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What happens when street art meets private property?

We think of graffiti as ugly and annoying — gang symbols, names of taggers in cartoonish balloon letters and crude drawings.

But if that is all you can visualize when you think of graffiti, you should quickly search Google for the name “5Pointz” and look at the images that pop up. You will see stunning examples of what some would call graffiti, but is more appropriately called “exterior aerosol art.”

5Pointz is a compound of large, empty factory buildings occupying an entire city block in Queens, N.Y. In the 1990s, the walls had become a magnet for unsightly graffiti until 2002, when a street artist named Jonathan Cohen approached the owner of the buildings, Gerald Wolkoff, with a novel proposal:

Instead of allowing the buildings to deteriorate into an inevitable urban eyesore, Wolkoff should let Cohen act as the curator of this graffiti museum. Wolkoff, who was supportive of the creativity of the art that adorned his buildings, agreed.

Under Cohen's stewardship, 5Pointz became a “mecca for high-end works by internationally known aerosol artists.” Hundreds of artists participated on wall space allocated by Cohen. It was controlled chaos. The overall results were amazing. The walls were filled with vibrant, colorful designs and large-scale, lifelike portraits. 5Pointz became the repository of the largest collection of exterior aerosol art in the country.

So engaging was the art that covered virtually every inch of the huge complex (part of it rising five industrial stories high into the Queens cityscape) that 5Pointz became a tourist attraction. As many as 10 tour buses a

day would visit the site. Cohen personally conducted hundreds of school tours each year as well as corporate and VIP tours. 5Pointz appeared in the Time Out New York publication and was described as “a New York must-see.”

Alas, on Nov. 19, the tour buses stopped. Though you can still see much of the artwork on the Internet, you won't see it at 5Pointz. It has all been white-washed. This is what happens when street art meets private property.

The story of the demise of 5Pointz is vividly told by Judge Frederic Block in *Cohen v. G&M Realty* (S.D.N.Y., Nov. 20, 2013). The lawsuit was precipitated by the irresistible force called “progress.” Though Wolkoff appreciated the aerosol art on his buildings, he decided to

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INSIDE IP LAW



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demolish the empty structures to allow for the construction of two apartment buildings that would provide about 1,000 residences. After several years of planning, Wolkoff received permission from the city planning commission in August 2013.

A group of the artists hoped that copyright law would come to their aid to preserve the art. They brought suit under the Visual Artists Rights Act (VARA), which prohibits the destruction of certain “works of visual art,” if the work is one of “recognized stature.”

Could this act, which was essentially designed to protect works of fine art, be used to protect graffiti? Never before has a court confronted the issue of whether the work of an exterior aerosol artist is protected by VARA.

The artists asked the court to issue a preliminary injunction to prohibit the demolition of the building. Cohen and the other plaintiffs claimed that the aerosol art adorning the walls of 5Pointz falls squarely within the

definition of “a work of visual art,” namely “a painting, drawing, print or sculpture, existing in a single copy ...”

Nothing in the act says the art must be on paper or canvas; nothing says that it cannot be on the exterior of a dilapidated building. VARA contains no prohibition on spray paint. As such, the court agreed that the aerosol art came within the scope of VARA.

The more difficult question was whether the paintings were of “recognized stature.” This element of VARA requires that a work must have “stature,” i.e., is viewed as meritorious, and that this stature is recognized by art experts, other members of the art community or by some cross-section of society. The artists identified 24 specific paintings on the building that they contended met these standards.

Testimony of dueling art experts was presented. The defendant's expert pointed out that for most of the works, there were “no dissertations, no journal articles, no other scholarly mentions of the work” and, importantly, “no Google results.”

The plaintiff's expert focused on the quality of the works and the significant public exposure. Scholarly discussion, he said, is the old way of looking at recognized stature. New media has changed the concept of being “recognized.”

Block, who was born in Brooklyn, concluded that at least some of the works raised a legitimate claim to being of recognized stature, but the question required a full trial rather than just a preliminary injunction hearing.

The judge clearly appreciated the art and seemed disposed to agree with the artists on the merits of their VARA claim.

He wistfully wrote that “our souls owe a debt of gratitude to the plaintiffs for having brought the dusty walls of [these] buildings to life.”

However, there remained a significant hurdle to the plaintiffs’ case — namely, the transitory nature of the art. The artists created the paintings knowing that the buildings would eventually be demolished.

This tipped the balance of hardships in favor of the building owner. The court also found that

the artists, aware that their aerosol art would one day be destroyed, did not suffer irreparable harm because if they ultimately prevailed, they would be able to recover monetary damages under the Copyright Act. Dollars can be a potent salve, and the works can live on in other media. Reluctantly, the art-loving judge denied the injunction.

Within days after the court ruled, but before it had issued a written opinion, Wolkoff, “under

cover of darkness,” painted over all the works at 5Pointz. Though the art is gone, the case lives on. Wolkoff still faces the possibility of monetary damages if the 24 works are found to be of “recognized stature” after a full trial.

When it approved the demolition of 5Pointz, the city planning commission required that 3,300 square feet of the exterior of the new apartment buildings be made available for art. Noting this fact, Block sent a none-too-subtle message to Wolkoff

suggesting that he make even more space available for street art and give Cohen permission to continue as curator.

“For sure,” wrote Block, “the court would look kindly on such largesse when it might be required to consider the issue of monetary damages and 5Pointz, as reincarnated, would live.” It would be good for the artists, good for New York City and probably good for Wolkoff. It might not be prudent to ignore such a judicious suggestion.