

GRAFFITI AND THE VISUAL ARTISTS RIGHTS ACT

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ABSTRACT

*Common adornments on the sides of freight trains, highway underpasses, and dark alleyways, aerosol paint designs now also boast recent appearances on high-fashion runways, in Top 40 music videos, and even at sophisticated art auctions. Graffiti, by any other name, is still generally associated with gang activity. However, the acceptance of street art by pop culture has legitimized spray painting as another expression of modern art and aerosol artists have proven they deserve recognition. Nonetheless, while intellectual property law extends protection to benefit other artists, its application is limited as a recourse for graffiti artists. Why? Because the irony of protecting vandalism has not escaped the courts.*

*This Article explores the strategies used by an artist's counsel to protect his or her client's work from alleged infringers. After a brief overview of general copyright protections, the Article will focus on the potential claims an artist can assert under the Visual Artists Rights Act of 1990. Specifically, it will examine the case law established by a U.S. District Court in *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013), and discuss both an artist's possible claims for protection under VARA and the possible defenses. This Article will highlight key issues that remain unanswered and summarize recommendations for practitioners whose*

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*clients are on either side of these issues.*

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INTRODUCTION

For nearly two decades, as the Queens-bound 7 train emerged from under the East River and passed through Long Island City, riders were treated to front row, first-class views of original paintings created by artists from around the world. That is, until November 2014, when all the artwork was haphazardly painted over in cheap, white primer and eventually the entire display was unceremoniously torn down. By January 2015, the graffiti mecca known as “5Pointz” had been demolished into nothing but a city block of rubble.<sup>1</sup>

5Pointz got its start in 1993 when Jerry Wolkoff, owner of a 200,000 square foot warehouse complex, gave permission to local street artists to use his buildings to showcase legal graffiti work.<sup>2</sup>

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<sup>1</sup> A time-lapse video of the six-month demolition distilled into less than sixty seconds can be viewed online. Aymann Ismail, *Watch the Months-Long Demolition of 5 Pointz in a One-Minute Time-lapse*, ANIMAL (Jan. 8, 2015, 12:00 AM), <http://animalnewyork.com/2015/watch-months-long-demolition-5-pointz-one-minute-timelapse>.

<sup>2</sup> See Plaintiff’s Original Complaint at 40, *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) (No. CV13-5612), 2013 WL 5726692 [hereinafter Plaintiff’s Original Complaint].

Wolkoff specified only three restrictions: no political statements, no religious statements, and no pornography.<sup>3</sup> In 2002, Jonathan Cohen took over as the curator and manager of the aerosol arts program at 5Pointz.<sup>4</sup> Cohen, an artist himself under the tag “Meres One,” transformed 5Pointz into “the largest collection of exterior aerosol art in the United States.”<sup>5</sup> All artworks required Cohen’s express permission.<sup>6</sup> He would only allow new or unknown artists to initiate works after reviewing their portfolio and approving the proposed piece.<sup>7</sup> Cohen also decided the configuration of various artworks—the collection eventually grew to host over 350 works of art on the exterior and interior walls of the warehouse.<sup>8</sup> 5Pointz became a destination for both artists and art patrons from across the globe.<sup>9</sup>

In June 2012, Wolkoff, by and through his company, G&M Realty, announced a development project at the site of the warehouse.<sup>10</sup> The proposal aimed to replace the warehouse with two high-rise luxury apartment buildings containing over 1,000 residential units and to transform the dilapidated warehouse district into a gentrified community.<sup>11</sup>

The local community board initially rejected Wolkoff’s application for a special zoning permit, citing the development’s dearth of affordable housing and art studios, among other community-focused reasons.<sup>12</sup> Wolkoff returned with concessions,

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<sup>3</sup> See *id.* at 44.

<sup>4</sup> *Id.* at 42.

<sup>5</sup> Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

<sup>6</sup> Plaintiff’s Original Complaint, *supra* note 2, at 49.

<sup>7</sup> *Id.* at 50.

<sup>8</sup> *Id.* at 66.

<sup>9</sup> *Id.* at 55–62. See also Cohen, 988 F. Supp. 2d at 219.

<sup>10</sup> Rebecca Fishbein, *5Pointz Really Might Get Bulldozed Next Fall*, THE GOTHAMIST (June 26, 2012, 3:58 PM), [http://gothamist.com/2012/06/26/5\\_pointz\\_really\\_might\\_get\\_bulldozed.php](http://gothamist.com/2012/06/26/5_pointz_really_might_get_bulldozed.php).

<sup>11</sup> See Claire Trapasso, *Queens Borough President Helen Marshall Supports Tearing Down 5Pointz to Make Way for Residential Towers*, NY DAILY NEWS (July 17, 2013, 12:44 PM), <http://www.nydailynews.com/new-york/queens/queens-borough-president-backs-luxury-towers-5pointz-article-1.1401185>.

<sup>12</sup> See Christian Murray, *Community Board 2 Rejects 5Pointz Developer’s Plans*, LIC POST (June 7, 2013), <http://licpost.com/2013/06/07/community-board-2-rejects-5-pointz-developers-plans>.

including 210 affordable units, 12,000 square feet of artist's studios, and even an open space for Cohen to continue curating street art.<sup>13</sup> The New York City Council unanimously approved this revised proposal.<sup>14</sup> The fate of 5Pointz appeared inevitable.

Wolkoff's project, however, was further delayed by a lawsuit brought by seventeen 5Pointz artists led by Cohen.<sup>15</sup> The artists invoked the federal Visual Artists Rights Act to attempt to secure a preliminary and permanent injunction barring Wolkoff from demolishing the warehouse and all of 5Pointz's artwork with it.<sup>16</sup>

## I. THE VISUAL ARTISTS RIGHTS ACT OF 1990

In 1990, Congress acknowledged artists' "droite moral," or moral rights, by enacting the Visual Artists Rights Act ("VARA") as a supplement to traditional copyright law.<sup>17</sup>

### A. Copyrights and the Fair Use Doctrine

Copyrights, in general, secure for creators special property rights over their original work as long as the product is "fixed in a tangible medium."<sup>18</sup> A copyright holder controls the right of reproduction, the right of adaptation, the right of distribution, the right of performance, and the right of display, as far as the nature of the work permits.<sup>19</sup> It follows logically that graffiti artists may

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<sup>13</sup> Sarah Maslin Nir & Charles V. Bagli, *City Council to Decide Fate of Mecca for Graffiti Artists*, N.Y. TIMES (Oct. 8, 2013), <http://www.nytimes.com/2013/10/09/nyregion/city-council-to-decide-fate-of-mecca-for-graffiti-artists.html>.

<sup>14</sup> Emily, *5Pointz Condo Plan a Go, More Development Details Emerge*, BROWNSTONER QUEENS (Oct. 9, 2013, 1:15 PM), <http://queens.brownstoner.com/2013/10/breaking-city-council-approves-5pointz-plan-more-development-details-emerge>.

<sup>15</sup> See *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

<sup>16</sup> See Plaintiff's Original Complaint, *supra* note 2, at 184-92.

<sup>17</sup> See 17 U.S.C.A. § 106A (West 2015) (bringing U.S. law into compliance with the international Berne Convention for the Protection of Literary and Artistic Works).

<sup>18</sup> *Id.* § 102.

<sup>19</sup> *Id.* § 106A.

invoke copyright protections for their aerosol art.<sup>20</sup> However, in practice, those protections are awarded with varying success.<sup>21</sup>

If copyright infringement lawsuits do move forward, defendants may still prevail by asserting the Fair Use Doctrine.<sup>22</sup> This defense permits certain uses of copyrighted work without violating the work's copyright protections. Whether use of a work is "fair" depends on four factors: (1) purpose and character of the use; (2) nature of the original, copyrighted work; (3) amount and substantiality of the portion used in relation to the original; and (4) effect of the use upon the potential market or value of the original.<sup>23</sup> The Fair Use Doctrine, therefore, allows for reproductions of copyrighted graffiti art without obtaining the artist's permission.<sup>24</sup>

### *B. How VARA is Differentiated from Copyright*

VARA rights differ from traditional copyrights because VARA protects the original artwork itself, and protects only "works of visual art,"—specifically, paintings, drawings, photographic prints and sculptures.<sup>25</sup> VARA rights are exclusively owned by the artist

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<sup>20</sup> *But see* Villa v. Brady Publ'g, No. 02 C 570, 2002 WL 832574 (N.D. Ill., May 2, 2002) (requiring the artist first establish he or she owns a valid copyright over the art to assert a valid claim of copyright infringement), *vacated*, 2002 WL 1400345 (June 27, 2002).

<sup>21</sup> Many artists initiate copyright suits against alleged infringers only to settle out of court. *See generally* Bill Donahue, *American Eagle, Street Artist Settle Copyright Suit*, LAW360 (Dec. 2, 2014, 1:40 PM), <http://www.law360.com/articles/600542/american-eagle-street-artist-settle-copyright-suit>; Nicholas O'Donnell, *Graffiti Litigation Update: Settlements and Procedural Wrangling*, ART LAW REPORT (Dec. 3, 2014), <http://www.artlawreport.com/2014/12/03/graffiti-litigation-update-settlements-and-procedural-wrangling/>; Gabe Friedman, *Can Graffiti Be Copyrighted*, ATLANTIC (Sept. 21, 2014), <http://www.theatlantic.com/business/archive/2014/09/can-graffiti-be-copyrighted/380323>.

<sup>22</sup> *See* 17 U.S.C.A. § 107 (West 2015).

<sup>23</sup> *Id.*

<sup>24</sup> *See* Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (holding that a rock band's unauthorized use of the artist's copyrighted graffiti illustration in a music video backdrop was sufficiently transformative as not to violate the artist's copyright).

<sup>25</sup> 17 U.S.C. § 101 narrows the definition further to:

and remain with the artist even after the work or its copyright have been transferred to another.<sup>26</sup> And, unlike copyrights, VARA rights cannot be transferred, though they may be waived.<sup>27</sup>

The Act promulgates the “belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should be protected and preserved.”<sup>28</sup> The reputation of the work and the artist are intertwined by two categories of moral rights: (1) rights to attribution and (2) rights to integrity.<sup>29</sup> Rights to attribution give artists the exclusive right to claim authorship of their work or disclaim works that are not their creation.<sup>30</sup> Rights to integrity authorize artists to prevent any “intentional distortion, mutilation, or modification” of their work which would be prejudicial to their honor or reputation.<sup>31</sup> “[A]ny destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”<sup>32</sup> It is under this second prong of VARA that graffiti artists can try to prevent the physical destruction of their work.

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(1) 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, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C.A. § 101 (West 2015).

<sup>26</sup> *Id.* § 106A(e).

<sup>27</sup> *Id.*

<sup>28</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (citing RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 417 (1989)).

<sup>29</sup> 17 U.S.C.A § 106A(a).

<sup>30</sup> *Id.* § 106A(a)(1).

<sup>31</sup> *Id.* § 106A(a)(2)(3).

<sup>32</sup> *Id.* § 106A(a)(3)(B).

### C. Defenses to VARA Claims

In defense of a VARA cause of action, defendants may assert that the artwork in question does not meet VARA's criteria for protection or falls within an express exception.<sup>33</sup> VARA does not apply to works made for hire, advertising of promotional materials, applied art, technical drawings, works featured in magazines, or works that can be modified under the "public presentation" exception of 17 U.S.C. § 106A(c)(2).<sup>34</sup> A defendant may also upend a prima facie VARA complaint by establishing that the artwork was placed without the consent of the property owner.<sup>35</sup> Additionally, artists may waive their VARA rights.<sup>36</sup>

## II. ANALYSIS OF *COHEN V. G&M REALTY*

### A. The Artists' Claims Under VARA

When Cohen and his co-plaintiffs brought their complaint and subsequent amended complaints against Wolkoff, their suit marked "the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law."<sup>37</sup>

In order to succeed on their VARA claims to prevent the destruction of their work, the plaintiffs needed to establish four elements: (1) the work was a work of visual art; (2) the art was of recognized stature; (3) the art was or will be destroyed; and (4) the art was copyrightable.<sup>38</sup> Here, the court concluded graffiti is a

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<sup>33</sup> See *id.* §106A(c).

<sup>34</sup> Rebecca E. Hatch, *Cause of Action for Destruction of "Work of Visual Art" of "Recognized Stature" Under Visual Artist Rights Act (VARA)*, 17 *U.S.C.A. §106A*, 63 *CAUSES OF ACTION* 2D 649 (July 2015).

<sup>35</sup> "VARA is inapplicable to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question." *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, \*4 (S.D.N.Y. Dec. 3, 1997). This Article does not consider possible applications of VARA to illegal graffiti.

<sup>36</sup> 17 U.S.C.A. § 106A(e)(1) (West 2015).

<sup>37</sup> *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

<sup>38</sup> Hatch, *supra* note 34, at 7.

visual art, and the demolition of the warehouse complex would undoubtedly destroy all of 5Pointz's art. Consequently, whether the art was of "recognized stature" became the ultimate issue in dispute in *Cohen v. G&M Realty*.

### B. *Wolkoff's Defenses*

VARA specifically addresses works of visual art that "may be incorporated in or made part of a building."<sup>39</sup> In those instances, the owner of the building must obtain a written waiver from artists before the owner can proceed with any removal or possibly damaging actions.<sup>40</sup>

In *Cohen*, Wolkoff did not obtain written waivers from the artists. However, the defendants argued a variation on the waiver exception. Wolkoff testified that he had always been explicit about his plans to eventually knock down the buildings.<sup>41</sup> Cohen and other artists had also acknowledged that inevitability at various times before bringing this action.<sup>42</sup> Furthermore, the court pointed out that, by nature, graffiti is temporary.<sup>43</sup> Cohen himself explained that most of the artwork at 5Pointz was "meant to be turned over" on a "quickly rotating" basis.<sup>44</sup>

### C. *The Court's Analysis of Claims Under VARA*

The decision in *Cohen* ultimately rested on whether the artwork at 5Pointz—created by the seventeen plaintiff-artists—constituted works of "recognized stature" such that each piece merited VARA protection and altogether would halt the demolition project. The court applied the analysis set forth by the U.S. District Court of the Southern District of New York in *Carter v. Helmsley-*

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<sup>39</sup> *Cohen*, 988 F. Supp. 2d at 215 (citing 17 U.S.C.A. § 113d(1)(A) (West 2015)).

<sup>40</sup> 17 U.S.C.A. § 113d(1)(B) (West 2015).

<sup>41</sup> *Cohen*, 988 F. Supp. 2d at 223.

<sup>42</sup> *Id.* at 224.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 223-24.



*Spear, Inc.*<sup>45</sup> The lower *Carter* court established a two-tiered test for determining “recognized stature.” First, the artwork in question must have “stature,” that is, must be viewed as meritorious.<sup>46</sup> Second, that stature must be “recognized” by art experts, other members of the artistic community, or by some cross-section of society.<sup>47</sup>

In *Carter*, the district court concluded that the art in question, a sculpture in the lobby of a commercial building, was a work of recognized stature. The court was persuaded by expert opinions that testified to the work’s reputation, that the sculpture was “an incredible phenomenon,” “the imagination of the work is tremendous,” and that an art society wanted to organize a tour of the work.<sup>48</sup>

Following the formulation in *Carter*, the district court in *Cohen* similarly tested whether plaintiffs’ artworks at 5Pointz were of “recognized stature.”<sup>49</sup> One plaintiff, Danielle Mastrion, testified that all twenty-four works were of recognized stature because they satisfied factors such as “technical ability, composition, color, line work, detail and also the artist’s credentials.”<sup>50</sup> She also testified that 5Pointz’s high visibility and exposure to the public further elevates its qualifications even more.<sup>51</sup> Plaintiffs’ expert witness, Daniel Simmons, Jr., the head of the Rush Philanthropic Arts Foundation and owner of two well-known art galleries in New York City, agreed with Mastrion. Simmons also focused on the quality of the work, such as design, color, shape, form, and characteristics of symmetry and innovation.<sup>52</sup> Simmons concluded that New York City as a whole would be diminished if 5Pointz

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<sup>45</sup> 861 F. Supp. 303 (S.D.N.Y. 1994), *vacated in part and aff’d in part* by 71 F.3d 77 (2d Cir. 1995). The court of appeals did not address what constitutes a work of “recognized stature” but found that the artwork was indeed of recognized stature because it was not precluded as a work made for hire exception. *See id.*

<sup>46</sup> *Id.* at 325.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 325-26.

<sup>49</sup> *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 220 (E.D.N.Y. 2013).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 222.

were to be lost. “It had become part of the urban landscape and should be preserved, if possible.”<sup>53</sup>

From the defendants’ perspective, the artwork at 5Pointz, although “beautiful,” did not achieve “recognized stature.” Defendants brought in Erin Thompson, an art history professor, to testify to a restrictive view of both “recognition” and “stature.” Thompson explained that, “while quality is certainly one of the factors in the stature . . . stature is recognizing not particular qualities of objects, but the way these qualities are valued by the public.”<sup>54</sup> Thompson asserted that none of the twenty-four works had achieved recognized stature.<sup>55</sup> Nineteen of the twenty-four have never been mentioned in academic publications.<sup>56</sup> The other five were only mentioned by the artists themselves or on the 5Pointz website.<sup>57</sup> Only one piece, Lady Pink’s “Green Mother Earth,” had been mentioned in a dissertation, or a scholarly book or a journal article.<sup>58</sup> Although Thompson conceded aerosol art can achieve recognized stature by citing to Banksy, whose works are widely known, Thompson concluded VARA recognition is not satisfied simply because visitors came to see a particular work of art.<sup>59</sup>

The district court ultimately agreed with Thompson. The court noted it did not have the authority to preserve 5Pointz as a tourist site—the power of eminent domain belonged to the City.<sup>60</sup> Although the court “was taken by the breadth and visual impact of 5Pointz,” and although “the Court wished it had the power to preserve them,” the court did not afford VARA protection to the 5Pointz works.<sup>61</sup>

Adding insult to injury, the court added, “in a very real sense, plaintiffs’ have created their own hardships.”<sup>62</sup> Cohen knew the

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<sup>53</sup> *Id.* at 223.

<sup>54</sup> *Id.* at 221.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 226.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 227.

warehouse complex would someday be torn down.<sup>63</sup> Yet, plaintiffs had continued to paint, even after the City Planning Commission gave Wolkoff their final approval for his demolition and building plans.<sup>64</sup>

The court further reasoned that, “plaintiffs’ works can live on in other media.”<sup>65</sup> “[The court had] exhorted the plaintiffs to photograph all [artworks] which they might wish to preserve. All would be protected under traditional copyright law, and could be marketed to the general public, even to those who had never been to 5Pointz.”<sup>66</sup> In refusing VARA protection to the 5Pointz artists, the *Cohen* court confirmed that copyright protections are accessible to graffiti artists.

### III. ISSUES LEFT UNANSWERED BY COHEN V. G&M REALTY

Although the holding of *Cohen v. G&M Realty* has not yet been challenged by an appeal or other case law, the conclusion of *Cohen* leaves several issues in need of additional explanation. The *Cohen* court emphasized the works’ temporary duration in its reasoning multiple times yet affirmed that, “VARA protects even temporary works from destruction.”<sup>67</sup> Aside from prompting a philosophical inquiry into the nature of graffiti—its dichotomy of permanence and transience—the court’s dicta opens a can of worms as to what happens if VARA *does apply* to protect *temporary* graffiti art.

What remedies could a court impose? The plaintiffs in *Cohen* asked for an injunction to halt Wolkoff’s demolition plans but, in the absence of eminent domain powers, can a court realistically prevent a property owner from exercising his or her lawful property rights? In circumstances where the artwork has already been destroyed, *Cohen* declares that creators are entitled to monetary damages.<sup>68</sup> However, calculation of those damages

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<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 226.

would depend on the artworks' value as "reflected in the money they command in the marketplace."<sup>69</sup> The court notes that the works at 5Pointz were painted for free but declines to elaborate on the fair market valuation of the works beyond "surely the plaintiffs would gladly have accepted money from the defendants . . . ."<sup>70</sup>

Finally, if plaintiffs succeed on a VARA claim and prevent demolition from going forward, then whose responsibility is it to oversee the consequent and continual preservation of the artwork? Are preservation efforts even required considering that graffiti is generally subject to the wear and tear of the elements? Again, the ephemeral nature of graffiti art becomes a crucial factor in VARA considerations.

#### CONCLUSION

Even though the court in *Cohen v. G&M Realty, Inc.* decided against awarding VARA protections to plaintiffs, its analysis certainly provides a point of reference for future VARA actions concerning street art. Artists, property owners, and their attorneys now have a framework within which to adapt their VARA claims and defenses and the opportunity to explore the blind spots of the *Cohen* decision. There is no doubt that under the right set of circumstances, a graffiti artist can successfully protect his or her artwork from destruction under the Visual Artists Rights Act.

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<sup>69</sup> *Id.* at 227.

<sup>70</sup> *Id.*

## PRACTICE POINTERS

## For Artists' Counsel:

- Obtain and register valid copyright for artwork.
- Obtain written consent of property owner for artwork and agreement on how long the work will last.
- Publicize the work to garner recognition and acclaim in order to achieve “recognized stature.”
- Have artwork appraised by expert witnesses.
- Petition the local government to protect the structure and/or its art under eminent domain.

## For VARA Defenses:

- Establish that the artwork is illegally placed without consent of the property owner.
- Obtain written waiver of VARA rights before permitting artwork, or negotiate a termination date for granting permission.
- Notify artists of potential demolition or actions that could mutilate, distort, modify or destroy the art before allowing them to paint.
- Assert applicable VARA exceptions under 17 U.S.C. § 106A(c)(2).
- Challenge the recognized stature of the artwork and/or emphasize the temporary nature of street art.

