving unique works mounted together in a collective installation, the setting makes an enormous difference. Preservation can involve not only each specific creative work, but also the entire collection visible in a creative space. In many ways, the threatened destruction of *5Pointz* imperiled a creative, collective environment as much or more than it destroyed any specific works. If the creation of new works at *5Pointz* was still possible, that setting would be alive and well and available for viewing in Queens.

All of this is not to say that using VARA to justify barring the demolition of *5Pointz* was unquestionably the correct result. Even if irreparable harm to the plaintiffs was highly likely to arise if the factory buildings came down, the interests of the site’s owners merit consideration as well. Making a decision to grant or deny a preliminary or permanent injunction requires not only a judgment about whether

92. See *supra* note 16.

93. *Cohen v. G&M Realty, L.P.* (5Pointz I), 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013). September was two months before the preliminary injunction proceeding—that can be a lifetime in the street art world.

94. See 17 U.S.C. § 101 (defining “visual art”).

95. H.R. Rep. No. 101-514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6922.

those seeking relief will suffer irreparable harm if their interests are impeded, but also a balancing of interests among the parties.⁹⁶ But using the fact that the temporary quality of the graffiti was known to the artists as the principal motivation for concluding that there was little if any harm to plaintiffs was clearly erroneous. Judge Block's analysis was incorrect when he wrote, "[W]hether viewed as bearing upon the issue of irreparable harm or the balancing of the hardships, the ineluctable factor which precludes either preliminary or permanent injunctive relief was the transient nature of the plaintiffs' works."⁹⁷ He simply disregarded the fact that the temporal quality of the graffiti at issue in the case was forced by the actions of Wolkoff rather than a decision emanating from the 5Pointz graffiti community.

B. BALANCING INTERESTS: WAS IT PROPER TO ALLOW THE DEMOLITION OF 5POINTZ?

Under a "pure" VARA analysis that includes ideas about control over mutilation and destruction of work in the graffiti art world, the legal right to decide about destruction of art at 5Pointz was in the hands of the painters, not the property owners.⁹⁸ But, as noted above, preliminary injunctions are not always granted to the party holding the entitlement to a legal right. As in many nuisance cases, potential harm to the side opposing the injunction also becomes a bone of contention when interests of the entitlement holder are balanced with those of the other parties.⁹⁹ Thus, the ultimate problem in the preliminary injunction hearing was whether the painters' justifiable claim to exercise community control over the lifetime of their art was subordinate to Wolkoff's economic interests in real estate development. The burden is typically placed upon the party seeking preliminary injunctive relief to convince the court that their interests should prevail. The plaintiffs more than met their obligation to come forward with evidence that destruction of their work would cause irreparable harm. Having met their burden, further balancing analysis should have begun with Wolkoff. Under these circumstances, one would have expected an in-depth discussion of Wolkoff's economic interests during the preliminary injunction hearings. From the contents of Judge Block's opinion, it appears that did not occur. The opinion contained only very brief statements about the value of

96. See discussion of preliminary injunctions, *supra* note 62 (citing *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008)).

97. *5Pointz I*, 988 F. Supp. 2d at 227. It is ironic that on the same page Judge Block acknowledged that temporary art work is protected from destruction by VARA. That simply deepens the mystery about why the graffiti's impermanence loomed so large in the injunction analysis.

98. This assumes, of course, that much of the work at 5Pointz was of "recognized stature" per 17 U.S.C. § 106A. This issue will be taken up in the next section of the essay.

99. This line, of course, refers to the famous article by Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The theory has not gone uncriticized, with perhaps the most trenchant rejoinder being by Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). The case most frequently used as an exemplar that an injunction is not always granted to the party holding the legal entitlement is *Boomer v. Atlantic Cement Company, Inc.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970). *Boomer* involved plaintiffs holding an entitlement to be free of pollution from Atlantic's factory who were granted damages rather than an injunction against the polluting activities.

Wolkoff's project to its owners and to the public as well as some questionable and largely irrelevant conclusions about the sufficiency of damage relief for the plaintiffs.

Judge Block's opinion failed to address the interests of the developers in any meaningful way. It contained no information about the value of the 5Pointz apartment project to Wolkoff and the others in the ownership group. It is obvious that large buildings are expensive to build, that the owners expect to make money, and that the city has a strong interest in providing housing for its citizens, especially in below-market rate units. But there was no analysis in the opinion about whether the old buildings could have been saved in whole or in part and what additional costs, if any, would have been imposed on the project by doing so. This was so despite the willingness of other developers in similar settings to go to great lengths to save important street art or historic building features. Two of the latest art rescues include a development in London where the owner suspected there was a Banksy hidden in a wall and spent a significant amount of time, effort, and money to find and preserve it, and the restoration of an important mosaic mural in Harlem after it was covered up during remodeling for a new shoe store.¹⁰⁰ Perhaps the most spectacular recent redevelopment plan saves one of the most important interiors in New York's history of grand playhouses. The Palace Theater—a storied and beautiful stage—opened at Broadway and 47th Street in 1913. The theater now is under the Doubletree Guest Suites Times Square Hotel on West 47th Street. The hotel sits twenty-nine feet above the top of the theater on concrete columns. The plan calls for jacking the entire theater box up the columns and hanging it directly beneath the hotel. The space opened up underneath the theater will become a retail and entertainment area. The cost is expected to reach two billion dollars.¹⁰¹ While the Palace theater project is both massive and unusual, it does make clear that modern engineering allows surprising degrees of flexibility in the reuse and reconfiguration of old spaces. Could something have been done at 5Pointz to build in or on top of the extant buildings? Was it possible to leave the graffiti walls intact and build without tearing them down? No efforts were made to find out. Should that have been considered at the preliminary injunction hearing? Absolutely.

The court noted New York City's interest in the construction of new apartments¹⁰² and of Wolkoff's promise to make 3,300 square feet of exterior space available for

100. See Amy Tsang, *Valuable Work of Art Was Hiding Under the Plywood and White Paint*, N.Y. TIMES, Aug. 24, 2017, <https://www.nytimes.com/2017/08/23/business/banksy-art-london-lost.html>; Colin Moynihan, *Newcomer's Bricks Conceal Colorful Harlem Mural, to Leaders' Dismay*, N.Y. TIMES, Dec. 18, 2017, <https://www.nytimes.com/2017/12/17/nyregion/spirit-of-harlem-mural.html> (the mosaic was commissioned by the prior tenant and made by Louis Delsarte, a well-known art professor at Morehouse College in Atlanta).

101. Cathy Cunningham, *Raising the Roof: Inside the Palace Theatre's \$2 Billion Plan to Elevate Itself to New Levels*, COMMERCIAL OBSERVER (June 15, 2016), <https://perma.cc/2KN7-WF8W>; *New Renderings of Times Square's \$2 Billion Palace Theater Redevelopment*, CITY REALTY (Aug. 23, 2017), <https://perma.cc/N3FE-RPBT>.

102. It is interesting to note that the number of below market rate units now planned is up to 223 from the original proposal of seventy-five. Ameena Walker, *Long Island City's 5Pointz-Replacing Rental Towers Reveal Interiors*, CURBED (May 25, 2017), <https://perma.cc/6YV3-TS46>. The number was increased during negotiations with the City Council and the City Planning Commission when required zoning variances were under discussion and a bit more during construction planning. Julie Strickland,

art.¹⁰³ Judge Block also added precatory language encouraging Wolkoff to increase the space available for painters and to allow Cohen to return as curator, adding that he would “look kindly on such largesse when it might be required to consider the issue of monetary damages; and 5Pointz, as reincarnated, would live.”¹⁰⁴ But none of this involved the sort of analysis one would expect in deciding whether preliminary injunctive relief should issue in such a novel and precedent setting case.

Similarly, the opinion’s statements about the adequacy of damages for the artists were not only irrelevant in this preliminary injunction setting, but untenable. The court claimed that “plaintiffs would be hard-pressed to contend that no amount of money would compensate them for their paintings; and VARA—which makes no distinction between temporary and permanent works of visual art—provides that significant monetary damages may be awarded for their wrongful destruction.”¹⁰⁵ But surely this is not the proper test, even in a permanent injunction hearing. Balancing of interests requires an inquiry into the adequacy of damages, not whether some amount of money might satisfy the artists. An appropriate inquiry entails examination of the nature of the market for graffiti in place and the nature of available damage relief.¹⁰⁶

Furthermore, traditional market measures for damage relief are not adequate in a case like *5Pointz*. Judge Block wrote that “[P]aintings generally are meant to be sold. Their value is invariably reflected in the money they command in the marketplace. Here, the works were painted for free, but surely the plaintiffs would gladly have accepted money from the defendants to acquire their works, albeit on a

Wolkoff More Than Doubles Affordable Housing at 5Pointz, REAL DEAL (Oct. 3, 2013), <https://perma.cc/YMR3-RQLC>.

103. 5Pointz I, 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013). The apartment project plans now under construction do contain space for a graffiti wall approximately 40’ x 80’. Dana Schulz, *First Look at the Artsy Common Spaces of 5Pointz-Replacing Rental Towers*, 6SQFT (Dec. 21, 2016), <https://perma.cc/GU72-QE5B>. As noted by Schulz, this hardly compares with the large spaces at the demolished buildings. In addition, as is evident from renderings by the architects, the art wall is not visible from the street or from the 7 train passing nearby. See also Eli Rosenberg, *Renderings: Dedicated Graffiti Space in Old 5Pointz Site*, N.Y. DAILY NEWS (Aug. 6, 2014, 8:29 PM), <https://perma.cc/PD29-M9JP>. Both features were a major aspect of 5Pointz’s fame. The Schulz article contains architect’s renderings of parts of the new buildings. These include a graffiti-like logo found in the lobby area of one of the luxury buildings. See Ameena Walker, *Long Island City’s 5 Pointz-Replacing Rental Towers Reveals Interiors*, CURBED (May 25, 2017, 3:00pm), <https://perma.cc/H3JL-RB6X>. This is ironic, if not perverse. Many in the 5Pointz community were angry at the prospect of the new apartment project being named after the graffiti center. They were not pleased by the sanitized graffiti-like logos and art work planned for the buildings. See Silver, *supra* note 13.

104. 5Pointz I, 988 F. Supp. 2d at 227.

105. *Id.* at 226. The court’s note that VARA does not distinguish among works of art based upon their longevity is especially peculiar given the prior statements about the importance of the temporal nature of the work and Cohen’s knowledge of both approval of redevelopment by New York City and of Wolkoff’s intention to demolish the buildings.

106. The copyright act provides that violations of VARA may be remedied in the same ways available in more traditional copyright infringement actions. That makes actual damages and profits derived from infringement or statutory damages available to prevailing plaintiffs. 17 U.S.C. § 504 (2010). There are no profits of the defendants attributable to any violation of VARA in the *5Pointz* case. Statutory damages may range between \$750 and \$150,000 depending on circumstances.

wall rather than on a canvas.”¹⁰⁷ This was, to be charitable, peculiar logic. A market analogous to that for two-dimensional art on traditional surfaces did not exist for the bulk of graffiti incorporated in the 5Pointz buildings.¹⁰⁸ While some of the works painted on easily removed surfaces like wall board or plywood could have been taken down and sold,¹⁰⁹ a “market” was hardly open for most of the 5Pointz works. The only potentially interested parties were Wolkoff on one side and the artists on the other. If the buildings were subject to demolition, Wolkoff had no incentive to pay anything for the art and no sale would occur; there would be no market. If the artists were able to forestall demolition of the buildings by obtaining injunctive relief, they would have been in a hold-out position and (if they were willing to bargain at all) could have demanded a significant part of the development’s equity value¹¹⁰ in return for allowing partial or complete demolition of the buildings to go forward. Neither price—zero or a share of the equity—represented a standard value even remotely like prices paid in the traditional art world. The real value of most of the art was in place—as emblematic of the culture of graffiti and as publicity for the talents of the artists if they wished to move into more easily marketed media. Finally, VARA’s provisions call for damages to be paid for damage to reputational harm in the case of mutilation and to loss of stature in the case of demolition. Neither relates to the actual value of the art itself.

Fortunately for Judge Block, the copyright statute contains non-market-based damage provisions allowing for awards up to \$150,000 per infringement.¹¹¹ In a setting like *5Pointz* where traditional damage measures are not applicable, this provision should govern in the absence of injunctive relief. The court never mentioned it.

In sum, it is not possible on the facts as presented in the preliminary injunction hearing to determine whether denial of the preliminary injunction was appropriate. Even taking the standard tack of assuming the facts against the interests of the party seeking preliminary injunctive relief—the artists here—it is unlikely that Wolkoff met his rebuttal burden given the strong proof of irreparable harm to the plaintiffs. For the reasons stated here, if Judge Block’s decision had been appealed, it should have been reversed and remanded for a new hearing with a much more complete inquiry into the economic and artistic interests of the parties. Where that hearing

107. *5Pointz I*, 988 F. Supp. 2d at 226–27.

108. The only way to preserve much of the 5Pointz graffiti before the buildings were torn down was to saw out portions of the cinder block and cement walls and haul them off to another location. That was incredibly expensive and time consuming. Though it has been done in rare cases, especially with the work of Banksy, it is very unusual and outside the operation of a normal art market. In the case of *5Pointz*, the work at issue covered so much space that such preservation techniques would probably have been impossible.

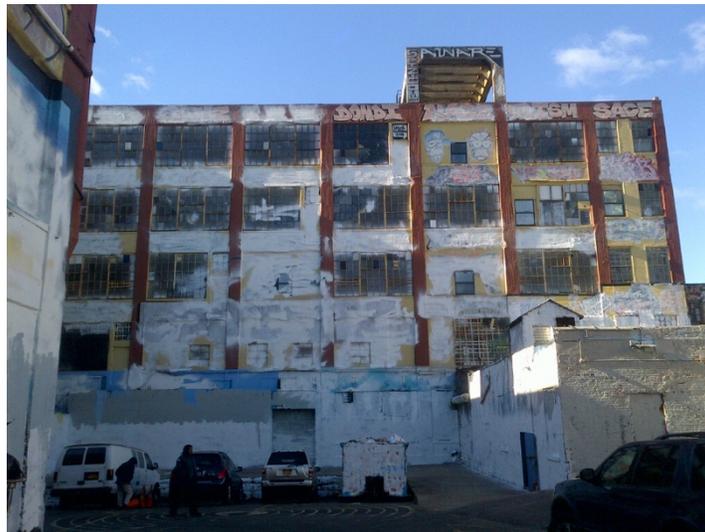
109. In the court’s final opinion, Judge Block noted that one of plaintiff’s expert witnesses, Harriet Alden, opined that 12 works could have been removed and 9 others partially removed by the artists. The other 28 required substantial work by conservators and contractors. *5Pointz II*, No. 13-CV-05612(FB)(RLM), slip op. at 42 (E.D.N.Y. Feb. 12, 2018).

110. This might have come in monetary form, but it also could have arisen as a space reuse plan.

111. 17 U.S.C. § 504(c) (2010). In standard infringement cases, such awards are available only for infringements occurring after a work is registered with the Copyright Office. But the registration rules specifically exclude VARA cases. 17 U.S.C. §§ 411, 412 (2008).

would have led is unclear in the absence of a record containing information about the costs of preserving some or all of the graffiti areas at 5Pointz and the impact on the market prices for new market rate apartments located in a famous graffiti zone.

III. ROUND TWO OF THE 5POINTZ LITIGATION: THE DAMAGE CLAIMS



Appearance of 5Pointz after the whitewashing during the night of November 19, 2013 (photo: Richard Fried¹¹²)

The full impact of Judge Block's denial of preliminary injunction relief in the 5Pointz case became obvious shortly after he rendered his decision orally on November 12, 2013. On Tuesday, November 19, 2013, Wolkoff arranged for workers on lifts to whitewash almost the entire exterior of the 5Pointz complex. Bingo. Virtually all the art was destroyed.¹¹³ The whitewashing also frustrated a renewed attempt to have the site designated as an historic landmark.¹¹⁴ Though Judge Block rued the destruction in the written decision he issued the following day,¹¹⁵ the damage was done. Perhaps the plaintiffs should have sought a stay pending appeal immediately after the oral ruling was made.¹¹⁶ But the whitewashing

112. Richard Fried, a good friend and one-time rider of the 7 train running between Manhattan and Queens right by the 5Pointz site, took the picture.

113. Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES, Nov. 19, 2013, <https://perma.cc/FH9R-RF5B>.

114. By the day before the graffiti was destroyed 20,000 people had signed a petition seeking designation. *5Pointz Backers Renew Landmarking Efforts After Court Defeat*, REAL DEAL (Nov. 18, 2013, 1:30 PM), <https://perma.cc/5ECQ-FUQM>.

115. 5Pointz I, 988 F. Supp. 2d 217, 226 (E.D.N.Y. 2013).

116. Despite the normal rule that only final decisions are appealable to federal circuit courts of appeals under 28 U.S. §1291, an exception is available for review of grants or denials of injunction. 28 U.S.C. § 1292 (2012).

was unexpected. Not immediately seeking a stay and appealing the failure to grant a preliminary injunction was one thing; anticipating the secretive destruction of 5Pointz would have been remarkably prescient. The unfortunate conclusion is that the lack of a stay and appeal led to the destruction of 5Pointz as a center for graffiti in an act widely perceived in the street art community as a profound slight.¹¹⁷ Destroying the 5Pointz buildings in a legally sanctioned demolition was one thing; secretly whitening out the art, mostly in the dead of night, with litigation still pending was quite another.

After the whitewashing, the plaintiffs in the original action filed an amended complaint describing in detail the secretive and unexpected nature of the event and revising their claims to include additional violations of VARA and access to enhanced damages for the wanton destruction of the art.¹¹⁸ In addition, four other artists filed an identical complaint on June 3, 2017, bringing the total number of artist plaintiffs to twenty-one and the number of pieces in dispute to forty-nine.¹¹⁹ The new complaints maintained the prior allegations that 17 U.S.C. § 113(d)(1) barred mutilation and destruction of works of “visual art” that were in or on a building in the absence of a written waiver between the artist and the building owner recognizing that the work may be lost if it is removed. The whitewashing led to the raising of an important new issue. All of the plaintiffs claimed that the whitewashing was willful and malicious—predicates to obtaining enhanced statutory damages of up to \$150,000 per violation rather than the standard maximum of \$30,000 per violation.¹²⁰ That altered the nature of the issues that were heard at the damages trial in October 2017.¹²¹ Three areas were left in dispute: what the measure of damages should be,

117. Wolkoff claimed he did it to avoid further conflict and to reduce “the pain of seeing the painted walls being pulled down.” He even stated that he cried when the building actually came down in 2016. Some, of course, are skeptical about Wolkoff’s statements. Corey Kilgannon, *5Pointz Street Artists Whose Works Were Erased Will Get Day in Court*, N.Y. TIMES (Apr. 9, 2017), <https://perma.cc/Y73T-LPN2>. In his damages opinion, Judge Block scoffed at the idea that Wolkoff had the interests of the artists at heart when he whitewashed the work. 5Pointz II, No. 13-CV-05612(FB)(RLM), slip op. at 40–45 (E.D.N.Y. Feb. 12, 2018).

118. Second Amended Complaint, 5Pointz II, No. 13-CV-05612(FB)(RLM) (E.D.N.Y. June 17, 2014). The plaintiffs also made state claims—intentional infliction of emotional distress, conversion, and property damage. The defendants answered in defense of the VARA claims and also filed a counterclaim for abuse of process. When cross motions for summary judgment were made only the VARA claims survived. The rest were dismissed. Memorandum and Order, 5Pointz II, No. 13-CV-05612(FB)(RLM) (E.D.N.Y. Mar. 31, 2017).

119. Jury Charge at 7, 5Pointz II, No. 13-CV-05612(FB)(RLM) (E.D.N.Y. Nov. 6, 2017).

120. See 17 U.S.C. § 504(c) (2010). In this case, a “violation” would arise from the mutilation or destruction of each work.

121. Another issue was also raised by the whitewashing. 17 U.S.C. § 113(d)(2) provides that if the building owner wishes to remove a work of visual art, 90 days’ notice must be given to the artist of the plans if the graffiti “can be removed from the building without the destruction, distortion, mutilation, or other modification of the work.” Though the artists of 5Pointz certainly knew about the plans to demolish the buildings, they had no idea that Wolkoff would arrange to whitewash the art beforehand. It is unlikely, however, that this provision was triggered by many of the works in issue. The cost of removing most (but not all) of the graffiti at issue in the dispute without damaging it would have been prohibitively expensive for the artists to bear. At the damages trial, there was testimony that twelve of the pieces were applied to easily disassembled surfaces such as “siding or plywood or sheetrock” that were fairly cheap to remove. Another nine were partially removable. Those pieces appear to fall outside of the statutory provision

whether the whitewashing of the art caused damage to the “honor or reputation” of the artists within the meaning of VARA’s mutilation provision, and whether each work was of “recognized stature” within the meaning of the destruction provision of § 106A. The collective work issued raised in this essay was neither included in the plaintiffs’ complaint nor presented by the court’s jury instructions during the damage trial. The defendants answered the new complaint, after which cross motions for summary judgment were filed. Both motions were denied as to the VARA claims and the case was set for trial.¹²²

A. THE *TILTED ARC* DISPUTE

Another famous mutilation and destruction dispute sets the tone for further discussion of the remaining issues—not because the legal setting was like that in *5Pointz* but because it was so different. It involved the famous quarrel between Richard Serra and the General Services Administration over the removal of a large sculpture—*Tilted Arc*—from the plaza in front of the Javits Federal Building in lower Manhattan. Moral rights protections did not exist in American copyright law at the time, but the circumstances of the work’s removal closely mirrored those surrounding the demise of *5Pointz*. In 1979, the United States General Services Administration (“GSA”) Arts-in-Architecture program commissioned a large work by Richard Serra for installation in the plaza in front of the Jacob J. Javits Federal Building in lower Manhattan.¹²³ An emotional public controversy emerged after the sculpture—*Tilted Arc*—was installed in 1981. Some who worked or routinely had business in the area found Serra’s piece an unsightly intrusion that blocked both movement and vision across the large, and somewhat sterile, plaza in front of the building. Others found it exhilarating and provocative. The sculpture was very large—120 feet long, 12 feet tall, and 2½ inches thick—and made of the unfinished,

because damage would have been done during removal. *See 5Pointz II*, No. 13-CV-05612(FB)(RLM), at 42. In the absence of the complex’s preservation, removal of the rest of the art would have required disassembly and saving of large parts of the structures. It is hard to imagine that the painters would have been able to raise enough money to accomplish that. Nor was there a known place where the work could have been stored or reconstructed. Though Wolkoff would have acted with appropriate legal caution by giving the §113(d)(2) notice, it probably was irrelevant for the difficult to remove art. In the actual jury charge given by Judge Block during the damage phase of the trial, he noted that the ninety-day provision was a way for the building owner to avoid liability. But since the notice was not given, he said, the issue was irrelevant in the case as to all the work. *See Jury Charge* at 14, *5Pointz II*, No. 13-CV-05612(FB)(RLM) (E.D.N.Y. Nov. 6, 2017).

122. *See supra* note 118.

123. He reiterated this view in his opinion rendered after the damages trial was complete. The image is from Jessica Kearns, *Walking Among Giants: Richard Serra’s Monuments to Minimalism*, JESSICA KEARNS WRITING PORTFOLIO (Dec. 14, 2014), <https://perma.cc/62TD-7PQP>. The General Services Administration’s (somewhat sanitized) version of the story is online. U.S. GEN. SERVS. ADMIN., *Richard Serra’s Tilted Arc*, <https://perma.cc/BCM8-KN6U> (last reviewed Aug. 13, 2017). More fulsome reports are Jennifer Mundy, *Lost Art: Richard Serra*, TATE MUSEUM (Oct. 25, 2012), <https://perma.cc/3HKW-5628>; Christina Michalos, *Murdering Art: Destruction of Art Works and Artists’ Moral Rights*, in *THE TRIALS OF ART* 173 (Daniel McClean ed., 2007).

rough surfaced, corten steel plate used by Serra in many of his works.¹²⁴ The artist described how the sculpture altered the plaza space as pedestrians moved through it. “The viewer becomes aware of himself and of his movement through the plaza. As he moves, the sculpture changes. Contraction and expansion of the sculpture result from the viewer’s movement. Step by step the perception not only of the sculpture but of the entire environment changes.”¹²⁵ Such changes in perception are standard fare for Serra’s work. Reading literature about his oeuvre or walking around, in, and through his large sculptures installed in museums throughout the world confirms that is Serra’s point.¹²⁶ He wants to alter the way people perceive space and relate to their environment by forcing them to move in unexpected ways and to encounter surprising vistas.



After *Tilted Arc* was installed, a petition seeking removal of the work gathered 1300 signatures. The government declined to act for a time but when a new GSA regional administrator—William Diamond—was appointed in 1984 during the Reagan administration, the tone changed. He decided to hold a public hearing about

whether it should be removed.¹²⁷ In March of 1985, 180 people testified—122 seeking to leave the work in place and 58 asking for its removal—before Diamond and four others he had appointed to the panel.¹²⁸ Many of those supporting Serra were prominent figures in the art world. Many of those opposing the sculpture worked in nearby buildings. Serra himself testified, emphasizing the site-specific nature of the work and clearly stating that moving the work to another location would

124. As this material oxidizes, a rough, highly textured surface no longer subject to rust forms. It is very long lasting and quite variable in its colorations—a perfect product for use in outdoor installations. It’s the same material that is used in Barnett’s Broken Obelisk sculpture in front of the Rothko Chapel in Houston.

125. Richard Serra, Statement at GSA Public Hearing Arguing in Support of *Tilted Arc* (March 1985), reprinted in *THE DESTRUCTION OF TILTED ARC: DOCUMENTS 65* (Clara Weyergraf-Serra and Martha Buskirk eds., 1991), cited in Michalos, *supra* note 123, at 180 nn. 42-43.

126. The existing literature on Serra is vast. But just taking a look at a pamphlet issued during a retrospective of his work at the Museum of Modern Art in New York makes the point. See *MUSEUM OF MODERN ART, RICHARD SERRA SCULPTURE: FORTY YEARS* (June 3-Sept. 10, 2007), <https://perma.cc/TL9P-EZJ6>. See also *DIA:BEACON MUSEUM OF CONTEMPORARY ART, Richard Serra*, <https://perma.cc/VTF8-C4QQ> (last visited Feb. 26, 2018) (cataloging huge installation of Serra’s work at Dia:Beacon Museum of Contemporary Art just north of New York City).

127. The legal story is told in *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988); *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987); and *Serra v. U.S. Gen. Servs. Admin.*, 664 F. Supp. 798 (S.D.N.Y. 1987).

128. Mundy, *supra* note 123. This was a unique process. There was no statutory or regulatory basis for it. Diamond simply thought it was the best way to proceed given the highly public nature of the controversy.

effectively destroy it. A 4-1 vote by the Diamond panel to relocate *Tilted Arc* was confirmed after review by the Acting Administrator of the GSA. In a compromise gesture, the GSA also asked for the convening of a panel by the National Endowment for the Arts to seek an alternative location for the sculpture. That panel agreed with Serra that moving the work would effectively destroy it, though a list of alternative sites was provided.¹²⁹

In December 1986, Serra filed a lawsuit in federal district court seeking to bar the sculpture's removal and, in his eyes, destruction. He was in a difficult legal position. The United States lacked a moral rights law at the time the case was brought. Though in 1988 the United States joined the Berne Convention that contained a provision requiring moral rights provisions in each participant's national law,¹³⁰ the implementing legislation enacted after the *Serra* conflict arose did not contain a specific moral rights section. Congress claimed that other aspects of American law, such as unfair competition and trademark rules,¹³¹ provided sufficient protection to justify joining the Convention. The moral rights statute at issue in *5Pointz* was not adopted until 1990. The copyright law therefore provided no explicit basis for complaint about the mutilation or destruction of Serra's sculpture. Under the statute extant at the time of the *Tilted Arc* controversy, there was no limit on the ability of an owner of a unique artistic object to destroy it at will. Stunning. Someone owning a great twentieth century American work by Jackson Pollock, Louise Nevelson, Robert Rauschenberg, Mark Rothko, Agnes Martin, or Georgia O'Keefe had the power to cut it up into pieces.¹³² If Serra was to prevail he had to find a new and novel approach to the problem.

The complaint alleged that the actions of the government in threatening to remove *Tilted Arc* breached Serra's contract with the government, and violated free speech rights, federal trademark and copyright law, and due process. He sought an injunction and \$30,000,000 in damages.¹³³ Most of the case was dismissed on sovereign immunity grounds; the contract and intellectual property law issues should have been raised in the United States Federal Claims Court where jurisdiction for most damage claims against the United States lies.¹³⁴ The only issues taken up on appeal to the Second Circuit Court of Appeals involved constitutional claims—allegations that William Diamond, who set up the General Services Administration review panel, appointed its members, and wrote the initial recommendations, was so

129. *Serra*, 664 F.Supp. at 801; Richard Serra, *The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39, 42-46 (2001).

130. See *supra* note 35.

131. The famous case in which Monty Python challenged the significant alterations in episodes aired by American Broadcasting Company under the Lanham Act provided some basis for the Congressional claim, but hardly enough to justify the failure to enact a specific moral right statutory scheme. See *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976).

132. Or swallow it! See Isaac Kaplan, *If You Buy an Artwork, Can You Legally Eat It?*, ARTSY (Dec. 11, 2017, 5:17 PM), <https://perma.cc/KN7P-AQQG>.

133. *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988). He also made some state law claims.

134. Most disputes with United States arising out of contractual disputes or other claims for money may not be brought in a regular United States District Court. Jurisdiction lies only with the United States Court of Federal Claims.

biased that the hearing was unfair and violated the Due Process Clause, and that removing *Tilted Arc* violated Serra's free speech rights.

The court declined to intervene on fairness grounds under the Due Process Clause, noting that the Acting Administrator of the GSA, Dwight Ink, reviewed the entire report as well as the three-day hearing transcript and was free of any connections of note with Diamond when he decided to affirm the removal of Serra's work. The First Amendment claim was also resolved unfavorably to Serra, but in a troubling way that provided guidance about the appropriate basis for awarding damages in the *5Pointz* case. The central holding of the Circuit Court of Appeals was that free speech rights in *Tilted Arc*, if any existed, were held by the United States of America, the owner of the work, not by Serra. Although it conceded that an artist has an expressive right when creating a work, the court concluded that it was lost when ownership of the work was transferred to another.¹³⁵ The court went on to write that even if an artist retained expressive rights in a work after transferring it, those rights were subject to standard time, place, and manner restrictions in the public interest when the owner of the work was the government or the work was located in a public place. Relocating the sculpture to another location was said to be an appropriate exercise of such a restriction. The GSA's desire to provide freer movement in the plaza where the sculpture sat and to remove from view a sculpture disliked by many was within the legitimate discretion of the GSA. The fact that the GSA review panel expressed aesthetic distaste for *Tilted Arc* was said not to be regulating content in violation of the First Amendment. In a critically important part of the opinion, Judge Jon O. Newman wrote:

Serra suggests that Diamond and Ink thought "Tilted Arc" was ugly. . . .

To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. . . . GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations. Moreover, the Supreme Court has consistently recognized that consideration of aesthetics is a legitimate government function that does not render a decision to restrict expression impermissibly content-based. . . .

If Serra had presented any facts to create a genuine issue as to whether GSA was removing "Tilted Arc" to condemn a political point of view or otherwise to trench upon First Amendment rights, we would require a trial. . . . But he has not done so. In the absence of such facts, his lawsuit is really an invitation to the courts to announce a new rule, without any basis in First Amendment law, that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency. Neither the values of the First Amendment nor the cause of public art would be served by accepting that invitation.¹³⁶

In the same manner as the secretive whitewashing of *5Pointz*, *Tilted Arc* was dismantled at night when the area was largely empty and New York City was asleep.

135. *Serra*, 847 F.2d at 1048-49.

136. *Id.* at 1050-51.

On March 18, 1989, it was cut into three pieces and carted away for storage. The pieces sit in a Maryland warehouse today.¹³⁷

At first glance, Judge Newman's position that government control of aesthetics may be in the public interest seems hard to contest. Many historic district and landmark preservation statutes grant regulatory agencies the authority to oversee alterations to landmark structures and to review proposals for new buildings planned in historic districts. The first form of control is perfectly consistent with moral right legislation. Preservation of both buildings and artistic works is intended to protect the aesthetic and historical integrity of already extant work. Review of new construction in an historic district, however, might seem aesthetically more intrusive. But this also conforms to moral right norms. Any person, organization, or government has the authority to select works of art for fabrication or construction before purchasing them. And that authority extends to reviewing artists' proposals for publicly visible works and consulting with them about the form the artistic endeavors might take. When the General Services Administration considered purchasing a Serra work, it could have elected to work with a different artist if a disagreement arose. And Serra, if he was displeased by the aesthetic preferences of the GSA, had the power to decline the invitation to create a sculpture. But once the sculpture was fabricated and in place, the issues were different. The integrity of the work itself then came into play. And that is the domain of moral rights. Similarly, the power to oversee construction of a new building in an historic district raises different questions from the power to control alteration or demolition of a structure once it is constructed. When a new building is proposed, the interests of the neighborhood are taken into account by the landmarks authority. Initial aesthetic judgments typically are consultative and subject to modification. But once the building is in place, it becomes part of the historic fabric of the community. It is subject to the same preservation rules as the much older structures in the district. Judge Newman missed this point.

Serra was deeply upset by the court's opinion. Some years after the decision was rendered his displeasure was unabated. Calling the position taken by the government and the final decision the product of a "kangaroo court," he wrote that the outcome affirmed the government's "commitment to private property rights over the interests of art and free expression. It means that if the government owns a book, it can burn it. If the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right of property supersedes all other rights, including the rights of freedom of speech, freedom of expression, and the protection of one's creative works." He went on to say, "If I had known that the government would claim *Tilted Arc* as its own speech and destroy it, I would never have accepted the commission in the first place. *Tilted Arc* was never intended to, nor did it speak for the United States Government."¹³⁸

137. A summary of the story, as well as of the hearing testimony of Serra and other artists, is at NERO, *Tilted Arc*, <https://perma.cc/7GTG-TDLJ> (last visited Feb. 27, 2018).

138. Serra, *supra* note 129, at 44-46.

Serra's position goes to the heart of moral right protection.¹³⁹ Copyright in America, as he suggested, is largely based on an economic foundation—that the primary goal of copyright law is to use economic incentives to encourage the creation of works of authorship. Inherent in that idea is that creation of a viable market in such works will benefit both authors and consumers by allowing for distribution of creativity to the greatest number.¹⁴⁰ As noted earlier, basic American copyright law is designed as a system of economic interests. It prefers an economic incentive structure to a system based upon prizing and protecting the inherent value of human creativity. Traditional moral right law, however, is based in large part on the inherent value of human creativity.¹⁴¹ That is why many moral right statutes around the world provide that artists may not totally waive or sign agreements transferring all of their moral rights and that moral rights last longer than the lives of the artists. In such a system, mutilating or destroying an artistic work is not primarily about damaging the economic interests of the artist or the owner, but about protecting the integrity and historical integrity of the creation itself. Indeed, in the complaint Serra filed in federal court he alleged that his inducement for making *Tilted Arc* “was not financial, but the unique opportunity to make his work available to a broad public in the present and the future, and to enhance his reputation through permanent placement of a major sculpture in a significant Federal site.”¹⁴²

It was the latter conception of *Tilted Arc* that was at stake in Serra's confrontation with the government. He was personally insulted when the GSA decided to remove a piece that was created specifically for that location under an agreement Serra claimed guaranteed it would be located permanently in the plaza. But he also was deeply disturbed that aesthetic dyspepsia contributed to its removal. Art is not always about making people happy. It is not always about making widely accepted political or social statements. Modern artists are often interested in reshaping understanding of the human condition and of the environments and visual aspects of the spaces in which we move—sometimes in challenging or confrontational ways. That was Serra's goal in *Tilted Arc*. And it worked! It did exactly what he designed it to accomplish. People did pay attention. Some were upset. They had to move in unexpected directions. They were pushed about the world in ways they may not have preferred. It caused inconvenience for some by cutting off a direct pathway to a subway entrance or other nearby locations in a city full of people in a hurry. Others, experiencing the same sculpture, took delight in the ways Serra played with the space. They moved around the sculpture, touched the rough-hewn surface of the steel, and marveled at the vast, subtle permutations in the surface colorations. They stopped and thought. There was inherent creative value in Serra's work that had

139. Later disputes confirmed the relevance of VARA to efforts to remove site-specific works. See, e.g., Francesca Garson, *Before that Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203 (2001).

140. There is much literature about the purposes and economics of copyright law. One of the classics is Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

141. See KWALL, *supra* note 37, at 40–43.

142. Complaint at 4, *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042 (1987) (No. 96 Civ. 9656).

nothing to do with its market value or with the willingness of the Government Services Administration to pay him for initialing fabricating the sculpture. For Serra and others, *Tilted Arc*'s most important role was cultural, not economic. It was not primarily designed as a commodity in a market.¹⁴³ Its speech was aesthetic and it was a sense of aesthetic insult that led Serra to stake out a First Amendment claim.

Personal testimony is unusual in law review articles but may be relevant here. In 2007, Serra was honored with a retrospective exhibition at the Museum of Modern Art. I visited it and spent a great deal of time wandering around in, out, and through his work. At one point, I was in the outdoor sculpture garden of the museum looking at the sculpture pictured below entitled *Intersection II*.¹⁴⁴ It was quite large—four identically sized and shaped, thick, curved steel plates fifty feet long and thirteen feet high. Each was placed on the plaza in a different way, resulting in a spatial composition with a variety of different passages, arcs, and tilts. The scale is evident when you look at the person at the right of the picture standing near the sculpture. After taking every possible pathway to experience how it altered the environment, I decided to lie down on the pavers in its middle space and look up to the sky. It was a revelation. My side views were restricted. But when I peered up through the tunnel created by the art, I got a never-before seen, oddly framed view of New York City. I will never forget the experience. I could have been aggravated by the way the work broke up viewing the museum's classic courtyard. That, of course, would also have served Serra's artistic goals. Any reaction to the way *Intersection II* altered space would have satisfied him. Instead, I allowed the sculpture to alter my perceptions of the world. I suspect Serra would have smiled if he had seen me lying in the courtyard that day.¹⁴⁵ Protecting the ability to experience a creative work through the generations is the goal of moral right protections.

143. After VARA was adopted, the General Services Administration altered its contracts for the purchase of artistic works by requiring that moral rights be waived. See Serra, *supra* note 125 at 49. He described this step as “repugnant.”

144. The image may be found in Jerry Saltz, *Buono Serra*, N.Y. MAG. (June 1, 2007), <https://perma.cc/U6TU-9728>. The picture credit reads: “Serra’s *Intersection II* (1992–93), at MoMA. (Photo: Lorenz Kienzle/© 2007 Richard Serra/ARS/Courtesy of MoMA).” For the museum’s web page for the exhibition, see *Richard Serra: Sculpture: 40 Years*, MUSEUM OF MODERN ART, <https://perma.cc/W3GD-Z9AA> (last visited Aug. 6, 2017).

145. Not everyone smiled. The experience didn’t last long. A guard told me I was not permitted to lie down in the courtyard. When I suggested that he also should ask the children laying on their tummies and playfully dipping their hands in the nearby water pool to rise, he simply told me a bit more gruffly to get up and move along. Such is life.



B. TILTED ARC: RELATIONSHIP TO 5POINTZ

The *Tilted Arc* controversy was in the mind of many when the Visual Artists Rights Act was adopted during the year after the work was dismantled.¹⁴⁶ Much of the new law's basic structure mirrored Serra's concerns. Rather than providing protections for a work of visual art simply because of its role in a market, it created rights that are intrinsic to the work itself—in its inherent creative value and historic importance. The default holder of the right to bar mutilation or destruction was given to the artist, not the purchaser of the object or the owner of the building on which the copyrighted work is fixed. Judge Newman's position that Serra lacked expressive rights in *Tilted Arc* was presumptively reversed by VARA. And that is of critical importance for *5Pointz*.

In the portion of Judge Block's preliminary injunction opinion about balancing of interests, he misunderstood the basic notion that the graffiti artists' primary concern was about the inherent creative value of the work to the culture at large, not about the market value of the work to a potential purchaser. This emphasizes all the more that standard damage measures based on economic losses to artists are not appropriate in most moral right disputes. That may be why statutory damage relief rather than market-based relief is always available in moral rights cases without the

146. If VARA had been in effect at the time the GSA was considering what to do with *Tilted Arc*, the answer should have been obvious. The sculpture should have stayed in place. But it is not clear what would have occurred if Judge Block's points of view as voiced in the *5Pointz* case governed the outcome. Judge Block's perceptions that art markets determine the value of creativity and that works must be considered in isolation from their location even when the setting is critical to the impact of the work might well have led to the conclusion that the GSA was free to move *Tilted Arc* to another place if it wished.

need to allege that the work was registered prior to the copyright violation.¹⁴⁷ And it also makes clear that Wolkoff's whitewashing of the graffiti was not about destroying works with market values, but about negating their cultural significance. The artists' angry reactions to the event were understandable. It was a deep affront to the importance of their work. They, like Serra, felt their cultural legitimacy was subverted.¹⁴⁸

The reactions of Serra and the 5Pointz artists provided significant clues for resolution of the damages phase of the litigation. First, as suggested above, statutory rather than market-based relief was the proper way to resolve the *5Pointz* damages dispute, especially after the works of graffiti were whitewashed.¹⁴⁹ This simply was not a case that could be given proper economic content by seeking to measure the market value of the destroyed art or the actual damages caused to the artists by the loss of their work. If money was to be the remedy, the amounts awarded needed to reflect the statutory language—harm to reputation or loss of stature—both measures of the affront to their creative endeavors. In addition, the applicable statutory damages formula allowed for enhanced awards up to \$150,000 for the mutilation or destruction of each work of visual art, rather than the maximum of \$30,000 applicable to measurement of statutory damages in typical infringement cases. The statute provides that “[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”¹⁵⁰ Wolkoff's stunning decision to whitewash the graffiti at 5Pointz in the midst of litigation while the time for appeal had not expired and permits for demolition of the buildings had not yet been issued was not a routine moral rights violation. It was willful and gratuitous behavior. If actions like those of Wolkoff that were justifiably considered insulting by the graffiti artists are to be deterred in the future a significant payment to the plaintiffs had to be exacted.

Second, the *Serra* case also answered the question about whether the actions of Wolkoff were prejudicial to the honor or reputation of the artists if the court deemed the whitewashing to be mutilation of their works. Even if all the art he whitewashed was scheduled to disappear when the 5Pointz complex came down the following year, his preemptory actions were unnecessary, demeaning, and destructive. The most frequently cited case on this issue is *Carter v. Helmsley-Spear, Inc.*¹⁵¹ Using common meanings given to the phrase “prejudicial to the honor or reputation of the artists,” the court concluded that reputation may refer to both the artist and the work

147. See 17 U.S.C. § 411(a) (2008).

148. One of a number of media articles about artist reactions is Raillan Brooks, *The Community Mourns the Buffing of 5Pointz at Tuesday Night's Candlelight Vigil*, VILLAGE VOICE (Nov. 20, 2013), <https://perma.cc/PJ5Q-JYKL>.

149. In a typical copyright case, statutory damages are available only for infringements occurring after a work is registered. But that limitation is lifted for moral right claims. See 17 U.S.C. § 411(a) (2008).

150. 17 U.S.C. § 504(c)(2) (2010).

151. There are three reported opinions: *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

in issue, and that the artist need not be well known to claim rights under VARA. Rather the focus is on whether alteration or mutilation of a work “would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.”¹⁵² Whitewashing 5Pointz, though it left parts of a few works showing through, altered the graffiti to such an extent that it materially diminished the artistic vision intended by the artists and therefore left its status and reputation diminished. Each plaintiff was eligible to receive an enhanced damages award because of the mutilation.

That leaves the question of whether, for purposes of the destruction provision, the works were of recognized stature. What test should be applied? The meaning of the phrase “recognized stature” has not been clearly elucidated by the courts.¹⁵³ Here too the most commonly cited case is *Carter*. The works involved in the dispute were installed by Jx3—John Carter, John Swing and John Veronis. The owners of a warehouse building in Queens asked them to create and install two and three-dimensional work in the lobby and other areas of the building. After several years of labor, the warehouse owners filed for bankruptcy, and Jx3 were told to leave the building. They feared that their creations would be altered or destroyed and sought relief under VARA.¹⁵⁴



The trial court concluded that VARA barred alteration or destruction of the art in the lobby.¹⁵⁵ It opined that the recognized stature requirement served a “gate-

152. *Carter*, 861 F. Supp. at 323.

153. The best analysis of the standard is Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935 (2000).

154. These images are available at Bryan Frye, *Class 23: The Visual Artists Rights Act*, OPEN SOURCE COPYRIGHT CASEBOOK (Mar. 30, 2014), <https://perma.cc/YUJ9-HULN>.

155. The result was reversed on appeal, but not because the lower courts conclusions about damage to honor or reputation, or about recognized stature were erroneous. Instead, the Circuit Court concluded that the plaintiff artists were employees, that the art was therefore made under the work for hire provisions of the copyright code, and that the work was therefore excluded from VARA coverage under the definition of a work of visual art. See *Carter*, 71 F.3d at 85-88. There is no obvious reason why works for hire

keeping” function, preserving “only those works of art that art experts, the art community, or society in general views as possessing stature.”¹⁵⁶ The showing required was not that the art met the standard of widely recognized artistic stars. Nor must the work be widely admired. Rather, the goal of the recognized stature requirement was to avoid nuisance lawsuits and squabbles over minor artistic endeavors. To fulfill the standard, the court concluded, “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 ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” And in fulfilling these obligations, the artist typically must make use of expert testimony.¹⁵⁷

It might be argued that the rule as stated by the court went well beyond the notion of gate-keeping, that it allowed too much art to be destroyed. Indeed, it has been argued that the recognized stature condition for VARA protection is unnecessary and counterproductive. By imposing a requirement that the value of artistic endeavors be subject to judicial scrutiny, VARA violates a basic norm of copyright jurisprudence dating back to Justice Holmes’ famous warning well over a century ago in *Bleistein v. Donaldson Lithographing Company*, that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁵⁸ Imposing a stature requirement risked allowing the destruction of works that might later be deemed highly important exemplars of major artistic trends.¹⁵⁹ But even if the *Carter* standard of recognized stature was used, the *5Pointz* plaintiffs surely met it. Like Serra’s *Tilted Arc*, the graffiti at 5Pointz was internationally recognized. And though, like Serra’s work, not each piece of the graffiti was widely known and admired, that is not the test; it only needs to be known and to display a certain level of artistic competence. In addition, the entire collection of work at 5Pointz actually was widely known and admired. Recalling that the meaning of “work of visual art” includes the environment and setting in which it is seen, evaluating the “recognized stature” standard must take into account the reputation of the entire complex in the community—the inherent value of the collective work as whole. Using that standard, there can be no doubt that the graffiti fulfilled the statutory requirements.

should be excluded from VARA coverage. Group projects may be just as artistically creative as individual ones.

156. *Carter*, 861 F. Supp. at 325.

157. *Id.*

158. 188 U.S. 239, 251 (1903). The case involved whether circus posters were sufficiently original to garner copyright protection. Justice Holmes concluded that they were copyrightable and that it was inappropriate to deny protection to graphic works in advertisements that appealed to the masses. *Id.* Indeed, he compared posters to works by Degas who spent much of his career depicting circus performers. *Id.*

159. Robinson, *supra* note 153, at 1965. Courts too have at times seemed to lighten the burden of fulfilling the standard even while claiming to apply it. In *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999), the court affirmed a grant of summary judgment under VARA for destruction of a sculptural work based largely on newspaper and other public commentary and without testimony from any experts.

Judge Block's summary of the expert testimony at both the preliminary injunction hearing and the damages trial unsurprisingly revealed that experts testifying for the two sides in the case differed widely in their approach. Though they all opined that some level of quality was required in order for a work to have stature, they varied enormously in their approach to the issue. The defendant's witnesses, especially the art historian Erin Thompson,¹⁶⁰ testified that recognition was best measured by commentary on a work in academic literature or Internet postings.¹⁶¹ She found such material lacking or minimally available for the 5Pointz artists. Widespread knowledge about the graffiti among tourists and non-artists, she argued, would not fulfill the statutory requirement. Plaintiffs' witnesses, on the other hand, viewed recognition in a broader light, including notions of widespread knowledge, whether by museum figures or by the public at large. It is difficult to see why Thompson's standard should be applied. It did not follow the language in *Carter*. Relying principally on academic writers severely limited the meaning of recognition, ignored the influence of the public at large on artistic movements, and summarily limited the ability of unheralded artists, gallery owners, and buyers to alter the ways in which artistic movements emerge and flourish. Indeed, it moved well beyond the notion of the recognized stature's gate-keeping function to force courts to assume the role of sophisticated art critics and aficionados. In order to deter others from treating graffiti as cavalierly as Wolkoff, the damage stage of the litigation should have resulted in a very substantial damage award to all of the plaintiffs.

That is what happened though the procedure at the October 2017 damages trial veered into unusual territory. It began as a jury trial as the plaintiffs requested. But the two sides surprisingly agreed just prior to presenting their summations that the jury verdict and damage conclusions would be advisory, and that the final decision and remedy would be left up to the court. The entire case was given to the jury for deliberation without revealing to them that their findings would be advisory.¹⁶² Putting aside for a moment that the jury result awarded only about one-tenth of the amount that Judge Block eventually decided to grant, allowing the court to decide the case may have been the best choice, at least for the plaintiffs. The large number of plaintiffs, the alternative theories and diverse elements involved in finding liability for either mutilation or destruction of the art, the different systems for awarding actual or statutory damages, and the availability of enhanced statutory damage awards and the need to find willful misbehavior before awarding such amounts made for a decisional nightmare for a lay jury. In addition, the parties and the court had agreed to use a complicated and not altogether clear special verdict form for each of the forty-nine works of art involved in the trial.¹⁶³ So there were good reasons for

160. Her primary field is study of the damage and impact of art theft on the world's cultural heritage. See her faculty biography page at <https://perma.cc/79SK-29AA>.

161. 5Pointz II, No. 13-CV-05612(FB)(RLM), slip op. at 31-32 (E.D.N.Y. Feb. 12, 2018); 5Pointz I, 988 F. Supp. 2d 212, 221 (E.D.N.Y. 2013).

162. 5Pointz II, No. 13-CV-05612(FB)(RLM) at 5, 12.

163. The complexity of the case led to some apparent confusion among the jurors. Judge Block gave the jury a lengthy special verdict form to fill out during their deliberations. They were asked to decide for each item of visual art whether the defendants violated either or both of the mutilation or destruction wings of the dispute, whether the artists should be awarded actual damages to reputation or stature if VARA was

the parties to agree upon this process. But the defendants miscalculated. They failed to perceive the level of pique Gerald Wolkoff's whitewashing of 5Pointz and behavior during the trial raised in the mind of Judge Block. At the end of the day, he threw the book at the defendants.

Judge Block's decision on the merits was much better than his preliminary injunction decision. He largely followed the recommendations outlined here in both his instructions to the jury and in his own opinion deciding the damage case. First, in a stunning reversal of his position about the temporal quality of the work diminishing entitlement to preliminary injunctive relief, he affirmed that all of the works in suit were works of visual art subject to VARA protection despite the inevitability of their destruction.¹⁶⁴ Indeed, he regaled his readers by reciting at some length that the coming and going of work was "not anarchy"¹⁶⁵ but an expected part of the aerosol art world in which better pieces routinely replaced less exciting work. Second, he carefully described to the jury the existence of two distinct liability theories—mutilation and destruction—and described the appropriate tests for evaluating whether the art was of recognized stature and the nature of reputational harm that might have been occasioned by its mutilation. As to the former, his instructions were to find liability if the mutilation "caused injury or damage to the artists' good name, public esteem, or reputation within the artistic community" and that "it is not necessary that the Plaintiffs have independent stature in the artistic community. Instead you should focus on how the Plaintiffs' reputation or honor is embodied in the work itself." Judge Block was similarly flexible in defining recognized stature, adopting the two-tier *Carter* test,¹⁶⁶ requiring that the work be meritorious and that this merit be recognized by "art experts, other members of the artistic community, or some cross-section of society."¹⁶⁷ In both aspects of the case, the court rejected a narrow vision of reputational harm or stature relying wholly on opinions in the academic community. In his opinion on the merits after the jury rendered its decision, he did not spend much time on these standards issues, noting that the plaintiffs had produced "such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most

violated and, if so, in what amount, and whether enhanced statutory damages were available and should be awarded. The form, however, was ambiguous about whether statutory damages should be awarded for mutilation or destruction. Separate entries were required for the jury's decisions about whether damages for mutilation and destruction were appropriate and for the amounts of actual damages for each. But only one entry line was made available for a decision about whether the actions of the defendants were willful; separate spaces were not provided for mutilation and destruction. In addition, only one line was provided in each case for statutory damages without regard to whether they were being awarded for mutilation or destruction. While only one statutory damage award per work is allowed, the form meant it was impossible to determine which legal theory the jury felt justified the exemplary damages. Finally, some of the art was made by more than one artist. Separate lines were provided for actual damage awards to each artist, but, again, only one space was provided for the entire statutory damages award; there was no indication as to how it was to be divided. A listing of all the jury findings for the various works involved in the case is in an Appendix. As noted there, some anomalous results were rendered.

164. *5Pointz II*, No. 13-CV-05612(FB)(RLM) at 22-27.

165. *Id.* at 20.

166. See text following *supra* note 149.

167. Jury Charge at 10, *5Pointz II*, No. 13-CV-05612(FB)(RLM) (E.D.N.Y. Nov. 6, 2017).

restrictive of evidentiary standards almost all of the plaintiffs' works easily qualify as works of recognized stature.¹⁶⁸ Even Jonathan Cohen took on something of the role of an expert for Judge Block. His widespread reputation as "one of the world's most accomplished aerosol artists,"¹⁶⁹ meant that his curatorial activities in selecting artists to work at 5Pointz and in choosing which works should be included as part of the plaintiff's case dramatically enhanced the stature of the works. For the court, the role of Cohen as curator almost took on the characteristics of a compilation copyright that included the entire complex—a central theory expounded earlier in this essay. The testimony of defendants' primary expert, Erin Thompson, was discounted as unduly restrictive and too reliant on academic data sources.¹⁷⁰ As a result, Judge Block concluded that all but four of the forty-nine works were of recognized stature, nine more than the jury.¹⁷¹

Third, again in contrast with his studied attention to traditional economic damage theories at the preliminary injunction stage, Judge Block concluded that actual damages were not appropriate in this case. In a stunning reversal of expectations, he even criticized the *plaintiffs'* expert witnesses who attempted to define the value of the work at 5Pointz. Instead, he credited the defense expert who claimed that the art works lacked "a provable market value" because of the "unique challenges and costs" of preparing the works for sale!¹⁷² Statutory damages, he declared, were more appropriate in settings like this where actual damages can't be calculated.

Finally, as recommended here, substantial statutory damages were awarded for each of the forty-five works of recognized stature. Although the jurors decided that Wolkoff behaved willfully in every case where they awarded damages to a plaintiff, Judge Block went much further. He blasted Gerald Wolkoff and awarded the maximum allowable enhanced award of \$150,000 for each of the forty-five works in play for a total of \$6,750,000. His evaluation of the quality of Wolkoff's actions was stunning. Simply put, Judge Block was convinced that Wolkoff behaved terribly—both in whitewashing the graffiti and in delivering his testimony in court. Judge Block even threatened him with contempt to control his apparently obstructionist behavior on the witness stand.¹⁷³ After recalling that Wolkoff whitewashed 5Pointz without even bothering to try avoiding liability by giving the artists a ninety-day warning to remove their work under § 113(d),¹⁷⁴ the court added:

168. *5Pointz II*, No. 13-CV-05612(FB)(RLM) at 30.

169. *Id.* at 14.

170. *Id.* at 31.

171. The four works without recognized stature were deemed peripheral to the core of the 5Pointz project. They were not, he concluded, part of the curated collection and attracted very little attention from third parties. *See id.* at 34. In addition, Judge Block noted that only one measure of statutory damages was available for each work. If, therefore, the forty-five works of recognized stature were destroyed by the whitewashing and statutory damages rather than actual damages were awarded, then there was no need to decide if their mutilation also caused reputational harm to the plaintiffs. *See id.* at 35–36. The four lacking stature also were found not to have been mutilated. The jury concluded that thirteen works were not worthy of damage awards. For a review of the jury's work see the table of awards in the Appendix.

172. *Id.* at 38.

173. *Id.* at 15.

174. The impact of this part of the statute is ambiguous. It is not clear if the ninety-day notice provision operates independently of the written waiver provision. That is, can a building owner use the

Wolkoff's recalcitrant behavior was consistent with the manner by which he testified in court. He was bent on doing it his way, and just as he ignored the artists' rights he also ignored the many efforts the Court painstakingly made to try to have him responsively answer the questions put to him.

From his testimony, the only logical inference that the Court could draw from Wolkoff's precipitous conduct as soon as the Court denied the artists' preliminary injunction application was that it was an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art. This was the epitome of willfulness.¹⁷⁵

Judge Block concluded in an equally succinct and powerful fashion:

If not for Wolkoff's insolence, these damages would not have been assessed. If he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully. Given the degree of difficulty in proving actual damages, a modest amount of statutory damages would probably have been more in order.

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.¹⁷⁶

IV. CONCLUSION

A number of conclusions flow from the *5Pointz* litigation, both for artists and for building owners. Several have already been discussed in this essay—the pressures on graffiti writers from the cultural changes in their craft and the growing acceptance of their work, the need for New York City to consider easing the thirty-year-old landmark trigger to allow earlier designation of especially worthy buildings, and the growing pressure on building owners to protect their interests under the present moral right statute by obtaining waivers from those they permit to incorporate work in or on their buildings. The low level of understanding in parts of the street art and real estate industries about the potential consequences of moral rights claims surely will change as the *5Pointz* case becomes more widely known.¹⁷⁷ In combination, these conclusions may create additional pressures as artists and building owners navigate their relationships in a world where street art has become much more widely accepted and admired. Whether it will reduce the amount of legally sanctioned work on buildings is certainly an open question.¹⁷⁸

ninety-day notice provision even in a case where no waiver was obtained? Or does the provision operate only in cases where a waiver was signed—thereby giving an artist the chance to remove endangered work? Or does the notice provision operate in both settings?

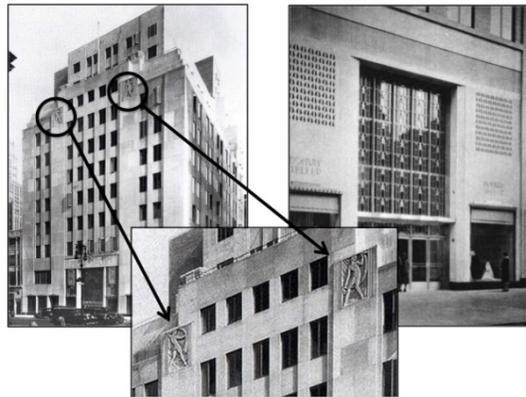
175. *5Pointz II*, No. 13-CV-05612(FB)(RLM), at 44–45.

176. *Id.* at 49–50.

177. A very recent example involves the remodeling of a store in Harlem by Footaction that covered a mosaic inspired by the famous Apollo Theater with a brick wall. See Moynihan, *supra* note 100.

178. Philippa Loengard at the Center for Law, Media and the Arts at Columbia Law School, immediately suggested that some forms of public art will now be commissioned at lower rates. Jason

There also are other issues that are closely related to but go significantly beyond the immediate facts and consequences of *5Pointz*. Extending analysis beyond *5Pointz* is nicely done by dipping into the controversial (and perversely topical) destruction in 1980 of the Bonwit Teller store to make way for the fifty-eight story Trump Tower in New York City. The art deco entrance grillwork and two beautiful friezes on the upper levels of the building were unexpectedly destroyed while efforts were being made to insure their preservation. Exploring that story ineluctably leads to questions about various aspects of VARA—the statute’s barring of works for hire from coverage, the limitation of moral rights protection to the author’s life, the ability of artists to waive moral rights protection, the adequacy of the remedies available to artists and their successors, and the relationships between moral rights and historic landmark legislation. The baseline inquiry is whether moral rights disputes involving mutilation or destruction of works of visual art incorporated in or on buildings should be handled differently from other settings where works are not in any way attached to structures.



*Bonwit Teller 5th Avenue Store*¹⁷⁹

Bonwit Teller had a storied but somewhat checkered history as a high-end department store. The first branch in what later became a chain opened in 1895 on 38th Street and Fifth Avenue. After the 1929 Crash led to the failure of Stewart & Company, another top-of-the-line retailer, Bonwit Teller took over Stewart’s recently opened ornate store on Fifth Avenue and 56th Street. Unfortunately, Bonwit Teller’s architect, Ely Jacques Kahn, stripped away many of the decorative interior elements of the Stewart & Company building in 1930. But the exterior structure, including two artistically important friezes on the eighth-floor exterior of the twelve-story building and the grillwork around the main entrance remained after the interior alterations. The structure, located in what became the most important high-end

Daley, *What to Know About 5Pointz Graffiti Collective’s Big Win at Court*, SMITHSONIAN MAGAZINE (Feb. 14, 2018), <https://perma.cc/T3ZF-9P74>.

179. I composed the inset and arrows. The image of the store may be found online at the Department Store Museum, available at <https://perma.cc/CCZ3-L54P>.

shopping area in the city, was Bonwit Teller's flagship store as the company opened others around the country. The chain's sales began to lag in the middle of the century and its ownership changed frequently after 1960. Allied stores purchased the business in 1979, but the Fifth Avenue store was not part of the deal. The building ended up on the market and was purchased by Donald Trump in 1980. He demolished it later that year for construction of what is now Trump Tower.¹⁸⁰

Though New York's landmark law was adopted in 1965 shortly after the destruction of Penn Station in 1963, the Bonwit Teller building was undesignated when Trump bought it. In hindsight that was a serious omission. The building probably qualified for landmark status. Warren & Wetmore, one of the most prominent New York City architecture firms of the early twentieth century, designed the building.¹⁸¹ They also planned Grand Central Station, numerous historic hotels in New York and elsewhere, and Steinway Hall on 57th Street, the home of the renowned piano manufacturer.¹⁸² In addition to the probability that the building qualified for designation as an historic landmark, the friezes, and perhaps the grills, would also have been likely to meet VARA's definition of a "work of visual art."¹⁸³

Though the building is gone, Trump's treatment of its historically important elements provides a perfect tapestry for further analysis of both 5Pointz and American moral rights law. After he purchased the store and announced his intention to demolish it, many prominent New Yorkers urged that the entrance grillwork and the two friezes be preserved if the entire building was to be destroyed. The architect of Trump Tower, Der Scutt, of Poor, Swanke, Hayden & Connell, tried to convince Trump to save the friezes and incorporate them into the lobby of the new building, but was unable to gain permission to do so.¹⁸⁴ Trump did promise the grills and friezes to the Metropolitan Museum of Art, conditioned on his being able to remove them. But rather than doing so he suddenly ordered them destroyed. Workmen pulled out the grills. The Trump organization later claimed they had no idea where they were; they have not been recovered. The friezes were jack-hammered and

180. Christopher Gray, *The Store That Slipped Through the Cracks, Fifth Avenue Bonwit Teller: Opulence Lost*, N.Y. TIMES, Oct. 3, 2014, <https://nyti.ms/2m97C71>. The decline of bricks and mortar department store commerce in New York City continues to the present day. Lord & Taylor sold its main store at Fifth Avenue and 38th Street in 2017. The building is landmarked and therefore protected from demolition. Michael J. de la Merced & Michael Corkery, *Lord & Taylor Building, Icon of New York Retail, Will Become WeWork Headquarters*, N.Y. TIMES, Oct. 24, 2017, <https://nyti.ms/2zyFVXH>.

181. A classic book about the firm is PETER PENNOYER & ANNE WALKER, *THE ARCHITECTURE OF WARREN & WETMORE* (2006).

182. See KENNETH POWELL, *GRAND CENTRAL TERMINAL: WARREN & WETMORE* (1996). Steinway Hall on West 57th Street was designated a landmark in 2001. See New York City Landmark Preservation Commission, DL-331, LP-2100 (Nov. 13, 2001), <https://perma.cc/6SEU-QW6Y>. The company sold the building and its associated air rights in 2013. A super-tall apartment building is now under construction next door with a large cantilever hanging over the building. Steinway moved to a new location on Sixth Avenue and 43rd Street.

183. The reliefs were sculptural works of visual art incorporated into the facade. The grills were incorporated in the building, but may not be covered as sculptural works under the copyright act. There may be a question as to whether they serve a useful purpose other than adornment. While that seems dubious, the conclusion is not totally obvious.

184. Michael Leccese, *New York City Trumped: Developer Smashes Panels*, 20 PRESERVATION NEWS 2 (July 1, 1980), <https://perma.cc/4XE3-YNSN>.

shattered on the floor of the partially demolished building. The Trump organization later claimed that the reliefs were “without artistic merit” and that saving them would have delayed demolition for months and cost \$500,000. An earlier estimate by the same organization put the cost at only \$32,000.¹⁸⁵ The notion that the reliefs were artistically without merit was false on its face. Why would the Metropolitan Museum of Art wish to add works deemed unimportant in the art and architecture communities to their collection?¹⁸⁶ The destruction, like the whitewashing at 5Pointz, was totally unexpected. It also occurred without giving the Metropolitan Museum of Art a chance to bear the costs of removing the reliefs even after it expressed a desire to own them.

Though the two friezes were probably works of visual art “incorporated in” a building under 17 U.S.C. § 113(d), they would not have been eligible for protection under VARA had the statute been in effect when the Bonwit Teller building was destroyed. Works for hire—most commonly creations by full time employees for the companies they work for¹⁸⁷—are not covered by the act. In addition, any moral right protections granted by the statute would have ended when Whitney Warren, the primary architect and a principal in the Warren & Wetmore architectural firm,¹⁸⁸ died in 1941 long before the friezes were destroyed. Those two facts, of course, were not replicated in the 5Pointz setting, where individuals rather than firms created all the works, and the artists were all still alive when the art was whitewashed and the buildings were demolished.

The contrast in VARA coverage of the Bonwit Teller friezes and the 5Pointz aerosol art suggests there are at least two important anomalies in the present moral rights statute—the lack of protection of works for hire and the short term of protection for works that should be preserved both for their special creative content and for their historical significance. There is no obvious reason why works for hire do not qualify for moral rights protection. The central theory supporting moral right provisions—the inherent value of creativity—exists regardless of the description of the persons, people, or organizations that create artistic work. Human ingenuity can exist in all settings. If creativity produces things worth saving for the benefit of the public, these items deserve protection regardless of the creative source.

As noted in the earlier discussion of 5Pointz, historic preservation instincts also underpin moral rights law. Protecting the value of creativity inevitably pushes legal

185. Controversy over preservation of valuable parts of the Bonwit Teller building was not the only major problem surrounding demolition of the building. Serious labor law violations and large monetary settlements of claims brought against the Trump organization also arose from use of undocumented workers who were not paid wages and benefits in accordance with federal and state law. See Charles V. Bagli, *Trump Paid Over \$1 Million in Labor Settlement, Documents Reveal*, N.Y. TIMES, Nov. 27, 2017, <https://perma.cc/9MLW-6EFM>.

186. *Id.*; Ruth Osborne, *Donald’s Demolition: Reckless Jackhammering of Artistic Heritage to Make Way for the First Trump Tower*, ARTWATCH INTERNATIONAL (July 12, 2016), <https://perma.cc/SBZ9-ACUT>.

187. According to 17 U.S.C. § 101, a work for hire is “a work prepared by an employee within the scope of his or her employment” or one of a variety of specially commissioned works, not including architectural works, created under a contract designating it as a work for hire.

188. Anthony Tiquen & Chris Tiquen, *Vanished New York City Art Deco: Stewart and Company / Bonwit Teller*, DRIVING FOR DECO (Oct. 15, 2016), <https://perma.cc/XRZ5-ZNKZ>.

systems to establish limits on the destruction of physical objects embodying human ingenuity. We can't do the former without the latter. The demolition of the Bonwit Teller building exemplifies the oddity of denying protection to works for hire. Why should the friezes have been subject to destruction under present moral rights norms while the right to demolish 5Pointz was limited? Though the friezes in the former were works for hire and the street art in the latter were autonomously created works, constraining the destruction of both was a worthy enterprise for exactly the same reasons. They both were notable creative works incorporated in or on a building and were historically important. Though there are problems in designating the "owner" of moral rights in works for hire originating in large organizations that do not exist with individual creations, the solution to that problem is not to deny protection for works for hire but to create systems for protecting them from mutilation or destruction.¹⁸⁹

The short term of moral right protection for works of visual art incorporated in or on buildings in the United States also makes little sense. Creativity's cultural usefulness does not expire with the death of an author. Nor is historical significance defined by the lifetime of any person. A desire to benefit the public by making access to creative works generally available is not well served by cutting short the protection when the original author dies.¹⁹⁰ To the contrary, it is deeply inconsistent with the goals and aims of moral right protection. The importance of preserving creativity and historic work does not end at a time certain defined by the arbitrary span of a life. Cultural mainstays retain their value from one generation to another. Historic preservation schemes confirm that observation. Buildings don't lose their protection after their architects die.

Once we reach the point of treating moral rights in works incorporated in or on buildings as a long term set of protections, it is impossible to avoid asking whether long extant historic preservation schemes protecting individual landmarks and moral rights protections for works of visual art incorporated in or on a building should operate under the same standards. In New York and most other places, historic preservation and moral rights schemes differ in four noteworthy ways in addition to the differing terms of protection. First, a building usually may not be designated as historic until it is at least twenty-five years old. Many jurisdictions, mimicking the norm used for the National Registry of Historic Places, wait fifty years. New York, as already noted, uses a thirty-year time limit.¹⁹¹ But there is no time delay in moral rights cases. Second, the "special character" standard used in the preservation scheme in New York City, or similar criteria used elsewhere,¹⁹² typically is more stringent than the reputational and "recognized stature" norms of moral rights law

189. In France, the solution is fairly straightforward. Employees control the moral right issues when their employers otherwise own copyright in the works. See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 178 (2006). That would be a novel idea in the United States but certainly doable.

190. Again, using France as a contrast, the right of integrity, which includes controls over mutilation and destruction of a work, lasts indefinitely. *Id.* at 169.

191. See MICHAEL A. TOMLAN, *HISTORIC PRESERVATION: CARING FOR OUR EXPANDING HISTORIC LEGACY* 121 (2015).

192. *Id.* at 120-21.

dealing with mutilation or destruction of works incorporated in or on buildings. Third, the sometimes intense administrative and judicial review process that occurs when evaluating candidates for preservation is completely absent under the automatically applicable provisions of VARA. Finally, waiver ideas operate in both arenas, though to different effect. Landmark statutes typically contain no formal waiver system like that extant in VARA. But a building owner may seek or not object to designation of a particular structure. That does not short circuit the administrative process of evaluating whether landmark status is appropriate, but as a practical matter it may avert contentious public hearings and remove the possibility of administrative and judicial appeals. There is no way, however, for an owner to “waive” landmark status if the city elects to impart that designation over the owner’s objection. Existence of moral rights, however, inheres automatically in a work of visual art meeting the statutory standards once it is created. Neither a waiting period nor an administrative process is required. As a result, the impact of the informal waiver process in landmark law operates the opposite way in moral right law. Rather than accepting designation, an artist may waive moral right protection provided that a writing “specifically identif[ies] the work, and uses of that work, to which the waiver applies, and the waiver shall apply to the work and uses so identified” or, in the case of works incorporated in a building, recognizes the possibility that the building may be altered or demolished.¹⁹³

It is hardly surprising that designating a landmark involves full administrative and judicial processes, a somewhat stringent standard for designation, and a waiting period.¹⁹⁴ Buildings, especially in a densely packed environment like New York City, often are very valuable. The designation process may therefore become quite

193. Just to review, the entire language of the waiver provision covering all works of visual art in § 106A(e)(1) provides:

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

And the specific provision dealing with art and buildings in § 113(d)(1) provides:

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

In both settings, the author—the artist in our problem—may waive moral right claims as to a work of visual art.

194. Though I recommend reduction of the traditional waiting period for especially meritorious buildings, that standard is even stricter than that found in VARA for works of visual art.

contentious. Though landmark designation may enhance the cachet and value of a building, it may also have negative economic effects, especially if a building's size is well below that allowed under extant zoning law. Though New York law allows transfer of development rights from landmarks to other sites, that process is sometimes cumbersome and not always practical.¹⁹⁵ Building owners also may seek the right to alter or raze a building under certain hardship conditions in New York¹⁹⁶ and other cities.¹⁹⁷ It is therefore clear that the primary purposes of historic preservation systems do not involve enhancing the value of an owner's property. Rather, public benefit is bestowed by providing continuing, open access to the architectural and artistic heritage embedded in the urban fabric.¹⁹⁸ While this goal is appropriately enriched by the permanence of landmark designations, the eternal length of protection further justifies both the use of high standards for deciding which buildings qualify and of full administrative and judicial processes.

But such an intense evaluation, administrative structure, and judicial review process is not necessary in moral rights settings. The waiver provisions of VARA act as a powerful check on the unanticipated imposition of restraints on the alteration or destruction of buildings incorporating works of visual art. Recall that artistic works retain their moral rights against mutilation or destruction only when the owner of the building invites artists to incorporate works in or on their structures. Once that happens, the building owner should expect that problems might arise later if alteration or demolition plans evolve. In short, an owner, as in *5Pointz*, brings upon itself moral rights problems by failing to seek a waiver. There is therefore no need for the complex evaluative, administrative, and judicial procedures designed to protect the value of real estate from unexpected historic designations. Even if, as some have argued, waiver of moral right protection should not generally be allowed in areas other than art in or on a building, there are reasons for preserving it in cases involving structures.

That has been the tradition even in France, the long-recognized home of highly protective moral rights law.¹⁹⁹ Moral rights disputes in France involving architecture are particularly relevant to cases like *5Pointz* and Trump Tower. The terse French

195. A recent example is the long-term series of disputes over the use of Grand Central Terminal air rights. Charles V. Bagli, *Owners of Grand Central Drop Lawsuit, Clearing Way for a 1,401-Foot-Tall Skyscraper*, N.Y. TIMES (Aug. 10, 2016), <https://perma.cc/PUX9-G3DR>; Anthony Noto, *How Grand Central's Landlord Says His Air Rights Became 'Worthless' and Why the City Owes Him \$1.1B*, N.Y. BUS. J. (Sep. 29, 2015), <https://perma.cc/29TH-GH7R>.

196. See, e.g., Admin. Code, *supra* note 28, at § 25-309.

197. See TOMLAN, *supra* note 191 at 122-23.

198. This theory was used by the United States Supreme Court to hold that landmark preservation laws are constitutional. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

199. The literature on French moral right law is broad. See, e.g., Susan P. Liemer, *On the Origins of le Droit Moral: How Non-Economic Rights Came to be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65 (2011); Aharoni, *supra* note 37; Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361 (1998).

statute confers largely unspecified,²⁰⁰ but broad rights, that are both eternal and presumptively unalterable. French courts have filled in some of the blanks. First, among the rights protected by the statute's first sentence is the right of integrity—including limitations on mutilation or destruction of artistic objects. It is deemed to be part of granting "an author . . . respect . . . for his work." Not surprisingly, French courts have balanced the interests of building owners and architects despite the apparently absolute language of the statute.²⁰¹ In some ways, the decisions closely mimic the positions taken in this essay. First, little sympathy is given to those making claims after illegally placing art on another's property. Owners hold the prerogative to remove it.²⁰² Second, property owners retain the right to make modifications to their property over the objections of the architect, as long as they retain the basic aesthetic integrity of the structure. Examples include preservation of the structural integrity of a building, restoration of a structure to its original appearance that results in alteration or destruction of a later work, or modifications that improve a building's utility. These sorts of cases, mostly involving injunction requests by architects, require balancing the interests of the building owner with the public's interest in maintaining the integrity of the artistic work.²⁰³ Though damages may later have to be paid, especially if specific building plans are modified without permission during construction, the end results are configured very much like the *5Pointz* litigation.²⁰⁴ Third, site-specific work generally must be left *in situ*, though the holder of moral rights must demonstrate that location in a particular place is part of the basic artistic conception.²⁰⁵ Fourth, and of particular interest, complete waivers of all moral rights protections for a specific work generally are barred, but particularized agreements are enforced when an author allows specific alterations in or uses of a work that do not "distort the spirit of the author's work."²⁰⁶ This limitation is not expressly present

200. Though it is commonly believed that civil law is statutory, the moral right provision in France is remarkably terse. The vast bulk of "rules" emerge from case law. Article L121-1 of the French Intellectual Property Law says simply:

An author shall enjoy the right to respect for his name, his authorship and his work.

This right shall attach to his person.

It shall be perpetual, inalienable and imprescriptible. It may be transmitted *mortis causa* to the heirs of the author.

Exercise may be conferred on another person under the provisions of a will.

The word "imprescriptible" in the statute means that the right may not be taken away from the owner.

201. A summary of the law of integrity may be found in ADENEY, *supra* note 189, at 181-92.

202. *Id.* at 190-91; Swack, *supra* note 199, at 378 (describing a case where a bishop who owned a chapel was not liable for removing frescos from the chapel walls because they were painted without the bishop's consent).

203. ADENEY, *supra* note 189, at 186, 191.

204. See, e.g., the dispute over the design and construction of the Paris Philharmonie. Frederique Fontaine & Pauline Celeyron, *France: French Court Rules on the Moral Rights of Well-Known Architect Jean Nouvel*, LEXOLOGY (Dec. 7, 2016), <https://perma.cc/92LP-6MHS>.

205. ADENEY, *supra* note 189, at 187.

206. KWALL, *supra* note 37, at 45. See also, Swack, *supra* note 199 at 403 ("[A]lthough France theoretically disallows waiver, if an artist contractually waives his moral rights, he is bound by the contract.").

in VARA, which is phrased in terms of the specific rights protected by the statute.²⁰⁷ The VARA waiver provisions, however, act similarly to French law. Whether or not French law allows the total destruction of a work in case of plans to replace a building is not clear. VARA, however, does expressly allow a building owner to obtain a waiver of rights in case of plans to demolish a building in which art is incorporated.²⁰⁸ France allows waivers in cases not involving buildings on terms very similar to the summary just provided. This also makes sense. Recall some of the examples discussed previously—the willingness, *nee* desire, of street artists to see their works overwritten, the artistic expectation that temporary installations will be dismantled, and the participation of De Kooning in the erasure of one of his drawings by Rauschenberg. In these cases, the artists *desired* to alter or destroy work as part of a creative process. It would be counter intuitive to bar such creativity from occurring.

5Pointz teaches us many lessons about the nature of human creativity, the quickly changing and inventive qualities of artistic endeavors, the growing dialog or perhaps controversy between artists and building owners, the importance of careful consideration of laws protecting the value of artistic endeavors, and the need for judges and legislators to become much better educated about the history, meanings, purposes, and characteristics of artistic movements. Though the general legal structure that unfolded in the dispute was in many ways sensible, the particular approach taken in the preliminary injunction hearing was deeply flawed. It also is evident that America's moral rights statute needs substantial revision. It will be fascinating to watch the long-term consequences of the *5Pointz* dispute unfold.

207. Section 106A(e)(1) reads, in part, that a waiver “instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.” There are no cases that give guidance as to the scope a waiver may take or whether it may undermine the artistic integrity of a work.

208. Section 113(d) states that a waiver specifying “that installation of the work [in or on a building] may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal” is allowed.

APPENDIX: SPECIAL VERDICT JURY RESULTS IN 5POINTZ CASE

Artist	Work	Destruction Liability	Des: Actual Damages	Mutilation Liability	Mut: Actual Damages	Total Act. Damages	Statutory Damages
Jonathan Cohen	Drunken Bulbs	No	NA	Yes	\$3,000	\$3,000	\$4,000
Jonathan Cohen	Eleanor RIP	No	NA	No	NA	NA	NA
Jonathan Cohen	7 Angle Time Lapse	Yes	\$0	Yes	\$50,000	\$50,000	\$55,000
Jonathan Cohen	Patience	No	NA	No	NA	NA	NA
Jonathan Cohen	Character	No	NA	No	NA	NA	NA
Jonathan Cohen	Clown with Bulbs	Yes	\$0	Yes	\$3,000	\$3,000	\$4,000
Jonathan Cohen	Meres Outdoor Wildstyle	No	NA	Yes	\$3,000	\$3,000	\$4,000
Jonathan Cohen	Inside Wildstyle	No	NA	No	NA	NA	NA
Sandra Fabara	Green Mother Earth	Yes	\$0	No	NA	\$0	\$10,000
Luis Lamboy	Blue Jay Wall	Yes	\$1,000	Yes	\$3,000	\$4,000	\$5,000
Luis Lamboy	Inside 4th Floor	No	NA	Yes	\$3,000	\$3,000	\$4,000
Luis Lamboy	World Traveler	No	NA	No	NA	NA	NA
Luis Lamboy	Logo for Clothing Brand	No	NA	No	NA	NA	NA
Luis Lamboy	Electric Fish	No	NA	No	NA	NA	NA
Esteban Del Valle	Beauty and The Beast	Yes	\$5,000	?*	\$4,000	\$9,000	\$10,000
Rodrigo Henter de Resende	Fighting Tree	Yes	\$0	Yes	\$4,000	\$4,000	\$5,000
Thomas Lucero	Black Creature	Yes	\$2,000	No	NA	\$2,000	\$3,000
Akiko Miyakami	Japenese Irish Girl	No	NA	No	NA	NA	NA
Akiko Miyakami	Magna Koi	Yes	\$0	No	NA	\$0	\$3,000
Christian Cortes	Skulls Cluster	Yes	\$0	No	NA	\$0	\$4,500
Christian Cortes	Jackson Avenue Skulls	No	NA	No	NA	NA	NA
Christian Cortes	Up High Blue Skulls	Yes	\$0	No	NA	\$0	\$3,000
Christian Cortes	Up High Orange Skulls	Yes	\$0	Yes	\$6,000	\$6,000	\$7,000
Carlos Game	Geisha	No	NA	No	NA	NA	NA
Carlos Game	Marilyn	Yes	\$0	Yes	\$9,000	\$9,000	\$10,000
Carlos Game	Red	No	NA	Yes	\$4,500	\$4,500	\$5,000
Carlos Game	Denim Girl	No	NA	Yes	\$9,000	\$9,000	\$10,000
Carlos Game	Faces on Hut	No	NA	No	NA	NA	NA
Carlos Game	Black and White 5Pointz Girl	Yes	\$0	Yes	\$12,000	\$12,000	\$15,000
James Rocco	Bull Face	No	NA	? ²⁰⁹	\$0	\$0	\$750

209. In the two cases with question marks the jury's answers to the liability questions on mutilation were contradictory. In order for liability to exist the two questions (one on mutilation and the other on damage to reputation) had to be answered positively. But in these cases, one was positive and the other was negative. Nonetheless damages were awarded.

Artist	Work	Destruction Liability	Des: Actual Damages	Mutilation Liability	Mut: Actual Damages	Total Act. Damages	Statutory Damages
James Rocco	No	No	NA	No	NA	NA	NA
James Rocco	Face on Jackson	No	NA	No	NA	NA	NA
Steven Lew	Crazy Monsters	Yes	\$3,000	Yes	\$15,000	\$18,000	\$20,000
Francisco Fernandez	Dream of Oil	Yes	\$1,000	Yes	\$65,000	\$66,000	\$80,000
Nicholas Khan	Does Equis Man	Yes	\$1,500	Yes	\$8,000	\$9,500	\$10,000
Nicholas Khan	Orange Clockwork	Yes	\$2,000	Yes	\$5,000	\$7,000	\$8,000
James Cochran	Subway Rider	Yes	\$1,000	Yes	\$54,000	\$55,000	\$65,000
Luis Gomez	Inside Hong Kong	Yes	\$5,000	No	NA	\$5,000	\$5,500
Richard Miller	Monster I	Yes	\$0	No	NA	\$0	\$30,000
Richard Miller	Monster II	Yes	\$15,000	Yes	\$30,000	\$45,000	\$50,000
Kenji Takabayashi	Starry Night	Yes	\$5,000	Yes	\$35,000	\$40,000	\$45,000
Jonathan Cohen & Maria Castillo	Lover Girl and Burner	Yes	\$0	Yes	\$30,000	\$30,000	\$30,000
Jonathan Cohen & Akiko Miyakami	Underwaster Fantasy	Yes	\$0	Yes	\$52,000	\$52,000	\$60,000
Jonathan Cohen & Rodrigo Henter de Resende	Halloween Pumpkins	No	NA	Yes	\$8,000	\$8,000	\$7,000
Jonathan Cohen & Akiko Miyakami	Save 5Pointz	Yes	\$2,000	Yes	\$20,000	\$22,000	\$15,000
William Tramontozzi & James Rocco	Jimi Hendrix Tribute	Yes	\$1,000	Yes	\$10,000	\$11,000	\$12,000
Akiko Miyakami & Carlos Game	Japanese Fantasy	No	NA	Yes	\$8,000	\$8,000	\$10,000
Bienbenido Guerra & Carlos Nieva	Return of New York	Yes	\$750	Yes	\$15,000	\$15,750	\$12,000
Jon Cohen, Luis Lamboy & Thomas Lucero	Angry Orchard	Yes	\$20,000	Yes	\$12,000	\$32,000	\$30,000 ²¹⁰
Total Amounts			\$65,250		\$480,500	\$542,750	\$651,750

210. In all of the cases inside the heavily outlined cells, strange things occurred. The amount of enhanced damages in all other instances of liability were greater than the actual damage awards. In these cases, however, there were multiple artists. The enhanced damages were low and sometimes lower (even significantly so) than the total actual damage award given to all of the artists responsible for the work. I suspect the jury meant to multiply the enhanced damage amount awarded by the number of artists and then to divide that amount up in proportion to the actual damages awarded to each artist. But that, of course, is only a guess. The anomaly arose because the special verdict form had separate spaces for actual damages awarded to each artist but only one space for the amount of enhanced damages. In any case, these particular cases were ripe for another look by Judge Block.