

Home (/front)	Attorneys (/our-attorneys/judd-b-grossman)	Areas of Practice (/areas-of-practice)	Art Law Blog (/art-law-blog)	Recruiting (/recruiting)	Contact Us (/contact-us)
-------------------------------	--	--	--	--	--

Art Law Blog (/art-law-blog)

The art world, and the laws that regulate it, are continually evolving. Grossman LLP’s Art Law Blog offers our insights into the important legal issues and developments impacting the art world on a daily basis.



Two Recent Cases Highlight The Scope Of Artists’ Protections Under VARA

Posted **May 20th, 2014** - by **Kate Lucas** (<http://grossmanllp.com/art-law-blog/author/kate-lucas/>)

CATEGORIES: *Legal Developments* (<http://grossmanllp.com/art-law-blog/category/legal-developments/>)

TAGS: *5 Pointz* (<http://grossmanllp.com/art-law-blog/tag/5-pointz/>), *Victor Henderson* (<http://grossmanllp.com/art-law-blog/tag/victor-henderson/>)

The Visual Artists Rights Act, 17 U.S.C. § 106A (commonly known as **VARA** (<http://www.law.cornell.edu/uscode/text/17/106A>)) aims to protect artists’ “moral rights” related to the proper attribution of their works, as well as the physical “integrity” of the works themselves. A **survey** (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902151) in 2003 concluded that the law was still little-used, although awareness of VARA was increasing. As the Wall Street Journal **observed** (<http://online.wsj.com/news/articles/SB10001424052748703447004575449793518169052?KEYWORDS=ascalon&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748703447004575449793518169052.html%3FKEYWORDS%3Dascalon>)

in 2010, the contours of VARA are continually evolving. Over the past year, two lawsuits have highlighted some of the ongoing questions about how VARA protects the rights of artists, particularly when the art at issue has been created on property owned by someone else.

The 5 Pointz Case

In a highly publicized opinion, a New York federal judge **refused** (<http://www.artlawreport.com/files/2013/11/5Pointz-decision-B1665419.pdf>) to issue an injunction to prevent the destruction of graffiti in the so-called “5 Pointz” location in Queens. Over the course of many years, 5 Pointz had become what the court called a “repository” of a significant “collection of exterior aerosol art.” The collection had developed with the informal blessing of one of the property owners, who “was supportive of creative efforts but wanted somebody responsible to manage it,” and thus had appointed one of the artists to “curate” the graffiti at the site and “select who would be permitted to paint on the walls.” Some of the works were short-lived, lasting only days or weeks before being replaced with new works, but about two dozen were considered by the curator to be “permanent,” and not to be painted over. Over time, the site became a tourist attraction, a popular location for events such as video and photo shoots, and a “mecca for high-end works by internationally recognized aerosol artists.” When the buildings at 5 Pointz were scheduled for demolition, a group of artists who had created the “permanent” works sued the buildings’ owners, seeking to protect their artworks.

BLOG POSTS BY CATEGORY	
Art Exhibitions	
(http://grossmanllp.com/art-law-blog/category/art-exhibitions/)	17
Art Galleries	
(http://grossmanllp.com/art-law-blog/category/art-galleries/)	40
Art Market	
(http://grossmanllp.com/art-law-blog/category/art-market/)	54
Auction	
(http://grossmanllp.com/art-law-blog/category/auction/)	20
Authentication	
(http://grossmanllp.com/art-law-blog/category/authentication/)	21
Copyright	
(http://grossmanllp.com/art-law-blog/category/copyright/)	30
Fine Art	
(http://grossmanllp.com/art-law-blog/category/fine-art/)	34
Forgeries	
(http://grossmanllp.com/art-law-blog/category/forgeries/)	19
Legal Developments	
(http://grossmanllp.com/art-law-blog/category/legal-developments/)	109
Museums	
(http://grossmanllp.com/art-law-blog/category/museums/)	23
Nazi-looted Art	
(http://grossmanllp.com/art-law-blog/category/nazi-looted-art/)	23

In an opinion issued in late 2013, the court observed that VARA provides a mechanism to protect artworks from destruction, but only if they are works of “recognized stature.” The statute does not provide a definition of that term, and courts have struggled to develop useful ways to assess whether a work meets that standard. In the 5 Pointz case, the artists’ testimony focused on the works’ intrinsic quality, apparently assuming that “if the work had artistic merit it was *ipso facto* of recognized stature.” The defendants and their expert witness, on the other hand, presented a more restrictive view of both “stature” and “recognition,” and argued that while quality, innovation, and uniqueness were certainly relevant to the issue of “stature,” a court should also look at “the way these qualities are valued by the public” and the work was “at a level where scholars agree that it is ‘changing the history of art.’” On the issue of “recognition,” they urged an inquiry into how works had been examined in academic publications, articles, and scholarship.

At the preliminary injunction stage, the court declined to rule on the definition of “recognized stature,” but noted that, although the overall site of 5 Pointz undoubtedly had stunning “breadth and visual impact” and had become a tourist attraction, VARA’s protection must focus on particular individual “works” and not the collection as a whole. Ultimately, the court decided that the evidence left open the possibility that at least some of the 24 “permanent” works might be of “recognized stature,” but that final resolution should be “left for a fuller exploration of the merits after the case has been properly prepared for trial.” Thus, for purposes of a preliminary injunction, the court held there were sufficiently serious questions going to the merits of the case.

However, the court held that the plaintiffs had not made an adequate showing of irreparable harm warranting a preliminary injunction. The court noted that in a sense, plaintiffs had “created their own hardships,” citing evidence that all the parties (including the owners, the curator, and other artists) had long held a mutual understanding that the entire arrangement was ephemeral and the works were transient, meant to last only until the buildings were demolished or put to new use. Indeed, many of the works had been created after plans were publicly underway for the buildings to be demolished. Moreover, the court said that monetary damages could compensate the artists for the loss of their works, speculating that although the works were painted for free, “surely the plaintiffs would gladly have accepted money from the defendants” to paint them in the first place. The judge also observed that the “works can live on in other media,” including photographs.

The 5 Pointz decision sparked extensive commentary, including criticism that the court gave inadequate consideration to whether the collection as a whole might be a “work” under VARA, that it made an unwarranted assumption that money damages and photographs would compensate the artists, and that the judge placed inadequate weight on the loss suffered by the public and the artists when 5 Pointz was **destroyed** (<http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html?hpw&rref=nyregion&r=0>). (On this point, it’s worth noting that while the buildings have not yet been demolished, the artworks have been whitewashed and obscured with paint, prompting an amended complaint by the plaintiffs.)

The “Brooks Avenue Painting” Case

VARA was back in the **spotlight** (<http://www.artlawreport.com/2014/05/02/victor-henderson-of-la-fine-arts-squad-files-vara-claim-over-brooks-avenue-painting/>) last month when a newly filed lawsuit raised further questions about the law’s reach into the world of art created on someone else’s property. In a **complaint** (<http://www.artlawreport.com/files/2014/05/Henderson-Complaint.pdf>) filed in federal court in the Eastern District of California, artist Victor Henderson sued a building owner over the destruction of a mural he co-created in 1969 as a member of the “Los Angeles Fine Art Squad,” a group of artists who painted public artworks throughout southern California.

The case differs from 5 Pointz in several key respects. First, the work is already **destroyed** (<http://www.latimes.com/entertainment/arts/culture/la-et-cm-lawsuit-la-fine-arts-squad-mural-venice-20140422-story.html#axzz2zoQejC70>), so there is no injunctive relief sought; rather, the artist seeks, in addition to punitive damages, costs, and attorneys’ fees, damages “sufficient to compensate him for all damages resulting from desecration, distortion, mutilation and alteration of mural, including, but not limited to deprivation of Plaintiff’s property rights and damage to his honor

Provenance
(<http://grossmanllp.com/art-law-blog/category/provenance/>)
36

Uncategorized
(<http://grossmanllp.com/art-law-blog/category/uncategorized/>)
265

POPULAR POST TAGS

Knoedler
(<http://grossmanllp.com/art-law-blog/tag/knoedler/>)

Sotheby's
(<http://grossmanllp.com/art-law-blog/tag/sothebys/>)

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(<http://grossmanllp.com/art-law-blog/tag/warhol/>)

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Matisse
(<http://grossmanllp.com/art-law-blog/tag/matisse/>)

BLOG ARCHIVE

May 2017
(<http://grossmanllp.com/art-law-blog/2017/05/>) 1

April 2017
(<http://grossmanllp.com/art-law-blog/2017/04/>) 4

March 2017
(<http://grossmanllp.com/art-law-blog/2017/03/>) 4

and reputation.” This case will likely involve interesting disputes over how to value a lost work, particularly a mural that is both physically and thematically intertwined with its location, with respect to both its market value and the harm the artist might suffer to his reputation.

Second, the artist here may have a stronger argument than the plaintiffs in 5 Pointz as to whether the work at issue was of “recognized stature” as required by the statute. Henderson has a well established reputation in the art world; his works have been displayed in several prominent museums, he has lectured at colleges and universities, and art critics and other prominent artists have hailed the accomplishments and impact of the Los Angeles Fine Art Squad.

Third, the 5 Pointz site gained attention as a repository of hundreds of different works, and the court in that case emphasized that although the overall 5 Pointz collection held cultural significance, the “recognized stature” analysis had to focus on particular individual works. In Henderson’s case, on the other hand, the dispute will focus on a single work that has been prominent for many years, and has been spotlighted in sources ranging from the Los Angeles Mural Conservancy website to a famous photograph of the band the Doors standing in front of it. Moreover, Henderson’s complaint alleges that his mural could have been safely removed from the building without mutilation; in other words, there might have been a way to save the mural. The parties in the 5 Pointz matter seemed to agree that there was no way for the owner to accomplish the planned demolition and rebuilding of the property while still preserving the graffiti art at issue in that case.

VARA “On the Street”

Graffiti art, murals, and other similar “street” artworks have become increasingly popular in recent years; witness the critical and popular success of Banksy. Indeed, the *New York Times* recently **reported** (<http://www.newyorker.com/online/blogs/currency/2014/05/is-luxury-graffiti-an-oxymoron.html>) that prominent housing development company Toll Brothers is touting graffiti-type art as part of the aesthetic of some of its new urban residential projects. The cases above highlight the particular legal issues involved in applying VARA to works created on property that belongs to someone other than the artist. Both cases are ongoing, and may continue to break more new ground in the VARA arena.

January 2017
(<http://grossmanllp.com/art-law-blog/2017/01/>) 11

December 2016
(<http://grossmanllp.com/art-law-blog/2016/12/>) 3

November 2016
(<http://grossmanllp.com/art-law-blog/2016/11/>) 3

October 2016
(<http://grossmanllp.com/art-law-blog/2016/10/>) 6

September 2016
(<http://grossmanllp.com/art-law-blog/2016/09/>) 7

August 2016
(<http://grossmanllp.com/art-law-blog/2016/08/>) 6

July 2016
(<http://grossmanllp.com/art-law-blog/2016/07/>) 2

June 2016
(<http://grossmanllp.com/art-law-blog/2016/06/>) 1

May 2016
(<http://grossmanllp.com/art-law-blog/2016/05/>) 3