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# THE SAGA OF 5POINTZ: VARA’S DEFICIENCY IN PROTECTING NOTABLE COLLECTIONS OF STREET ART

*Timothy Marks\**

This Note focuses on the protection of collections of street art under the Visual Artists Rights Act of 1990 (“VARA”). It centers on the recent litigation surrounding 5Pointz, a complex of unused industrial buildings in Long Island City, Queens, New York, that were used to exhibit works of street art by many well-known street artists. Since 2002, the site was used by artists to exhibit their works with the permission of the property owner and an appointed curator. In November 2013, several of the 5Pointz artists filed a claim in district court to prevent the planned destruction of 5Pointz to make way for high-rise residential condominiums.

This Note uses 5Pointz as a jumping off point to offer two proposals that address certain shortcomings of VARA as applied to street art. The first proposal is an alternate test to determining whether certain works of visual art are protected from destruction under VARA. The second proposal is a minor amendment to the statute that would add protection for complete sites of street art as “collective works.” In leading up to these proposals, this Note summarizes VARA’s provisions and pertinent case law to provide an understanding of VARA’s current scope. This Note then summarizes the 5Pointz opinion and the potential direction of future VARA case law. This Note finally discusses several relevant shortcomings of VARA and arguments for and against modifying the statute, followed by the two proposals.

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This is why I did it: it was torture for them and for me. They couldn't paint anymore and they loved to paint. Let me just get it over with and as I knock it down they're not watching their piece of art going down. The milk spilled. It's over. They don't have to cry.<sup>1</sup>

–Jerry Wolkoff, property owner

On the morning of November 19, 2013, New York City residents woke up to find that 5Pointz, the beloved “graffiti mecca,”<sup>2</sup> had been whitewashed clean of most of its artwork overnight.<sup>3</sup> This was the beginning stage of 5Pointz’s demolition to make way for two high-rise apartment buildings, a project the New York City Council had previously approved in October 2011.<sup>4</sup> On August 21, 2013, Jerry Wolkoff, owner of the 5Pointz site, received final approval from the City Planning Commission to demolish 5Pointz to make way for the housing development.<sup>5</sup> News of the whitewashing spread quickly, and many artists and fans alike lamented the loss of the site.<sup>6</sup> Anticipated to take up to four

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1. Tom Namako, *5Pointz Graffiti is Painted White Overnight*, METROPOLIS (Nov. 19, 2013, 10:46 AM), <http://blogs.wsj.com/metropolis/2013/11/19/5pointz-graffiti-is-painted-white-overnight>. Jerry Wolkoff is the property owner of the site that housed 5Pointz who commented on why he whitewashed 5Pointz in preparation for its demolition.

2. See, e.g., Erik Badia & Katherine Clarke, *Demolition of Graffiti Mecca 5Pointz Draws Tourists and Artists in Mourning*, N.Y. DAILY NEWS (Aug. 22, 2014, 4:29 PM), <http://www.nydailynews.com/life-style/real-estate/demolition-graffiti-mecca-5pointz-begins-article-1.1913624>; Mallika Rao, *Artists Bid Sad Farewell to 5 Pointz, New York City's Graffiti Mecca*, HUFFINGTON POST (Nov. 21, 2013, 3:00 PM), [http://www.huffingtonpost.com/2013/11/21/5-pointz\\_n\\_4316483.html](http://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html); Lauren Babcock & Bob Fredericks, *Graffiti Mecca 5 Pointz Erased Overnight*, N.Y. POST (Nov. 19, 2013, 9:29 AM), <http://nypost.com/2013/11/19/5-pointz-graffiti-erased-in-overnight-paint-job>.

3. 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?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html?pagewanted=all&_r=0).

4. *Demolition Work Begins at 5 Pointz*, CIRCA (Mar. 9, 2015, 9:37 AM), <http://cir.ca/news/5-pointz-demolition>.

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

6. See, e.g., *Demolition Work Begins at 5 Pointz*, *supra* note 4 (statement of artist Jonathan Cohen aka “Meres One”) (“The sad part is it’s another example of gentrifying the city

months, the demolition process of 5Pointz began on August 22, 2014.<sup>7</sup> As of February 2015, what was once 5Pointz was completely demolished.<sup>8</sup>

## I. INTRODUCTION

In its early days, 5Pointz was a set of buildings that housed various commercial businesses.<sup>9</sup> In the early to mid-1990s, the industrial buildings became plagued with distasteful graffiti and were known in the aerosol artist community as the “Phun Phactory.”<sup>10</sup> To help control this problem, Jonathan Cohen, an aerosol artist known as “Meres One,” approached Wolkoff in 2002 and asked to become the curator for aerosol works on the buildings.<sup>11</sup> As curator, Cohen would essentially pick and choose which artworks Wolkoff would allow to be painted on the exterior surfaces of the buildings.<sup>12</sup> Wolkoff agreed, and the quality of the artwork on the buildings’ walls vastly improved.<sup>13</sup> Soon the site evolved into “a mecca for high-end works by internationally recognized aerosol artists,”<sup>14</sup> and gained the moniker “5Pointz,” signifying the unification of New York City’s five boroughs.<sup>15</sup> This unification grew to an international level as 5Pointz

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and building up these high-rises and getting rid of the few things in New York that are available, that are free, that are for the people, by the people.”); Vanessa Castro, *Twitter Lashes out against 5 Pointz Being Painted over*, COMPLEX (Nov. 19, 2013), <http://www.complex.com/style/2013/11/5pointz-reactions>.

7. *Demolition Work Begins at 5 Pointz*, *supra* note 4.

8. Christian Murray, *5 Pointz Demolished: 'It is like an Old Friend That Has Gone,' Wolkoff Says*, LIC POST (Feb. 2, 2015), <http://licpost.com/2015/02/02/5-pointz-has-been-demolished-six-months-of-digging-is-next/>.

9. Cohen, 988 F. Supp. 2d at 218 (E.D.N.Y. 2013).

10. *Id.*

11. *Id.*

12. *Id.* at 219.

13. *Id.*

14. *Id.*

15. *About, 5POINTZ: THE INSTITUTE OF HIGHER BURNING*, <http://5ptz.com/about> (last visited Mar. 29, 2015).

developed into an “epicenter of the graffiti scene”<sup>16</sup> and became fondly known by many as the “United Nations of Graffiti.”<sup>17</sup>

5Pointz soon became a noted public attraction, with hundreds of school tours conducted each year for students traveling from as far as Canada, in addition to numerous corporate and VIP tours.<sup>18</sup> Indeed, 5Pointz received recognition in 150 different tour guidebooks, and was listed in *Time Out New York* as “a New York must-see.”<sup>19</sup> Moreover, 5Pointz was used as an event space, a wedding venue and a set for fashion photo shoots.<sup>20</sup> Even the film, “Now You See Me,” starring Morgan Freeman, Jesse Eisenberg, Woody Harrelson, and Michael Caine, used 5Pointz as a cinematic backdrop.<sup>21</sup>

5Pointz’s influence on the street art community and its rise in public and artistic fame motivated Jonathan Cohen’s actions on October 10, 2013, when he and several other 5Pointz artists filed a complaint in the United States District Court for the Eastern District of New York requesting a preliminary and permanent injunction that would bar the destruction of 5Pointz.<sup>22</sup> As the court would later note in its written opinion after the preliminary injunction hearing, the case was significant because it was “the first occasion that a court [] had to determine whether the work of an exterior aerosol artist . . . is worthy of any protection under the law.”<sup>23</sup>

Part II of this Note begins by providing background on the Visual Artists Rights Act of 1990 (“VARA”) and discussing two cases that interpreted VARA’s “recognized stature” requirement—the central issue of the 5Pointz litigation. Part III highlights the litigation surrounding 5Pointz and briefly discusses the potential direction of future VARA case law

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16. *Id.*

17. Buckley & Santora, *supra* note 3.

18. *Cohen*, 988 F. Supp. 2d at 219.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* Compl., *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) (No. 13-CV-5612), 2013 WL 5726692.

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

pertaining to street art. Part IV then discusses the certain relevant shortcomings of VARA as they apply to the protection of street art. This discussion provides a backdrop for Part V, which addresses the arguments for and against further VARA protection of street art. Part V then proposes two changes to the current law: First, an alternative “recognized stature” test that attempts to be more suitable for street art cases; and second, a modest amendment to VARA that would add protection to collective works of street art that meet the “recognized stature” requirement. Finally, Part VI concludes by framing these proposals within the context of 5Pointz and street art in general.

## II. BACKGROUND LAW

### A. *The Visual Artists Rights Act of 1990*

The Visual Artists Rights Act of 1990 (“VARA”), which protects works of visual art created on or after June 1, 1991,<sup>24</sup> serves as an extension of the Copyright Act by adding protections for “moral rights” of artists.<sup>25</sup> The term “moral rights” is a translation of the French phrase “*le droit moral*,” which refers to the rights of an artist that are “spiritual, non-economic and personal [in] nature.”<sup>26</sup> These rights originated in the belief that an artist “injects his spirit into the work” during its creation, necessitating protection of the artist’s personality and the integrity of the work.<sup>27</sup> In VARA’s legislative history, Congress stated that moral rights “result in a climate of artistic worth and honor that encourages the author in the arduous act of creation. Artists’ rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: ‘To promote the Progress of Science and useful Arts.’”<sup>28</sup> Upon its enactment, VARA provided protection to two specific moral rights: the

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24. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Title VI, § 610, 104 Stat. 5089, 5128 (1990) (codified in part at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506).

25. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (citing RALPH E. LERNER & JUDITH BRESLER, *ART LAW* 417 (1st ed. 1989)).

26. *Id.*

27. *Id.*

28. H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

right of attribution and the right of integrity.<sup>29</sup> The right of attribution covers both the right to be credited as the author of a work of visual art and the right to prevent the use of the author's name for any work he or she did not create.<sup>30</sup> The right of integrity also encompasses two rights.<sup>31</sup> First, an artist has the right to prevent any "intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."<sup>32</sup> Second, the artist may "prevent any destruction of a work of *recognized stature*."<sup>33</sup> VARA's legislative history indicates, "[w]hile no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation."<sup>34</sup>

While VARA does not define "recognized stature,"<sup>35</sup> an earlier version of VARA provides some guidance as to its meaning:

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of works of visual art. Evidence of commercial exploitation of a work as a whole, or of, particular copies, does not preclude a finding that the work is a work of recognized stature.<sup>36</sup>

For purposes of VARA, a "work of visual art" is narrowly defined to

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29. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 225 (E.D.N.Y. 2013) (citing *Carter*, 71 F.3d at 81).

30. See 17 U.S.C. § 106A(a)(1)(A)–(B) (2012); MELVILLE B. NIMMER & DAVID NIMMER, 3-8D NIMMER ON COPYRIGHT § 8D.03[A]–[B] (Matthew Bender, Rev. Ed., 2014).

31. See generally 17 U.S.C. § 106A(a)(3)(A).

32. *Id.*

33. 17 U.S.C. § 106A(a)(3)(B) (emphasis added).

34. H.R. REP. NO. 101-514, at 16, reprinted in 1990 U.S.C.C.A.N. 6915, 6926.

35. See 17 U.S.C. §§ 101, 106A (2012).

36. WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:25 (2014) (citing § 106A(a)(3); H.R. REP. NO. 2690, 101st Cong. (1989)).

include “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”<sup>37</sup> Photographs are also protected if produced only for exhibition purposes.<sup>38</sup> VARA expressly excludes protection of many other copyrightable works including “any poster, map . . . diagram, model, applied art, motion picture or other audio-visual work,” and any merchandising items or advertising.<sup>39</sup> VARA also does not protect works made for hire, which are defined as “work[s] prepared by an employee within the scope of his or her employment,” or by an independent contractor.<sup>40</sup> Congress made these distinctions due to the different circumstances in which each type of work is created and disseminated.<sup>41</sup> Indeed, many commentators (including the drafters of VARA) noted that it was this very limited nature of protection, which pertained only to the fine arts and excluded other copyrightable works, that allowed the statute to be enacted.<sup>42</sup>

In determining whether a particular work falls within the scope of VARA, “courts should use common sense and generally accepted standards of the artistic community.”<sup>43</sup> Congress observed that since “[a]rtists may work in a variety of media, and use any number of materials in creating their work[,] . . . whether a particular work falls within the definition should not depend on the type of medium or materials used.”<sup>44</sup> In fact, VARA recognizes that a work of visual art may be “incorporated in or

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37. 17 U.S.C. § 101.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Carter*, 71 F.3d at 84 (citing H.R. REP. NO. 101-514, at 9, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919).

42. Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 408 (1995) (citing Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM. VLA J.L. & ARTS 477, 478–79 (1990); H.R. REP. NO. 101-650 at 9, *reprinted in* 1990 U.S.C.C.A.N. 6915).

43. *Carter*, 71 F.3d at 84 (citing H.R. REP. NO. 101-650 at 11, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921).

44. *Id.*

made part of a building” and protects such works created after the effective date of VARA unless a written waiver is signed by the artist.<sup>45</sup> An artist may expressly waive his moral rights in a signed written instrument.<sup>46</sup> The signed written instrument must specifically identify the work and the uses of the work to which the waiver applies.<sup>47</sup>

Additionally, for joint works, a waiver by any one joint author constitutes a waiver for all of the other joint authors.<sup>48</sup> Where a work is affixed to a building, an artist can also waive her rights simply by consenting in a signed written instrument that “installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.”<sup>49</sup> Where a work is affixed to a building and can be removed without its “destruction, distortion, mutilation, or other modification,” the artist’s rights of attribution and integrity still apply.<sup>50</sup> This is the case unless the building owner makes a “diligent, good faith attempt without success” to notify the artist of the intended action, or if the artist was notified and failed to either remove the work herself or pay for its removal within ninety days.<sup>51</sup>

Because VARA creates personal rights that are independent of traditional rights under copyright law,<sup>52</sup> only the artist of a work of visual art can assert a VARA claim.<sup>53</sup> VARA rights also may not be transferred.<sup>54</sup> Moral rights “endure for a term consisting of the life of the author,” or, in the case of a joint work created by two or more artists, “for a term

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45. See 17 U.S.C. § 113(d)(1) (2012).

46. 17 U.S.C. § 106A(e)(1) (2012).

47. *Id.*

48. *Id.*

49. 17 U.S.C. § 113(d)(1)(B).

50. 17 U.S.C. § 113(d)(2).

51. 17 U.S.C. § 113(d)(2)(A)–(B).

52. Nimmer & Nimmer, *supra* note 30, § 8D.06[D].

53. 17 U.S.C. § 106A(b) (2012).

54. 17 U.S.C. § 106A(e)(1).

consisting of the life of the last surviving author.”<sup>55</sup> Any works created prior to VARA’s effective date are also protected, but only if title to the work has not been transferred from the original author.<sup>56</sup> Furthermore, in an action for infringement of moral rights, “[a]ll remedies . . . under copyright law, other than criminal remedies, are available.”<sup>57</sup>

VARA also contains several exceptions to the rights granted therein. For example, any modification of a work of visual art that is the result of the passage of time or the “inherent nature of the materials” is not within the scope of the right of integrity.<sup>58</sup> Acts of conservation or public presentation, including lighting and placement of the work, also fall outside of infringing modifications, unless the modification is caused by gross negligence.<sup>59</sup> For example, a mural that is completely obstructed but not altered in any way would fall under this exception.<sup>60</sup> Because the location of a work is a matter of presentation, removal of a work from a specific location also falls under the public presentation exception.<sup>61</sup> Courts have interpreted this to exclude “site-specific” works from VARA protection.<sup>62</sup> “Site-specific” works are those that are meant to “[derive] enhanced meaning from [their] environment” and integrate their context into the overall work.<sup>63</sup> Finally, the rights granted under VARA do not apply to

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55. 17 U.S.C. § 106A(d)(1)–(3).

56. 17 U.S.C. § 106A(d)(2).

57. *Carter*, 71 F.3d at 83 (citing 17 U.S.C. § 506 (2012)).

58. 17 U.S.C. § 106A(c)(1).

59. 17 U.S.C. § 106A(c)(2).

60. *See English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137, at \*15-16 (S.D.N.Y. Dec. 2, 1997) (holding that the obstruction of plaintiffs’ murals fell under VARA’s public presentation exception).

61. H.R. REP. NO. 101-514, at 17, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 (1991); *see also* *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226 (DAB), 2003 U.S. Dist. LEXIS 10221, at \*34 (S.D.N.Y. June 17, 2003) (stating that the point of VARA “is not . . . to preserve a work of visual art *where* it is, but rather to preserve the work *as* it is.”).

62. *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 99 (D. Mass. 2003) (citing *Bd. of Managers of SOHO Int’l Arts Condo.*, 2003 LEXIS 10221, at \*10).

63. *Id.* at 95.

any work that is excluded from the definition of “work of visual art,” such as a newspaper, advertising, or any work made for hire.<sup>64</sup>

## B. VARA Case Law and “Recognized Stature”

### 1. *Carter v. Helmsley-Spear, Inc.*

A seminal case on the application of VARA is the 1994 case *Carter v. Helmsley-Spear, Inc.*<sup>65</sup> Currently, it is the only case to attempt to define and apply “recognized stature.”<sup>66</sup> In *Carter*, the court addressed an action to prevent the alteration and destruction of a sculpture installed in the lobby of a Queens, New York, commercial building.<sup>67</sup> In determining whether the plaintiff could protect his work from destruction, the *Carter* court laid out a standard for “recognized stature,” which has been quoted by several subsequent courts:<sup>68</sup>

[T]he recognized stature requirement is best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature. A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall,

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64. 17 U.S.C. §§ 101, 106A(c)(3) (2012).

65. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994); Jeffrey P. Cunard, *Moral Rights for Artists: The Visual Artists Rights Act*, CAA NEWS (May/June 2002), available at <http://www.collegeart.org/ip/vara>.

66. See *Cohen*, 988 F. Supp. 2d at 217 (“[T]he Court’s research has located only one circuit court and two other district courts that have substantively evaluated whether a visual art work was one of ‘recognized stature.’”); see also *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (“The only case found undertaking to define and apply ‘recognized stature’ is *Carter v. Helmsley-Spear, Inc.*” (citation omitted)).

67. *Carter*, 861 F. Supp. at 310, *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

68. See, e.g., *Cohen*, 988 F. Supp. 2d at 217; *Martin*, 192 F.3d at 616; Michelle Bougdanos, Note, *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, 562 (2002) (stating that other courts have adhered to the *Carter* court’s reasoning of the “recognized stature” requirement as a gate-keeping mechanism).

or Giacometti. . . . Nor must the trier of fact personally find the art to be aesthetically pleasing.<sup>69</sup>

The court laid out a standard that broke down the term “recognized stature” into two parts.<sup>70</sup> Under the test, a plaintiff must show that (1) the work of visual art has “stature,” or merit, and (2) this stature is “recognized by art experts, other members of the artistic community, or by some cross-section of society.”<sup>71</sup> The court noted that satisfying these two elements often requires calling expert witnesses.<sup>72</sup> Additionally, the court stated that in order to receive injunctive relief, a plaintiff must show that defendant has either commenced or intends to destroy the work of visual art in question.<sup>73</sup>

In holding that recognized stature was demonstrated, the lower court in *Carter* relied entirely on expert testimony voicing praise and admiration for the work in question.<sup>74</sup> Specifically, Professor Robert Rosenblum, an art history professor, art critic, and author, testified that the work was “like almost nothing [he’d] ever seen before,” and that the work was an “incredible phenomenon” that he and likely many others “want to see . . . again and learn more about.”<sup>75</sup> Likewise, Kent Barwick, president of the Municipal Art Society of New York (“MAS”), testified that the work “constituted one of the great spaces located in New York,” and that it was in the interest of the City of New York to have the piece maintained.<sup>76</sup> Barwick further stated that MAS organized a tour of the work, which MAS only does for “noteworthy works of art or architecture,” and that the participants of the tour were “very, very excited” about the work.<sup>77</sup> Lastly,

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69. *Carter*, 861 F. Supp. at 325.

70. *Id.*

71. *Id.* (internal quotation marks omitted).

72. *Id.*

73. *Id.*

74. *Id.* at 325–26.

75. *Carter*, 861 F. Supp. at 325.

76. *Id.* at 325–26.

77. *Id.*

Professor Aedwyn Darroll, a professor of two- and three-dimensional design and an expert in visual art, testified that he was “very exhilarated” by the work and that its imagination was “tremendous.”<sup>78</sup> However, on appeal, the plaintiff ultimately was not successful in his claim.<sup>79</sup> While the Second Circuit did not reverse the lower court’s “recognized stature” determination, the case was reversed and dismissed on other grounds for falling within VARA’s work-for-hire exception.<sup>80</sup>

## 2. *Martin v. City of Indianapolis*

The 1999 case of *Martin v. City of Indianapolis* took a slightly different approach to “recognized stature” and is one of the few VARA cases where an artist has been successful.<sup>81</sup> In *Martin*, the plaintiff sued for the destruction without prior notice of his twenty-by-forty-foot metal sculpture entitled “Symphony #1” that had been commissioned by the Indianapolis Metropolitan Development Commission.<sup>82</sup> In contrast to the expert testimony of *Carter*, the plaintiff only submitted printed evidence to support his claim.<sup>83</sup> The evidence submitted included a letter from the Director of the Herron School of Art at Indiana University describing the sculpture as an “interesting and aesthetically stimulating configuration of forms and structures.”<sup>84</sup> Other evidence included an article by the visual arts editor of *The Indianapolis Star*, which described the sculpture as “[g]leaming clean and abstract” and stated that “[i]t unites the area, providing a nexus, a marker, a designation, an identity and, presumably, a point of pride.”<sup>85</sup> The plaintiff also submitted a program of the art show

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78. *Id.* at 326.

79. *Carter*, 71 F.3d at 77.

80. *Id.*

81. David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985, 1023 (2014); *see generally* *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

82. *Martin*, 192 F.3d at 610–12.

83. *Id.*

84. *Id.* at 613.

85. *Id.*

where a model of the sculpture won “Best of Show.”<sup>86</sup>

Overall, the plaintiff argued for the “recognized stature” of his sculpture by emphasizing the media coverage of the sculpture’s construction and its social value to the community.<sup>87</sup> The court noted that the evidence was less complete than that submitted in *Carter*.<sup>88</sup> However, the court also noted that this was likely because the sculpture had been destroyed before it could be appraised by art experts.<sup>89</sup> The court ultimately accepted the plaintiff’s evidence in affirming the trial court’s holding that he had met his “recognized stature” burden of proof.<sup>90</sup> In doing so, the court also acknowledged the plaintiff’s argument that the “recognized stature” test of *Carter* “may be more rigorous than Congress intended.”<sup>91</sup>

### III. COHEN AND THE SCOPE OF VARA IN STREET ART

#### A. *Cohen v. G&M Realty: The Fight for 5Pointz*

Jonathan Cohen, along with seventeen other plaintiffs who were fellow aerosol artists, filed their case to enjoin the destruction of 5Pointz in the United States District Court for the Eastern District of New York.<sup>92</sup> In the complaint, the plaintiffs identified twenty-four works on the exterior walls of 5Pointz which they claimed were of “recognized stature” under VARA, and thus should be protected from destruction.<sup>93</sup> Because these works were “scattered around the building,” the plaintiffs asserted that the majority of the whole building would need to be preserved in order to

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86. *Id.*

87. Brief of Appellee/Cross-Appellant Jan Randolph Martin at 18, *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (Nos. 98-4041, 98-4132 (consolidated)), 1999 WL 33732101, at \*18.

88. *Martin*, 192 F.3d at 612.

89. *Id.*

90. *Id.*

91. *Id.*

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

93. *Id.* at 215.

accommodate them.<sup>94</sup> On November 12, 2013, the court issued an order denying the application for the preliminary injunction.<sup>95</sup>

In the subsequent written opinion (which was filed after 5Pointz was whitewashed), the court relied on the two-tiered “recognized stature” test from *Carter*.<sup>96</sup> In testifying as to whether the identified works had “stature” (the first prong of the *Carter* test), several of the plaintiffs took an expansive view and cited the intrinsic qualities of the works.<sup>97</sup> One plaintiff, Danielle Mastrion (whose portrayal of hip-hop legend Kool Herc was one of the identified works), cited the “technical ability, composition, color, line work, detail and . . . the artist’s credentials” as factors that established “stature.”<sup>98</sup> Similarly, Joe Conzo, Jr., a self-proscribed “forefather” of hip-hop and a documentary photographer, claimed the works possessed “stature” because of common elements like their details and “hard work.”<sup>99</sup> The plaintiffs’ expert, Daniel Simmons, Jr., an owner of two well-known New York City art galleries and head of the Rush Philanthropic Arts Foundation, also focused his testimony on the quality of the works.<sup>100</sup> Simmons discussed qualities such as “design, color, shape, [and] form,” as well as symmetry and innovation in stating his belief that all twenty-four works qualified as “real artworks” that had “stature.”<sup>101</sup>

In contrast, the defendants’ expert, Professor Erin Thompson, took a much different approach to “stature” that focused on external aspects.<sup>102</sup> She testified that quality is certainly a factor in determining “stature,” but

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94. *Id.* at 224 (internal quotation marks omitted).

95. *Id.* at 214.

96. *Id.* at 217; see also Nicholas O’Donnell, *5Pointz Not of “Recognized Stature” Under the Visual Artists Rights Act? Court Takes the Narrow View and Paintings are Whitewashed*, ART LAW REPORT (Nov. 24, 2013), <http://www.artlawreport.com/2013/11/24/5pointz-graffiti-painted-over-court-finds-it-was-not-of-recognized-stature-under-the-visual-artists-rights-act/> (discussing the *Cohen* opinion).

97. *Cohen*, 988 F. Supp. 2d at 220.

98. *Id.*

99. *Id.*

100. *Id.* at 221–22.

101. *Id.* at 222.

102. *Id.* at 221.

overall, “stature is recognizing not particular qualities of objects, but the way these qualities are valued by the public.”<sup>103</sup> Thompson further recognized that innovation and uniqueness are also factors of “stature,” but that ultimately a work’s “stature” should be at the level “where scholars agree that it is changing the history of art.”<sup>104</sup>

Regarding whether the stature of any of the works was “recognized” (the second prong), each party relied on the testimony of their respective art expert.<sup>105</sup> The plaintiffs’ expert, Simmons, stated he believed that “recognition” meant that “there’s enough people that know what [the work] looks like, and feels like, and what it’s trying to impart; that . . . if it was missing from the canon of art history, that it would be a loss.”<sup>106</sup> Simmons focused on the factor of “significant public exposure,” citing the visibility and prominence of 5Pointz, and the fact that several of the 5Pointz artists had other works displayed in museum exhibits.<sup>107</sup> Simmons specifically mentioned the work “Dream of Oil” by Francisco Fernandez which, due to its size and location on top of one of the 5Pointz buildings, had “tremendous” visibility to people riding the 7 train.<sup>108</sup> Simmons also pointed to the signature “Drunken Bulbs” of Jonathan Cohen’s works and the iconic images of the works by artist “Shiro,” which Simmons claimed were famous and instantly recognizable.<sup>109</sup> Overall, Simmons asserted that the celebrated reputations of both 5Pointz and many of its artists were, in themselves, what drew many people to come see the works in question.<sup>110</sup>

Conversely, the defendants’ expert Thompson focused on whether any of the twenty-four works had been mentioned on the Internet or in academic publications.<sup>111</sup> She noted that nineteen of the twenty-four had

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103. *Cohen*, 988 F. Supp. 2d at 221.

104. *Id.* (internal quotation marks omitted).

105. *Id.* at 220–21.

106. *Id.* at 222 (alteration in original).

107. *Id.*

108. *Id.* at 223.

109. *Cohen*, 988 F. Supp. 2d at 222–23.

110. *Id.* at 223.

111. *Id.* at 221.

not; three were mentioned by the artists themselves on the 5Pointz website, and the remaining two were mentioned either on a street art website or a blog.<sup>112</sup> Thompson ultimately concluded that none of the twenty-four works were sufficiently “recognized” to be of “recognized stature,” although “Lady Pink’s” “Green Mother Earth” came closest by being mentioned in a “dissertation, or a scholarly book or a journal article.”<sup>113</sup> Thompson further noted that that 5Pointz’s status as a tourist attraction would not help achieve recognition in this case unless visitors came to see particular works.<sup>114</sup>

Overall, the court stated that the evidence presented “sufficiently serious questions going to the merits to make [the twenty-four works] a fair ground for litigation.”<sup>115</sup> However, the court stated (with some regret) that VARA did not vest it with the authority to preserve 5Pointz as a whole for being a tourist site.<sup>116</sup> It clarified that such a power was normally only vested in state or local authorities.<sup>117</sup> For example, the court stated that “since 5Pointz had become such a scenic attraction, the City probably could have exercised its power of eminent domain to acquire the site.”<sup>118</sup> Additionally, there may be appropriate monetary damages to compensate the plaintiffs for their works.<sup>119</sup> The court also noted that the plaintiffs in a sense “created their own hardships” by continuing to create works on 5Pointz even after the City Planning Commission approved the demolition of the buildings.<sup>120</sup> The court ultimately found that the defendants’ new apartments, and the City Planning Commission’s requirement that the defendants reserve 3,300 square feet of the exterior of the new building for

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Cohen*, 988 F. Supp. 2d at 226.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 226–27.

120. *Id.* at 227.

art, served the public's general interests.<sup>121</sup>

*B. In What Direction Could VARA Cases Go from Here?*

While the application of VARA to street art is relatively uncharted territory in the courts, *Henderson v. Ziman*, which was recently filed on April 21, 2014, may provide some insight.<sup>122</sup> Artist Victor Henderson filed the suit under both VARA and the California Art Preservation Act (“CAPA”) over the destruction of a mural (known as the “Brooks Avenue Painting”) he co-created in 1969 as part of the artist group, the “Los Angeles Fine Art Squad.”<sup>123</sup> The complaint alleges that the mural “could have been removed without [its] destruction, distortion, mutilation or other modification.”<sup>124</sup> Henderson is seeking punitive damages, costs, attorney’s fees, and damages “sufficient to compensate him for all damages resulting from desecration, distortion, mutilation and alteration of [the] mural, including, but not limited to deprivation of the plaintiff’s property rights and damage to his honor and reputation.”<sup>125</sup> While still in its beginning stage, the case could prove to be an interesting comparison to *Cohen*. One commentator argues that the case will involve some “interesting disputes over how to value a lost work.”<sup>126</sup> The commentator asserts that the plaintiff may have a stronger argument as to “recognized stature” due to his “well established reputation in the art world.”<sup>127</sup> Moreover, the case may result in a different outcome than *Cohen* because one single work—prominent for many years—is involved, as opposed to 5Pointz, which was a collection of many individual works.<sup>128</sup> As the litigation in this case

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121. *Cohen*, 988 F. Supp. 2d at 227.

122. See generally Compl., *Henderson v. Ziman*, No. 2:14-cv-03042-SJO-AS (C.D. Cal. Apr. 21, 2014).

123. See *id.* at 1–3, *Henderson v. Ziman*, No. 2:14-cv-03042-SJO-AS (E.D. Cal. Apr. 21, 2014); Kate Lucas, *Two Recent Cases Highlight the Scope of Artists’ Protections Under VARA*, ART LAW BLOG (May 20, 2014), <http://grossmanllp.com/art-law-blog/2014/05/two-recent-cases-highlight-scope-artists-protections-vara/>.

124. Compl., *supra* note 122, at 5.

125. *Id.* at 8; Lucas, *supra* note 123.

126. Lucas, *supra* note 123.

127. *Id.*

128. *Id.*

progresses, the question of whether more clarification will be given to the scope of VARA and the “recognized stature” requirement will be answered.<sup>129</sup>

#### IV. THE SHORTCOMINGS OF VARA IN PROTECTING STREET ART SITES

VARA was a secondary statute tacked on to the Judicial Improvements Act of 1990, so, like much legislation, the act was “a compromise between many conflicting interests.”<sup>130</sup> Once enacted, it was immediately criticized on several fronts.<sup>131</sup> Overall, it is clear that VARA is a very narrowly drafted statute,<sup>132</sup> which has led some commentators to describe it as “weak, anemic and insufficient.”<sup>133</sup> Moreover, as illustrated in the cases highlighted above, successful VARA cases are a rarity.<sup>134</sup> As a result, and due to the uniquely ephemeral nature and countercultural aspects of street art compared to more traditional visual art, VARA may be even less suited to successfully protect street art in litigation.<sup>135</sup>

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129. See generally, Compl., *supra* note 122.

130. Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1935 (2000) (citing Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Title VI, § 610, 104 Stat. 5089, 5128 (1990) (codified in part in 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1994)); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 *CARDOZO L. REV.* 373, 428–29 (1995).

131. Robinson, *supra* note 130, at 1963 nn.246–49; Sherman, *supra* note 130, at 427–430.

132. Sherman, *supra* note 130, at 376–77.

133. David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 *MISS. L.J.* 985, 988 (2014) (citing Bernard J. Pazanowski, *Controversy Over Football-Field-Sized Exhibit Supports Artist’s VARA Suit Against Museum*, 78 *U.S.L.W.* 1469 (Feb. 9, 2010); Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 *AM. BUS. L.J.* 407, 452 (2009)).

134. Shipley, *supra* note 133, at 989.

135. See Michelle Bougdanos, Note, *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, 550–51 (2002) (discussing the “public legal perception of graffiti art” and how “it will be difficult for [a graffiti mural] to be considered of ‘recognized stature’ because of the public perception of graffiti”); see generally Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 *CHI.-KENT J. INTELL. PROP.* 204 (2013) (discussing the application of VARA to street art).

### A. VARA's Deficiency in Protecting 5Pointz and Similar Sites

Because VARA only protects *individual* works of visual art, a central debate of many VARA cases is whether several physically separate elements can be considered, as a whole, one individual work that warrants protection.<sup>136</sup> This was one of the obstacles that the plaintiffs in *Cohen* had to overcome.<sup>137</sup> The plaintiffs had to identify specific works to be protected under VARA because 5Pointz was essentially a collection of individual works, not a single work itself, and therefore could not be protected under VARA as a whole.<sup>138</sup> The *Cohen* plaintiffs did not attempt to make an argument that 5Pointz as a whole was one unified work.<sup>139</sup> This decision may have been based on previous case law addressing the issue.<sup>140</sup> The argument would have been difficult due the lack of necessary unifying elements, including the amount of different works on 5Pointz and the fact that many were only temporary.<sup>141</sup> The fact that the 5Pointz works were all created on a single common site likely would not have been enough to constitute them as a single work.<sup>142</sup> Moreover, as the court in *Cohen* stated, protecting 5Pointz for being a prominent tourist site was something entirely outside of VARA's language.<sup>143</sup>

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136. See, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 96–99 (D. Mass. 2003) (analyzing whether multiple sculptures in a park can be considered one whole work due to several “unifying design element[s]”); *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137, at \*8–10 (S.D.N.Y. Dec. 2, 1997) (analyzing whether multiple sculptures and murals created in a garden could be conceived as one whole work).

137. See *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 226 (E.D.N.Y. 2013).

138. *Id.* (“[The Court’s] authority under VARA is consequently limited to determining whether a particular *work* of visual art that was destroyed was one of recognized stature.”).

139. See generally *id.* (plaintiffs did not argue 5Pointz was one work).

140. See *Phillips*, 288 F. Supp. 2d at 98.

141. Compare *Cohen*, 988 F. Supp. 2d at 223–24, with *Phillips*, 288 F. Supp. 2d at 98 (holding that several of the sculptures in question “are individual free-standing pieces of sculpture, which are not integrated into the other pieces by spirals or granite.”).

142. See *Phillips*, 288 F. Supp. 2d at 98 (holding that the sculptures not integrated with the other pieces through the use of the spirals or granite were separate, free-standing sculptures).

143. *Cohen*, 988 F. Supp. 2d at 226.

### *B. Avoiding Future Problems by Executing Written Agreements*

One of the conclusions one might make from the litigation surrounding *Cohen* is that both sides would have been better off entering into a written agreement that established a clear set of expectations for the 5Pointz site.<sup>144</sup> One shortcoming worth noting regarding written agreements is the effect of VARA's waiver provisions. Before the passage of VARA, the existence of waivers was disputed in the two chambers of Congress.<sup>145</sup> The Senate expressed concern that due to an "imbalance in the economic bargaining power of the parties," artists would routinely be forced to grant waivers, thus "eviscerating the law."<sup>146</sup> Some commentators share this concern over the express waiver provision contained in Section 106A(e), particularly because buyers of works do not always share the same interest as the artist in protecting a work's integrity.<sup>147</sup>

Additionally, another potential problem lies in the much less explicit "consent" provision contained in Section 113(d)(1) that can apply to works affixed to buildings.<sup>148</sup> Some suggest that this provision can potentially lead to involuntary waivers of moral rights since this consent of the artist can be incorporated in a written agreement without otherwise explicitly waiving moral rights as required under 106A(e).<sup>149</sup> Since street art is usually affixed to buildings, this provision would likely apply and the commissioning of street art through a written agreement could have unwelcome results for the unaware street artist.<sup>150</sup>

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144. *See generally id.* (neither side entered into a written agreement establishing a clear set of expectations).

145. *See* 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:37 (2014).

146. *See* 3-8D MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[D] (Matthew Bender, rev. ed., 2014) (citing H.R. REP. NO. 101-514 (1990)).

147. Sherman, *supra* note 130, at 413.

148. *See* 17 U.S.C. § 113(d)(1)(B) (2012) ("In a case in which . . . the author consented to the installation of the work in the building . . . in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) [the rights of attribution and integrity] shall not apply.").

149. Sherman, *supra* note 130 at 421.

150. *Id.*

C. The “Recognized Stature” Standard Applied to Street Art

In order to invoke VARA’s protection against the destruction of a work of visual art, that work must be of “recognized stature.”<sup>151</sup> While street art may be becoming more socially accepted,<sup>152</sup> it still carries some negative connotations with vandalism and other crime.<sup>153</sup> This suggests that works of street art likely face much greater difficulty in meeting the “recognized stature” standard than more traditional works of visual art.<sup>154</sup> In fact, some commentators have pointed to obstacles in attaining “recognized stature,” such as the reluctance of courts to expand VARA protection to street art and the potentially greater likelihood of public outcry against street art.<sup>155</sup>

Additionally, some have argued that the “recognized stature” test from *Carter* may be too stringent in general.<sup>156</sup> For example, in the event of a newly discovered Picasso, one commentator suggested that the work,

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151. 17 U.S.C. § 106A(a)(3)(B) (2012).

152. See, e.g., *Announcing Art in the Streets*, THE CURVE (Mar. 9, 2011), [http://sites.moca.org/thecurve/2011/03/09/announcing-art-in-the-streets/\(discussing the exhibition on the history of graffiti and street art at the Los Angeles Museum of Contemporary Art\)](http://sites.moca.org/thecurve/2011/03/09/announcing-art-in-the-streets/(discussing%20the%20exhibition%20on%20the%20history%20of%20graffiti%20and%20street%20art%20at%20the%20Los%20Angeles%20Museum%20of%20Contemporary%20Art)); Ossian Ward, *How Graffiti Became Art*, TIME OUT (Jan. 29, 2008), <http://www.timeout.com/london/art/how-graffiti-became-art> (tracking urban art’s growing popularity in mainstream media); Edward Rueda, *How Has Graffiti Evolved?*, CONSIDER THIS (Oct. 15, 2013, 10:30 PM), <http://america.aljazeera.com/watch/shows/consider-this/Consider-This-blog/2013/10/15/how-has-graffitievolved.html> (interviewing New York graffiti artist Carlos Mare on the development of graffiti as a culture and art form).

153. See Bougdanos, *supra* note 135, at 559 (citing SAN FRAN. PUB. WORKS CODE art. 23 § 1301(a) (1994) (“[G]raffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. . . . Graffiti results in visual pollution and is hereby deemed a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts.”); N.Y. PEN. LAW § 145.60 (McKinney 1993) (“The unabated proliferation of graffiti is a physical blight upon the urban landscape.”)); see also Elizabeth G. Gee, Comment, *City Walls Can Speak: The Street Art Movement and Graffiti’s Place in First Amendment Jurisprudence*, 20 VILL. SPORTS & ENT. L.J. 209, 242–43 (2013) (discussing the controversy of the “Art in the Streets” exhibit at the Los Angeles Museum of Contemporary Art and the cancellation of its exhibition at the Brooklyn Museum).

154. Shipley, *supra* note 133, at 1025.

155. See generally Bougdanos, *supra* note 135 (discussing VARA’s limited scope and the public perception of graffiti).

156. Shipley, *supra* note 133, at 1025.

by law, could not be capable of “recognized stature” since it had never been publicly displayed, and thus had not been reviewed by experts in the art community.<sup>157</sup> Under the current standard, it is not sufficient that the artist be well-recognized if the individual work is not.<sup>158</sup> Furthermore, because a work must be considered meritorious under the *Carter* test to have “stature,” the test may discriminate against unpopular or controversial works, or works that are misunderstood.<sup>159</sup> The countercultural and nontraditional nature of street art suggests that this discrimination could work against these types of works.

While not a street art case, the plaintiff in *Martin* also argued against the *Carter* test.<sup>160</sup> Instead of focusing only on the rigorous burden of proving the “merit” of a work, the plaintiff argued that a court should also consider the author of the work in making a determination.<sup>161</sup> The plaintiff argued that an artist’s prior accomplishments, while not essential to proving “recognized stature,” should be considered.<sup>162</sup> The plaintiff also argued that “stature” should expand to include “any work that receives acknowledgment and comment in the art community,” not just works perceived to be “meritorious.”<sup>163</sup> VARA’s legislative history may have intended this wider scope of works considered to be of “recognized stature” due to its statement that “less well-known or appreciated artists also have honor and reputations worthy of protection.”<sup>164</sup>

In this regard, the *Carter* test may have the effect of discriminating against emerging artists or those not widely recognized within the larger artistic community, such as those whose works may not be discovered until

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157. *Id.*

158. 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:25 (2014).

159. Bougdanos, *supra* note 135, at 563.

160. Brief of Appellee/Cross-Appellant Jan Randolph Martin at 16, *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (Nos. 98-4041, 98-4132 (consolidated)), 1999 WL 33732101, at \*16.

161. *Id.*

162. *Id.* at 17.

163. *Id.*

164. H.R. REP. NO. 101-514, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925.

years later.<sup>165</sup> In VARA's legislative history, Congress did in fact address this notion that "many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created."<sup>166</sup> An example in the street art realm is Banksy, who is arguably the most famous street artist today, and who is considered by many to be a cultural icon.<sup>167</sup> Like many other street artists, Banksy started out small; however, as his notoriety and fame grew and his art became more popular and appreciated, so did the value of his work.<sup>168</sup> Some of his works have sold for tens of thousands of dollars and have even yielded upwards of \$575,000.<sup>169</sup> Surely some of Banksy's earliest works, while undeniably valuable and worthy of protection today, would not have received VARA protection at the time of their creation.

An earlier example is Keith Haring, whose beginnings were rooted in his chalk drawings in New York subway stations, but who later became one of the most celebrated artists of the 1980s.<sup>170</sup> Haring's works were eventually exhibited in museums worldwide and he was even

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165. Natalia Thurston, Note, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 715 (2005).

166. H.R. REP. NO. 101-514, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925.

167. See, e.g., Gabe Bergado, *40 Powerful Photos Show Why Banksy is the Spokesman of Our Generation*, MIC (Nov. 11, 2014), <http://mic.com/articles/103360/40-powerful-photos-show-why-banksy-is-the-spokesman-of-our-generation> (showcasing a collection of forty photos of Banksy's work); Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAGAZINE (Feb. 2013), <http://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/?all> (discussing the influence of Banksy); Shepard Fairey, *Banksy*, TIME (Apr. 29, 2010), [http://content.time.com/time/specials/packages/article/0,28804,1984685\\_1984940\\_1984945,00.html](http://content.time.com/time/specials/packages/article/0,28804,1984685_1984940_1984945,00.html) (naming Banksy one of TIME's "100 Most Influential People in the World in 2010").

168. BANKSY, WALL AND PIECE 13 (2005) (chronicling when he was eighteen years old and ran away from police after spray painting the side of a train); see, e.g., Jennifer Swann, *Banksy's "Haight Street Rat" at the U.S. Bank Tower: This is Where I Draw the Line*, LA WEEKLY (Sept. 29, 2014), <http://www.laweekly.com/arts/banksys-haight-street-rat-at-the-us-bank-tower-this-is-where-i-draw-the-line-5110530>. See generally Lauren Collins, *Banksy Was Here*, THE NEW YORKER (May 14, 2007), <http://www.newyorker.com/magazine/2007/05/14/banksy-was-here> (discussing the appearance of Banksy's early works and the rise of his reputation).

169. Gee, *supra* note 153, at 237–38.

170. *Bio*, THE KEITH HARING FOUNDATION, <http://www.haring.com/!/about-haring/bio#.VL6MVUIF9VY> (last visited Mar. 29, 2015); Bougdanos, *supra* note 135, at 561.

commissioned to work on the Berlin Wall.<sup>171</sup> Yet another example of a street artist who gradually received more mainstream recognition is Shepard Fairey, best known for being the artist behind Barack Obama's 2008 "HOPE" campaign and the "Obey Giant" campaign and clothing line.<sup>172</sup> Thus, VARA's current language may not protect the works of today's street artists who will follow in these artists' footsteps, something that, in retrospect, society may wish to have more power to avoid. This potential stifling of works by emerging artists may ultimately work against VARA's stated goals of being in accord with the Copyright Act and promoting "the Progress of . . . useful Arts."<sup>173</sup>

## V. PROPOSED SOLUTION

### A. *Balancing the Picture: Both Sides of Expanding Street Art Protection*

This Note proposes a broader alternative to the *Carter* test, as well as a modest amendment to VARA that would give protection to collections of street art such as 5Pointz that meet the "recognized stature" requirement. The biggest obstacle in making such proposals is finding a balance between the competing interests of street artists and the owners of the property on which the street art is created.<sup>174</sup>

#### 1. Arguments for Further Protection of Street Art under VARA

From an artistic perspective, lack of protection and the removal or destruction of street art affects artists' abilities to express their ideas.<sup>175</sup>

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171. *Past – One Person Exhibitions*, THE KEITH HARING FOUNDATION, <http://www.haring.com!/exhibitions/one-person#.VLrXg0fF9VY> (last visited Mar. 29, 2015); *Keith Haring Paints Mural on Berlin Wall*, N.Y. TIMES (Oct. 24, 1986), <http://www.nytimes.com/1986/10/24/arts/keith-haring-paints-mural-on-berlin-wall.html>.

172. See, e.g., Peter Schjeldahl, *Hope and Glory: A Shepard Fairey Moment*, THE NEW YORKER (Feb. 23, 2009), <http://www.newyorker.com/magazine/2009/02/23/hope-and-glory>; *About*, OBEY, <http://www.obeygiant.com/about> (last visited Mar. 29, 2015).

173. H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

174. See *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 220 (articulating defendant property owner's testimony that "there was no feasible engineering way he could preserve the existing buildings, with their 'beautiful' artwork, and incorporate them into the new ones.").

175. See Francesca Garson, Note, *Before that Artist 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, 206 (2001).

From a societal perspective, this can lead to a community's deprivation of culturally and aesthetically pleasing images exhibited in prominent and accessible locations.<sup>176</sup> While it is true that street art is more ephemeral by nature, it would still seem that a lack of protection might discourage some artists from investing the significant time and energy into creating works of street art.<sup>177</sup> At the very least it would seem to discourage the more time-intensive creation and maintenance of larger sites like 5Pointz that house collections of street art.<sup>178</sup>

Works of art in general certainly provide benefits to communities at large, and a public interest exists in protecting certain works that have the potential to enhance cultural development and stimulate the creation of new works.<sup>179</sup> Regarding its value, one commentator noted:

Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from . . . We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.<sup>180</sup>

This cultural connection between a work of art and the community may in fact align with VARA's "recognized stature" requirement, for there is no reason to accord a work of visual art greater protection than other artistic property if it is kept from the public view.<sup>181</sup>

However, not only do works of visual art have cultural importance,

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176. *Id.*

177. See generally Bruce Wallace, *Remembering 5Pointz: A Five-Story Building That Told Plenty More*, NPR (Nov. 21, 2013, 5:01 PM), <http://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more> (quoting several people about what attracted them to visit 5Pointz).

178. *Id.*

179. Natalia Thurston, Note, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 703 (2005).

180. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

181. See Elizabeth M. Bock, Note, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153, 166 (2011).

but also street art in particular may provide its own unique cultural value.<sup>182</sup> In his book *Wall and Piece*, Banksy argued how street art “serve[s] as the antithesis to the exclusive art business” due to its accessibility to the public and the opportunity it gives artists in expressing their opinions.<sup>183</sup> He went further, averring that it serves as a response to corporate society.<sup>184</sup> Street art, by its nature, is accessible to anyone and provides voices to artists who may not otherwise have the opportunity to have their art exhibited. The description of a recent street art exhibit at the Station Museum of Contemporary Art in Houston succinctly detailed the value of street art:

[Street artists] exhibit the moral dignity and the mastery of an art that lie outside the academic and commercial tradition of fine art. In other words, because they are free of the conventions of the commercial gallery system and the university, they are able to develop visual ideas and forms in new, powerfully energetic ways. Their work is a measure of the raw creativity of the community, and their subject matter deals with issues that are both personal and of general interest to an extremely diverse multi-cultural community.<sup>185</sup>

In this regard, street art arguably provides cultural value that other forms of visual art cannot, and thus, its continued existence should be accorded just as much protection as any other type of visual art.

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182. See Elizabeth G. Gee, Comment, *City Walls Can Speak: The Street Art Movement and Graffiti's Place in First Amendment Jurisprudence*, 20 VILL. SPORTS & ENT. L.J. 209, 237 (2013).

183. *Id.* n.207 (“[Graffiti is] actually the most honest artform available. There is no elitism or hype, it exhibits on some of the best walls a city has to offer, and nobody is put off by the price of admission.”) (citing BANKSY, WALL AND PIECE 8 (2005)).

184. BANKSY, WALL AND PIECE 8 (2005) (“The people who truly deface our neighbourhoods are the companies that scrawl their giant slogans across buildings and buses .... They expect to be able to shout their message in your face from every available surface but you’re never allowed to answer back. Well, they started this fight and the wall is the weapon of choice to hit them back.”).

185. *Call It Street Art, Call It Fine Art, Call It What You Know*, STATION MUSEUM OF CONTEMP. ART, <http://stationmuseum.com/index.php/component/content/article/19-exhibitions/244-call-it-street-art-call-it-fine-art-call-it-what-you-know> (last visited Mar. 29, 2015).

In the case of 5Pointz, part of its draw may have been the particular artists who worked on the building or some specific works. But overall, the main draw of 5Pointz likely was its identity as a whole—an amalgamation of quality works of street art that could be viewed in harmony all in the same place, much like a museum.<sup>186</sup> Indeed, sites like 5Pointz may be as close as it gets to “museums” of street art. While street art has been exhibited in actual museums,<sup>187</sup> those instances arguably do not compare to the exhibition of street art in its natural environment. The value added by their location is thus another reason why these sites should be protected. Overall, street art is certainly worthy of the same amount of protection accorded other forms of visual art,<sup>188</sup> which it has under VARA, at least theoretically. However, in the case of sites like 5Pointz, that protection currently is insufficient.

## 2. Arguments against Further Protection of Street Art under VARA

As seen in the 5Pointz litigation, the big question regarding sites housing collections of street art is: how should legal protection extend to these sites when that protection is in conflict with the interests of the property owners?<sup>189</sup> From a traditional legal standpoint, property owners have the right to exclude all others from the use or possession of their property.<sup>190</sup> Property owners also retain the right to control the use,

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186. See, e.g., Bruce Wallace, *Remembering 5Pointz: A Five-Story Building That Told Plenty More*, NPR (Nov. 21, 2013, 5:01 PM), <http://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more> (quoting several people about what attracted them to visit 5Pointz).

187. See, e.g., *City as Canvas*, MUSEUM OF THE CITY OF NEW YORK, <http://www.mcny.org/content/city-canvas> (last visited Mar. 29, 2015); *Call It Street Art, Call It Fine Art, Call It What You Know*, STATION OF MUSEUM OF CONTEMP. ART, <http://stationmuseum.com/index.php/component/content/article/19-exhibitions/244-call-it-street-art-call-it-fine-art-call-it-what-you-know> (last visited Mar. 29, 2015); *Past Exhibitions: Art in the Streets*, MUSEUM OF CONTEMP. ART, LOS ANGELES, <http://www.moca.org/museum/exhibitiondetail.php?&id=443> (last visited Mar. 29, 2015).

188. See generally *Call It Street Art, Call It Fine Art, Call It What You Know*, *supra* note 185.

189. See *Cohen*, 988 F. Supp. 2d at 220 (articulating defendant property owner’s testimony that “there was no feasible engineering way he could preserve the existing buildings, with their ‘beautiful’ artwork, and incorporate them into the new ones.”).

190. Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTELL. PROP. 204, 208 (2013).

transfer, and sale of the property as well as reap any benefit originating from it.<sup>191</sup> In the realm of art, many courts have affirmed these rights as superior to any other rights associated with art that is affixed to private property, particularly when created without the property owner's permission.<sup>192</sup>

From a property owner's perspective, there are several reasons why the scope of VARA may be better as it currently stands. If a property owner has to tolerate a work on her property for the duration of the artist's life (potentially fifty or more years), then the property owner might not be able to use her land to its full potential.<sup>193</sup> That certainly seemed to be the case with 5Pointz, where Jerry Wolkoff was seeking to renovate his property to make way for apartment buildings—something that would surely yield him a greater economic benefit.<sup>194</sup> Furthermore, due to the nature of the numerous rotating works of art on 5Pointz, this problem had the potential of being exacerbated, where new artists would eventually replace the deceased and there would be an endless cycle of works that could potentially render 5Pointz perpetual protection under VARA.<sup>195</sup>

Furthermore, this concern also extends to the potential for an artist to freeze a site in a particular state by creating a work of art on it.<sup>196</sup> This prevents the property owner from making other uses of her property and

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191. *Id.*

192. *See, e.g.,* English v. BFC&R East 11th Street LLC, No. 97 Civ. 7446(HB), 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 3, 1997) (holding that VARA does not apply to artwork placed on property without the owner's consent when the artwork cannot be removed from the site); Botello v. Shell Oil Co., 229 Cal. App. 3d 1130, 1138 (1991) (“[T]here is no duty at all if the mural cannot be detached from the structure without damage to the mural or the structure, unless the artists' rights have been preserved in an executed and recorded instrument.”).

193. Francesca Garson, Note, *Before That Artist 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, 205–06 (2001).

194. *See Cohen*, 988 F. Supp. 2d at 220 (“Nonetheless, the time had come to knock down the buildings to make room for two apartment complexes that are expected to provide approximately 1,000 residences.”).

195. *See id.* at 219 (Johnathan Cohen describes, “I've seen 5 to 10 artists on a very good day, until now up to 40 artists on a good day, and on our most craft [sic] day, a hundred ten artists painting.”).

196. *English*, 1997 U.S. Dist. LEXIS 19137, at \*11 (expressing concern that parties could “effectively freeze development of vacant lots by placing artwork there without permission.”).

can even impede the rights of the public who might prefer to interact with other works of art or even other uses for the site.<sup>197</sup> In the end, these potential consequences may in fact deter property owners from commissioning art on their property to begin with. Indeed, in their analysis of the economic impact of moral rights, Judge Richard Posner and Professor William Landes suggest that the assertion of artists' moral rights deters developers from commissioning works of art to be publicly displayed.<sup>198</sup> Based on the value of street art discussed above, this certainly would be a loss to the surrounding community and possibly many others.

At the end of the day, while the result of the *Cohen* case may have been the best compromise of these competing rights,<sup>199</sup> it certainly does not mean that the result will always be the case for other litigated street art sites. The litigation over 5Pointz demonstrated that the real problem for analogous cases is the application of the *Carter* test and the current scope of VARA as it applies to street art sites. Thus, further protection should exist to eliminate the vulnerability apparent in these sites.

### B. An Alternative “Recognized Stature” Test

One commentator has recommended the elimination of the “recognized stature” requirement altogether.<sup>200</sup> As a replacement, this proposal suggests a national registry of highly significant works where a panel of art experts would elect works by taking into account their aesthetic, art-historical, historical, and cultural significance.<sup>201</sup> However, due to the aforementioned countercultural and nontraditional nature of street art, this national registry may not necessarily be as effective when

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197. Vera Zlatarski, Note, “Moral” Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM.-VLA J.L. & ARTS 201, 228 (1999).

198. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 286 (2003).

199. See generally *Cohen*, 988 F. Supp. 2d 212 (stating that, although the defendant’s public interest in building additional housing outweighed the importance of protecting 5Pointz as a tourist site, the defendant agreed to reserve exterior space on the new building for artwork).

200. Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1971 (2000).

201. *Id.* at 1972.

applied to that genre.<sup>202</sup> Moreover, having the additional safeguard of a court to observe and evaluate competing expert assessments of a work may be more desirable. Currently, the “gate-keeping mechanism” of the “recognized stature” requirement<sup>203</sup> may serve imperative functions, such as barring frivolous nuisance lawsuits including those arising from the destruction of works of “an amateurish or pedestrian character.”<sup>204</sup> Thus, a better solution may be to propose an alternative to the *Carter* test.

Since the Seventh Circuit in *Martin* did not actually refine the *Carter* test in its opinion, this Note proposes an alternative test that addresses both the *Martin* plaintiff’s arguments and the issues presented above that exist due to the competing interests of street artists and property owners. While staying somewhat within the framework of *Carter*, an alternative test could be framed as follows:

Plaintiff must demonstrate that (1) the value [i.e. cultural and/or historical importance] and nature [i.e. mastery and other transcendent qualities] of the visual art in question is of significance compared to works of a similar nature, and (2) the visual art in question has accrued substantial acclaim and/or recognition.

Under this test, it would be made clear that printed evidence demonstrating acclaim and recognition (such as that presented in *Martin*) should be given equal evidentiary weight to expert testimony. In evaluating the nature or value of visual art, there is no denying that experts are inevitably needed in most cases since courts themselves should not be the judges of artistic merit.<sup>205</sup> However, newspaper or magazine articles and other media coverage can be just as effective in establishing acclaim and recognition.<sup>206</sup> Furthermore, this dependence on experts in

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202. *Id.*

203. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, vacated in part*, 71 F.3d 77 (2d Cir. 1995).

204. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 954–55 (1990).

205. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

206. See generally *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (affirming the district court’s holding that plaintiff’s proffered evidence of printed materials established

determining “recognized stature” does not come without criticism, with one commentator lamenting over the “battle of paid experts” produced by the lack of “recognized stature” definition.<sup>207</sup> To help avoid increased litigation caused by “battle[s] of expert witnesses,” it should be clearly established that other evidence can have equal weight in demonstrating “recognized stature.”<sup>208</sup> Under this approach, part one would generally need to utilize some form of expert testimony to demonstrate the value and nature of a work, but part two would rely primarily on other types of evidence such as recognition by newspaper and magazine articles and critic or spectator reviews.

### 1. The Value and Nature of the Visual Art in Question

In an attempt to address certain shortcomings of the *Carter* test (at least as applied to street art), this alternative would also consider a broader scope of evidence. In determining the value of a work (part one), courts would also be allowed to consider community opinion and/or testimony in addition to the necessary expert testimony. This would serve the purpose of establishing the value of a work of street art to the surrounding community, arguably the greatest recipients of the work’s value and those most affected by its destruction.<sup>209</sup> This test would also examine whether an overall site that houses a collection of street art is of “recognized stature.” Where a collection of street art—any site analogous to 5Pointz—is in question, the acclaim and recognition of the site overall would be considered. For example, while a site’s status as a notable tourist attraction may not speak to the value of a *particular* work, it certainly speaks to the value that the public derives from the collection of works overall. This is arguably an even greater value than that derived from a single work.

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“recognized stature”).

207. 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:25 (2014) (“The lack of such a definition will frequently lead to the further proliferation of one of the cancers of American legal system, the battle of paid experts. . . . Experience under VARA has provided ample examples of the buffoonery perpetrated by some experts.”).

208. H.R. REP. NO. 101-514, at 13 (1990), *reprinted in* 1990 U.S.C.A.N. 6915, 6925 (discussing whether to include the “recognized stature” language in VARA and concluding that “the Committee recognizes that the original standard would have increased litigation by creating a battle of expert witnesses over whether a particular work had a recognized stature.”).

209. *See* Barnett, *supra* note 190, at 211 (explaining that the community has no control over the fate of a piece of street art even though the artwork may still have an impact on the social and economic value of the community).

Regarding testimony on the nature of a work (also part one), this test would also compare a work to those of a similar nature, i.e., whether a work of street art is of exceptional quality, significant meaning, etc. compared to other street art. By framing the evaluation of a work within its specific niche or genre, the test is more capable of truly quantifying its cultural worth through comparison. This would be more effective since street art might not be readily comparable to more traditional paintings or some other forms of visual art. Thus, comparing street art with all art may be too broad and ineffective of an exercise. However, to the extent possible, the impact of the work on the general art world would still be considered, but it would not be essential in demonstrating “recognized stature.” Moreover, this test would also give more weight to the testimony of street artists or those who have some other notable experience with street art. This is particularly crucial for a more unconventional form of art, like street art where many otherwise capable art experts might not be as well-versed in the genre or as capable of comprehending certain nuances of its culture.

## 2. The Acclaim and Recognition of the Visual Art in Question

In determining whether a work has accrued substantial acclaim or recognition (part two of the proposed test), many of the factors addressed by the *Carter* test would require consideration (recognition “by art experts, other members of the artistic community, or by some cross-section of society”).<sup>210</sup> However, this part of the test would focus more on printed materials and other evidence existing prior to the filing of the case. This would attempt to provide more objective and neutral evidence compared to testimony that is prepared specifically for court and more catered to each side’s case. This part would also address the plaintiff’s argument in *Martin* and take into account the significance and recognition of the artist of the work. While recognition and acclaim of the actual work would be more persuasive, the reputation of the artist remains relevant in determining the overall recognized stature of the individual work. To a certain extent, this also addresses the criticism that the “recognized stature” requirement excludes newly discovered works by famous artists like Picasso that would undeniably be valuable.<sup>211</sup>

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210. *Carter*, 861 F. Supp. at 325.

211. See David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 Miss. L.J. 985, 1025 (2014).

### 3. The Balancing Mechanism

The last crucial part of this proposed test is a balancing mechanism that weighs the above “recognized stature” of a work of visual art against the potential value and public interest served by the property owner’s desired new use for the site. This is particularly crucial for cases of street art where buildings and other private property are usually the chosen medium for the artistic works.<sup>212</sup> The main motivation behind this balancing mechanism is to maintain the traditionally superior rights of property owners and their freedom to profit from and use their property to its fullest potential.<sup>213</sup> However, at the same time, this test should still consider cases like 5Pointz where a property owner allows his property to be used primarily or exclusively as a medium for street art for many years. In these situations, the extent to which the property owner may have brought difficulty on himself should not be irrelevant, especially when a property owner does not make the effort to either protect himself or set expectations for the artist(s) by executing some form of written agreement. Overall, this balancing mechanism seeks to maintain some protection for artists—particularly when their works are of notable cultural value—while acknowledging that property owners still have superior rights in many, if not most, cases.

In an attempt to meet a fair and just compromise, this balancing mechanism would consider several factors. Most importantly, it would look at both the level of cultural value of a work of “recognized stature,” and the probable value of any public interest served by the property owner’s proposed use. For example, the public interest served by constructing a parking lot may not outweigh the cultural value of a building that is a popular tourist attraction for its exhibit of street art. On the other hand, the public interest served by constructing in-demand, low-income housing likely will outweigh the cultural value of that building. In the case of 5Pointz, the defendants were able to reach a compromise with their desired housing development by agreeing to include seventy-five affordable housing units and install 3,300 square feet of “exterior art panels” to be used for street art.<sup>214</sup> By doing so, the defendants arguably

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212. See Barnett, *supra* note 190, at 206–07 (defining street artists as those “who apply their work to private property without the property-owners’ permission”).

213. See *id.* at 208.

214. *Cohen*, 988 F. Supp. 2d at 221.

will serve a sufficient public interest to outweigh the lost cultural value of 5Pointz.

Other relevant factors would include: (1) the property owner's desired use of the site; (2) the timeframe of the project and the imminence of when construction would start; (3) existence of any prior written agreement; or (4) absent a prior written agreement, the length of time that street art was permitted to be created on the property; and (5) any income or other benefit the property owner received from the property in its current form. These listed factors are not exhaustive, but rather, are meant to demonstrate the kinds of information that courts may consider. For example, whether a defendant already has a concrete plan in place, such as a finalized construction deal, would serve to evaluate the legitimacy of the defendant's desired use. Among other things, this would also serve as a safeguard to prevent a property owner from concocting some purpose as pretext and then never following through after the site and its art is destroyed. In addition, where a desired use is determined to be legitimate, but is still in the developing stages, a court may allow the site to be demolished, but not until a plan is finalized and it is clear that construction would shortly follow the demolition. This would prevent a site from unnecessarily sitting vacant after it is demolished and would thus maximize the continued cultural value derived from the site before it is destroyed.

Evidence of a prior written agreement between the parties would of course be a significant factor in determining the end result. This would allow a court to determine whether the plaintiff agreed to or reasonably should have expected the site to eventually be demolished. Where a written agreement was not executed, a court would be allowed to consider how long the property owner permitted the street art to be created on his property. While this factor may not initially have much weight, it could be a determining factor in an otherwise close case by providing an estoppel justification for preventing the defendant's demolition. Lastly, the evaluation of any income or other benefit the property owner derived from the property (such as through charging admission, conducting tours, or from the site being used for photo shoots) would also serve to balance any hardships or burdens.

Overall, this balancing mechanism would ensure that a "recognized stature" determination does not automatically negate the rights of property owners, although it would make VARA protection possible. Since property rights have traditionally been superior to other legal rights, such as those of an artist painting on the property, it is important to maintain

them.<sup>215</sup> At the same time, there is no denying the importance of protecting artists' rights, which is the reason why VARA exists in the first place.<sup>216</sup> Because street art often involves this complicated relationship of conflicting ownership rights of the artist versus the property owner, a balancing mechanism aims to achieve an appropriate compromise. The outcome of *Cohen* may have been such an appropriate compromise. However, as similar compromises are not guaranteed in future cases, this balancing mechanism helps to ensure similar outcomes that are justified within the framework of the competing ownership interests of street art.

### C. A Minor Amendment to VARA's Integrity Right

The district court in *Cohen* stated that it “regrettably had no authority under VARA to preserve 5Pointz as a tourist site.”<sup>217</sup> As discussed earlier in this Note, additional cultural value can be derived from collections of street art as a whole, not merely from the individual works themselves. There are numerous sites similar to 5Pointz—not to mention potential future sites—that would benefit from VARA protection. A few examples of other notable street art sites include Wynwood Walls in Miami, Florida, Art Alley in Rapid City, South Dakota, and HOPE Outdoor Gallery in Austin, Texas.<sup>218</sup> To ensure that these culturally significant sites of street art are accorded some protection, this Note proposes a modest amendment to VARA that would add collective works of “recognized stature” to those accorded protection from destruction.

In addressing the value of street art, one proposal does come close to a solution. One commentator has suggested an amendment to VARA that would treat certain street art as cultural property, similar to currently protected articles of cultural significance such as historical sites and monuments, sunken treasures, Native American artifacts, and specified significant architectural works.<sup>219</sup> This proposal further states: (1) to be

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215. See Barnett, *supra* note 190, at 208.

216. See H.R. REP. NO. 101-514, at 5, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.

217. *Cohen*, 988 F. Supp. 2d at 226.

218. WYNWOOD WALLS, <http://thewynwoodwalls.com/> (last visited Mar. 29, 2015); ART ALLEY, <http://artalley.awardspace.com/> (last visited Mar. 29, 2015); HOPE OUTDOOR GALLERY, <http://hopecampaign.org/hopeprojects/hope-outdoor-gallery/> (last visited Mar. 29, 2015).

219. Barnett, *supra* note 190, at 211–12.

protected, the work must be of “recognized stature,” (2) “site-specific” works should be protected under VARA, with street art presumed to be “site-specific,” and (3) the artist’s estate or heirs and members of the relevant community should also have standing under VARA.<sup>220</sup> The proposal would also ensure that the work would not interfere with the beneficial enjoyment of the specific property to which it is affixed.<sup>221</sup> This proposal certainly would seem to be an improvement for the protection of individual works of street art. Most notably, the expansion of who has standing under VARA would empower members of the community that directly benefit from a work of street art and are most affected by its destruction to protect the value of the street art. This would be a positive improvement that already exists to a certain level in several state equivalents to VARA. For example, California’s Cultural and Artistic Creations Preservation Act gives standing to any established nonprofit arts organization acting in the public interest.<sup>222</sup> However, while the above proposal may have some benefits, it does not specifically address the lack of protection for collections of street art as was the case in *Cohen*.

As a result, this proposal would make a small addition to the language of Section 106A(a)(3)(B) (the subsection addressing the destruction of works of “recognized stature”) to include the protection of collective works. The proposal might read: [The author of a work of visual art shall have the right] to prevent any destruction of a work *or collective work* of recognized stature, and any intentional or grossly negligent destruction of that work *or collective work* is a violation of that right.<sup>223</sup> Section 101 defines a “collective work” as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled

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220. *Id.* at 212–14.

221. *Id.* at 214.

222. CAL. CIV. CODE § 989(c) (West 2014). California enacted the Cultural and Artistic Creations Preservation Act (“CACPA”) in 1982 as a supplement to the California Arts Preservation Act (“CAPA”). The statute added protection for works by unknown or deceased artists that were previously unprotected by CAPA. Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1943–44 (2000).

223. The italicized language is the proposed addition, the non-italicized language is the current language of 17 U.S.C. § 106A(a)(3)(B) (2012), and the bracketed language is current language taken from the beginning of § 106A to add clarity for purposes of the example.

into a collective whole.”<sup>224</sup> Since a periodical issue, anthology, and encyclopedia are all works that are currently excluded from VARA’s protection, they would still be excluded even with the addition of this language.<sup>225</sup> This is because this subsection of the statute is still subject to the exception provided under Section 106A(c)(3). This subsection specifically excludes VARA protection for works that are excluded from the Section 101 “work of visual art” definition.<sup>226</sup> If desired, an additional subsection to this proposed amendment could also be added to provide further clarity. This could state something along the lines of: “what constitutes a collective work for purposes of this subsection is subject to the same exclusions set forth for a ‘work of visual art’ in section 101.”

One benefit of using the “collective work” definition is that the proposal uses existing language of the Copyright Act. This helps provide clarity if there is any question as to the applicability of the term. However, a street art site such as 5Pointz should clearly fit within the definition since it consists of separate and independent works of street art that are assembled into a collective whole, such as on the same building. Furthermore, any artist who contributed a work to the collective work would have standing under VARA, much like a joint author.<sup>227</sup>

## VI. CONCLUSION

The *Cohen* court concluded its opinion with an appropriate quote by Pablo Picasso: “[t]he purpose of art is washing the dust of daily life off our souls.”<sup>228</sup> In the case of 5Pointz, this was more literal. It gave new life to the bleak exterior walls of unused old industrial buildings and created a

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224. 17 U.S.C. § 101 (2012).

225. 17 U.S.C. § 101 (“A work of visual art does not include . . . any . . . book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.”).

226. 17 U.S.C. § 106A(c)(3) (“The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of ‘work of visual art’ in section 101. . . .”).

227. 17 U.S.C. § 106(b) (“The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.”).

228. *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 225 (E.D.N.Y. 2013) (alteration in original).

celebrated cultural attraction that drew in spectators and artists from many parts of the world. 5Pointz was a testament to the unique value that street art can offer. Although the law ultimately did not protect its destruction, there are still many similar sites around the country and the world where this value remains.<sup>229</sup> In light of 5Pointz's destruction, the proposals of this Note seek to find a solution that would provide some legal protection to equivalents of 5Pointz.

Overall, the solutions proposed by this Note seek to fill a gap in VARA without radically changing the statute. The proposed amendment to VARA's "recognized stature" subsection allows for the possible protection of future "graffiti meccas" without changing how VARA otherwise currently functions. As more people begin to recognize and understand the value of street art, this proposal takes the logical next step of protecting overall sites that amass this value into one location. As mentioned above, the result of *Cohen* may have been the right compromise. However, the public outcry over the whitewashing and eventual demolition of 5Pointz is indicative of the controversy that can be inherent in the complicated relationship between street artist and property owner.<sup>230</sup> Public outcry also shows why the cultural value of these sites should be considered. In the end, these proposals attempt to find a fair middle ground while laying to rest some of the criticisms of VARA in the process. While street art likely will never go away, these proposals seek to add legal protection for the value offered by the uniqueness of sites like 5Pointz. In doing so, these proposals will hopefully help maintain the true "museums" of street art and what they represent. As Banksy once stated in an interview, "[s]hould graffiti be judged on the same level as modern art? Of course not: It's way more important than that."<sup>231</sup>

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229. See e.g., WYNWOOD WALLS, <http://thewynwoodwalls.com/> (last visited Mar. 29, 2015); ART ALLEY, <http://artalley.awardspace.com/> (last visited Mar. 29, 2015); HOPE OUTDOOR GALLERY, <http://hopecampaign.org/hopeprojects/hope-outdoor-gallery/> (last visited Mar. 29, 2015).

230. Vanessa Castro, *Twitter Lashes Out Against 5 Pointz Being Painted over*, COMPLEX (Nov. 19, 2013), <http://www.complex.com/style/2013/11/5pointz-reactions>.

231. David Fear, *Street (II)legal: Q&A With Banksy*, TIME OUT NEW YORK (Apr. 12, 2010), <http://www.timeout.com/newyork/film/street-il-legal-q-a-with-banksy>.