

The 5Pointz Case and the Role of Communities in the Visual Artists Rights Act

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At two o'clock in the morning on November 19, 2013, a building was whitewashed in Queens. The 5Pointz Aerosol Art Center, or “5Pointz” for short, was an outdoor exhibition space for graffiti and street art. The building was slated to be demolished, but the 5Pointz artists had been trying to save their work until it was all painted white in the dark. Seven years and a long lawsuit later, they would receive \$6.75 million in damages under the Visual Artists Rights Act of 1990 (VARA), a federal copyright law.

The 5Pointz case is about art, but it is also about community. Its story shows how different communities—of artists, critics, judges, and jurors—define art and how those ideas change over time. Named for the five boroughs of New York City, 5Pointz ultimately became something larger. It was an inflection in what we understand art to be, a collision between graffiti culture, the art world, property development, and the justice system. None emerged the same.

The story begins in 1971, when a young real estate developer bought an old factory in Long Island City, an industrial neighborhood in Queens.¹ Born in Brooklyn in 1937, Gerald

¹ Agreements Between Gerald Wolkoff, Colon Holding Corp., Dime Savings Bank of N.Y., and Neptune Meter Co., (Aug. 1971) N.Y.C. DEPT. OF FIN., OFF. OF CITY REG., AUTOMATED CITY REGISTER INFORMATION SYSTEM,

Wolkoff grew up in a single-parent home.² He began working at 12 and started his first business, a floor waxing company, at 14.³ Though he could not afford college, his company soon became the largest of its kind in the city.⁴ He sold it, and with the money he had made waxing floors, he bought land and built homes in Brooklyn and Staten Island.⁵

The factory in Long Island City was Wolkoff's first commercial building. From 1892 to 1971, it had housed the Neptune Meter Company, until the business moved to Alabama and Wolkoff bought the property. He would eventually acquire the entire 200,000 square foot complex, which covered the entire block of Jackson Avenue between Davis Street and Crane Street. The elevated 7 train ran nearby, carrying riders in and out of Manhattan.

By the time Wolkoff bought the building in 1971, trains like the 7 had become vivid displays of New York's growing graffiti art scene, or what many would call its graffiti art problem. That summer, the *New York Times* interviewed TAKI 183, formally known as Demetrius, a seventeen-year-old Greek-American from Washington Heights.⁶ TAKI was a young graffiti writer who had tagged his street name on trains and walls all over the city.⁷ Many others followed suit. Because graffiti uses lettering, its practitioners are commonly called "writers" instead of "artists." The subways began to look "like guestbooks, signed with names and street numbers."⁸ Subway cars—in particular, those of visible, above-ground lines like the

<https://a836-acris.nyc.gov/CP/>, (last visited Mar. 2, 2021); *see also* 5Pointz NYC, GOOGLE ARTS & CULTURE, <https://artsandculture.google.com/exhibit/5-pointz-nyc-street-art-nyc/wRU6hVET> (last visited Mar. 1, 2021).

² U.S. CENSUS BUREAU, SIXTEENTH CENSUS OF THE UNITED STATES: POPULATION SCHEDULE (1940); *see also* Transcript of Injunction Hearing at 140, *Cohen v. G&M Realty L.P.*, 320 F.Supp.3d 421 (E.D.N.Y. 2018) (No.13 Civ. 5612).

³ Transcript of Injunction Hearing, *supra* note 2, at 140.

⁴ *Id.* at 141.

⁵ *Id.* at 140.

⁶ 'TAKI 183' Spawns Pen Pals, N.Y. TIMES, July 21, 1971, at 37.

⁷ *See id.*

⁸ ROGER GASTMAN & CALEB NEELON, THE HISTORY OF AMERICAN GRAFFITI, 58 (2010).

7—were “coveted and important places of performance and competition”⁹ for aspiring graffiti writers.



Graffiti on the interior and exterior of subway cars in New York City, 1973.

Like TAKI, most graffiti writers were in their teens.¹⁰ The majority were male, working-class people of color.¹¹ Unlike other forms of art that catered to the wealthy and white, graffiti welcomed anyone with a spray can or a Magic Marker. With the city as its canvas, graffiti gave a “chance for young people of any background to contribute.”¹² They tagged their names and told the world that they were here, too.

In response, New York City Mayor John Lindsay declared war on graffiti in 1972.¹³ He began by creating the city’s first graffiti task force.¹⁴ After a unanimous vote by the city council, he made it a crime to “carry an aerosol spray paint can, broad tipped indelible marker or etching acid”¹⁵ into a public facility with the intention to write, paint, or draw. The Mayor’s office spent

⁹ See Tyson Mittman, *Advertised Defiance: How New York City Graffiti Went from “Getting Up” to “Getting Over,”* in UNDERSTANDING GRAFFITI 201 (eds. Troy Lovata & Elizabeth Olton, 2015).

¹⁰ *Id.* at 23.

¹¹ See Joe A. Austin, *From The City Walls to ‘Clean Trains’: Graffiti In New York City, 1969-1990,* in THE ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 227 (ed. Jeffrey Ian Ross, 2016).

¹² See *id.* at 29.

¹³ CRAIG CASTLEMAN, GETTING UP: SUBWAY GRAFFITI IN NEW YORK, 136 (1982).

¹⁴ See *id.* at 138.

¹⁵ See *id.*; see also N.Y.C., N.Y., ADMIN. CODE § 10-117 (2006).

an estimated \$10 million on anti-graffiti efforts that year.¹⁶ It was not enough. In 1973, it reported that 63 percent of all subway cars remained “heavily defaced”¹⁷ with graffiti, and 75 percent of that graffiti happened in the city’s subway yards.¹⁸



Passengers boarding the subway in New York City, 1974.

By the mid-1970s, the city was nearly bankrupt, and crime rates were high.¹⁹ When Mayor Ed Koch took office in 1977, his approach was aggressive. The Koch administration saw graffiti as “evidence that [a] space was out of control,”²⁰ as part of its “broken windows” theory of policing, in which small, visible offenses were considered signs of greater social disorder.²¹ In 1981, Mayor Koch announced that subway yards would be fortified with barbed wire and guard dogs, as if they were prisons.²² To many in New York, the word “graffiti”—from the Italian verb

¹⁶ See Castleman, *supra* note 13, at 140.

¹⁷ Murray Schumach, *At \$10 Million, City Calls It a Losing Graffiti Fight*, N.Y. TIMES, Mar. 28, 1973, at 51.

¹⁸ See Castleman, *supra* note 13, at 140.

¹⁹ See Mittman, *supra* note 9, at 197.

²⁰ See *id.* at 203.

²¹ The theory suggests that police should address these smaller offenses to discourage more serious crimes. See George Kelling & James O. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982). The effects of this policy have been disproportionately racist and resulted in discriminatory policies such as stop-and-frisk. See *How a Theory of Crime And Policing Was Born, and Went Terribly Wrong*, NAT’L PUB. RADIO (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong>.

²² See, e.g., Ari L. Goldman, *Dogs to Patrol Subway Yards*, N.Y. TIMES, Sept. 15, 1981, at A1; Ari L. Goldman, *City to Use Pits of Barbed Wire In Graffiti War*, N.Y. TIMES, Dec. 15, 1981, at B1; Mittman, *supra* note 9, at 199.

“graffiare,”²³ “to scratch”—had become synonymous with vandalism, disorder, and disrespect for property. To others, it was “the bastard child of freedom and chaos.”²⁴

Wolkoff bought his Long Island City factory against this backdrop. Until the early 1990s, he leased it to a company that made record-player accessories, tapes, and CD covers.²⁵ When that tenant left, Wolkoff converted the complex into smaller studios and leased space to photographers, furniture makers, sculptors, jewelers, and other artists and entrepreneurs.²⁶ It became known as Crane Street Studios. Lease agreements fixed the rent at below-market rates, sometimes \$1 per square foot.²⁷ The agreements also specified that Wolkoff could notify tenants 60 or 90 days in advance that he was cancelling their leases and demolishing the building. He included these provisions in his leases for at least 15 years.²⁸

While the Crane Street artists worked inside, graffiti writers began to target the building’s exterior. In the early 1990s, Wolkoff met Pat DiLillo, a Queens local who had started Graffiti Terminators, a community service organization that cleaned up graffiti around the city.²⁹ Though he was usually in the business of removing graffiti, DiLillo had decided he liked some of the work. He wondered if, with his supervision and Wolkoff’s permission, writers could work on the

²³ *Graffiare*, CAMBRIDGE ITALIAN-ENGLISH DICTIONARY, <https://dictionary.cambridge.org/dictionary/italian-english/> (last visited Mar. 2, 2021).

²⁴ See Gastman & Neelon, *supra* note 8, at 31.

²⁵ See Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, is Whited Out in Queens*, N.Y. TIMES (Nov. 19, 2013), <https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html>.

²⁶ Interview with Marie Cecile Flageul, Co-Founder, 5Pointz Creates and Curator, Museum of Street Art (MoSA), via Zoom (Jan. 22, 2021).

²⁷ Tessa Stuart, *The Queens Graffiti Mecca 5Pointz Was Never Just About the Painting on the Outside*, VILLAGE VOICE (July 15, 2014), <https://www.villagevoice.com/2014/07/15/the-queens-graffiti-mecca-5-pointz-was-never-just-about-the-painting-on-the-outside/>.

²⁸ Transcript of Injunction Hearing, *supra* note 2, at 142.

²⁹ Transcript of Trial at 1437, *Cohen v. G&M Realty L.P.*, 320 F.Supp.3d 421 (E.D.N.Y. 2018) (No.13 Civ. 5612).

outer walls of Crane Street Studios.³⁰ Wolkoff agreed. DiLillo, who was neither a graffiti writer nor an artist himself, named the walls “The Phun Phactory” and incorporated the organization as a non-profit, The Phun Phactory Aerosol Art Corporation.³¹

Writer Jonathan Cohen, known as Meres One, heard about the Phun Phactory in 1994.³² Cohen was born in the South Bronx in 1973 and grew up in Queens.³³ He began writing graffiti as a teenager, working mostly illegally, on abandoned buildings and tracksides.³⁴ In 1991, he enrolled at the Fashion Institute of Technology to study illustration.³⁵ He wanted to start painting larger “productions”³⁶ that included both lettering and images. His search led him to the Phun Phactory, which was by then known to the graffiti community as a “legal outlet”³⁷ where writers were permitted to work.

In 2001, DiLillo left the Phun Phactory after a disagreement with Wolkoff. The system unraveled. Wolkoff said he would continue to allow art on the exterior walls if someone else ran the program.³⁸ Cohen considered the idea, and eventually he approached Wolkoff. In 2002, they met to discuss plans, in what Cohen recalled as a “quick meeting in the loading dock” and “a handshake.”³⁹ Wolkoff had three rules: no religious art, no political art, and no pornography.⁴⁰ Cohen would be the curator. Nothing was put in writing.⁴¹ Wolkoff gave Cohen the keys to a small, windowless office space about the size of a bathroom.⁴² Cohen would also use another

³⁰ See *Moral Rights in Street Art: The 5Pointz Story*, THE ART LAW PODCAST (Apr. 9, 2018), <http://artlawpodcast.com/2018/04/09/5pointz-and-the-moral-rights-of-artists/>.

³¹ N.Y. ST. DEP’T OF ST., The Phun Phactory Aerosol Art Corporation Entity Information (Aug. 14, 1997).

³² Transcript of Trial, *supra* note 29, at 1507.

³³ Meres One Art, <http://www.meresone.com/> (last visited Mar. 21, 2021).

³⁴ Transcript of Trial, *supra* note 29, at 1437.

³⁵ Meres One Art, *supra* note 33.

³⁶ See *id.*; see also THE ART LAW PODCAST (Apr. 9, 2018), *supra* note 30.

³⁷ Transcript of Trial, *supra* note 29, at 1437.

³⁸ *Id.* at 1438.

³⁹ See THE ART LAW PODCAST, *supra* note 30.

⁴⁰ See *Cohen v. G&M Realty L.P.*, 988 F.Supp.2d 212, 218 (E.D.N.Y. 2013).

⁴¹ Transcript of Trial, *supra* note 29, at 1441.

⁴² *Id.* at 1440; see also Interview with Marie Cecile Flageul, *supra* note 26.

small storage space and a supply closet for ladders, scaffolds, and rollers.⁴³ At one point, he also rented a studio space in the building, for which he for which he paid rent, in cash, to Wolkoff each month.⁴⁴

Cohen renamed the walls “5Pointz: The Institute of Higher Burnin’.” The name “5Pointz” signified a place where the five New York boroughs met.⁴⁵ He avoided using the word “graffiti” because it had so many negative connotations.⁴⁶ In 2004, Cohen incorporated 5Pointz as a non-profit, The 5Pointz Aerosol Art Center, Inc.⁴⁷ In an interview that year, he distinguished between graffiti and aerosol art: “Graffiti is a label for writers who vandalize. Aerosol art takes hours and days. It’s a form of calligraphy.”⁴⁸



Jonathan Cohen, known as Meres One, at 5Pointz. The lightbulb is his signature image.

Cohen was never an employee of Wolkoff nor of the 5Pointz non-profit. He was never paid for his work, whether curatorial, administrative, artistic or otherwise, and he worked seven

⁴³ See Interview with Marie Cecile Flageul, *supra* note 26.

⁴⁴ Transcript of Trial, *supra* note 29, at 1446.

⁴⁵ See *id.*

⁴⁶ THE ART LAW PODCAST, *supra* note 29.

⁴⁷ N.Y. ST. DEP’T OF ST., 5Pointz Aerosol Art Center, Inc. Entity Information (July 02, 2004).

⁴⁸ Transcript of Trial, *supra* note 29, at 1446.

days a week.⁴⁹ He supported himself by building an art career outside of 5Pointz. (“If I relied on 5Pointz for a living, I would be living in a box, in the loading dock,”⁵⁰ Cohen would say later.)

When he took over on a Tuesday in 2002, Cohen found the building dark, run-down, and infested with rats.⁵¹ Over time, as he cleaned and improved the space, and invited and supervised the artists working on its walls, 5Pointz began to attract attention from community members, art fans, and tourists. In 2007, singer Joss Stone filmed the music video for her single “Tell Me ‘Bout It” at 5Pointz, with the artwork on prominent display.⁵² At one point in the video, Stone stands on a large, exterior staircase in front of a wall covered in murals.



The exterior staircase at 5Pointz.

⁴⁹ Interview with Marie Cecile Flageul, *supra* note 26.

⁵⁰ Transcript of Trial, *supra* note 29, at 1452.

⁵¹ Transcript of Trial, *supra* note 29, at 1448.

⁵² Joss Stone, *Tell Me ‘Bout It*, YOUTUBE (Nov. 14, 2007), https://www.youtube.com/watch?v=IhUmko2z_ds&ab_channel=JossStoneVEVO.

On April 10, 2009, that staircase collapsed.⁵³ Nicole Gagne, a jeweler and tenant at Crane Street Studios, was seriously injured.⁵⁴ The New York City Department of Buildings issued Wolkoff several violations and ordered that the studios from the second to fifth floors be vacated.⁵⁵ None of the indoor studio spaces above the ground floor has been rented since.⁵⁶ A few businesses remained on the ground floor: a few design studios, a bakery, some garment shops, and an Irish pub called the Shannon Pot. The accident was the end of Crane Street Studios, which had nearly 200 artists' studios.⁵⁷ It looked like the end of 5Pointz too. The artists stopped painting. Wolkoff did construction and repairs and repainted most of the walls.

Then, in August 2009, Wolkoff made a public statement about inviting the artists back. He and Cohen again met to discuss.⁵⁸ Cohen saw a second chance for 5Pointz and went to work. This time, he also had the help of Marie Cecile Flageul, a professional event planner and marketer.⁵⁹

While Cohen managed the art, Flageul put together a calendar of events for the summer season. In 2010, *TimeOut* published the 5Pointz summer calendar on its website.⁶⁰ By 2011 and 2012, the 5Pointz team was running about fifty events between May and October.⁶¹ All events were free and open to the public. Alcohol and drugs were not permitted. Flageul began to hire summer interns, often college students studying art or design in New York. Cohen led over 100 school tours of 5Pointz every year for students of all ages.⁶²

⁵³ Cara Buckley, *One Artist is Hurt, and 200 Others Are Feeling the Pain*, N.Y. TIMES, Apr. 18, 2009, <https://www.nytimes.com/2009/04/19/nyregion/19pointz.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Interview with Marie Cecile Flageul, *supra* note 26.

⁵⁷ *See* Buckley, *supra* note 53.

⁵⁸ Transcript of Trial, *supra* note 29, at 1454.

⁵⁹ Interview with Marie Cecile Flageul, *supra* note 26.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Complaint at 62, Cohen v. G&M Realty L.P., 320 F.Supp.3d 421 (E.D.N.Y. 2018) (No.13 Civ. 5612).

5Pointz inspired artists of all kinds: filmmakers, musicians, fashion designers, and photographers. The final scene of the 2013 film *Now You See Me* was filmed at 5Pointz.⁶³ Donna Karan used images of the murals in her Madison Avenue store for her 2013 spring and summer collection.⁶⁴ Usher performed there while on tour.⁶⁵ 5Pointz was the location of choice for engagement photos, weddings, and even a funeral.⁶⁶

Wolkoff handled the arrangements and contracts for *Now You See Me*, but little else.⁶⁷ He came once a month to collect rent in cash from the tenants on the building's ground floor. He never gave any funding or supplies to 5Pointz. The artists that painted at 5Pointz all worked directly with Cohen. Wolkoff and Cohen had little involvement with each other.



Gerald Wolkoff and his son, David Wolkoff, at 5Pointz.

⁶³ Transcript of Trial, *supra* note 29, at 1451.

⁶⁴ Complaint, *supra* note 62, at 64.

⁶⁵ Cohen v. G&M Realty L.P., 320 F.Supp.3d 421, 433 (E.D.N.Y. 2018), *aff'd sub nom* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

⁶⁶ Interview with Marie Cecile Flageul, *supra* note 26.

⁶⁷ Transcript of Trial, *supra* note 29, at 1451.

Flageul and Cohen lived nearby in Long Island City, Queens, just blocks from 5Pointz. In the spring of 2013, Flageul saw a post on the Facebook page for Queens Community Board 2 about a town hall at MoMA PS1, across the street from 5Pointz.⁶⁸ The agenda listed an application by G&M Realty (Wolkoff’s company, named for himself and his wife, Michele), for a zoning variance.⁶⁹ A variance is a special permit for exemption from zoning rules that would otherwise apply.



The artwork at 5Pointz included writers’ tags as well as larger productions.

G&M Realty sought the special permit to demolish 5Pointz and replace it with two luxury condominium towers, forty-one and forty-seven stories high. Together the buildings

⁶⁸ *Id.* In New York City, community boards are “local representative bodies” of city government that advise on land use and zoning matters. That role, however, is advisory only. The 50 members of CB2 are all volunteers, appointed by the Borough President and City Council members. See About Community Boards, New York City Mayor’s Community Affairs Unit, <https://www1.nyc.gov/site/cau/community-boards/about-commmunity-boards.page#cb> (last visited Feb. 26, 2021).

⁶⁹ Interview with Marie Cecile Flageul, *supra* note 26.

would house 1,000 apartment units.⁷⁰ The development would also include 50,000 square feet of retail space, 32,000 square feet of public open space, 2,200 square feet for artists' studios, and a parking garage with 250 spaces.⁷¹ If granted, the permit would increase the value of the property from \$40 million to about \$200 million.⁷²

Condominium buildings like these had become more common in Long Island City. Historically, the area was industrial, but much of it was rezoned in 2001.⁷³ The new zoning rules permitted residential buildings and more mixed-use developments for retail and community use.⁷⁴ The result was a surge of new construction and rapid gentrification. In 2001, the Department of City Planning had estimated that the zoning changes would lead to the construction of about 300 new housing units in total.⁷⁵ The recession from 2008-2012 slowed development slightly, but by 2018, more than 10,000 new housing units would be built in Long Island City.⁷⁶

Later that spring, in 2013, Queens Community Board 2 voted to reject G&M's special permit application because the proposal did not give enough benefits to the community.⁷⁷ Among other ideas, the Board suggested that G&M include benefits such as low-cost studio spaces and partnerships with local arts organizations like 5Pointz.⁷⁸ By the end of June, Wolkoff and the Board had made a deal.⁷⁹ Wolkoff would provide 75 affordable apartment units, 20 artists'

⁷⁰ N.Y. DEP'T OF CITY PLAN., CITY PLAN. COMM'N, RES. C 130191 ZSQ (Aug. 21, 2013) at 1.

⁷¹ *Id.*

⁷² Transcript of Trial, *supra* note 29, at 1458.

⁷³ Terry Pristin, *Council Approves a Zoning Plan to Revitalize Long Island City*, N.Y. TIMES, Jul. 27, 2001, at B4.

⁷⁴ *See id.*

⁷⁵ MUN. ART SOC'Y OF N.Y., A TALE OF TWO REZONINGS: TAKING A HARDER LOOK AT CEQR 4 (2018).

⁷⁶ *See id.*

⁷⁷ *See* N.Y. DEP'T OF CITY PLAN., CITY PLAN. COMM'N, *supra* note 70, at 11.

⁷⁸ *Id.*

⁷⁹ Interview with Marie Cecile Flageul, *supra* note 26.

studios, and parking spots at below-market rates. The Queens Borough President agreed to the special permit, and the proposal went on to the City Planning Commission on those terms.

Members of the 5Pointz community attended every meeting. At the City Planning Commission Public Hearing on July 24, 2013, they testified about “the need to preserve 5Pointz because of its contribution to the international art world.”⁸⁰ On August 21, the City Planning Commission approved the special permit.

In the meantime, 5Pointz had its busiest summer yet. Central Park Summer Stage had approached Flageul and Cohen about hosting DJ Kool Herc at 5Pointz.⁸¹ The result was “Summer 2013: 40 Years of Hip-Hop,” a summer-long “tribute to both the graffiti hub’s decade in existence and the culture that inspired it”⁸² with rotating gallery exhibits and weekly performances by resident 5Pointz DJ Marley Marl.

The owner of nearby restaurant John Brown Smokehouse had also invited Cohen and others to paint a mural on the restaurant’s back patio. It was there that Flageul and Cohen met Jeanine Chanes, who introduced herself as the attorney for the restaurant owner.⁸³ If they ever needed anything, she said, they should let her know.

Cohen soon received an eviction notice. The notice was for his small office space in the building; it said nothing about the exterior walls or the artwork.⁸⁴ Chanes represented Cohen and some of the other building tenants in housing court and secured their tenancy through the end of December 2013.⁸⁵

⁸⁰ See N.Y. DEP’T OF CITY PLAN., CITY PLAN. COMM’N, *supra* note 70, at 12.

⁸¹ Interview with Marie Cecile Flageul, *supra* note 26.

⁸² Kenny Herzog, “Celebrating 40 Years of Hip-Hop”: 5Pointz Reopens for the Season, TIME OUT N.Y. (Apr. 29, 2013), <https://www.timeout.com/newyork/things-to-do/celebrating-40-years-of-hip-hop-5-pointz-reopens-for-the-season>.

⁸³ Interview with Marie Cecile Flageul, *supra* note 26.

⁸⁴ Transcript of Trial, *supra* note 29, at 1459.

⁸⁵ Interview with Marie Cecile Flageul, *supra* note 26.

Cohen had also filed an application with the New York City Landmark Preservation Commission to designate 5Pointz as a city landmark. On August 21, the same day the City Planning Commission approved the special permit, the Landmark Preservation Commission rejected the application. 5Pointz was not old enough.⁸⁶ To be designated a landmark in New York City, a structure must be at least 30 years old.⁸⁷ The Neptune Meter Factory had been built in 1892, but 5Pointz (when combined with its predecessor, the Phun Phactory) was only twenty. The temporary nature of the art also hurt 5Pointz’s chance of success. In its rejection letter, the Landmarks Preservation Commission noted that the artwork was “constantly changing,” so “many of the pieces are even more recent”⁸⁸ than the required thirty years.

For the first time in 5Pointz history, Cohen was also trying to fundraise. He hoped to raise enough money not to buy the building—a goal which would have been out of reach, especially if the variance were granted—but to remove and preserve the artwork.⁸⁹ Wolkoff and Cohen had never discussed removal, but much of the artwork had been painted on drywall, doors, or sheetrock that could have been removed and saved relatively easily.⁹⁰ The siding that wrapped around the entire back of the building, for example, was all removable.⁹¹

But things were moving quickly. Once the City Planning Commission approved the special permit, the last stop for G&M Realty was the New York City Council, which would vote after two public hearings. In September, Chanes reached out to Cohen and Flageul. She had done

⁸⁶ N.Y.C. LANDMARKS PRESERVATION COMM’N, LETTER RE: 5POINTZ WAREHOUSE, DAVIS STREET AND JACKSON AVENUE, QUEENS (Aug. 20, 2013).

⁸⁷ N.Y.C. LANDMARKS PRESERVATION COMM’N, DESIGNATION TYPES & CRITERIA, <https://www1.nyc.gov/site/lpc/designations/landmark-types-criteria.page> (last visited Mar. 30, 2021).

⁸⁸ *See id.*

⁸⁹ Interview with Marie Cecile Flageul, *supra* note 26.

⁹⁰ Cohen v. G&M Realty L.P., 320 F.Supp.3d 421, 444 (E.D.N.Y. 2018), *aff’d sub nom* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

⁹¹ Transcript of Trial, *supra* note 29, at 1466.

some research, she said, and found an obscure but valid law that might help the artists save their work.⁹²

The Visual Artists Rights Act of 1990 (VARA) is part of United States copyright law. Copyright law protects works of literature, art, music, and other “original works of authorship.”⁹³ In the United States, copyright is traditionally an economic right. A copyright gives its owner the exclusive right to reproduce, distribute, display, and publicly perform the corresponding work, and to claim the economic benefits that follow.⁹⁴ A copyright vests automatically in the artist or author of a work, but she can choose to sell or transfer that right—and the consequent economic benefits—to subsequent owners.

VARA, by contrast, protects the moral rights of artists in certain cases. Where VARA applies, it is in addition to the traditional economic protections of copyright. While economic rights enable an artist to control and maximize the profits from her work, moral rights allow her to control and preserve her personal, creative interests in the work. Moral rights originated in France as “le droit moral,” in response to the French Revolution, the rise of Romanticism, and a focus on individual intellectual creation.⁹⁵ Protections for moral rights are more common in European law for this reason. Moral rights include the artist’s ability to prevent changes to her work, forbid its destruction, and require proper attribution. Unlike her economic rights, the artist

⁹² Interview with Marie Cecile Flageul, *supra* note 26.

⁹³ 17 U.S.C. § 102(a) (1976).

⁹⁴ 17 U.S.C. § 106 (1990).

⁹⁵ Christopher J. Robinson, *The Recognized Stature Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1938 (2000).

cannot transfer her moral rights to another person. In the United States, she can, however, choose to waive them herself.⁹⁶

Congress passed VARA after the United States joined the Berne Convention for the Protection of Literary and Artistic Works in 1989. Before then, eleven U.S. states had some form of moral rights protection for artists.⁹⁷ The Berne Convention requires its member countries to protect moral rights, but the United States, with its strong commitment to economic and property rights, had hesitated to compromise those rights in the name of authorship.⁹⁸ For that reason, when Congress granted federal protection for moral rights, it did so very narrowly.

VARA covers only “works of visual art.”⁹⁹ A “work of visual art” is defined as “a painting, drawing, print, or sculpture”¹⁰⁰ of which there is either a single copy or, for photographs and sculptures, 200 or fewer copies. Works made for hire, such as by an employee for an employer, are not protected. Audiovisual works, such as films, are also not protected.¹⁰¹

Qualifying works receive two forms of protection: the right of attribution and the right of integrity.¹⁰² The first is the artist’s right to claim she made her work and to prevent the use of her name in connection with works she did not make. The second is her right to prevent “intentional distortion, mutilation, or other modification”¹⁰³ of her work that would harm her reputation. In addition, if her work is “of recognized stature,”¹⁰⁴ the artist can prevent not only its modification,

⁹⁶ In most European countries with moral rights regimes, moral rights cannot be waived.

⁹⁷ H.R. REP. NO. 101-514 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6919.

⁹⁸ *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at* Paris, July 24, 1971, art. 6bis, S. TREATY DOC. NO. 99-27, 25 U.S.T. 1341; *see also* Robinson, *supra* note 95, at 1940.

⁹⁹ 17 U.S.C. § 106A (1990).

¹⁰⁰ 17 U.S.C. § 101 (2010).

¹⁰¹ *See* H.R. REP. NO. 101-514 at 6919.

¹⁰² 17 U.S.C. § 106A (1990).

¹⁰³ 17 U.S.C. § 106A(a)(3)(A) (1990).

¹⁰⁴ 17 U.S.C. § 106A(a)(3)(B) (1990).

but also its destruction. If someone destroys that work on purpose, the artist has the right to sue. The law does not define “recognized stature.”

If the work is on a building, additional considerations apply. The building owner, of course, has a property right in the building. The artist has a copyright in her work. If her work qualifies under VARA, she may also have moral rights protection. In the context of graffiti and street art, the question becomes how these competing rights affect each other.

Under VARA, building owners have two ways to remove protected works. The first is with a waiver, and the second is with notice to the artist. First, the building owner and artist can agree in writing that (i) because the work is installed on a building, it may be destroyed if removed, and (ii) the artist therefore waives her moral rights under VARA.¹⁰⁵ Second, and regardless of whether a waiver has been signed, the building owner can notify the artist of plans to remove the artwork.¹⁰⁶ The artist has 90 days to remove the work herself or pay for its removal. If she does not do either, the building owner can then remove the work without liability under VARA.

When an artist creates a work on a building, she has a copyright in that work, whether she received permission from the property owner or not. Her work cannot be copied without her approval. If the artist had permission of the building owner and her work is protected by VARA, then, to remove the work, the building owner must also follow these statutory provisions.

If the artist did not have permission from the building owner and thus put up her work illegally, the situation may look different. In the United States, works made illegally can still receive copyright protection,¹⁰⁷ but other issues may follow: first, a court may be less likely to

¹⁰⁵ 17 U.S.C. § 113(d)(1) (1990).

¹⁰⁶ *Id.*

¹⁰⁷ See generally Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J. L. & TECH. 454 (2014).

find that an illegal work is protected by VARA, and second, criminal penalties for graffiti and trespass may apply.

Neither the quality of the art nor the reputation of the artist will be a shield in that case. For example, in 2009, Shepard Fairey was well-known for his “Hope” poster of Barack Obama. His first-ever solo exhibition was about to open at the Institute of Contemporary Art in Boston. Fairey was in a cab on his way to the opening when police stopped the car and arrested him on two outstanding warrants for graffiti charges.¹⁰⁸ Fairey ultimately plead guilty to one count of property defacement and two counts of property destruction.¹⁰⁹ Under his plea agreement, he was required to pay \$2,000 to a graffiti removal organization.¹¹⁰ He was also forbidden from carrying tagging supplies in Boston and required to let officials know whenever he is in the area.¹¹¹

Because Wolkoff gave Cohen his permission from the start, in that quick meeting on the loading dock in 2002, these kinds of criminal penalties never applied at 5Pointz. While copyright and VARA are part of federal law, much of criminal law varies from state to state. In New York, writing graffiti on any building, public or private, “without the express permission”¹¹² of the owner is a misdemeanor punishable by imprisonment of up to one year or a fine of up to \$1,000.¹¹³

Those criminal consequences did not apply, but unbeknownst to the 5Pointz artists, VARA did. They had never heard of it until September 2013, when Chanes came to the loading dock to tell them what she had found.¹¹⁴ Neither, it seemed, had Wolkoff. He would claim in

¹⁰⁸ See Abby Goodnough, *Boston Vandalism Charges Stir Debate on Art’s Place*, N.Y. TIMES (Mar. 11, 2009), <https://www.nytimes.com/2009/03/12/arts/design/12boston.html>.

¹⁰⁹ Lisa Tobin, *Shepard Fairey: No Hard Feelings*, BOSTON, WBUR NEWS (Jul. 10, 2009), <https://www.wbur.org/news/2009/07/10/shepard-interview>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² N.Y. PENAL CODE §§ 70.15, 80.05, 145.60, 145.65 (1992).

¹¹³ *See id.*

¹¹⁴ *See, e.g.* THE ART LAW PODCAST, *supra* note 29; Interview with Marie Cecile Flageul, *supra* note 26.

response that the artists had known—that everyone knew—he would eventually demolish the building, that it was only a question of when. Wolkoff and Cohen had never signed any waivers or agreements about the art, nor had they discussed removal, or what might happen if the building were demolished.¹¹⁵

By 2013, VARA had been in effect for only 23 years, which, in the life of a law, is not much time to generate precedent. There had been only a handful of VARA cases since the law was passed in 1990.¹¹⁶ The most relevant to 5Pointz was *Carter v. Helmsley-Spear, Inc.*, in which the court defined “recognized stature” with a two-part test.¹¹⁷

5Pointz would be the next test of VARA. On October 9, 2013, the New York City Council voted unanimously to approve G&M Realty’s special permit application.¹¹⁸ On October 10, Cohen and sixteen other artists filed a lawsuit in the Eastern District of New York. The 17 plaintiffs named 24 specific works of art in the complaint.¹¹⁹ They claimed that each was of recognized stature under VARA and sought an injunction to prevent Wolkoff from destroying the works.¹²⁰ They owned all the copyrights to their work, and Wolkoff had never asked them to transfer the titles to him.¹²¹ They had worked for free and never signed waivers.¹²²

The court held a hearing over two days, at which Wolkoff, art experts, and several of the plaintiff-artists all testified.¹²³ On November 12, the court denied the injunction with a note that

¹¹⁵ That the artists considered removal an acceptable form of preservation indicates some of the differences in moral rights between the United States and other countries. In the European tradition, moral rights require preservation of art in its original form and exact place. Removal is a different approach.

¹¹⁶ *See, e.g.*, *Carter v. Helmsley-Spear, Inc.*, 861 F.Supp. 303 (S.D.N.Y. 1994); *Martin v. City of Indianapolis*, 192 F.3d 1608 (7th Cir. 1999).

¹¹⁷ 861 F.Supp. 303 (S.D.N.Y. 1994).

¹¹⁸ Interview with Marie Cecile Flageul, *supra* note 26.

¹¹⁹ Complaint, *supra* note 62.

¹²⁰ *Id.* at 183–85.

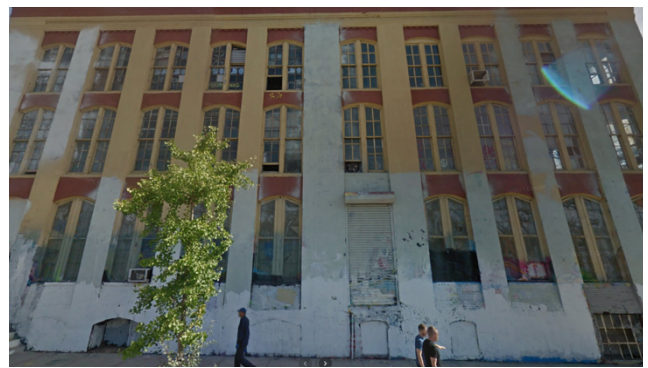
¹²¹ A work must usually be registered with the U.S. Copyright Office before a copyright infringement suit can be filed. VARA claims, however, are an exception. 17 U.S.C. § 411 (2008).

¹²² Complaint, *supra* note 62 at 191.

¹²³ *See generally*, Transcript of Injunction Hearing, *supra* note 3.

its full opinion would soon follow.¹²⁴ Before Judge Frederic Block issued that decision, though, Wolkoff hired workers to whitewash the building in the middle of the night on November 19.

At 6:30 in the morning on November 19, Cohen’s phone rang.¹²⁵ He and Flageul went to 5Pointz immediately. The whitewashing was still ongoing. The workers had been granted police protection and started at 2:00 in the morning.¹²⁶ When Cohen tried to hit an emergency brake on one of the lifts, a police officer threatened to arrest him. Cohen and Flageul knew most of their local police officers from their years of work at 5Pointz, but these officers were from a different precinct.¹²⁷ The whitewashing was not uniform. In some areas, entire pieces were painted over; in others, works were covered only partially. A white smiley face had been painted over some of the artwork.¹²⁸



5Pointz before and after the whitewashing.

Judge Block issued the court’s full opinion the next day. The denial of the injunction was not a license for Wolkoff to destroy the art. Had the court gone the other way and granted the

¹²⁴ See Cohen v. G&M Realty L.P., 988 F.Supp.2d 212, 214 (E.D.N.Y. 2013).

¹²⁵ THE ART LAW PODCAST, *supra* note 29.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Amended Complaint & Demand for Jury Trial at 84, Cohen v. G&M Realty L.P., 320 F.Supp.3d 421 (E.D.N.Y. 2018) (No.13 Civ. 5612).

injunction, Wolkoff would have been forbidden from destroying it. But the court had chosen not to grant the injunction because the case was not that simple.



The whitewashing was uneven. Some pieces were covered completely, while others remained visible.

The specific question was a new one for the court. It had never considered “whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law.”¹²⁹ Though the *Carter* test gave a guideline, VARA itself had no definition of “recognized stature.” At the hearing, the plaintiffs had argued for a “more expansive”¹³⁰ definition, while the defendants advocated a more “academic”¹³¹ understanding. The choice between these different approaches would be best resolved with a trial and a jury, not a short hearing. Noting that all of the works had already been destroyed—“and the Court wished it had the power to preserve them”¹³²—the court suggested that monetary damages could

¹²⁹ See *Cohen v. G&M Realty L.P.*, 988 F.Supp.2d 212, 214 (E.D.N.Y. 2013).

¹³⁰ *Id.* at 226.

¹³¹ *Id.*

¹³² *Id.*

compensate the artists for their losses because, after all, “paintings generally are meant to be sold.”¹³³

Four years later, the case finally went to trial. By then it involved 21 plaintiffs and 49 works of art. From October 16 to November 17, 2017, Judge Block and eight jurors heard from 29 witnesses.¹³⁴ Wolkoff testified, as did Cohen, many other artists, three experts for the plaintiffs, and two for the defendants. Some of the artists traveled from other countries to testify. Others spoke by Skype. Before trial began each morning, the artists met with a Buddhist monk, who also attended all of the proceedings.¹³⁵

For each of the 49 works, the jury would decide whether it was “of recognized stature and/or was mutilated, distorted, or otherwise modified to the prejudice of the artist’s honor or reputation.”¹³⁶ Its verdict sheet was 98 pages long. The jury found that 28 works of recognized stature had been destroyed and eight others damaged to the detriment of the artists’ reputations, for a total of 36 violations of VARA.¹³⁷ It recommended \$545,750 in actual damages and \$651,750 in statutory damages for the artists.¹³⁸

Oddly enough, just before the trial ended, both sides agreed to change the proceeding from a jury trial to a bench trial, with only the judge presiding.¹³⁹ The judge, however, noted how much time, effort, and diligence the jurors had put into the case. He decided not to tell the jurors about the change and instead kept them on in an advisory role. He took their findings into consideration when he made his final decision.¹⁴⁰

¹³³ *Id.* at 226–27.

¹³⁴ *See* Cohen v. G&M Realty L.P., 320 F.Supp.3d 421, 431 (E.D.N.Y. 2018), *aff’d sub nom* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

¹³⁵ Interview with Marie Cecile Flageul, *supra* note 26.

¹³⁶ *See* Cohen, 320 F.Supp.3d at 431.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ The reason for this decision is not part of the public record.

¹⁴⁰ *See id.* at 430–31.

On February 12, 2018, Judge Block issued that decision. It found that 45 of the 49 works were of recognized stature, and that their destruction had been a violation of VARA.¹⁴¹ For the four works that did not qualify, the court had deferred to the jury.¹⁴² Two had been gifts to the Shannon Pot, the pub on the ground floor, and were not part of 5Pointz. They had not attracted much attention on social media or otherwise. Another was Halloween-themed and also received little attention. The last was on a tin shack near the loading dock where no one really wanted to paint.¹⁴³



“Burner and Love Girl,” by Jonathan Cohen and Maria Castillo, known as Toofly, was one of the paintings at issue in the case. The court determined it was of recognized stature.

Plaintiffs in copyright lawsuits can recover actual damages, statutory damages, or a combination of the two.¹⁴⁴ Actual damages are meant to compensate plaintiffs for the actual

¹⁴¹ *See id.* at 439.

¹⁴² *See id.* at 440.

¹⁴³ *See id.*

¹⁴⁴ Plaintiffs can choose to receive actual or statutory damages, while the court can choose to award statutory damages in either case. *See* 17 U.S.C. § 504.

losses they suffered: the amount of money they would have made if they could have sold the work, for example. Statutory damages are, as the name suggests, prescribed by statute, and awarded per work, not per violation. Statutory damages for copyright infringement can be between \$750 and \$30,000 per work. If the infringement was “committed willfully,”¹⁴⁵ that amount can increase up to \$150,000. The court has discretion to decide the amount of statutory damages, if any, to award.¹⁴⁶

The court did not award any actual damages in this case. Because the paintings were so large, so unique, and had never been for sale, determinations of their worth proved too elusive. The plaintiffs and defendants had each called experts to testify about the paintings’ market value. The experts’ theories differed significantly. The court concluded that the plaintiffs had not “established a reliable market value”¹⁴⁷ for the works and instead used its discretion to give statutory damages.

Wolkoff had removed the works on purpose. He could have given the artists 90 days’ notice, as VARA requires, but he chose not to comply. With that time, they could have removed much of the work to preserve or sell it.¹⁴⁸ One of the artists had received interest from a European collector who had also bought pieces of the Berlin Wall.¹⁴⁹ Wolkoff testified that he had indeed hired people to whitewash the wall and that he did not want to wait three months for the art to come down.¹⁵⁰ The court called his actions “the epitome of willfulness.”¹⁵¹ For each of

¹⁴⁵ 17 U.S.C. § 504.

¹⁴⁶ *Id.*

¹⁴⁷ *See Cohen*, 320 F.Supp.3d at 442.

¹⁴⁸ *See id.* at 444.

¹⁴⁹ Interview with Marie Cecile Flageul, *supra* note 26.

¹⁵⁰ *See Cohen*, 320 F.Supp.3d at 444.

¹⁵¹ *See id.* at 445.

the 45 violations, it awarded the artists the maximum amount of damages of \$150,000, for a stunning total of \$6.75 million.¹⁵²

Wolkoff and G&M Realty appealed. Two years later, in February 2020, the Second Circuit affirmed the trial court's decision.¹⁵³ Wolkoff and G&M Realty appealed to the Supreme Court. In October 2020, the Supreme Court declined to hear the case.¹⁵⁴

The outcome turned on the definition of “recognized stature.” Without a definition in the statute, the court had to write its own. This task is especially tricky because courts also try to avoid making judgments about the merits of art. In *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes famously explained the principle of aesthetic neutrality: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”¹⁵⁵ While courts have claimed to follow Holmes's lead ever since, the line between legal and aesthetic judgments is not always so clear.¹⁵⁶ A court may call itself neutral, but “the move to a new analytical perspective is itself a decision of aesthetic significance.”¹⁵⁷ When a court recognizes art, it legitimizes that art. The law does not just follow aesthetic movements; it sustains them.

The evolution of “recognized stature” illustrates this idea. The earlier case of *Carter v. Helmsley-Spear, Inc.* defined the term with a two-part test.¹⁵⁸ First, the court asks if the art is “meritorious,” and second, if its merit was “recognized” by a cross-section of society or other members of the artistic community.¹⁵⁹ In the 5Pointz case, the trial court used this test and added

¹⁵² See *id.* at 447.

¹⁵³ See *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167 (2d Cir. 2020), *cert. denied*, 592 U.S. __ (2020).

¹⁵⁴ Order List, 592 U.S. __ (2020) (No. 20-66).

¹⁵⁵ 188 U.S. 239, 251 (1903).

¹⁵⁶ See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 250 (1998).

¹⁵⁷ *Id.*

¹⁵⁸ 861 F.Supp. 303 (S.D.N.Y. 1994).

¹⁵⁹ See *Cohen*, 320 F.Supp.3d at 437.

“common sense.”¹⁶⁰ On appeal, the Second Circuit restated the idea that a work is “of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”¹⁶¹

Communities, as a result, were critical to the case. There were the jurors as representatives of American society, the artists as members of the aerosol art community, and the experts as academics, appraisers, and members of the art world. With input from all of these groups, the court concluded that the works in question were indeed of recognized stature. Under the law, then, art is a community enterprise. Our definitions of art will depend on the communities we consult: on graffiti writers, the art world, property developers, and the justice system. 5Pointz thus became not only the convergence of the five boroughs, but an inflection in what we understand art to be.

The Second Circuit described the “relevant community” as “the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.”¹⁶² Traditionally, these curators and critics would be part of the “high art” establishment that graffiti writers and aerosol artists might criticize. Under Cohen’s vision and leadership, 5Pointz lived in both worlds. Anyone could sign up to paint, but Cohen, an artist and writer himself, maintained a clear curatorial method and order. Much of this structure came from classic elements of graffiti culture.

While graffiti is often depicted as lawless chaos, this image does not reflect its reality. Since the rise of urban graffiti in the 1970s, communities of graffiti writers have found their own

¹⁶⁰ *See id.* at 438.

¹⁶¹ *See Castillo*, 950 F.3d at 166.

¹⁶² *See id.* at 166.

ways to organize.¹⁶³ Unable to rely on traditional copyright law, especially given the underlying illegality of graffiti, writers created their own system of social order.

Where legal protections for intellectual property are not available, social norms may evolve instead.¹⁶⁴ Like many other artistic and intellectual communities, graffiti writers have developed a unique system of norms that governs their behavior.¹⁶⁵ These norms may differ from one city to the next, but in general, they dictate acceptable behaviors and consequences for failures to act accordingly. Members of the group enforce these rules against those who deviate from them. The consequences of violations can include shaming, sanctions, or expulsion from the group altogether. In spite of its appearance as spontaneous, graffiti is “actually a highly structured field of operation.”¹⁶⁶ It has a specific vocabulary, a self-regulatory code of conduct, and a set of aesthetic schools.¹⁶⁷

Graffiti has its own language. Martha Cooper and Henry Chalfant’s 1984 book *Subway Art* includes a section on the vocabulary of graffiti writers.¹⁶⁸ The list includes: “bite—to copy another’s style,” “bomb—prolific painting or marking with ink,” “buff—to erase,” “getting up—successfully hitting a train,” “piece—a painting, short for masterpiece,” “tag—a writer’s

¹⁶³ See generally, MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE (2016). While Iljadica’s field work focuses on the graffiti subculture in London, she explains that the London practices are a “transplant of graffiti culture from the US.” See Iljadica at 9–10. When discussing the origins of graffiti, she focuses on the “period of New York graffiti train writing in the late 1970s and early 1980s,” the same period discussed in the beginning portion of this paper. See Iljadica at 13.

¹⁶⁴ See Emmanuelle Fauchart and Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

¹⁶⁵ See generally, Fauchart and von Hippel, *supra*, note 164; David Fagundes and Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019); Dotan Oliar and Christopher Jon Sprigman, *There’s No Free Laugh Anymore: The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VIR. L. REV. 1787 (2008).

¹⁶⁶ Heitor Alvelos, *A Set of Premises for the Scrutiny and Interpretation of Graffiti and Street Art*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART & GRAFFITI 18 (Enrico Bonadio ed., 2019).

¹⁶⁷ Alvelos, *supra* note 166, at 19.

¹⁶⁸ MARTHA COOPER AND HENRY CHALFANT, *SUBWAY ART* 27 (1984).

signature with marker or spray paint,” “toy—an inexperienced or incompetent writer,” and, of course, “writer—practitioner of the art of graffiti.”¹⁶⁹

Writers adopt street names that often include a shortened name and number, like Demetrius’s choice of TAKI 183 and Cohen’s choice of Meres One. Names are central to graffiti culture. Tags are chances to cultivate a distinct style, to become visible and recognized. Visibility in turn leads to fame, which earns respect.¹⁷⁰ Graffiti is also very competitive, in part because it is so accessible. All you need is a spray can.

Writers work as individuals or as members of crews, which are “loosely organized group[s] of writers.”¹⁷¹ The name of a crew is often a three-letter acronym, which members of the crew can add to their pieces.¹⁷² A crew might operate by consensus.¹⁷³ For example, if a current member notices a promising writer, he will consult with the other current members about admitting the new candidate. If admitted, the new writer begins a trial period. For at least three months, the new member may not write the crew’s name in her pieces until she is confirmed and given permission to do so.¹⁷⁴ Writers plan and practice their pieces in detail before they paint. The blackbook, or sketchbook, is an “essential part of graffiti culture”¹⁷⁵ and a way for graffiti writers to experiment, develop their own styles, and improve their abilities. Skill, or “can control,”¹⁷⁶ also determines success.

Two graffiti norms are especially important: first, the rule against appropriation, and second, the expectation of impermanence. The anti-appropriation norm in graffiti is similar to

¹⁶⁹ *Id.*

¹⁷⁰ Iljadica, *supra* note 163, at 24.

¹⁷¹ See Cooper and Chalfant, *supra* note 168, at 27; see also Interview with Marie Cecile Flageul, *supra* note 26.

¹⁷² Iljadica, *supra* note 163, at 25.

¹⁷³ Interview with Marie Cecile Flageul, *supra* note 26.

¹⁷⁴ *Id.*

¹⁷⁵ Iljadica, *supra* note 163, at 200.

¹⁷⁶ See *id.* at 186.

rules in other artistic communities.¹⁷⁷ Originality is critical, but graffiti also demands that writers be original within stylistic constraints and conventions.¹⁷⁸ Writers—as artists, poets, and others have done for centuries—seek to illustrate their “indebtedness... to the creativity of others”¹⁷⁹ while also developing their own styles. Copying, or “biting,” is a sure way to lose respect in the community.

The graffiti community also has a common understanding of impermanence. Because of the nature of graffiti, the expectation of ephemerality is “deeply ingrained”¹⁸⁰ in its writers. Pieces on trains and walls are understood not to last forever, regardless of the legality of their placement.¹⁸¹ This understanding has spurred an emphasis on documentation and photographs in graffiti culture. Impermanence is an accepted component of the art form.

Cohen incorporated many of these cultural elements into 5Pointz, but with important differences. Unlike the graffiti community at large, in which members must uphold its norms, 5Pointz had a single, central enforcer: Cohen himself. It was, as the court called it, a “site of creative destruction,”¹⁸² but that cycle of creation and destruction worked under a strict set of rules.

Unlike New York’s endless subway lines, 5Pointz had limited wall space. To manage painting, Cohen developed a permitting system. When he took over in 2002, he spray-painted his email address and the words “No painting without permit” all over the building.¹⁸³ In the beginning, he spent much of his time talking to artists, explaining the rules, handling conflicts,

¹⁷⁷ See, e.g., Fauchart and von Hippel, *supra* note 164 at 192–93; Fagundes and Perzanowski, *supra* note 165 at 1333.

¹⁷⁸ See Iljadica, *supra* note 163, at 180.

¹⁷⁹ *Id.* at 176.

¹⁸⁰ *Id.* at 133.

¹⁸¹ *Id.*

¹⁸² See Cohen v. G&M Realty L.P., 320 F.Supp.3d 421, 433 (E.D.N.Y. 2018), *aff’d sub nom* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

¹⁸³ Interview with Marie Cecile Flageul, *supra* note 26.

and “getting the respect”¹⁸⁴ he would need to continue. In some ways, the development of rules at 5Pointz mirrored that of the legal system. Cohen made the comparison at trial when he stated that “laws change and things evolve.”¹⁸⁵ As 5Pointz became more popular, Flageul and Cohen made a website and a dedicated email address to manage permits and scheduling. The website read:

“To obtain a permit, please provide a work sample... so that we can properly place you. The most coveted locations are given to accomplished graffiti artists who create high-quality, conceptual work that displays great artistic detail, while the less visible areas are preserved for new and aspiring aerosol artists. The better the mural, the longer it stays up. Pieces and productions are typically left on display for anywhere from one day to two years, depending on the quality and effort of the work, as well as the pedestrian traffic level of its wall placement.”¹⁸⁶

Artists from all over the world sent Cohen their sketchbooks to review and approve.¹⁸⁷

Cohen required the artists to submit their proposed pieces and their larger portfolios so he could evaluate their skills.¹⁸⁸ After approving an artist, he issued a permit with a specified time slot and location. He also included the anticipated run time of the piece.

Whenever an artist painted at 5Pointz, Cohen was there to supervise and explain the rules of the site.¹⁸⁹ Painting season was from May to October.¹⁹⁰ Weekends were the busiest times, especially if there were evening events planned as well. Local artists usually brought their own ladders. For international or other visiting artists, Cohen provided ladders and scaffolds on wheels, which he brought to the artist’s wall before they began and broke down at the end of the

¹⁸⁴ THE ART LAW PODCAST, *supra* note 29.

¹⁸⁵ Transcript of Trial, *supra* note 29 at 1441.

¹⁸⁶ See Mekhala Chaubal & Tatum Taylor, *Lessons From 5Pointz: Toward Legal Protection of Collaborative, Evolving Heritage*, 12 FUTURE ANTERIOR: J. OF HIST. PRESERVATION, HISTORY, THEORY, AND CRITICISM 77, 78–79, (2015), citing <http://5ptz.com/experience/> (no longer available).

¹⁸⁷ *Id.*

¹⁸⁸ Transcript of Trial, *supra* note 29 at 1444.

¹⁸⁹ Interview with Marie Cecile Flageul, *supra* note 26.

¹⁹⁰ *Id.*

day.¹⁹¹ Outside of the summer high season, Cohen made exceptions when prominent artists could only visit New York in the winter. Spray paint hardens in cold weather. Cohen would accompany the artists to 5Pointz, keep his car running nearby, and store the artist's paint in the car to prevent it from freezing, and so the artist could come in for breaks.¹⁹²



Esteban del Valle's "Beauty and the Beast" was one of the works in the artists' complaint and found to be of recognized stature. To the right of the painting, spray-painted on the wall, is an explanation of the 5Pointz permit requirements and hours.

Cohen strictly enforced the two norms about appropriation and impermanence. Before an artist began a new piece, he required the artist to buff what was there completely. Cropping or otherwise incorporating another artist's work into your own was strictly prohibited. To do so would have been impermissible "biting," or copying. A new artist could not, for example, preserve a part of the prior work, incorporate it into their new piece, and claim it as their own. This requirement underscored the importance of integrity and respect between artists. In his testimony at trial, Cohen explained: "You respect your wall, you clean up what you've done, you cover what you go over completely. If you do not cover what you went over, you do not last."

¹⁹¹ *Id.*

¹⁹² *Id.*

That was rule number one. Respect in our game is everything, and if you don't have respect then you don't get respect."¹⁹³

The haphazard whitewashing was especially insulting to the artists for this reason. Some pieces were painted over completely, but many remained visible beneath uneven white paint. While the artwork may have been temporary, photographs are not. Internet searches for 5Pointz return photos of the whitewashed building as top results. This, Cohen said, has affected his honor and reputation as an artist, to use VARA's words. "I see my artwork disrespected put up online and you can see my work through the paint. If this was a graffiti game, [Wolkoff] would have a lot of problems for doing that,"¹⁹⁴ Cohen said at trial.

At 5Pointz, permanence was a function of skill. Cohen organized the space into short-term walls and long-term, sometimes permanent, walls. The shortest-term wall was known as the practice wall, a small wall near the loading dock and the ladder room where beginners could come to paint.¹⁹⁵ Teenagers came with their parents to try out the art form.¹⁹⁶ The practice wall changed frequently, even daily. Cohen explained before painters began that their art would be gone soon after it was created.¹⁹⁷

Other short-term walls were painted over every week or month. Based on his evaluation of the artist's portfolio and proposal, Cohen would determine a run time for the piece and tell the artist before they started to work. In some cases, an artist might have an off-day, finish painting, and ask Cohen to paint over it sooner rather than later. Reputation alone would not guarantee an artist a spot on a particular wall. Cohen made his judgments solely on the quality of the work

¹⁹³ See *Cohen v. G&M Realty L.P.*, 320 F.Supp.3d 421, 433 (E.D.N.Y. 2018), *aff'd sub nom* *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

¹⁹⁴ Transcript of Trial, *supra* note 29 at 1480.

¹⁹⁵ Interview with Marie Cecile Flageul, *supra* note 26.

¹⁹⁶ *Id.*

¹⁹⁷ See *Cohen*, 320 F.Supp.3d at 433.

submitted: "... because you are an advanced writer doesn't mean that you are going to perform on an advanced level... And you could be a beginner and do the performance of your lifetime and produce a piece that is so amazing that it's decided it will stay,"¹⁹⁸ he explained.

Permanence, therefore, was flexible. The longest-running, most coveted walls were those visible from the nearby 7 train. They were seen by the "millions of commuters,"¹⁹⁹ that passed by on the elevated tracks, a powerful reminder of the origins of the art form.



A view of 5Pointz from the nearby train yard. Spaces visible from the 7 train were some of the most desirable.

Like graffiti culture, 5Pointz emphasized visibility, respect, fame, and competition. Artists competed to work on the highly visible long-standing walls and tried to improve under Cohen's supervision and guidance.²⁰⁰ As graffiti writers, many likely knew these rules already. Cohen is a founder of the OTM aerosol art collective and a member of the CBS crew.²⁰¹ His curatorial system succeeded because he, too, was an artist and knew what it meant to be part of the community. Unlike on museum walls, where pieces hang separated, Cohen might encourage

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 434.

²⁰⁰ *Id.*

²⁰¹ *See Meres One Art, supra* note 33.

a conversation between artists by assigning them to work next to one other. A conversation might evolve between their works as well, one that would continue long after the scaffolds and ladders came down.²⁰²

In its own way, the “Institute of Higher Burnin” became an institution. Though it borrowed much from graffiti culture, 5Pointz was not a typical community of graffiti writers. It highlighted the aerosol art form “while also subverting the concept of an art museum”²⁰³ and the art establishment. Between 2002 and 2013, 5Pointz saw about 10,650 works painted on its walls.²⁰⁴ It became known as the “Graffiti Mecca”²⁰⁵ and “the world’s largest collection of quality outdoor aerosol art.”²⁰⁶ Cohen’s system both preserved graffiti culture and incorporated curatorial practices typically associated with “high art.” 5Pointz showed how these communities could meet and evolve into something different altogether. It was this phenomenon that enabled much of 5Pointz’s success at trial. It spoke to everyone: to the jury, as representatives of society; to the experts, as agents of the contemporary art world; and to the judge, as the arbiter of the law.

In 2013, 5Pointz was not the place it had been in 2002, nor was Long Island City. Communities change with time, as do our understandings and experiences of them. Art is part of those shifts. The 5Pointz case forces us to consider the relationship between art and time. It illustrates how our definitions of art change over time and how a single work of art might itself evolve—and may not last forever.

²⁰² Interview with Marie Cecile Flageul, *supra* note 26.

²⁰³ See Chaubaul & Taylor, *supra* note 186, at 78.

²⁰⁴ See Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d. Cir. 2020), *cert. denied*, 592 U.S. _ (2020).

²⁰⁵ See Buckley & Santora, *supra* note 25.

²⁰⁶ See Cohen v. G&M Realty L.P., 320 F.Supp.3d 421, 433 (E.D.N.Y. 2018), *aff’d sub nom* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

In the late 1970s, when Mayor Koch’s administration had painted graffiti writers as the enemy, it would have been unthinkable for a court to label graffiti or aerosol art as worthy of “recognized stature.” Forty years later, this conception has changed completely. The Second Circuit noted that transformation. Its opinion discussed the expanding market for street art and its status as a “major category of contemporary art.”²⁰⁷ The court acknowledged that Banksy, who is famously anonymous, was listed as one of *Time* magazine’s 100 most influential people in 2010.²⁰⁸ Shepard Fairey wrote the profile for *Time*, which was accompanied by a photo of Banksy with a brown paper bag over his head. “His works, whether he stencils them on the streets, sells them in exhibitions, or hangs them in museums on the sly, are filled with wit and metaphors that transcend language barriers,”²⁰⁹ Fairey wrote.

Our understandings of both art and law evolve over time. In addition to these general ideas, the 5Pointz case raised specific questions about time and ephemerality with respect to particular works of art. It asked—and ultimately answered—whether particular works must last forever to be recognized.

Wolkoff argued repeatedly that the art at 5Pointz could not possibly be of recognized stature because it was temporary.²¹⁰ The artists themselves had acknowledged as much, he claimed. Both the trial and the appellate court rejected his view.

VARA aside, to be eligible for copyright protection in the United States, a work must be “fixed in a tangible medium of expression.”²¹¹ The requirement is easy to meet. As long as the work is “sufficiently permanent or stable to permit it to be perceived... for a period of more than

²⁰⁷ See *Castillo*, 950 F.3d at 167.

²⁰⁸ See *id.* at 168.

²⁰⁹ Shepard Fairey, *Banksy*, TIME (Apr. 29, 2010), http://content.time.com/time/specials/packages/article/0,28804,1984685_1984940_1984945,00.html

²¹⁰ See *Cohen*, 320 F.Supp.3d at 435; see also *Castillo*, 950 F.3d at 167.

²¹¹ 17 U.S.C. § 102 (1976).

transitory duration,”²¹² it will pass. Seconds may not suffice, but minutes will.²¹³ Choreographers can meet the fixation requirement by videotaping their routines. Musicians meet the requirement by writing their music down. Even if a work at 5Pointz had been painted on the practice wall and buffed the next day, it would pass as “fixed” under the law.

VARA does not distinguish between temporary and permanent works. Earlier cases have found that VARA protects unfinished works and does not cover natural changes from the passage of time or materials used.²¹⁴ Whitewashing does not fall into either category. Congress also drafted VARA to be “highly specific”²¹⁵ because of concerns over the mere idea of moral rights protection in the United States. The court would not impose an additional requirement where Congress had not done so first.²¹⁶ What VARA does address, and in detail, is removal. Had Wolkoff notified the artists and waited the 90-day notice period for them to remove their works—many of which could have been removed easily—he would have had no liability.

The Second Circuit gave examples of temporary works that would clearly be worthy of recognized stature. It began with “The Gates,” the installation of 7,503 orange gates in Central Park by artists Christo Vladimirov Javacheff and Jeanne-Claude Denat in 2005.²¹⁷ It continued with the 2018 incident at Sotheby’s in London when a painting by Banksy self-destructed within minutes of selling for \$1.4 million.²¹⁸ The next day, Banksy posted a video on Instagram of himself installing a hidden shredder in the painting. The caption read, “The urge to destroy is also a creative urge.”²¹⁹

²¹² 17 U.S.C. § 101 (2010).

²¹³ See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 128–29 (2d. Cir. 2008).

²¹⁴ See *Mass. Museum of Contemporary Art. Found., Inc. v. Buchel*, 593 F.3d 38 (1st. Cir. 2010).

²¹⁵ See *Castillo*, 950 F.3d at 167.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.* at 168.

²¹⁹ Andrew Liptak, *One of Banksy’s Paintings Self-Destructed Just After It Was Auctioned*, VERGE (Oct. 7, 2018), <https://www.theverge.com/2018/10/7/17947744/banksy-ballon-girl-artwork-self-destructed-sothbys>.

Banksy, who left an installation of inflated balloons near the Long Island Expressway and the message “Save 5Pointz” in October 2013, does not represent the entire aerosol art genre.²²⁰ His work raises other issues, some inflation-related, like the exorbitant pricing in contemporary art markets. But his invocation in this case introduced the importance of ephemerality. The Second Circuit squarely announced: “Although a work’s short lifespan means there will be fewer opportunities for the work to be viewed and evaluated, the temporary nature of the art is not a bar to recognized stature.”²²¹

The Second Circuit sits in lower Manhattan. The courthouse is the kind of imposing public building that graffiti writers might once have sought to deface, an emblem of the state and its power. With this decision, the court acknowledged how our understanding of this art form has changed. Rather than remain on the outside, the artists had been invited in.

The decision concerned defenders of property rights. How are property owners to defend their entitlements against artists like these? Will property owners hesitate to commission art on their buildings if they might face massive damage awards should they later change their minds?

These concerns are unfounded. VARA does not protect any and all works of art. It protects only specific works of visual art from modification. It protects an even smaller subset of works from destruction. At least 350 works were painted at 5Pointz when it was whitewashed.²²² Only 49 were involved in the case. An artist’s name alone does not confer recognized stature, though it might help. The work itself must deserve it.

²²⁰ Amanda Holpuch, *Banksy Concludes New York Art Blitz With Call to Save 5Pointz Graffiti Space*, GUARDIAN (Oct. 31, 2013), <https://www.theguardian.com/artanddesign/2013/oct/31/banksy-concludes-new-york-residency-graffiti>.

²²¹ See *Castillo*, 950 F.3d at 168.

²²² See Transcript of Trial, *supra* note 29, at 1474.

VARA concerns can be avoided relatively easily. Wolkoff and Cohen never discussed rights or removal; they didn't know VARA existed. Now, though, artists and developers can have these conversations earlier. Since the case ended, artists have reached out to Flageul and Cohen, asking their opinions on whether they might have a VARA claim. The response is: "One, it's not that simple, and two, do you know what you're looking to get into?"²²³ For them, the case had always been about preservation.²²⁴ It was only after Wolkoff destroyed the work, and preservation was no longer an option, that the case became about money.

5Pointz was whitewashed on November 19, 2013. In 2014, the building was demolished, and in 2015 construction began. The two high-rises are now complete. The complex is called 5Pointz, its logo in graffiti-style lettering. Its website lists apartments for rent. In July 2020, Wolkoff died at the age of 83. His son David now runs the business.

For almost a year after the whitewashing, Cohen stopped painting completely.²²⁵ In March 2014, Cohen and Flageul moved from Long Island City to Brooklyn. Until then, they had lived two blocks from 5Pointz.

In 2016, citizenM, a global luxury hotel chain, contacted Flageul and Cohen about a graffiti exhibition for its New York location, the citizenM New York Bowery.²²⁶ The result is the Museum of Street Art (MoSA), a tribute to graffiti that spans the entire 20-floor staircase inside the hotel. Twenty former 5Pointz artists came together to paint it. Flageul is the curator, and Cohen the lead artist. Outside the hotel is a 5,000 square foot mural by Cohen, with large, wild, red and black lettering. The mural is called "Rebirth."

²²³ Interview with Marie Cecile Flageul, *supra* note 26.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

2007



2013



2015



2020



Photos from Google Street View.