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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?

SUSANNA FREDERICK FISCHER

ABSTRACT

This paper considers the extent to which federal moral rights law protects authorized graffiti and aerosol art against destruction, in the context of the controversy over the destruction of 5Pointz. 5Pointz, a sprawling complex of warehouse buildings in Queens, was a Mecca for aerosol art. The buildings' owners ordered the demolition of 5Pointz after the November 2013 order by New York federal district judge Frederic Block denying the artists a preliminary injunction to stop destruction under the federal moral rights statute, the Visual Artists Rights Act (VARA). This paper argues that Judge Block erred in finding that the transient nature of the aerosol art at 5Pointz precluded injunctive relief under VARA. Judge Block failed to adequately take into account both the statute's preservationist rationale and the non-economic nature of moral rights. Money damages will not always adequately compensate artists for the destruction of aerosol artworks like those at 5Pointz. The paper describes the creation of the aerosol art at 5Pointz and the moral rights litigation over its destruction, which remains ongoing at time of writing. It shows that VARA was enacted for the purpose of preserving art because of its social and cultural value. It contends that aerosol art such as that at 5Pointz is not barred from protection under VARA as site-specific art. However, VARA only protects art that has achieved significant social and cultural value in that it has "recognized stature." Aerosol art can, as Judge Block correctly recognized, achieve such recognized stature. However, Judge Block erred in finding that the transient nature of the 5Pointz aerosol art disentitled it to preliminary injunctive relief. This approach failed to recognize the difference between traditional economic copyright rights and VARA's non-economic moral rights. VARA's Building Exception provides for a way to resolve the conflict between preserving artwork on buildings and private ownership rights in those buildings. The transient nature of the art is not a factor under the Building Exception. Where artwork cannot be removed from a building without damaging it, as is arguably the case for the 5Pointz art, the artist has a moral right against destruction of art of "recognized stature" unless he has entered into a waiver agreement with the building's owner. While VARA may sit uncomfortably with private property rights, judges need to respect the balance between moral rights of artists and the rights of building owners set out in the Building Exception.

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I. INTRODUCTION.....	327
II. 5POINTZ AND THE LITIGATION OVER ITS DESTRUCTION.....	330
III. VARA WAS ENACTED FOR THE PURPOSES OF PRESERVING A NARROW CATEGORY OF WORKS OF VISUAL ART, WHICH SHOULD INCLUDE AUTHORIZED AEROSOL ARTWORKS SUCH AS THOSE AT 5POINTZ.....	338
IV. AEROSOL ARTWORK ON BUILDINGS LIKE 5POINTZ IS NOT EXCLUDED FROM VARA PROTECTION AS SITE-SPECIFIC ARTWORK.....	342
V. THE RECOGNIZED STATUTE REQUIREMENT FOR VARA PROTECTION AGAINST DESTRUCTION SHOULD BE READ BROADLY AND IN KEEPING WITH VARA'S PRESERVATIONIST GOAL BY RECOGNIZING THE CULTURAL VALUE OF AEROSOL ART..	345
VI. BECAUSE VARA'S RIGHT AGAINST DESTRUCTION IS A NON-ECONOMIC MORAL RIGHT AND VARA'S PURPOSE IS PRESERVATIVE, THE JUDGE SHOULD NOT HAVE REFUSED PRELIMINARY INJUNCTIVE RELIEF.....	353
VII. CONCLUSION.....	356

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I. INTRODUCTION

To what extent does federal moral rights law protect authorized graffiti and aerosol art from destruction? This paper considers this question in the context of the ongoing legal controversy over the destruction of 5Pointz, a famous New York showplace for graffiti and aerosol art.

The controversial nature of this type of art even extends to the choice of its name. Critics often style it “graffiti,” while those who value it as an expressive art form are more likely to call it “aerosol art.” I use the term “aerosol art” here.

The economic rights provided by American copyright law do not include express protections preserving art from destruction.¹ But in 1990, the Visual Artists Rights Act (“VARA”) added limited moral rights protections to federal law, including the right to prevent destruction of a limited category of works of visual art “of recognized stature.”²

Despite clear congressional intent that the preservation of art was a key goal of VARA, courts have thus far been unwilling to interpret the statute to save aerosol art from destruction by the owners of buildings on which the art is painted. The number of court rulings is so far tiny, including the order denying preliminary injunctive relief in the still ongoing 5Ppointz litigation. But the willingness of courts to give little weight to the preservationist purpose of VARA is troubling.

Courts have relied on two principal reasons for finding that VARA’s protections against destruction do not guarantee the preservation of aerosol art. One rationale is that VARA does not protect illegal graffiti.³ The second reason, given by Judge Frederic Block in denying a preliminary injunction to prevent the destruction of 5Pointz, is that the transient nature of aerosol art precludes injunctive relief to stop the destruction of authorized aerosol art, though monetary damages might still be available to compensate artists for their loss.⁴ This paper does not explore the merits

* © Susanna Frederick Fischer 2015. Susanna Frederick Fischer is Associate Professor of Law, Columbus School of Law, The Catholic University of America, Washington DC 20064. She can be reached by email at fischer@law.edu. She presented a draft of this paper at the Sixth Annual RIPL Symposium at the John Marshall Law School, Chicago, IL on October 24, 2014. She would like to thank the organizers of this symposium and editors of RIPL, especially Maureen Collins, Matt Lammers, and Amy Taylor. Fellow presenters who provided helpful feedback include Sydney Beckman, Christopher Doval, Derek Fincham, R.J. Inawat, Mary La France, Stephen McJohn, Daniel Mellis, Michael Moore, and Cathay Smith. She is also grateful to her husband, Erik Thomas Mueller, and her son, Matthew Edward Mueller, for their unwavering love and support.

¹ U.S. copyright law is entirely federal as a result of the express preemption provision in the federal copyright statute, the Copyright Act of 1976. 17 U.S.C. § 301 (2014).

² 17 USC § 106A(3)(B) (2014).

³ See *infra*, notes 87-90.

⁴ See *infra*, notes 40-41.

of the first rationale, but focuses only on the question of VARA protection for aerosol art that is authorized by the owner of the property on which it is painted.

This paper's main contention is that Judge Block's denial of preliminary injunctive relief to prevent aerosol art at 5Pointz against destruction was based on a misreading of VARA that failed to adequately take into account both the statute's preservationist rationale and the non-economic nature of moral rights.. Contrary to Judge Block's approach, the transient nature of aerosol art is not the essential issue in determining the availability of a preliminary injunction pursuant to VARA's right to prevent destruction of artwork. Since VARA's moral rights are not economic rights but rather protect the personality rights of an artist in his or her artworks, Judge Block erred in finding that money damages will always compensate an artist for destroyed aerosol art. Moreover, Judge Block's approach ignores a key VARA provision, its "Building Exception" in section 113(d), which expressly balances the conflict between the moral rights of artists (including the social and cultural value of preserving the artwork those artists create) and the property rights of building owners who have allowed the artwork to be created on their buildings.

Section II of this paper describes the creation of the aerosol art at 5Pointz and the moral rights litigation over its destruction. This litigation is still ongoing at the time of writing, but 5Pointz, a significant New York City cultural landmark, has been destroyed, along with all the aerosol art on its walls, as a direct result of Judge Block's order denying a preliminary injunction. Although the 5Pointz artists who have brought suit may eventually receive monetary relief under VARA, the destruction of their artworks cannot be undone and is out of synch with VARA's preservationist purposes.

Section III shows that VARA was enacted for the purpose of preserving art, because of art's social and cultural value. It explains that VARA's moral rights protections, including its right to prevent destruction of certain artworks, are quite different from the economic rights previously granted by U.S. federal copyright law. VARA protects art as the expression of the artist's personality rather than providing a utilitarian economic incentive to create art. The scope of VARA's protection is extremely narrow; VARA's moral rights apply only to a limited statutory category of "works of visual art", and the VARA right to prevent destruction applies only if such a work has achieved "recognized stature". But VARA's preservationist purposes apply to works of visual art regardless of medium. As a result, aerosol art should receive equivalent VARA protection to other more traditional and less controversial forms of art, as Judge Block correctly found in the 5Pointz case, at least where such art was painted with the authorization of a building's owner, as at 5Pointz.

Section IV raises an issue that Judge Block did not address: whether aerosol art like that at 5Pointz is barred from VARA protection as site-specific art. One federal circuit court, the First Circuit, has ruled that there is a categorical exception from VARA protection for site-specific art. However, this approach has been criticized by the Seventh Circuit, as well as by William Patry, the author of a leading copyright law treatise, for failing to properly take VARA's Building Exception into account. This section contends that the existence of the Building Exception makes it clear that VARA does not categorically exempt all moral rights protection for artwork that, like 5Pointz, is site-specific in the sense that it is painted on buildings.

Even though VARA does not permit discrimination on the basis of artistic medium, the statute's preservationist goal is limited only to art that has significant

social and cultural value in that it has achieved “recognized stature.” Section V explores how the courts have interpreted this recognized stature requirement, which VARA does not define, and contends that it should be interpreted broadly, so that the social and cultural value of avant-garde and unconventional art, including aerosol art, is fully respected. The most influential test for recognized stature, set out in a federal district court opinion in *Carter v. Helmsley-Spear*, has two prongs: first, whether the visual art at issue is viewed as meritorious and (2) that its stature is recognized by art experts, members of the artistic community, or by some cross-section of society. Expert evidence is generally required under this test. While this test gives a great deal of discretion to judges to serve as art critics, the judiciary has generally refrained, in the case law to date, from adversely assessing the artistic merit of artworks. This approach tracks the preservationist rationale of VARA; judges are concerned about preserving not only traditional art but also more unconventional or avant-garde art that may only later gain recognition as artistically meritorious. Even as a non-traditional art form, aerosol art may certainly have recognized stature, as Judge Block recognized. His decision that at the preliminary injunctive stage it was premature to assess whether the 5Pointz aerosol art had attained recognized stature was a reasonable approach in light of the need to ensure that the judge does not act as an untrained art critic.

Section VI contends that Judge Block went wrong as to the availability of preliminary injunctive relief. Block took the view that the transient nature of the art rendered injunctive relief inappropriate at the preliminary injunction stage. The plaintiffs knew their artwork was not permanent because they knew the 5Pointz buildings would eventually come down. Judge Block took the view that monetary damages would always compensate them for the destruction. This section argues that this approach fails to appropriately recognize the difference between moral rights and economic rights. In the case of non-economic moral rights, such as VARA’s prohibition of destruction for certain works of visual art, monetary damages can never compensate for the destruction of the work. The judge was concerned about the conflict between the preservation of art on buildings and the private ownership rights for those buildings. But he failed to take into account that VARA already contemplates a resolution of these values in its Building Exception. According to this statutory exception, any work of visual art that is incorporated or made part of a building is protected by VARA if created after VARA was enacted in 1991 unless the owner of the building enters into a written waiver. The transient nature of the work is not a statutory factor.

Where, as in the 5Pointz case, the owner of the building did not enter into any written waiver, then the question of whether the Building Exception applies necessitates full resolution of the issue of recognized stature. At the preliminary injunction stage, the court should have taken into account the inadequacy of monetary damages to compensate for the harm suffered and should have issued a preliminary injunction to protect against destruction.

While VARA may sit uncomfortably with private property rights, it is a moral rights statute granting rights that are not economic. Judges need to respect the balance between moral rights of artists and economic rights of property owners for which the statute expressly provides in its Building Exception.

II. 5POINTZ AND THE LITIGATION OVER ITS DESTRUCTION

5Pointz, a sprawling five-storey 200,000 square foot horseshoe shaped complex of warehouse buildings, occupied nearly an entire city block in Queens, New York.⁵ For decades, 5Pointz was a kind of Mecca for aerosol artists.⁶ Hundreds of artists traveled from across the United States and countries around the world, including Brazil, Japan, the Netherlands, and Switzerland, to contribute their artwork to 5Pointz.⁷ 5Pointz was located across the street from the contemporary art institution MoMA PS1, a champion of innovative and experimental art.⁸

See the photograph of 5Pointz below, which shows only part of the complex:



⁵ The building, originally built in 1892 as a water meter factory for Neptune Meter, was located at 45-46 Davis Street in Long Island City, Queens, New York. See Wikipedia, 5Pointz, http://en.wikipedia.org/wiki/5_Pointz (last visited Dec. 1, 2014).

⁶ Cara Buckley and Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES, Nov. 19, 2013, <http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html?pagewanted=all&r=0>; Robin Finn, *Writing's on the Wall (Art Is, Too, for Now)*, N.Y. TIMES, Aug. 27, 2011, at <http://www.nytimes.com/2011/08/28/nyregion/5pointz-arts-center-and-its-graffiti-is-on-borrowed-time.html?pagewanted=all>; Malika Rao, *Artists Bid Sad Farewell to 5Points, New York City's Graffiti Mecca*, HUFFINGTON POST, Nov. 21, 2013, http://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html.

⁷ 5Points NYC website, About, <http://5ptz.com/about/> (last visited Dec. 1, 2014).

⁸ MoMA PS1 website, <http://momaps1.org/about/> (last visited Dec. 1, 2014).

Some of the many famous 5Pointz aerosol artists are Stay High 149⁹, Lady Pink,¹⁰ Tracy 168, Cope2,¹¹ and Tats Cru.¹² Many 5Pointz artists have established reputations in the art world and art collectors prize their works. For example, the aerosol art of Lady Pink, who started out by spraying subway trains in the late 1970s, is now in the collections of leading museums, including the Whitney Museum of American Art, the Metropolitan Museum of Art, and the Brooklyn Museum.¹³ Large corporations, such as Sony and Coca-Cola, and famous musicians, including Jennifer Lopez and Nikki Minaj, have commissioned aerosol works by 5Pointz artists, such as Tats Cru.¹⁴

The effective owner of 5Pointz for the past four decades, realtor Jerry Wolkoff (who owns the complex through various corporate entities), allowed aerosol artwork to be painted on the exterior of 5Pointz from the 1990s.¹⁵ In 2002, Jonathan Cohen, an aerosol artist using the tag Meres One, became the volunteer curator of the aerosol art; it was Cohen who named the complex 5Pointz.¹⁶ Wolkoff allowed Cohen to decide which art would be displayed at 5Pointz, so long as the paintings were not political, religious, or pornographic.¹⁷ Wolkoff never requested any waivers from the artists of

⁹ Stay High 149 was described as a 1970s graffiti “superstar”. GREGORY J. SNYDER, *GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK’S URBAN UNDERGROUND* 24 (2009). The artist, whose real name was Wayne Roberts, died in 2012. David Gonzalez, *Wayne Roberts, ‘Stay High 149’ in Graffiti Circles, is Dead at 61*, N.Y. YORK TIMES, June 12, 2012, http://www.nytimes.com/2012/06/13/nyregion/wayne-roberts-stay-high-149-in-graffiti-circles-is-dead-at-61.html?_r=..

¹⁰ Alexa Altman, *Lady Pink: Graffiti’s feisty first lady*, THE QUEENS COURIER, <http://queenscourier.com/tag/sandra-fabara/>. (last visited Dec. 1, 2014), (describing Lady Pink as “graffiti’s first and fieriest female figurehead” who “still reigns supreme as an icon in the American art arena”).

¹¹ Denis Slattery, *He’s able to ‘tag’ wine label*, N.Y. DAILY NEWS, Jan. 9, 2014, <http://www.nydailynews.com/new-york/bronx/bronx-graffiti-artist-cope2-made-move-street-art-sommelier-article-1.1571405>, (reporting that Cope2’s artwork will appear on a limited edition wine label and also noting that Time magazine commissioned Cope2 to spray paint a billboard for \$20,000). See also Cope2’s CV, <http://cope2art.com> (listing many exhibitions of Cope2’s artwork in galleries around the world).

¹² Tats Cru is a group of graffiti artists who have gained international fame. Budd Mishkin, *One on 1 Profile: World-Renowned Graffiti Artist Collective Tats Cru Stays True to Its New York Roots*, TIME WARNER CABLE, Sept. 15, 2014, http://www.ny1.com/content/shows/one_on_1/186302/one-on-1-profile--world-renowned-graffiti-artist-collective-tats-cru-stays-true-to-its-new-york-roots.

¹³ See Lady Pink (Sandra Fabara) Resume. Lady Pink (Sandra Fabara), Biography, WOODWARD GALLERY, <http://woodwardgallery.net/pink/pink-resume.pdf> (last visited Dec. 1, 2014).

¹⁴ Yaron Steinbuch and Shawn Cohen, *Famous graffiti artist busted for hitting man with beer mug*, N.Y. POST, Oct. 15, 2014, <http://nypost.com/2014/10/15/famous-graffiti-artist-busted-for-hitting-man-with-beer-mug/>.

¹⁵ Christopher Cameron, *5Pointz unvarnished: the developer’s side*, THE REAL DEAL, May 1, 2014, http://therealdeal.com/issues_articles/5pointz-unvarnished-the-developers-side/ (noting that 5Pointz was used for manufacturing from the late 1970s, when Wolkoff bought it, until the 1990s); See Buckley and Santora, *supra* note 6.

¹⁶ See Steinbuch, *supra* note 14; Carmel Melouney, *In New York, Graffiti Exhibit Follows 5Pointz Whitewashing*, THE WALL STREET JOURNAL, Apr. 10, 2014, <http://www.wsj.com/articles/SB10001424052702304512504579492042907434948>, (stating that the name referred to “five points of New York coming to one epicenter.”). The aerosol artwork was originally called “The Phun Factory.” See Rao, *supra* note 6.

¹⁷ Nick Divito, *Condo Fought to Protect Commissioned Graffiti*, COURTHOUSE NEWS SERVICE, Oct. 14, 2013, <http://www.courthousenews.com/2013/10/14/61987.htm>.

their moral rights under VARA.¹⁸ Wolkoff rented out interior space for artists to use as studios until 2009, when one of the artists was injured as a result of a collapsing fire escape.¹⁹

5Pointz became renowned for its aerosol artwork.²⁰ Tourists flocked to see it.²¹ Cohen conducted hundreds of school tours annually.²² Wolkoff described the art at 5Pointz as “beautiful.”²³ But following concerns about the safety of the buildings, based, among other things, on concerns about the buildings’ deteriorating structural condition, Wolkoff decided that 5Pointz would cost too much to repair and launched plans to develop the site for residential condominiums.²⁴ City authorities green-lighted Wolkoff’s plan to replace 5Pointz with two new high-rise buildings.²⁵ Artists were outraged, despite Wolkoff’s announcement that 10,000 square feet of space in the new development would be used for curated graffiti art.²⁶

Opponents of the planned destruction unsuccessfully applied to New York City’s Landmarks Preservation Commission for a grant of landmark status for the 5Pointz buildings. The Commission deemed the complex too recent and too lacking in sufficient architectural distinction to qualify for landmarks protection.²⁷

Foes of the Wolkoff’s plans turned to the courts, filing a federal lawsuit in the United States District Court for the Eastern District of New York several weeks after the denial of landmarks status.²⁸ The plaintiffs, Cohen and sixteen other 5Pointz artists, including Lady Pink, brought suit against Wolkoff and a number of companies allegedly owned and controlled by him.²⁹ These artists sought declaratory and injunctive relief on the basis that destroying the aerosol art on the buildings without their consent violated VARA and also interfered with contractual relationships and with an easement in gross allegedly granted by Wolkoff.³⁰

¹⁸ Tania Karas, *Battle for Protection of ‘Graffiti Mecca’ Continues*, N.Y. L. J. Dec. 6, 2013, <http://www.taniakaras.com/2014/01/26/battle-for-protection-of-graffiti-mecca-continues/>.

¹⁹ See Finn, *supra* note 6.

²⁰ *Id.*

²¹ *Id.*

²² *The Fate of 5Pointz: Why One Man May Demolish New York’s Graffiti Mecca*, THE NEW SCHOOL FREE PRESS, Oct. 24, 2012, at: <http://www.newschoolfreepress.com/2012/10/24/the-fate-of-5-pointz-why-one-man-may-demolish-new-yorks-graffiti-mecca/>.

²³ Transcript, Hearing on Preliminary Injunction at 146, Cohen et al. v. G&M Realty et al., 988 F.Supp.2d 212 (E.D.N.Y. 2013); see Karas, *supra* note 18.

²⁴ See Finn, *supra* note 6; see Rao, *supra* note 6.

²⁵ Emily, *5Pointz Not Alone: City Planning Commission Also Approves Huge Hallets Point Project*, QUEENS BROWNSTONER, Aug. 21, 2013, <http://queens.brownstoner.com/2013/08/the-city-planning-commission-votes-for-big-changes-in-queens-today/>.

²⁶ Jenny Xie, *The End is Near for New York City The’s World-Famous ‘Graffiti Mecca’*, CITYLAB, Nov. 13, 2013, <http://www.citylab.com/design/2013/11/end-near-new-york-citys-world-famous-graffiti-mecca/7552/>.

²⁷ See Rao, *supra* note 6; Tom Namako and Nick Pinto, *Graffiti Mecca, Whitewashed Away*, THE WALL STREET JOURNAL, Nov. 19, 2013, <http://online.wsj.com/articles/SB10001424052702303531204579208100072483852>.

²⁸ Complaint, Cohen et al. v. G&M Realty L.P. et al., (E.D.N.Y. filed Oct. 10, 2013) (No. 1:13-cv-05612-FB-JMA).

²⁹ *Id.* at ¶¶ 4-38.

³⁰ *Id.* at ¶¶ 183-207. This paper does not consider the merits of the contractual and real property claims, which Judge Block dismissed, *sua sponte*, as without merit. Cohen et al. v. G & M Realty L.P. et al., 988 F.Supp.2d 212 n. 3 (E.D.N.Y. 2013).

The plaintiffs immediately moved for a preliminary injunction to halt the destruction of 5Pointz pending trial.³¹ Pending the hearing of this motion, Judge Block granted a temporary restraining order on October 17, 2013.³² But on November 12, 2013, Block denied the motion for a preliminary injunction and dissolved the temporary restraining order.

Only days after the judge's order, on November 18, Wolkoff hired a group of men to whitewash the façade of 5Pointz, thus destroying all of the artwork painted there.³³ Wolkoff said that the whitewashing caused him to tear up, but he likened it to ripping off a band-aid.³⁴ He felt the overnight action was necessary to avoid a "confrontation" with the artists.³⁵ Many viewed the situation very differently, and the whitewashing attracted a barrage of criticism.³⁶ The plaintiffs' lawyer wrote to Judge Block to complain that Wolkoff had acted "clandestinely . . . under cover of darkness," and that he had arranged for the whitewash to be carried out solely to make the lawsuit moot.³⁷ Someone sprayed "Art Murder" in large blue letters on the whitewashed complex.³⁸ Another critic or critics draped a large banner reading "Gentrification in Progress" around 5Pointz.³⁹

³¹ Plaintiffs' Motion for a Preliminary Injunction, Cohen et al. v. G & M Realty L.P. et al., 988 F.Supp.2d 212, 215 (filed Oct. 10, 2013).

³² Order, Cohen et al. v. G & M Realty, L.P. et al., (Case No. 13-CV-5612 (FB) Oct. 17, 2013) (extending temporary restraining order of Oct. 17, 2013 until Nov. 12, 2013).

³³ Joan Gralla, *Famed 5 Pointz graffiti spot in Queens whitewashed by developer*, NEWSDAY, Nov. 19, 2013, <http://www.newsday.com/news/new-york/famed-5-pointz-graffiti-spot-in-queens-whitewashed-by-developer-1.6465534>.

³⁴ *Id.*

³⁵ See Buckley and Santora, *supra* note 6.

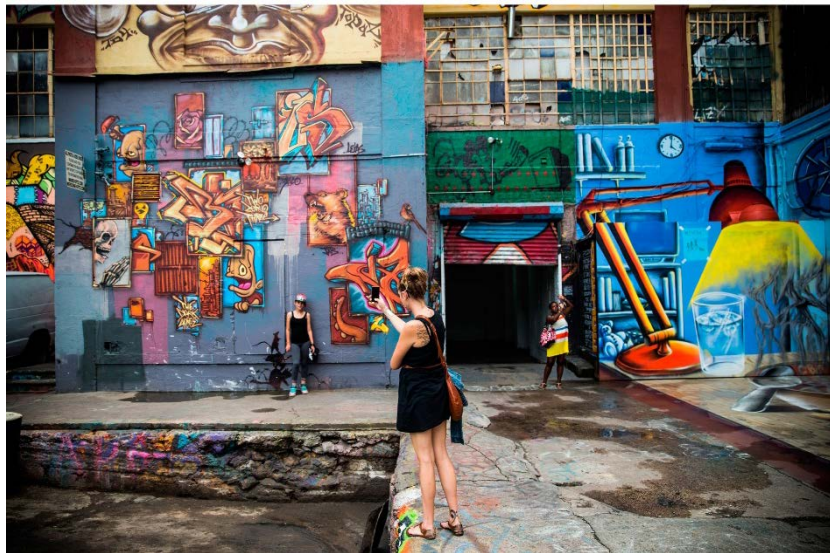
³⁶ *Id.*

³⁷ Letter from Attorney Jeannine Chanes (Attorney for the plaintiffs) to Judge Frederic Block, Nov. 19, 2013 (on file with Pacer).

³⁸ Fernanda DeSouza, *Graffiti Mecca 5 Pointz Sprayed with 'Art Murder'*, N.Y. OBSERVER, Feb. 4, 2014, <http://observer.com/2014/02/graffiti-mecca-5-pointz-sprayed-with-art-murder/>.

³⁹ Joe Coscarelli, *'Gentrification in Progress' at 5Pointz*, N.Y. MAGAZINE, Mar. 10, 2014, <http://nymag.com/daily/intelligencer/2014/03/gentrification-in-progress-at-5pointz.html>.

Below are pictures showing some of the art at 5Pointz before the whitewashing (bottom) and after (top).



In his opinion denying the preliminary injunction, written after the whitewashing of the artworks, Judge Block stated that although he personally wished that he “had the power to preserve” the paintings, the plaintiffs had not demonstrated that they

were likely to suffer irreparable harm.⁴⁰ According to Judge Block, some amount of money could certainly compensate the artists for their paintings, their artworks lived on in the form of photographs, and the plaintiffs always knew that the paintings would be ephemeral because they knew that 5Pointz would eventually come down.⁴¹ The judge took the view that the resolution of a key issue in the case, whether the artworks at issue were of such “recognized stature” that VARA protected them against destruction, was not appropriate for resolution at the preliminary injunction stage, but should wait for the case to be properly prepared for trial.⁴² The lawsuit continues, notwithstanding the destruction of the artwork.

In August 2014, demolition of 5Pointz began.⁴³ People gathered around the complex to see the building for the last time and to take pictures of it.⁴⁴ The culture website ANIMALNewYork posted a minute-long time-lapse video showing the demolition between September and December of 2015.⁴⁵ 5Pointz and its aerosol art are now gone. Wolkoff plans to replace 5Pointz with a new apartment complex with two towers.⁴⁶ One tower will be 47 stories tall and the other will be 31 stories in height.⁴⁷ A rendering of these new towers is below.

⁴⁰ Cohen et al. v. G & M Realty L.P et al., 988 F.Supp.2d 212, 226 (E.D.N.Y. 2013) (Order Denying Preliminary Injunction).

⁴¹ *Id.* at 227.

⁴² *Id.* at 226.

⁴³ Erik Badia, Catherine Clarke, *Demolition of graffiti mecca 5Pointz draws tourists and artists in mourning*, NEW YORK DAILY NEWS, Aug. 22, 2014, <http://www.nydailynews.com/life-style/real-estate/demolition-graffiti-mecca-5pointz-begins-article-1.1913624>.

⁴⁴ *Id.*

⁴⁵ Aymann Ismail, *Watch the Months-Long Demolition of 5 Pointz in a One-Minute Timelapse*, ANIMAL NEW YORK, Jan. 8, 2015, <http://animalnewyork.com/2015/watch-months-long-demolition-5-pointz-one-minute-timelapse/>.

⁴⁶ Eli Rosenberg, *New renderings show dedicated graffiti space on development replacing 5Pointz*, NEW YORK DAILY NEWS, Aug. 6, 2014, <http://www.nydailynews.com/new-york/queens/5pointz-site-save-room-graffiti-developer-article-1.1894421>

⁴⁷ *Id.*



The complex will have around 20 artists' studios.⁴⁸ Wolkoff also plans to allocate some spaces for aerosol artists to paint.⁴⁹ The first will be a 40 by 80 foot space above the garage.⁵⁰ A second area will be the walls surrounding a 30,000-foot courtyard at the rear of the building.⁵¹ The picture below is an artist's rendering of the courtyard showing some of these walls.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*



Wolkoff's plans for the new buildings have failed to satisfy many of the original 5Pointz artists. For example, Carlos Game, an aerosol artist who had painted several works on 5Pointz, was critical of Wolkoff's plans, complaining that the walls are "going to be in the back underneath the train and, to be honest with you, it has no type of social impact to the community."⁵² In a documentary about 5Pointz made by the independent filmmaker P.J. Monsanto and released on the one-year anniversary of the whitewashing, the aerosol artist Kid Lew commented "This is the biggest art crime in our minds, what [Wolkoff's] done. And he's got to live with that. Karma's on his side now."⁵³ Lew added, "Granted he [Wolkoff] owns this building, but we've taken the outside. This is what we do. What would you do if someone vandalized your property?"⁵⁴

Who's the vandal: the aerosol artists or the building owner? In the lawsuit over 5Pointz, that question must be answered by applying the federal moral rights statute, VARA.

⁵² *Id.*

⁵³ *We Don't Need More Rats Here* (2014 documentary film by independent filmmaker P.J. Monsanto), Vimeo, <http://vimeo.com/112014208> (includes many fantastic shots of 5Pointz before its destruction as well as interviews with aerosol artists).

⁵⁴ *Id.*

III. VARA WAS ENACTED FOR THE PURPOSES OF PRESERVING A NARROW CATEGORY OF WORKS OF VISUAL ART, WHICH SHOULD INCLUDE AUTHORIZED AEROSOL ARTWORKS SUCH AS THOSE AT 5POINTZ

VARA was added to federal law in 1990, and went into effect in 1991.⁵⁵ VARA adds certain moral rights to U.S. law, following the American ratification of the Berne Convention, the major international copyright treaty, in 1989.⁵⁶ Article 6bis of the Berne Convention requires its members to enact certain moral rights of attribution and integrity, which are independent of economic copyright rights such as the rights of reproduction, adaption, public distribution, public performance, and public display in section 106 of the federal Copyright Act.⁵⁷ While economic rights are designed as an incentive to create by granting authors, including visual artists, a limited monopoly over their creations, moral rights are grounded on a right of personality or human dignity.⁵⁸ Moral rights protect artistic works as manifestations of their creator's personality.⁵⁹

The moral rights mandated by the Berne Convention, attribution and integrity, protect these rights of personality. The right of attribution (also known as paternity) ensures that the author's name is used properly in connection with the work. It includes both the right to be named as the author of a work and not to be named as the author of a work that an artist did not create.⁶⁰ The right of integrity ensures that the work is not distorted, mutilated, or modified in a way that would conflict with the artist's artistic choices; it does not protect every change to the work but only those that are prejudicial to the artist's honor or reputation.⁶¹ The Berne Convention does not expressly require a right to prevent destruction of the work.⁶²

VARA, enacted as section 106A of Title 17 of the United States Code, includes both attribution and integrity rights, including, unlike the Berne Convention, a right to prevent destruction of certain works of visual art in certain circumstances.⁶³ Since VARA's attribution rights are not relevant to the issues under investigation in this paper, I will not discuss them further. VARA also gives all qualifying works of visual art rights of integrity against certain modifications as well as, in some circumstances, destruction. The author of a qualifying works of visual art has the right to "prevent any intentional distortion, mutilation, or other modification of [the] work which would be prejudicial to his or her honor or reputation, and any intentional distortion mutilation, or modification of [the] work is a violation of that right."⁶⁴ A "work of

⁵⁵ Act of Dec. 1, 1990, Pub. L. No. 101-650 § 610(a) (tit. VI), 104 Stat. 5089, 5128 to 5133, 101st Cong., 2d Sess.

⁵⁶ WILLIAM PATRY, PATRY ON COPYRIGHT LAW, § 16:1 (2014). It took the United States over 100 years to join this treaty, which was originally concluded in 1886.

⁵⁷ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30, art. 6bis.; 17 U.S.C. § 106.

⁵⁸ Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Protection for Visual Art*, 39 CATH. U. L. REV. 945, 949-50 (1990).

⁵⁹ *Id.* at 949, 990.

⁶⁰ Berne Convention, *supra* note 57, art. 6bis, para. 1, comment 6bis.3, at 41.

⁶¹ *Id.* at art. 6bis, para. 1.

⁶² *Id.* at art. 6bis.

⁶³ 17 U.S.C. §106A(1)-(3) (2014).

⁶⁴ *Id.* at § 106A(a)(3)(A).

recognized stature" is protected against destruction, and "any intentional or grossly negligent destruction of the work is a violation of that right."⁶⁵

There is a wealth of legislative history indicating that VARA was the result of congressional concern about preserving artwork. Representative Edward Markey, one of the sponsors of the legislation in the House of Representatives, stated: "Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artists."⁶⁶

Another sponsor of VARA, Representative Robert Kastenmeier, also referred to the preservationist purpose in his floor statement on the VARA bill: "We should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest."⁶⁷ Kastenmeier explained that the bill had three goals. The first was to protect the honor and reputation of visual artists. The second was "to protect the works of art themselves. Society is the ultimate loser when these works are modified or destroyed. They should be preserved in the way the artist intended, and as the important part of our cultural heritage that they are."⁶⁸ And finally, federal protection was designed to establish a national standard for these protections.⁶⁹

The House Report of the Committee on the Judiciary noted in support of the bill that "[w]itnesses at the Subcommittee [on Courts, Intellectual Property, and the Administration of Justice] were united in their support for H.R. 2690 because of its benefit not only to individual visual artists, but also to the American culture to which these artists make such a significant contribution."⁷⁰

Another supporter of the bill, Representative Jack Brooks, stated "[T]he Visual Artists' Rights Act bill will help to assure that the art we enjoy today will survive for the enjoyment of future generations."⁷¹ Brooks emphasized that the statute advanced both the interests of artists and those of the public.

Senator Ted Kennedy, the sponsor of a nearly identical bill in the Senate, stated that "[n]early 70 countries around the globe protect artists' authorship rights and the integrity of creative works. Still, the United States permits any individual to maliciously mutilate or destroy a work of art without fear of any sort of reprisal. Without these protections, cultural properties have been irretrievably damaged. Congress can no longer overlook its responsibility to safeguard the Nation's artistic heritage."⁷²

⁶⁵ *Id.* at § 106A(a)(3)(B).

⁶⁶ 135 Cong. Rec. E2227 (daily ed. June 20, 1989) (statement of Rep. Edward Markey), quoted in H.R. REP. NO. 101-514 (1990), reprinted in 190 U.S.C.C.A.N. 6915 (hereinafter VARA House Report)..

⁶⁷ 135 Cong. Rec. E2199 (daily ed. June 20, 1989) (statement of Rep. Robert Kastenmeier), quoted in VARA House Report.

⁶⁸ 136 Cong. Rec. H3111-02 (daily ed. June 5, 1990) (statement of Rep. Robert Kastenmeier).

⁶⁹ *Id.*

⁷⁰ VARA House Report.

⁷¹ 136 Cong. Rec. H3111-02 (daily ed. June 5, 1990) (statement of Rep. Jack Brooks)

⁷² 135 Cong. Rec. S6810-03, 1989 WL 179025 (statement of Sen. Kennedy in support of S. 1198, The Visual Artists Rights Act of 1989).

Despite the clear preservationist rationale for VARA's rights against destruction of qualifying visual artworks, commentary on the statute has noted that its enacted provisions do not completely serve the public interest in preserving culturally significant art since they leave it solely to the artist to decide whether or not to bring a VARA claim.⁷³

VARA seeks to limit moral rights protection only to culturally significant artworks set out in a narrow category of "work[s] of visual art," defined in the statute as:

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.⁷⁴

The aerosol artworks painted on 5Pointz are clearly "paintings" within VARA's definition. Assuming independent creation, they should have little difficulty satisfying the basic requirements of copyrightability: originality and fixation.⁷⁵ The current federal copyright statute, the Copyright Act of 1976, provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression."⁷⁶ The fixation requirement is not at issue for works of aerosol art as they are clearly "sufficiently permanent or stable to permit it to be perceived,

⁷³ Charles G. Wentworth, *Don't Deface My Painting! Artists' Rights Under Illinois and Federal Law*, 25 DCBA BRIEF 20 (June, 2013).

⁷⁴ 17 U.S.C. § 101 (definition of "work of visual art").

⁷⁵ *Id.* at § 102(a).

⁷⁶ *Id.*

reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁷ The 5Pointz aerosol artworks fall within the enumerated statutory categories of the types of works that qualify for copyright protection as “pictorial works.”⁷⁸ The Supreme Court has made clear that the test for originality is not at all stringent: all that is required is independent creation and a “minimal degree of creativity.”⁷⁹ The Court has described this creativity requirement as “extremely low; even a slight amount will suffice.”⁸⁰ It has noted that “[t]he vast majority of works make the grade quite easily, as they possess some creative spark.”⁸¹

The mere fact that the artworks use the unconventional medium of spray paint on a wall should not disqualify them from protection. In his order denying a preliminary injunction in the 5Pointz litigation, Judge Block agreed, noting that in his view the iconic modern artist Pablo Picasso “surely would have supported applying VARA to protect the works of the modern aerosol artist.”⁸² Block correctly cited the legislative history showing that Congress intended that VARA protection should not depend on the medium used for the art.⁸³ As quoted by Block in his opinion, the House Report states that “[a]rtists may work in a variety of media, and use any number of materials in creating their work.”⁸⁴

This medium-neutral approach is in keeping with general judicial reluctance to assess artistic merit as a precondition to copyright protection. As Justice Oliver Wendell Holmes famously stated in *Bleistein v. Donaldson Lithographing Co.*, “[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.”⁸⁵ Holmes was expressly concerned that new art forms might fail to be adequately appreciated. “[S]ome works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”⁸⁶

It is true that one New York federal district court has ruled that VARA does not apply to illegal graffiti, and the Second Circuit has affirmed this opinion. In *English v. BFC&R E. 11th St. LLC*, the Southern District of New York held that VARA “does not apply to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question.”⁸⁷ The case was originally brought by six artists who had created several murals and sculptures in a Manhattan community garden without permission of New York City, the then owner of the lot.⁸⁸ These artists sued for VARA violations when the city sold the lot

⁷⁷ *Id.* at § 101 (definition of “fixed”).

⁷⁸ *Id.* at § 102(a)(5).

⁷⁹ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Cohen et al. v. G & M Realty L.P. et al.*, 988 F.Supp.2d 212 (E.D.N.Y. 2013) (Order Denying Preliminary Injunction).

⁸³ *Id.* at 225, citing H.R. Rep. No. 514 at 11.

⁸⁴ *Id.*

⁸⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

⁸⁶ *Id.*

⁸⁷ *English v. BFC&R E. 11th St. LLC*, 1997 U.S. Dist. LEXIS 19137 *14 (S.D.N.Y. Dec. 2, 1997), *affirmed* 198 F.3d 233 (2d Cir. 1999).

⁸⁸ *Id.* at *1.

for development as affordable housing.⁸⁹ Although the court recognized that the artists had devoted “significant time and effort” in creating the artwork and cleaning up the site, it was loath to extend VARA protection to non-removable art created without permission because this would permit such art to “effectively freeze development of vacant lots.”⁹⁰ The court declined to rule on whether VARA was applicable to illegal art that was removable from the site.⁹¹

But even if illegal graffiti cannot receive protection under VARA, this would not disqualify the authorized aerosol art at 5Pointz. As noted in section II above, the aerosol art on 5Pointz was painted with Wolkoff’s permission via delegation to the curator, Jonathan Cohen.⁹²

Judge Block’s opinion denying preliminary injunctive relief in the 5Pointz case was absolutely correct as to the issue of whether VARA’s protection extends to aerosol art in general. Quoting Picasso’s statement that “[t]he purpose of art is washing the dust of daily life off our souls,” Block correctly noted that the legislative history shows that VARA’s protections are not medium-specific.⁹³ Block was also correct in finding that the works of art protected under VARA are incorporated into a building.⁹⁴ But Block did not address an issue related to this incorporation: whether the 5Pointz Artwork is excluded from protection as site-specific art. The next section considers this and concludes that the best interpretation of VARA is that it is not.

IV. AEROSOL ARTWORK ON BUILDINGS LIKE 5POINTZ IS NOT EXCLUDED FROM VARA PROTECTION AS SITE-SPECIFIC ARTWORK

Is aerosol art such as that at 5Pointz ineligible for VARA protection as site-specific art because it is painted on a building? Site-specific art has been defined as art for which “the location of the work is an integral element of the work.”⁹⁵ This contrasts with so-called “plop art,” which does not incorporate its physical location as part of its meaning.⁹⁶ The extent of VARA protection for site-specific art is controversial. Federal circuit courts of appeal have disagreed as to whether VARA applies to protect site-specific art.

The First Circuit has found VARA inapplicable to any site-specific art in *Phillips v. Pembroke Real Estate, Inc.*⁹⁷ This case involved nearly three dozen sculptures commissioned for a Boston park.⁹⁸ The sculptor, David Phillips, collaborated with a landscape architect on the design of the park and was also commissioned to design and build stone walls and other elements of landscape design in the park.⁹⁹ When the company that leased the parkland from the State of Massachusetts sought to redesign

⁸⁹ *Id.*

⁹⁰ *Id.* at *2, *11.

⁹¹ *Id.* at *14.

⁹² *See supra* note 17.

⁹³ *Cohen et al. v. G & M Realty L.P. et al.*, 988 F.Supp.2d 212, 225 (E.D.N.Y. 2013).

⁹⁴ *Id.*

⁹⁵ *Phillips v. Pembroke Real Estate Inc.*, 459 F.3d 128, 134 (1st Cir. 2006).

⁹⁶ *Id.*

⁹⁷ *Id.* at 143.

⁹⁸ *Id.* at 130.

⁹⁹ *Id.* at 130-131.

the park, remove much of the stonework, and relocate the sculptures, Phillips sued in federal district court for injunctive relief under VARA as well as under the Massachusetts moral rights statute, MAPA.¹⁰⁰ Phillips asserted that the entire park was a large integrated piece of sculpture, which was protected by VARA. The district court found the park itself was not a single work of visual art.¹⁰¹ Although moving Phillips's work would alter it, the district court held that VARA did not protect his work from removal because the public presentation exception in section 106(c)(2) applied.¹⁰² This provision states that:

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.¹⁰³

The district court found that MAPA protected Phillips's works from removal; this question was certified to the Massachusetts Supreme Judicial Court, which ruled that MAPA did not protect site-specific art.¹⁰⁴ On appeal of the district court's VARA ruling, the First Circuit ruled that the proper reading of the statute was that it did not apply to site-specific art "at all."¹⁰⁵ The First Circuit's rationale was that the public presentation exception made no sense if site-specific art were protectable, because the statute would "purport[] to protect site specific art" but simultaneously always "permit its destruction by one of VARA's exceptions."¹⁰⁶ The First Circuit was also not convinced by Phillips's argument that VARA set up a kind of dual regime treating site-specific and non-site specific art differently in that VARA was applicable to site-specific art but the public presentation exception did not apply to site-specific art.¹⁰⁷

But the Seventh Circuit has questioned the First Circuit's interpretation of VARA in *Phillips*, though it did so in *dicta* in *Kelley v. Chicago Park District*, resolving the issue before it on different grounds than the site-specificity of the art. The plaintiff in *Kelley* was Chapman Kelley, an artist and creator of a wildflower garden in Chicago's Grant Park, who was outraged when city authorities shrank and modified his original garden design.¹⁰⁸ The district court ruled that Kelley's moral rights claim failed because the garden lacked originality and also was barred from protection as site-specific art.¹⁰⁹ On appeal, the Seventh Circuit ruled that VARA could not apply to the garden because it did not meet the basic copyrightability requirements of authorship and fixation.¹¹⁰ The Seventh Circuit therefore found it unnecessary to rule on the extent of VARA protection for site-specific art, but expressed criticism of the First

¹⁰⁰ *Id.* at 131.

¹⁰¹ *Phillips v. Pembroke Real Estate*, 288 F.Supp.2d 89, 99 (D. Mass. 2003) (hereinafter *Phillips v. Pembroke I*).

¹⁰² *Id.* at 100.

¹⁰³ 17 U.S.C. § 106A(c)(2) (2014).

¹⁰⁴ *Phillips v. Pembroke I*, 288 F.Supp.2d at 102; *Phillips v. Pembroke Real Estate, Inc.*, 443 Mass. 110, 117-120, 819 N.E.2d 579, 584-585 (Mass. 2004).

¹⁰⁵ *Phillips v. Pembroke Real Estate*, 459 F.3d 128, 143 (1st Cir. 2006).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 140-141.

¹⁰⁸ *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 295 (7th Cir. 2011).

¹⁰⁹ *Id.* at 292.

¹¹⁰ *Id.* at 303, 306.

Circuit's approach in *Phillips*, which the district court in *Kelley* had followed.¹¹¹ The Seventh Circuit stated: "*Phillips's* all or nothing approach to site specific art may be unwarranted."¹¹²

The Seventh Circuit noted flaws in the First Circuit's reasoning that the protection of site-specific art was inconsistent with the public presentation exception as well as with VARA's Building Exception. One difficulty pointed out by Seventh Circuit is that the wording of the public presentation exception does not wipe out all VARA protection, but only violations related to the work's location or to the way the work is publicly displayed. For example, the public presentation exception does not apply to every violation of the right of integrity (such as defacements by someone painting on the work or cutting it with a knife) or attribution.¹¹³ Also, the Seventh Circuit noted that VARA's Building Exception in section 113(d)(1) clearly covers a type of site-specific art. This provision applies to works "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."¹¹⁴ Such works get protection unless the artist has consented to the installation of the art in the building prior to the effective date of VARA (June 1, 1991) or the artist and building owner have signed a written instrument exempting from VARA protection works installed on or after VARA's effective date.¹¹⁵ The Seventh Circuit pointed out that this provision facially applies to site-specific art and there would be no reason for it to be included in VARA if site-specific work were completely excluded from VARA protection.¹¹⁶

William Patry, the author of the influential treatise *Patry on Copyright*, prefers the approach of the Seventh Circuit in *Kelley* to that of the First Circuit in *Phillips*.¹¹⁷ Patry takes the view that the best reading of VARA is that site-specific artworks are not categorically excluded from protection.¹¹⁸ In Patry's view, site-specific works incorporated into a building are covered by the Building Exception in section 113.¹¹⁹ Where such works are not incorporated into buildings, but are situated in places such as city squares or parks, they do have VARA protection against mutilation, but they have no protection from mere removal from their original installation without any accompanying mutilation or destruction.¹²⁰ Patry states, "The better approach is that removal per se does [not] violate VARA, but that mutilations that occur subsequent to removal may."¹²¹ Destruction of a removed work could also, according to Patry, constitute a VARA violation.¹²²

The interpretative approach of Patry and the Seventh Circuit is most consistent with the express statutory language of VARA. VARA plainly does not entirely exempt

¹¹¹ *Id.* at 306.

¹¹² *Id.* at 307.

¹¹³ *Id.*

¹¹⁴ 17 U.S.C. § 113(d)(1)(A).

¹¹⁵ 17 U.S.C. § 113(d)(1)(B).

¹¹⁶ *Kelley*, 635 F.3d 290 at 307.

¹¹⁷ 5 PATRY ON COPYRIGHT § 16:31 (2014).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

site-specific art incorporated in buildings, such as 5Pointz, from all moral rights protection, because its Building Exception expressly applies to such art. The destruction of the aerosol art at 5Pointz is therefore protected by VARA subject to its Building Exception, provided that the aerosol art has the “recognized stature” required by the statute.

V. THE RECOGNIZED STATURE REQUIREMENT FOR VARA PROTECTION AGAINST DESTRUCTION SHOULD BE READ BROADLY AND IN KEEPING WITH VARA’S PRESERVATIONIST GOAL BY RECOGNIZING THE CULTURAL VALUE OF AEROSOL ART

Although VARA does not permit discrimination on the basis of artistic medium and VARA should be interpreted to apply to aerosol art painted on buildings even though such art is site-specific, the statute’s preservationist goal is limited in that it only protects art that has significant social and cultural value. VARA expressly provides that visual art must achieve “recognized stature” to be protected against destruction.¹²³ The relevant provision provides for a right “to 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.”¹²⁴ Thus, the art at 5Pointz - and, indeed, any aerosol art - must have achieved recognized stature to be protected by VARA, as Judge Block correctly held in his ruling denying a preliminary injunction.¹²⁵

Judge Block found that it was premature at the preliminary injunction to rule on whether the 5Pointz aerosol art had in fact achieved recognized stature.¹²⁶ Block’s wish to ensure that this issue could be objectively assessed based on a fully developed evidentiary record is in keeping with the general approach of the case law on this issue. It was proper to leave a ruling on recognized stature for trial, but, as will be shown in section VI, it was not in keeping with the noneconomic nature of moral rights and the preservationist goal of VARA to refuse a preliminary injunction to stop the destruction of works that could later be judged to have recognized stature.

As Block noted, VARA does not define the term “recognized stature,” leaving it to judges to determine its scope.¹²⁷ This raises the danger, noted by Justice Holmes in *Bleistein*, that judges untrained as art critics may assess the artistic merits of a work.¹²⁸ There is also a danger, if the recognized stature requirement is interpreted too narrowly, that avant-garde or unconventional art forms like aerosol art, that may be truly innovative but ahead of their time, will not be accorded the preservation they deserve as a matter of their social or cultural value. Courts should therefore interpret the term “recognized stature” broadly by not attempting to subjectively assess the artistic merits of the work but rather objectively assessing whether the work has attained recognition as art even if only by a minority.

There is not a great deal of case law on the issue of recognized stature, nor indeed on any aspect of VARA. As wryly noted by Christopher J. Robinson in an article in the

¹²³ 17 U.S.C. § 106A(a)(3)(B).

¹²⁴ *Id.*

¹²⁵ *Cohen et al. v. G & M Realty et al.*, 988 F.Supp.2d 212, 215 (E.D.N.Y. 2013).

¹²⁶ *Id.* at 226.

¹²⁷ *Id.*

¹²⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

Fordham Law Review, “articles on the subject [of moral rights] far out outnumber the cases in which they are invoked.”¹²⁹ But most courts have heeded the *Bleistein* warning and have been unwilling to subjectively judge the artistic merits of artworks in assessing whether they have recognized stature. Some courts have also expressed concern that the social value in art preservation extends to avant-garde art that may take some time to gain recognized stature.

In his *5Pointz* opinion denying preliminary injunctive relief, Judge Block applied the most influential test for recognized stature, set out by a New York district court in *Carter v. Helmsley-Spear, Inc.*¹³⁰ Although the district court’s ruling in *Carter v. Helmsley-Spear* went to the Second Circuit on appeal, the appellate court did not address whether the district court’s test for recognized stature was the correct interpretation of VARA. The Second Circuit decided the appeal on the ground that the sculpture did not qualify for any VARA protection because it was a work made for hire. The few courts that have ruled on the issue of recognized stature in VARA claims, including the Seventh Circuit and the Eastern District of New York, have applied the district court’s test in *Carter v. Helmsley-Spear*, although the Seventh Circuit has voiced concern that this test may be flawed.¹³¹ The Eastern District of Pennsylvania has also cited the *Carter v. Helmsley-Spear* test with apparent approval, although this opinion did not rule on whether the test was actually met because of a finding that the statute of limitations had run.¹³² The District of Massachusetts has also applied the two-tiered *Carter v. Helmsley-Spear* test.¹³³ Only one court, the Northern District of New York, has refused to apply the *Carter v. Helmsley-Spear* test, finding it inappropriate in a case involving a mural created for use in a protest.¹³⁴

According to the district court’s test in *Carter v. Helmsley-Spear*, to prove “recognized stature” a plaintiff has to show “(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.”¹³⁵ The district court in *Carter v. Helmsley-Spear* also concluded that the goal of VARA was “preservative in nature: Congress was concerned that the destruction of works of art represented a significant societal loss.”¹³⁶ The court’s test for recognized stature was based both on this legislative goal, which the opinion states is supported by the VARA’s legislative history, and on VARA’s text.¹³⁷

The district court in *Carter v. Helmsley-Spear* noted that “the recognized stature requirement is best viewed as a gate-keeping mechanism- protection is afforded only to those works of art that art experts, the art community, or society in general views

¹²⁹ Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM LAW REV. 1935 (2000).

¹³⁰ *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y.), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995) (appeal decided on other grounds than recognized stature).

¹³¹ *See infra*, note 161.

¹³² *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F.Supp.2d 517, 520-521 (E.D.Pa. 2005).

¹³³ *Phillips v. Pembroke Real Estate, Inc.*, 288 F.Supp.2d 89, 97, 101 (D. Mass. 2003), *aff’d on different grounds*, 459 F.3d 128 (1st Cir. 2006).

¹³⁴ *Pollara v. Seymour*, 206 F.Supp.2d 333, 336 (N.D.N.Y. 2002), *aff’d on different grounds*, 344 F.3d 265 (2d Cir. 2003).

¹³⁵ *Carter*, *supra* note 130, at 325.

¹³⁶ *Id.* at 324.

¹³⁷ *Id.* at 325.

as possessing stature.”¹³⁸ This gate-keeping function was designed to prevent nuisance lawsuits.¹³⁹

Carter v. Helmsley Spear’s requirements as to the evidence that the court stated should be taken into consideration in assessing recognized stature reflects concern that judges should heed the warning in *Bleistein* and refrain from serving as untrained art critics. This evidence includes sources that had been enumerated in a failed 1987 legislative proposal for a federal Visual Artists Rights Act. The 1987 bill stated:

In determining whether a work is a work of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art.¹⁴⁰

When VARA was reintroduced in 1989, this provision had been removed, and the final enacted statute lacked any guidance on how to determine the issue of recognized stature. But in *Carter v. Helmsley Spear*, the district court essentially reinstated the excised provision, stating that recognized stature means recognition by “art experts, other members of the artistic community or by some cross-section of society,” and mandating that expert testimony is required on this issue.¹⁴¹ The court’s requirements were, in its words, designed to ensure that judges take into account the opinions of those persons listed in the 1987 bill, while acknowledging that the reason the provision had been taken out of the VARA bill was to give judges greater discretion.¹⁴²

The work at issue in *Carter v. Helmsley-Spear* was a sculpture, commissioned by the managing agent of the lessee of an 18,000 square foot former Macy’s warehouse in Queens and installed in the building’s lobby.¹⁴³ The avant-garde sculpture consisted of many “phantastagorical” elements, including colorful welded metal sculptures and glass tiled mosaics, and covered virtually the entire floor of the lobby, portions of its walls and the interior of three of the building’s elevators.¹⁴⁴ After the lease was terminated, the building’s owner ordered the sculpture to be removed from the lobby.¹⁴⁵ According to one of the artists, the owner’s representative yelled at them, , the owner from the lobby. dingtiled mosaics, and co¹⁴⁶ The plaintiffs, three sculptors known

¹³⁸ *Id.*

¹³⁹ *Id.*, citing Edward J. Damich, *The Visual Arts Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH.U.L.REV. 945, 954 (1990) (“The advantages of the ‘of recognized stature’ qualification include barring nuisance law suits, such as [a lawsuit over] the destruction of a five-year-old’s fingerpainting by her classmate. . .”).

¹⁴⁰ 100 Cong. Rec. S. 1619 § 101.

¹⁴¹ *Carter*, *supra* note 130, at 325.

¹⁴² *Id.*

¹⁴³ *Id.* at 312. There was an issue in the case as to whether the sculpture was a single work of art; the district court determined that it was. *Id.* at 314-315. See also S.J.D., *Out Damned Spot-Welders*, NEW YORK MAGAZINE 31, Apr. 25, 1994.

¹⁴⁴ *Carter*, *supra* note 130, at 312-13; S.J.D., *Out Damned Spot-Welders*, NEW YORK MAGAZINE 31, Apr. 25, 1994.

¹⁴⁵ *Carter*, *supra* note 130, at 312-313.

¹⁴⁶ S.J.D., *Out Damned Spot-Welders*, NEW YORK MAGAZINE 31, Apr. 25, 1994.

as the building! Geo had created the work at issue, sued for, *inter alia*, violations of VARA including the right to prevent destruction of a work of recognized stature.¹⁴⁷

After hearing expert testimony, the district court concluded that the sculpture in *Carter v. Helmsley-Spear* met its test for recognized stature. One expert, president of the Municipal Art Society of New York and a former chairman of the New York City Landmarks Preservation Commission, testified that his society had arranged tours of the work and planned to continue these tours.¹⁴⁸ Two professors, the art critic and New York University art history professor Robert Rosenblum and the Parsons School of Design design professor Aedwyn Darroll, praised the work as work as he work as rk as ity art history profes(Darroll).¹⁴⁹ The court found the testimony of these professors to be rt history professor Robert Rosenblum and the Parson' expert, Hilton Kramer, the editor and art critic of a conservative periodical, *The New Criterion*. The court found Kramer's disgust with most contemporary art modern art to be so "myopic" that his testimony on the merits of the work at issue was "unpersuasive and unconvincing" and had "little probative value."¹⁵⁰

It is true that even if the *Carter v. Helmsley-Spear* test requires judges to take into account the expert opinions of those listed in the second prong of the test (art experts, other members of the artistic community, or by some cross-section of society"), total discretion is left to judges as to how to weigh those opinions. An example of the use of such discretion is the court's rejection of the testimony of Hilton Kramer. The court viewed Kramer's testimony as completely worthless even though Kramer was a prominent art critic who served as chief art critic at the New York Times for almost ten years.¹⁵¹ While Kramer certainly had strong opinions as to the general lack of merit of art movements following High Modernism (including Pop Art, Conceptual Art, and postmodernist art), as well as the dangers of popular culture, it is certainly possible that the court's complete rejection of his expert evidence was based more on subjective aesthetic judgments than a truly objective assessment that his expertise lacked any real foundation.¹⁵² Similarly, in *English v. BFC&R East 11th Street*, another New York federal district court judge, considering the issue of recognized stature for an unauthorized mural painted on New York City property that the City wanted to develop, found the testimony of defendant's expert more credible than that of the plaintiff's without providing any full explanation of its reasons. This also raises concerns that the court could have been engaging in its own aesthetic judgments.¹⁵³

¹⁴⁷ *Id.*; *Carter*, *supra* note 130, at 313. The sculptors all had names beginning with J: John Veronis, Johnny Swing, and John Carter.

¹⁴⁸ *Carter*, *supra* note 130, at 325-26.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 324, 326.

¹⁵¹ William Grimes, *Hilton Kramer, Art Critic and Champion of Tradition in Culture Wars, Dies at 84*, NEW YORK TIMES, Mar. 27, 2012.

¹⁵² *Id.*

¹⁵³ *English v. BFC&R E. 11th St.*, 1997 WL 746444, U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 2, 1997); see also *Phillips v. Pembroke Real Estate, Inc.*, 288 F.Supp.2d 89, 92, 101 (D. Mass. 2003) (finding evidence of recognized stature of park was "only conclusory" even though a "renowned landscape architect" and expert witnesses with stellar artistic credentials (the Executive Director of the Urban Arts Institute of the Massachusetts College of Art and Program Director of the Massachusetts Cultural Council as well as a sculpture professor) opined that the design of the park was meritorious), *aff'd* on other grounds, 459 F.3d 128 (1st Cir. 2006).

But even though the *Carter v. Helmsley-Spear* test gives judges the opportunity to disregard *Bleistein*, the case law shows that in applying this test, judges generally take great care not to act as art critics. No court has yet been willing to rule that artwork lacks the artistic merit needed to satisfy the first part of the *Carter v. Helmsley-Spear* test.¹⁵⁴ District courts have even found that work that has not yet been publicly exhibited or displayed prior to its destruction can have recognized stature, an approach that shows clear concern about upholding the purpose of VARA to preserve art, even new forms of art that have not yet achieved widespread recognition but may one day do so.¹⁵⁵

One case showing such concern is *Martin v. City of Indianapolis*, a 1999 decision of the Seventh Circuit.¹⁵⁶ This court applied the *Carter v. Helmsley-Spear* test, though expressing some doubt as to the test's correctness.¹⁵⁷ The majority opinion noted that *Carter v. Helmsley Spear* was the sole case at the time to have ruled on the issue of recognized stature.¹⁵⁸ In *Martin*, the Seventh Circuit had to rule on cross appeals of an award of summary judgment for the plaintiff artist, Jan Martin, and an award of statutory damages for a non-willful statutory violation. The case arose after the city demolished Martin's sculpture for an urban renewal project.¹⁵⁹ Martin sued for violation of VARA's prohibition against destruction.¹⁶⁰ The Seventh Circuit's majority opinion notes that Martin "may be" correct in his argument that the *Carter v. Helmsley-Spear* test "may be more rigorous than Congress intended."¹⁶¹ However, the opinion stated that it was not necessary to "endeavour to refine that rule" in this case.¹⁶² It went on to find that plaintiff's evidence of stature, which was solely written material (such as newspaper and magazine articles), rather than any expert evidence given by affidavit, deposition, or interrogatories, was sufficient to meet the test notwithstanding the defendant's objection that it was hearsay.¹⁶³ The hearsay argument failed because, the majority explained, the authors of the written articles and letters were providing subjective opinions rather than the truth of what other people had said.¹⁶⁴ The majority found that Martin's sculpture had satisfied the

¹⁵⁴ *Scott v. Dixon*, 309 F. Supp.2d 395 (work "may have had artistic merit"), *Pollara v. Seymour*, 206 F. Supp.2d 333 (N.D.N.Y. 2002), *judgment aff'd*, 34 F.3d 265 (mural at issue was "unquestionably meritorious.") It is true that in *English v. BFC&R East 11 Street LLC*, the Southern District of New York noted that the artwork at issue did not meet the recognized stature test without making clear which prong of the *Carter* test had not been satisfied, but this was "an aside" or dicta because of the court's primary ruling that art painted on property without the property owner's authorization could not qualify for VARA protection and, on appeal, the Second Circuit took the view that it did not need to rule on whether the mural was entitled to VARA protection. *English v. BFC&R East 11th Street LLC*, 1997 WL 746444 (S.D.N.Y. 1997), *aff'd*, 198 English v. BFC Partners, 1999 U.S. App. LEXIS 35242 (2d Cir. N.Y. 1999).

¹⁵⁵ *Pollara v. Seymour*, 150 F.Supp.2d 393, 397 (N.D.N.Y. 2001); *Scott v. Dixon*, 309 F.2d 395 (such work could only have such recognition if the artist had achieved a certain level of fame which was not the case for the artist of the work at issue).

¹⁵⁶ *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

¹⁵⁷ *Id.* at 612.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 610.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 612.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 613.

recognized stature requirement and affirmed the ruling of the district court, which had also applied the *Carter v. Helmsley-Spear* test.¹⁶⁵

As Craig Robinson has pointed out, the majority opinion in *Martin* does not make clear exactly how the evidence actually satisfied the two-prong test.¹⁶⁶ If the written material was not evidence of the truth of what was stated in it, then it was not evidence of the sculpture's actual merits but rather established only that various members of the art world believed it had artistic merit.

It seems clear that the Seventh Circuit majority in *Martin* was highly concerned about avoiding the *Bleistein* problem of judges serving as untrained art critics. The first words of the majority opinion display this concern through the statement that "[w]e are not art critics, do not pretend to be and do not need to be to decide this case."¹⁶⁷ Because of this concern, the majority did not wish to assess whether the artwork had artistic merit and thus effectively ignored the first prong of the *Carter v. Helmsley-Spear* test. The majority statement followed the approach of the district court judge, Judge Barker, whose opinion states that the "critical element" of the *Carter v. Helmsley-Spear* test was the second prong (recognition), namely "community opinion about Martin's work, not a determination that Martin's work is inherently meritorious."¹⁶⁸

The Eastern District of New York's application of *Carter v. Helmsley-Spear* test in *Scott v. Dixon* also shows an unwillingness to assess whether a work had artistic merit.¹⁶⁹ This case concerned a sculpture of a swan commissioned for a Long Island couple's back yard. The sculpture was surrounded by high hedges. It was therefore not visible from the public roadway, but only from inside the home.¹⁷⁰ No art critics had ever reviewed the swan sculpture.¹⁷¹ After the plaintiffs sold the home, they arranged for the sculpture to be dismantled and removed from the property.¹⁷² It was subsequently stored for several years at a construction company, where it rusted and corroded to some degree.¹⁷³ The artist who had created the sculpture, Linda Scott, sued for VARA violations. A key issue was whether the sculpture had "recognized stature."

The court applied the two-step *Carter v. Helmsley-Spear* test, stating that "To achieve VARA protection, an artist must show not only the work's artistic merit but also that it has been recognized as having such merit."¹⁷⁴ The court did not assess the artistic merit of the sculpture, but found that although it "may have had artistic merit," the recognition prong was not met.¹⁷⁵ Even though Scott had created another sculpture, Stargazer Deer, visible from a public highway, that had sufficient artistic merit and notoriety to have achieved recognized stature, that did not mean that her

¹⁶⁵ *Id.* at 614.

¹⁶⁶ *Robinson, supra* note 129, at 1956.

¹⁶⁷ *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999).

¹⁶⁸ *Martin v. City of Indianapolis*, 982 F.Supp. 625, 630 (S.D. Ind. 1997).

¹⁶⁹ *Scott v. Dixon*, 309 F.Supp.2d 395, 400 (E.D.N.Y. 2004).

¹⁷⁰ *Id.* at 396-97.

¹⁷¹ *Id.* at 398.

¹⁷² *Id.*

¹⁷³ *Id.* at 399.

¹⁷⁴ *Id.* at 400.

¹⁷⁵ *Id.* at 401.

swan sculpture also had achieved such stature.¹⁷⁶ The court held that while some artists, such as Picasso, had attained such a level of fame that all of their works would have recognized stature no matter whether they were publicly displayed, that was not the case for the less famous Scott.¹⁷⁷ Her swan sculpture had not met the *Carter v. Helmsley Spear* test and thus did not have sufficient recognized stature to be protected against destruction.¹⁷⁸

In a ruling on summary judgment in *Pollara v. Seymour*, a case involving the destruction of a mural created by artist Joanne Pollara for use by a public interest group at a protest of funding cuts for legal aid, the federal district court for the Northern District of New York took a similar approach to *Scott v. Dixon* in holding that the fact that a work had never been exhibited to the public did not necessarily mean that it failed the *Carter v. Spear* recognized stature test.¹⁷⁹ As the *Scott v. Dixon* opinion had pointed out, a famous artist could have such an “established” reputation that all of that artist’s works would have recognized stature, whether or not publicly displayed.¹⁸⁰ In *Pollara*, the court opined that achieving recognition prior to destruction was not required to satisfy the *Carter v. Spear* test.¹⁸¹ To so find would not be in keeping with the policies underlying moral rights protection against destruction: “(1) the society’s interest in the preservation of works of artistic merit; and (2) the artist’s economic self-interest in preservation of his or her own works so as to enhance his or her reputation as an artist.”¹⁸² The court noted that requiring recognition prior to destruction would not serve the interest in preservation because some artworks could achieve recognition after destruction.¹⁸³ Secondly, the self-interest in preservation was not dependent on prior recognition.¹⁸⁴ At the summary judgment stage, the *Pollara v. Seymour* court found that there were genuine issues of material fact on the issue of recognized stature.¹⁸⁵

But in a later ruling on the merits at the trial stage in *Pollara v. Seymour*, the same district court judge, Judge Hurd, voiced some criticism of the *Carter v. Helmsley-Spear* test as incomplete to resolve whether the work in question had recognized stature. Hurd found the *Carter v. Helmsley-Spear* test “of little assistance in the determination of whether Pollara’s mural meets the statutory definition [of a work of recognized stature].”¹⁸⁶ Hurd found that both prongs of the test were met because “the plaintiff’s work was unquestionably meritorious and this merit was recognized by her experts and in this decision.”¹⁸⁷ But this was not enough for the work to achieve recognized stature where it was intended solely as a display piece for a one-time event.”¹⁸⁸ The court took the view that reading VARA in light of its “underlying

¹⁷⁶ *Id.* at 396, 400.

¹⁷⁷ *Id.* at 400.

¹⁷⁸ *Id.*

¹⁷⁹ *Pollara v. Seymour*, 150 F.Supp.2d 393, 398 (N.D. N.Y. 2001).

¹⁸⁰ *Scott*, 309 F.Supp.2d at 400.

¹⁸¹ *Pollara*, 150 F.Supp.2d at 397.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 398.

¹⁸⁵ *Id.*

¹⁸⁶ *Pollara v. Seymour*, 206 F.Supp.2d 333, 336 (N.D.N.Y. 2002).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

purposes” required consideration of whether a work was actually intended as “art.”¹⁸⁹ If not, VARA would not protect it. The mural at issue was created to publicize an event, and was not intended by the artist to be preserved as art, so it therefore had no VARA protection as a work of recognized stature.¹⁹⁰ The key question for recognized stature was whether the work had independent value as art beyond being simply promotional materials. Only where there was such artistic economic value (presumably a resale market for the art), or some intent by an artist to preserve the work for future display as an artistic work, could the artist obtain protection for the work as one of recognized stature.¹⁹¹ Evidence of this lack of “lasting value” for Pollara’s mural included the artist’s admission of no financial injury from the work’s destruction; also relevant was the lack of evidence of permanent display of any of her mural works.¹⁹²

The Second Circuit affirmed the holding that Pollara’s work was not protected by VARA, but not on the ground of whether it had achieved recognized stature.¹⁹³

In his opinion in *Cohen v. G & M Realty L.P.*, Judge Block cited *Carter v. Helmsley-Spear*’s statement that the function of the recognized stature was a gate-keeping one.¹⁹⁴ Block also cited the two-stage *Carter v. Helmsley-Spear* test, although he did not expressly state whether he believed it to be correct.¹⁹⁵ At the preliminary injunction hearing, Block heard expert testimony from both sides as to the issue of recognized stature. Based on this testimony, the judge concluded that “at least some of the 24 works, which plaintiff contend were of recognized stature . . . present ‘sufficiently serious questions going to the merits to make them a fair ground for litigation.’”¹⁹⁶ However, he took the view that the issue of recognized stature should not be fully resolved at the preliminary injunction stage, but should wait for further development of the evidence as the case was fully prepared for trial.¹⁹⁷

The issue of recognized stature should be decided on expert evidence, so that judges refrain from subjectively acting as untrained art critics. But in weighing the expert evidence, judges should interpret the term “recognized stature” broadly, in order to ensure that unconventional art forms that may only be appreciated as art by a minority are still treated as having legitimate cultural value and are therefore protected against destruction to the same extent as more conventional art.

Deciding to wait for a more developed evidentiary record to determine the issue of recognized stature was not unreasonable, but Judge Block took a wrong turn when he followed this decision with a conclusion that preliminary injunctive relief should be denied.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 337.

¹⁹¹ *Id.* 336-37.

¹⁹² *Id.* at 337.

¹⁹³ *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2011).

¹⁹⁴ *Cohen et al. v. G&M Realty L.P. et al.*, 988 F.Supp.2d 212, 215 (E.D.N.Y. 2013).

¹⁹⁵ *Id.* at 217.

¹⁹⁶ *Id.* at 226.

¹⁹⁷ *Id.*

VI. BECAUSE VARA'S RIGHT AGAINST DESTRUCTION IS A NON-ECONOMIC MORAL RIGHT AND VARA'S PURPOSES ARE PRESERVATIVE, THE JUDGE SHOULD NOT HAVE REFUSED PRELIMINARY INJUNCTIVE RELIEF

As noted above in Section II, in his opinion in *Cohen v. G & M Realty L.P.*, Judge Block found preliminary injunctive relief prohibiting destruction of the 5Pointz artwork to be inappropriate because of what Block called the “ineluctable factor” of “the transient nature of the plaintiffs’ works.”¹⁹⁸ Following Block’s conclusion that there were triable issues as to recognized stature of the 5Pointz artwork, his conclusion that preliminary injunctive relief should not issue was based on a misunderstanding of the difference between the moral rights granted by VARA and the economic rights granted by federal copyright law. The judge also failed to give proper attention to the balance between the rights of artists and the rights of building owners set out in VARA’s Building Exception.

Judge Block’s conclusion that preliminary injunctive relief should not issue was based on the approach taken to injunctions set out by the United States Supreme Court in its 2006 opinion in *eBay, Inc. v. MercExchange*.¹⁹⁹ While *eBay* was actually a patent case, the Court expressly stated there that its approach to preliminary injunctions also applied in copyright cases.²⁰⁰ In *eBay*, the Court rejected the prior approach of many courts in granting preliminary injunctions after a finding of likelihood of success on the merits by presuming irreparable harm.²⁰¹ Rather, *eBay* held that a plaintiff must satisfy the traditional four-factor test for injunctive relief by showing:

- (1) that the plaintiff has suffered or is likely to suffer an irreparable injury if injunctive relief is not granted;
- (2) that legal remedies, such as damages, are not adequate to compensate for the injury suffered by the plaintiff.
- (3) that the balance of hardships tips in favor of granting the plaintiff an equitable remedy; and
- (4) the public interest would not be disserved by the grant of an injunction.²⁰²

While Judge Block did not directly cite *eBay* as authority for the requirements for a preliminary injunction, he did so indirectly by citing the 2010 opinion of the Second Circuit in *Salinger v. Colting*, a copyright infringement case expressly applying the *eBay* standard for preliminary injunctive relief.²⁰³ In *Salinger*, the Second Circuit

¹⁹⁸ *Id.*

¹⁹⁹ *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006); *Cohen*, 988 F.Supp.2d at 225 (citing *Salinger v. Colting*, 607 F.3d 68 79 (2d Cir. 2010) (applying the *eBay* standard for preliminary injunctive relief).

²⁰⁰ *eBay*, 547 U.S. at 392-393.

²⁰¹ *Id.*; see *Salinger*, 607 F.3d at 75-76 (stating that courts in the Second Circuit “nearly always issued injunctions in copyright cases as a matter of course upon a finding of a likelihood of success on the merits.”).

²⁰² *eBay*, 547 U.S. at 391.

²⁰³ *Cohen*, 988 F.Supp.2d at 225.

described the requirements that must be met for preliminary injunctive relief in a copyright case. First, a plaintiff must show “either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [p]laintiff’s favor.”²⁰⁴ Second, the plaintiff must demonstrate a likelihood of irreparable harm if an injunction is not granted, which requires the plaintiff to show (a) the balance of hardships tips in the plaintiffs favor; and (b) the “public interest would not be disserved.”²⁰⁵

Judge Block correctly concluded that there were sufficiently serious questions going to the merits, namely the issue of recognized stature, to make them a fair ground for litigation.²⁰⁶ However, he found that the 5Pointz plaintiffs had not established irreparable harm.²⁰⁷ According to Block, the balance of hardships did not tip in the plaintiffs favor because the “significant” monetary damages available under VARA could compensate the artists for the loss of their works.²⁰⁸ Block stated that the “plaintiffs would be hard-pressed to contend that no amount of money would compensate them for their paintings.”²⁰⁹ Moreover, Block found it significant that the plaintiffs always knew their artwork would be transient because they knew the buildings would eventually come down.²¹⁰ This knowledge, whether viewed as “bearing upon the issue of irreparable harm or the balancing of the hardships,” was the key factor making injunctive relief inappropriate. Finally, the artwork could “live on in other media,” such as photographs, so there could not be said to be irreparable harm.²¹¹ The judge noted that the court had urged plaintiffs to photograph the paintings they wished to preserve.

The problem with Block’s finding that there was no irreparable harm is that it fails to take into account that VARA provides for noneconomic moral rights that are fundamentally different from the economic rights provided by federal copyright law.²¹² Previous VARA cases in New York district courts have properly noted this distinction. For example, in *Carter v. Helmsley-Spear, Inc.*, the district court stated, “moral rights are not economic in nature and irreparable harm should be presumed on showing of violation.”²¹³ As the district court pointed out, because moral rights are designed to “supplement” economic interests by protecting “the author’s personal association with his or his work,” money damages would never suffice to compensate for the harm suffered by the plaintiff.²¹⁴ In *English v. BFC&R East 11th Street LLC*, the Southern District of New York cited *Carter v. Helmsley-Spear*’s approach to injunctions in VARA cases with approval, stating that “a violation of VARA rights constitutes a prima facie showing of irreparable injury.”²¹⁵ According to *English*, the issue on preliminary

²⁰⁴ *Salinger*, 607 F.3d at 79.

²⁰⁵ *Id.*

²⁰⁶ *Cohen*, 988 F.Supp.2d at 226.

²⁰⁷ *Id.* at 227.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *infra*, notes 217-18.

²¹³ *Carter v. Helmsley-Spear, Inc.*, 852 F.Supp. 228, 232 (S.D.N.Y. 1994).

²¹⁴ *Id.* at 231.

²¹⁵ *English v. BFC&R East 11th Street LLC*, 1997 WL 746444 at *3 (S.D.N.Y. 1997).

injunction in a VARA case is solely whether “plaintiffs have demonstrated a likelihood of success on the merits or sufficiently serious questions going to the merits and a balance of hardships tipping in their favor.”²¹⁶

Objection might be raised that both *Carter v. Helmsley-Spear* and *English* predate *eBay*, so they are no longer good authority. But the argument that the irreparable harm calculus is different for moral rights than for economic rights is still appropriate after *eBay*. Although the *eBay* approach to injunctions is clearly required in copyright cases involving violations of economic rights (e.g. copyright infringement claims), moral rights are very different. The preservationist rationale underlying moral rights mandates taking a different approach at the preliminary injunction stage, one that acknowledges that money damages do not fully compensate for the personal damage caused by destruction of an artwork. The wording of VARA expressly acknowledges the significance of injunctive relief: authors have the right to “prevent” violations of their moral rights.²¹⁷ In contrast, the economic rights in section 106 do not use the word “prevent,” but rather give the rights to “reproduce”, “prepare derivative works”, “distribute copies . . . to the public”, “perform . . . publicly” and “display . . . publicly.”²¹⁸

Judge Block’s decision to deny preliminary injunctive relief seems clearly based on the underlying concern that artists claiming for moral rights violations for works on buildings should not be able to trump development by property owners. But Block failed to take into account that VARA already provides for a balance between these competing interests in section 113, the Building Exception.

Section 113 makes clear that the authors of works of visual art incorporated into buildings have moral rights, including the right to prevent destruction unless certain exceptions apply. The first exception is where the work “has been incorporated 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” and the author agreed in writing after the effective date of VARA that “installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal” or consented to the installation prior to the effective date of VARA.²¹⁹ The second exception is where the work can be removed from the building “without the destruction, distortion, mutilation, or other modification of the work” and the building’s owner has given a “diligent, good faith attempt without success to notify” the author adequate notice of its intent to remove the work or the owner has given notice to the artist and the artist has failed to remove the work within 90 days of receipt of such notice.²²⁰ Whether the work is transient is completely irrelevant.

Judge Block’s opinion denying the 5Pointz plaintiffs preliminary injunctive relief mentions the Building Exception only in passing. Block correctly states that “VARA recognizes that the author of a work of visual art ‘may be incorporated in or made part of a building,’ and includes within its protective reach any such work that was created

²¹⁶ *Id.* (ultimately denying the motion because VARA did not apply to artwork that was illegally placed on the property of others, so the whole garden was not covered, and removal of the individual elements was also not protected under VARA because of the public presentation exception in section 106A(c)(2)).

²¹⁷ 17 U.S.C. § 106A (2012).

²¹⁸ *Id.* at § 106 (2012).

²¹⁹ *Id.* at § 113(d). The effective date of VARA is June, 1, 1991.

²²⁰ *Id.*

after its enactment on June 1, 1991.²²¹ But he fails to acknowledge that this framework establishes a statutory balance between artist and property owner where the owner permits artwork to be incorporated onto his building, as Wolkoff did with 5Pointz. Where the art cannot be removed without damaging it, as is arguably the case for 5Pointz, the owner must protect his ownership interests by entering into an agreement with the artists. Otherwise, the moral rights of the artist will trump the property rights of the building's owner. This balance was set up to foster the social goal of preserving art as a cultural value.

VII. CONCLUSION

Some commentators have criticized VARA's protectionist approach against the destruction of art. For example, Amy Adler has argued that preserving art is out of synch with modernist art that is premised on breaking with tradition.²²² Adler believes that VARA's mandate to preserve is stifling to creativity for the contemporary art to which the statute applies. She contends:

Here I make a claim that many may find repugnant: that there is an artistic value in modifying, defacing and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary-art making. As a result, moral rights law endangers art in the name of protecting it.²²³

Such views may have some merit. But VARA, on its clear text, is certainly not in keeping with Adler's views. The statute's prohibition on destruction could be changed without violating international law because, as noted above, the Berne Convention does not mandate moral rights protection against destruction. But VARA strikes a balance that Congress decided was appropriate at the time the statute was enacted. For that balance to be changed would require legislative enactment. In the meantime, judges deciding VARA claims over the destruction of aerosol art must respect the compromise between property owners and artists that the law has struck.

²²¹ Cohen et al. v. G & M Realty L.P. et al., 988 F.Supp.2d 212, 215 (E.D.N.Y. 2013).

²²² Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009).

²²³ *Id.* at 279-280.