

# Is Graffiti Worthy of Protection? Changes Within the Recognized Stature Requirement of the Visual Artists Rights Act

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## I. INTRODUCTION

In *Cohen v. G&M Realty L.P.*, plaintiffs sued for a preliminary injunction under the Visual Artists Rights Act (VARA) to prevent the destruction of 5Pointz, an industrial complex turned graffiti haven.<sup>1</sup> This decision is “the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law.”<sup>2</sup> While the United States District Court for the Eastern District of New York ultimately did not grant the injunction, it concluded that a number of the works present “sufficiently serious questions going to the merits to make them a fair

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1. 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013); see also 5POINTZ NYC, <http://www.5ptz.com> (last visited May 22, 2014).

2. *Cohen*, 988 F. Supp. 2d at 214.

ground for litigation.”<sup>3</sup> In making this claim, the court realized that future litigation will turn on whether the art is of a “recognized stature” necessary for protection under VARA.<sup>4</sup> It also acknowledged a conflict amongst experts regarding the definition of “recognized stature”: some experts recognize an “expansive” view focusing on a work’s widespread public perception while others subscribe to a “restrictive” view focusing on a work’s scholarly reception in academic publications and the Internet.<sup>5</sup> Although existing case law favors the more restrictive approach, the Eastern District of New York appears to be making a shift in favor of the expansive view.<sup>6</sup>

This Comment will first examine VARA’s background and the development of the “recognized stature” requirement in the law. Turning next to the focus of this piece, this Comment will analyze *Cohen* in the context of previous litigation concerning the recognized stature requirement. The Comment will then discuss the potential effects *Cohen* may have. Finally, the Comment will examine other areas of VARA-related litigation and how those developments may affect the protection for graffiti.

## II. VISUAL ARTISTS RIGHTS ACT

With its origins in the civil law, the term “moral rights” is derived from the French term *le droit moral*, describing “those rights of a spiritual, non-economic and personal nature.”<sup>7</sup> “Moral rights acknowledge that an artist has, in addition to an economic interest in his reputation, a creative persona that is injected into the work of art at creation and which remains a part of the work despite his physical relinquishment of the object to others.”<sup>8</sup> This infusion of personality allows an artist to control what he creates.<sup>9</sup> Most jurisdictions that recognize this concept ensure both the rights to attribution and to integrity.<sup>10</sup> Generally, the right of attribution allows artists to be recognized as the author of a work, whereas “the right of integrity allows

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3. *Id.* at 225 (quoting *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010)).

4. *Id.* at 227.

5. *Id.* at 226.

6. *See id.*

7. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

8. Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1939 (2000).

9. Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 *HOFSTRA L. REV.* 317, 319 (1989).

10. *Carter*, 71 F.3d at 81.

[artists] to prevent any deforming or mutilating changes.”<sup>11</sup> These rights have both an economic and an ethical justification.<sup>12</sup> In economic terms, a “failure to attribute authorship, the false attribution of authorship, or the alteration of a work may interfere with a creator’s ability to market his reputation and talent.”<sup>13</sup> In terms of ethics, any interference is both “offensive” and “an insult” to the author himself.<sup>14</sup>

Throughout the 1980s, the issue of moral rights became the center of a debate regarding whether the United States should join the Berne Convention for the Protection of Literary and Artistic Works.<sup>15</sup> The drafters signed the Berne Convention in Berne, Switzerland, in 1886, to afford authors reciprocal copyright protection within each nation.<sup>16</sup> At contention was the Berne Convention’s “author-centered conception . . . that the author is the primary beneficiary of copyright” protection.<sup>17</sup> Specifically, article 6*bis* of the convention states:

Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>18</sup>

U.S. copyright theory, on the other hand, provides for an economic incentive “to an author to create for the benefit of society at the least cost to consumers.”<sup>19</sup> However, on March 1, 1989, when the United States acceded to the convention, the legislature declared that despite this difference in perspective, the United States could achieve minimum compliance under its then current law and that the adoption would neither expand nor reduce any rights.<sup>20</sup> Because the Berne Convention is not a self-executing treaty, the United States Congress was then required to enact new legislation under which actions could be brought.<sup>21</sup>

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11. *Id.*

12. Davis, *supra* note 9, at 320.

13. *Id.*

14. *Id.*

15. *Carter*, 71 F.3d at 82.

16. RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS 981 (4th ed. 2012).

17. *Id.* at 983.

18. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6*bis*, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221.

19. LERNER & BRESLER, *supra* note 16, at 983 (citing Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 389 (1995)).

20. *Id.*

21. *Id.*

On December 1, 1990, VARA amended the Copyright Act of 1976 to bring American law more in-line with the moral rights dictated by the Berne Convention.<sup>22</sup> Much like international moral rights legislation, VARA grants “the right of attribution, the right of integrity and, in the case of works of visual art of ‘recognized stature,’ the right to prevent destruction.”<sup>23</sup> A “work of visual art” is defined by the Copyright Act as a “painting, drawing, print or sculpture, existing in a single copy, [or] in a limited edition.”<sup>24</sup> As summarized above, the right of attribution is “the right . . . to claim authorship of that work, and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”<sup>25</sup> Additionally, the right of attribution grants the artist “the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>26</sup> Similarly, the right of integrity allows an artist “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”<sup>27</sup> Finally, VARA allows an artist “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.”<sup>28</sup>

However, the extension of the right of integrity to prevent destruction of an artist’s work is a departure from the Berne Convention, which allows for complete destruction, under the theory that there would be no harm to the artist’s reputation if the work no longer existed.<sup>29</sup> The Berne Convention emphasizes the author’s personality in step with European justification for copyright protection.<sup>30</sup> In contrast, VARA prevents destruction as a way to preserve culture—similar to American copyright law’s desire to benefit society through an economic incentive to an author.<sup>31</sup> While VARA does provide this unique right, it does not define the right’s prerequisite of recognized stature.<sup>32</sup>

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22. *Id.* at 1075.

23. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (citing 17 U.S.C. § 106A (2012)).

24. 17 U.S.C. § 101.

25. *Id.* § 106A(a)(1)(A)-(B).

26. *Id.* § 106A(a)(2).

27. *Id.* § 106A(a)(3)(A).

28. *Id.* § 106A(a)(3)(B).

29. Robinson, *supra* note 8, at 1940.

30. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

31. *Id.* at 82.

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

## III. BACKGROUND

Acknowledging the lack of a statutory definition, the United States District Court for the Southern District of New York, in *Carter v. Helmsley-Spear, Inc.*, regarded the recognized stature requirement “as a gate-keeping mechanism.”<sup>33</sup> For a work to be protected, the court outlined that a plaintiff must show “that (1) 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.”<sup>34</sup> Additionally, the court stated that expert witnesses, while beneficial, are not explicitly required.<sup>35</sup> Here, the Southern District appears to lean towards the more expansive view, allowing a “cross-section of society” to deem a work to be of recognized stature.<sup>36</sup> Its use of “or,” rather than “and,” indicates that the community’s view is equally as important as the views expressed by art critics.<sup>37</sup>

A dichotomy exists, however, in the court’s analysis of the statute. By diffusing the recognized stature requirement into a two-part test, the court implies that a work can be of a certain stature but not recognized. Nevertheless, the court refined its definition of “stature” with “*i.e.* viewed as meritorious.”<sup>38</sup> In order for something to be “viewed as meritorious,” however, it must be recognized by someone or something.<sup>39</sup> If an artistic work is of stature under the *Carter* test, it is automatically recognized.

The Eastern District of New York inadvertently acknowledged *Carter*’s confusion with the recognized stature requirement. Its holding in *Scott v. Dixon* requires that the visual art subject to litigation must have acquired the stature itself.<sup>40</sup> “[I]t is not enough that works of art authored by the plaintiff, other than the work sought to be protected, have achieved such stature.”<sup>41</sup> By refining the definition in this way, *Scott* alludes to the fact that recognition is inherent to stature, not a separate entity. This case involved the removal and deterioration of a large, 6,000-pound steel sculpture of a swan installed in the defendant’s backyard, hidden from the road by a large hedge.<sup>42</sup> Although the sculpture never

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33. 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

41. *Id.*

42. *Id.* at 396-97.

received recognition from the community, the plaintiff's prior work was both physically visible to the local Southampton, New York, population and received positive responses in multiple publications.<sup>43</sup> Moreover, although the artist argued that the two pieces were part of the same series, because the swan itself was not visible, it was not regarded as having a recognized stature.<sup>44</sup>

Supporting the New York district courts, the United States District Court for the Southern District of Indiana reiterated, "The critical element of 'recognized stature' involves community opinion . . . , not a determination that [the] work is inherently meritorious."<sup>45</sup> In *Martin v. City of Indianapolis*, the aforementioned court found the plaintiff's work to be of a recognized stature after it won a "best of show" award at a local art salon, received acclaim in multiple publications, and was praised by local art critics and gallery owners.<sup>46</sup> In doing so, the court appeared to straddle the line between the restrictive and expansive view.

When interpreting VARA's recognized stature requirement, courts should adopt the more expansive view and follow *Carter's* perspective by analyzing the recognition of a piece of visual art by either art experts or a cross-section of society. This inclusive perspective responds to the American justification for copyright protection.<sup>47</sup> Just as the policy behind copyright law seeks to benefit society in general, the recognized stature requirement within VARA should function primarily to allow consideration as to what the community seeks to protect.<sup>48</sup> By utilizing "or," rather than "and," the court makes clear that experts' views need not be explicitly taken into account.<sup>49</sup> However, this perspective raises further questions: what is a sufficient cross-section of society and what sort of appeal must the work of visual art have on this body of people?

#### IV. *COHEN V. G&M REALTY*

Jonathan Cohen, an aerosol artist, approached Gerald Walkoff to become the curator of several of his graffiti-covered industrial buildings,

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43. *Id.* at 396. For more information on Linda Scott's Stargazer Project, see LINDA SCOTT—THE STARGAZER PROJECT, <http://www.lindascott.org> (last visited Oct. 10, 2014).

44. *Scott*, 309 F. Supp. 2d at 397-98, 401.

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

46. *Id.* at 631. For more information on Martin's work, see Judy Pasternak, *Razing of Artwork Frames Legal Debate: Indianapolis' Decision To Demolish Sculpture, Make Room for Development Could Provide Test of Unique Federal Law*, L.A. TIMES (Sept. 26, 1996), [http://articles.latimes.com/1996-09-26/news/mn-47816\\_1\\_federal-law](http://articles.latimes.com/1996-09-26/news/mn-47816_1_federal-law).

47. LERNER & BRESLER, *supra* note 16, at 983.

48. *Id.*

49. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

collectively known as the “Phun Phactory.”<sup>50</sup> It was Cohen’s mission to improve the quality of the works that began to appear in the mid-1990s by managing the Phun Phactory as a “controlled canvas for . . . artists to come, drop pieces and contribute to the overall story.”<sup>51</sup> By the middle of the next decade, “[t]he site became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists.”<sup>52</sup> Due to the artwork’s popular appeal, hundreds of school tours visited the site each year, it was listed as “a New York must-see” in *Time Out New York* and in 150 other tour guide books, it became a regularly used location for editorial photo shoots, and it was used in the final scene of the film *Now You See Me*, featuring Morgan Freeman and Michael Caine.<sup>53</sup>

The relationship between Cohen and Walkoff that spurred the advent of 5Pointz, however, was never formalized in writing.<sup>54</sup> Instead, the two had only a “general understanding that [Cohen] would be allowed to select who would be permitted to paint on the walls.”<sup>55</sup> When making the agreement, Walkoff claims that he informed Cohen of his intention to knock down the building and that 5Pointz “was always temporary.”<sup>56</sup> Cohen testified to this fact by agreeing that he “really didn’t have any long-lived expectations,” and in a March 2011 interview, he admitted that he understood Walkoff’s goal was to convert the site to a residential development.<sup>57</sup>

At hearing, the court merely entertained both parties’ interpretations of the recognized stature standard.<sup>58</sup> Taking the restrictive view, the defendant’s expert emphasized that stature is attained by how a visual work’s unique qualities are valued by artistic scholars, not by the particular qualities themselves.<sup>59</sup> Similarly, recognition is only attainable through critical reception, not by the public at large.<sup>60</sup> As such, the

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

51. *Id.* at 219.

52. *Id.*

53. *Id.*; see *5Pointz Aerosol Art Center Closed*, TIME OUT N.Y. (Nov. 4, 2010), <http://www.timeout.com/newyork/attractions/5-pointz-aerosol-art-center>.

54. Cohen, 988 F. Supp. 2d at 219; see Cara Buckley & 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>.

55. Cohen, 988 F. Supp. 2d at 219 (alteration in original) (internal quotation marks omitted).

56. *Id.* at 223 (internal quotation marks omitted).

57. *Id.*

58. *Id.* at 226.

59. *Id.* at 221.

60. *Id.*

defendant's expert indicated that the twenty-four graffiti works under dispute did not possess a recognized stature because only one "had been mentioned in a dissertation, or a scholarly book or a journal article."<sup>61</sup> Although the expert acknowledged that 5Pointz had become a tourist attraction, she regarded this as insufficient because there was no evidence that visitors came "to see a particular work of art."<sup>62</sup>

Taking the expansive view, the plaintiff's expert claimed that stature was attained by each work's unique characteristics such as "design, color, shape, form," and "innovation."<sup>63</sup> In line with this view, recognition would be attained when a work has "significant public exposure."<sup>64</sup> Thus, from the perspective of the plaintiff's expert, 5Pointz had attained the recognized stature necessary for protection against destruction.<sup>65</sup>

Akin to American copyright law's desire to benefit the many by giving an author an incentive to create, the expansive view focuses on preserving the visual works that a community values.<sup>66</sup> The plaintiff's expert concluded his remarks by saying that 5Pointz is "part of the development of Long Island City" and that "its extraordinary aerosol art had become part of the urban landscape."<sup>67</sup> Other articles have pointed out that the recognized stature requirement "is often met when it is a community work that exhibits the concerns of the community."<sup>68</sup> Accordingly, in order to maintain consistency, the court that ultimately analyzes the aerosol art under VARA should adopt the more expansive view. This definition of recognized stature preserves VARA's intention to synthesize the Berne Convention with American ideology.

Although graffiti is traditionally viewed as a nuisance per se, it has increasingly been used as a legitimate form of artistic expression in recent decades.<sup>69</sup> Through artists such as Jenny Holzer, Richard Hambleton, Keith Haring, and, most recently, Banksy, the genre has become a platform by which to make social and political commentary.<sup>70</sup> As a testament to graffiti's growing acceptance, The Museum of Contemporary Art in Los Angeles' 2011 exhibition "Art in the Streets"

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61. *Id.*

62. *Id.*

63. *Id.* at 222.

64. *Id.*

65. *Id.*

66. LERNER & BRESLER, *supra* note 16 (citing Sherman, *supra* note 19).

67. *Cohen*, 988 F. Supp. 2d at 223 (internal quotation marks omitted).

68. Michelle Bougdanos, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 564 (2002).

69. Margaret L. Mettler, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 251-52 (2012).

70. *Id.* at 252-53.



drew more visitors than any other in its history.<sup>71</sup> Therefore, while the defendant's expert could not identify any significant discussion on the work at 5Pointz, the genre is generally well analyzed by art critics.

## V. OTHER LITIGATION UNDER VARA

In addition to the provisions listed above, there are other issues that may affect VARA's possible protection for graffiti in general. While the following points of litigation are not directly involved with, or necessary for, settlement of the 5Pointz case, they provide further insight into the challenges that aerosol art poses. Included in this further analysis is a discussion of the building restriction exception, the public presentation exception, site-specific art, unfinished art, and the singleness of art.

### A. *Building Restriction and Public Presentation Exceptions*

Congress added a "building exception" to apply in situations where visual art is attached or physically incorporated into a building.<sup>72</sup> In short, the exception states that if a work is made part of a building and cannot be removed without destruction, distortion, mutilation, or other modification and that if a written instrument was executed between the building owner and artist specifying that installation may subject a work created after the effective date of the act, to destruction, then section 106A(a) of VARA does not apply.<sup>73</sup> Additionally, a public presentation exception was created.<sup>74</sup> It specifies that a modification of the placement of a work is not a destruction, distortion, or mutilation.<sup>75</sup> Here, changes in placement are restricted to the way a work is lit, framed, or physically shifted.<sup>76</sup> For example, a Picasso canvas cut into hundreds of squares and sold as original Picasso pieces would go beyond the presentation exception; however, sculptures of geese decorated with ribbon during the holiday season would remain within the presentation exception.<sup>77</sup>

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71. *Id.* at 253-54.

72. Rachel E. Nordby, *Off of the Pedestal and into the Fire: How Phillips Chips Away at the Rights of Site-Specific Artists*, 35 FLA. ST. U.L. REV. 167, 181-82 (2007).

73. 17 U.S.C. § 113(d) (2012).

74. *Id.* § 106A(c).

75. *Id.*

76. Nordby, *supra* note 72, at 181 (citing H.R. REP. NO. 101-514, at 17, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927).

77. *Id.*

### B. Site-Specific Art

At conflict with these exceptions is the unique category of site-specific art, a type of integrated art.<sup>78</sup> Integrated art is “comprised of two or more physical objects that must be presented together as the artist intended for the work to retain its meaning and integrity.”<sup>79</sup> In the case of site-specific works, one object is the work’s location.<sup>80</sup> Therefore, “Because the location of the work contributes to its meaning, site-specific art is destroyed if it is moved.”<sup>81</sup>

The United States Court of Appeals for the First Circuit most famously analyzed this type of art in *Phillips v. Pembroke Real Estate, Inc.*<sup>82</sup> In that case, the plaintiff designed a sculpture park near Boston Harbor that featured twenty-seven of his own bronze works.<sup>83</sup> The company that leased the park’s land from the Massachusetts Port Authority moved the sculptures and walkways during a redesign.<sup>84</sup> At issue was whether the sculpture park qualified as integrated art or site-specific art and whether VARA offered protection to either.<sup>85</sup>

While the court held that “works composed of a variety of pieces and in a variety of media may still constitute one work of ‘visual art’ under VARA,” it did not regard the plaintiff’s sculpture park as such.<sup>86</sup> The court took this position because the plaintiff did not specifically create each installed work.<sup>87</sup> Even though the plaintiff was involved in the overall design, it could not be a simple integrated work due to the amalgam of elements by different authors.<sup>88</sup> Furthermore, the court determined that VARA categorically denied protection for site-specific works.<sup>89</sup> It is not logical for VARA to protect a site-specific work and then, through an exception, to allow it to be moved, inadvertently causing its destruction.<sup>90</sup> Thus, VARA must not apply to site-specific works whatsoever.<sup>91</sup>

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78. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 129 (1st Cir. 2006).

79. *Id.*

80. *Id.*

81. *Id.* at 134.

82. *Id.* at 128.

83. *Id.* at 130.

84. *Id.* at 131.

85. *Id.* at 135.

86. *Id.* at 136-37 (quoting *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 98 (D. Mass. 2003)).

87. *Id.* at 137.

88. *Id.*

89. *Id.* at 143.

90. See Nordby, *supra* note 72, at 186; *Phillips*, 459 F.3d at 143.

91. See Nordby, *supra* note 72, at 186.

### 1. Competition Between Interests

Inherent in the building exception and the decision in *Phillips* is the underlying competition between interests: the artist in his visual art and the building owner in his or her real property.<sup>92</sup> Courts struggle because destruction of art via location change directly threatens a property owner's "rights of 'free alienability and absolute ownership against the world.'"<sup>93</sup> The court in *Phillips* appears to acknowledge the potential for property owners to lose control of their property by categorically denying any VARA protection for site-specific works.<sup>94</sup> By holding as such, the court effectively acknowledges that landowners' interests in real property trump the interests of visual artists in their work.<sup>95</sup>

In order to solve this dilemma, Belgian case law has looked to the concept of abuse of right as a way to view each interest as equal.<sup>96</sup> Generally, Belgian cases conclude that the abuse of right doctrine serves as a "correction mechanism" for solutions that are felt to be unfair.<sup>97</sup> "An abuse occurs where a right is exercised in a way 'which obviously exceeds the limits of the normal exercise of such right by a careful and cautiously acting person.'"<sup>98</sup> If courts begin with the "basic assumption that both rights are equal," then courts are open to investigate an abuse of either.<sup>99</sup>

An alternative manner in which to analyze this dispute is to draw an analogy to the restrictions placed upon historic landmarks. These restrictions seek to preserve buildings with "a special character or special historical or aesthetic interest or value" by restricting the owner's ability to change their appearance or structure.<sup>100</sup> Cities are motivated to implement these types of laws because they foster civic pride, protect tourist attractions, stimulate business, and promote the use of the

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92. Virginia M. Cascio, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under VARA*, 20 DEPAUL J. ART TECH. & INTELL. PROP. L. 167, 188-89 (2009).

93. *Id.* (quoting Francesca Garson, *Before That Art Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 214 (2001)).

94. *Id.* at 189.

95. *See id.*

96. *See* Marie-Christine Janssens, *Belgium—The Destruction of a Work of Art. Can Moral Rights Come to the Rescue?*, in ART & LAW 235, 240-41 (Bert Demarsin et al. eds., 2d prtg. 2009).

97. *Id.* at 240.

98. *Id.*

99. *Id.* at 241.

100. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 110 (1978) (internal quotation marks omitted).

protected historic districts and landmarks for the education, pleasure, and welfare of the general population.<sup>101</sup>

In the milestone decision *Penn Central Transportation Co. v. City of New York*, the United States Supreme Court ultimately held that these types of historical-landmark restrictions do not rise to the level of a “taking” under the Fifth Amendment because they “are substantially related to the promotion of the general welfare” and “permit reasonable beneficial use.”<sup>102</sup> There, the owners of Grand Central Station, the famous 1913 Beaux-Arts train station in midtown Manhattan, sought to construct a fifty-three- to fifty-five-story office building on top of the structure.<sup>103</sup> However, the Landmarks Preservation Commission (Commission), the entity charged with determining the “appropriateness” of any changes made, rejected the proposal on the grounds that the tower would overwhelm the station’s flamboyant façade, turning it into an “aesthetic joke.”<sup>104</sup> The Court reasoned: “Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. . . . [W]e must preserve them in a meaningful way [to] protect, enhance and perpetuate the original design rather than overwhelm it.”<sup>105</sup> Additionally, while recognizing that there is not a particular formula for determining “takings,” the Court acknowledged that it has “upheld land-use regulations that destroyed or adversely affected recognized real property interests” when they promote “health, safety, *morals*, or general welfare.”<sup>106</sup>

The landowners urged that they must be compensated for any restriction to be constitutional.<sup>107</sup> In doing so, they argued that the restrictions placed upon their building both deprived them of their “air rights” and diminished the value of the site.<sup>108</sup> The Court did not accept these arguments, however, because landmarking restrictions do not view a historic site as subdivided parcels, but rather, as a unified whole, and landmark laws have been held to be nondiscriminatory.<sup>109</sup> Furthermore, the Court held that because the landowners may continue to use their

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101. *See id.* at 109.

102. *Id.* at 138.

103. *Id.* at 116-17.

104. *Id.* at 118.

105. *Id.*

106. *Id.* at 125 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (internal quotation marks omitted)).

107. *Id.* at 130.

108. *Id.*

109. *Id.*

property in the same manner, there must not be an exercise of eminent domain.<sup>110</sup>

## 2. Possible Effect upon 5Pointz

In *5Pointz*, the Court effectively weighted a landowner's right to modify their building against the public's interest in preserving its historic nature. The court ultimately decided the historic value of specific structures was a sufficient basis by which to make the leap in favor of the public's rights over the individual's.<sup>111</sup> The court's decision acknowledged that a structure's historic value is partially dependent upon its relationship to its specific location and that moral rights are equal to the health, safety, and general welfare of the public.<sup>112</sup> Because the motivating factors are the same as VARA, this decision is particularly relevant to its potential protection of 5Pointz's graffiti. Thus, it appears that courts must decide whether a work of recognized stature is equivalent to that of a building with sufficient historic value necessary to be landmarked.

The Court repeatedly referenced the aesthetic value of the structure it was protecting in addition to its historical significance.<sup>113</sup> Also, inherent to this discussion are both the opinion of the city at large, rather than a limited number of art experts, and a desire to protect historic landmarks for the benefit of that populace. Therefore, it can be concluded that the Supreme Court takes a more expansive view of the requirements to protect a building against the monetary interest of the landowner. This provides significant weight to an expansive view of the recognized stature requirement. Because VARA effectively seeks to do what many landmarking statutes seek to do, the accepted methods of analyzing each statute should be the same.

Although *Cohen* did not raise these issues, the *Phillips* decision, VARA's exceptions, and an analogy to *Penn Central Transportation Co.* may ultimately shade the court's perspective on 5Pointz's aerosol art. First, the graffiti seeking protection is physically attached to the industrial buildings and cannot be removed without being destroyed. Additionally, the works were installed after the effective date of VARA without a written instrument specifying that they may be subject to destruction. Therefore, provided the work is regarded as having recognized stature, it does not satisfy the requirements necessary to allow

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110. *Id.* at 136.

111. *See id.* at 138.

112. *See id.* at 125.

113. *Id.* at 110.

destruction under the building exception.<sup>114</sup> However, the works do not meet the integrated art test offered by *Phillips*.<sup>115</sup> Although it can be argued that the twenty-four graffiti pieces constitute one large, continuous mural, they were painted by many different artists. Thus, VARA cannot reach the works under this theory. Finally, any argument categorizing 5Pointz as a site-specific work will provide further ammunition against protection. Nonetheless, it is noteworthy for art historical purposes that the aerosol art under dispute was described as “[p]art of the urban landscape.”<sup>116</sup> This rhetoric places the graffiti in the same mode as site-specific works because it both responds to, and derives its meaning from, the urban environment of Long Island City, New York.

### C. *Unfinished Art and Singleness of the Work*

Further factors considered in VARA litigation involve the possible protection for unfinished works of art and the singleness of work. Again, while the following points of litigation are not directly involved with or necessary to settle the 5Pointz case, they provide further insight into the challenges that aerosol art poses. The First Circuit in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* found that works which meet the necessary VARA requirements, though unfinished, are given protection.<sup>117</sup> It reasoned that the “convergence between artist and artwork does not await the final brush stroke or the placement of the last element in a complex installation.”<sup>118</sup> There, the Swiss installation artist Christoph Büchel remotely planned a new piece for the Massachusetts Museum of Contemporary Art (MASS MoCA) by sending the museum instructions to be implemented by staff.<sup>119</sup> Their relationship, eventually, broke down such that the installation was unable to be completed.<sup>120</sup> Seeking to capitalize from their efforts, Mass MoCA utilized the half-completed work of visual art in its “Made as MASS MoCA” exhibition designed as “a documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions.”<sup>121</sup> Büchel countersued, claiming that the museum

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114. 17 U.S.C. § 113(d) (2012).

115. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 137 (1st Cir. 2006).

116. *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 223 (E.D.N.Y. 2013) (internal quotation marks omitted).

117. 593 F.3d 38, 52 (1st Cir. 2010).

118. *Id.* at 51.

119. *Id.* at 42-43.

120. *See id.* at 45.

121. *Id.*

violated his VARA rights by associating his name with an unfinished piece of which he did not approve, resulting in harm to his reputation.<sup>122</sup>

Similarly, the court in *Carter* determined that a single piece of art is a “thematically consistent, inter-related work whose elements could not be separated without losing continuity and meaning.”<sup>123</sup> In this case, defendants sought to have VARA applied to each element of the work, so that components that may not be considered visual art standing alone would not be transformed into protected visual art when incorporated into the whole.<sup>124</sup> By finding that the large, “walk-through” sculpture involving a wide array of constituent elements was one single piece, it stated that the defendant’s goal was “not attainable.”<sup>125</sup>

Again, while *Cohen* did not discuss these topics, both issues may affect the way graffiti is protected generally. First, it can be argued that because 5Pointz perpetually adds work by a variety of artists, it is always an unfinished work of art. Second, the argument can also be made that the entirety of 5Pointz is one “thematically consistent, inter-related work.”<sup>126</sup> Not only do the variety of aerosol paintings physically overlap one another, but the installation is one unified reflection of Long Island City’s urban environment. Thus, as in *Carter*, all the individual graffiti works comprising the whole could be protected as one piece.<sup>127</sup>

## VI. CONCLUSION

As indicated by the discontinuity within decided case law and the question presented to the trial court in *Cohen*, the recognized stature requirement is currently in a transitional period. When *Cohen* is ultimately decided, the case will begin to settle the issue, in part as a result of the notoriety it has been given by the media. Additionally, due to the unique nature of 5Pointz and to graffiti generally, this case will serve to create a precedent for visual art not explicitly contemplated by the Berne Convention or VARA. Because this art form has only recently been seen as deserving of protection, the Eastern District of New York will be required to analogize to other settled areas of law in order to reach a conclusion. Ultimately, the aerosol art or graffiti at 5Pointz should be protected through an adoption of an expansive view. This perspective is

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122. *Id.* at 46.

123. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

in line with the other settled areas of law and furthers the American perspective on copyright protection.