

A WARNING TO REAL ESTATE DEVELOPERS: BEWARE OF GRAFFITI ARTISTS

Posted on March 6, 2020 by Michael A. Kahn

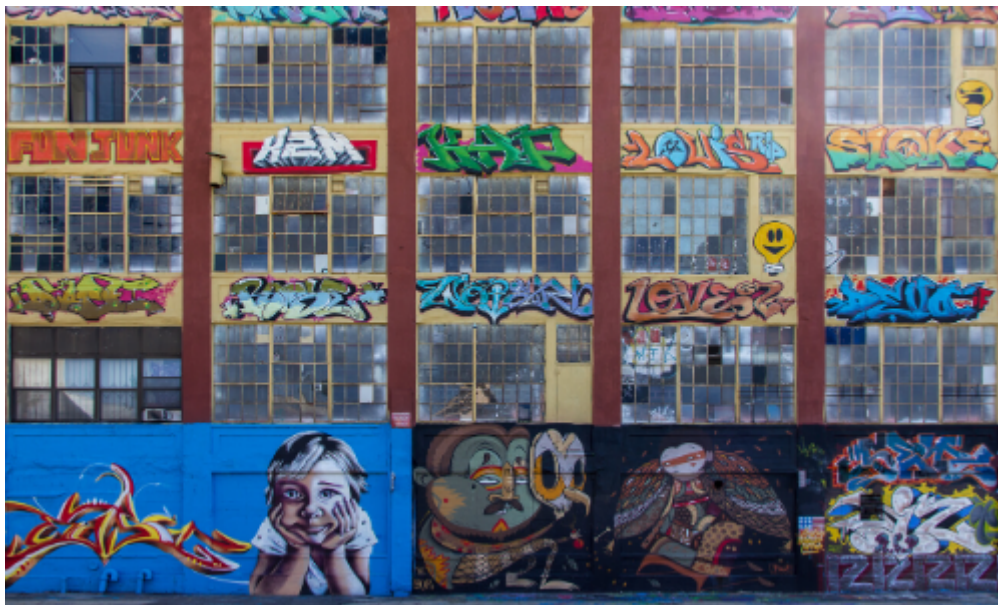


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A federal court of appeals has just upheld a \$6.5 million verdict against a real estate developer who destroyed the graffiti displayed in and on some dilapidated warehouses he owned in Queens, New York. Specifically, the court ruled that the developer willfully violated the Visual Artists Rights Act in 2013 when he whitewashed the [graffiti of dozens of artists at 5Pointz](#) (a/k/a the Queens "graffiti mecca") and then demolished those warehouses to build luxury condominiums.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.



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The ruling in *Castillo v. G&M Realty L.P* was a big win for the artists but also for the Visual Artists Rights Act (VARA)—a formerly obscure amendment to federal copyright law that protects visual art from destruction or mutilation.

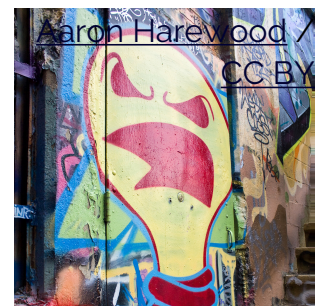
As the Court of Appeals explained, "VARA gives 'the author of a work of visual art' the right to prevent any destruction of a work of recognized stature' and provides that 'any intentional or grossly negligent destruction of that work is a violation of the right.'"

As to graffiti on a building, the Court explained that VARA "contains specific provisions governing artwork incorporated into a building. If the artwork is incorporated in such a way that removing the work from the building will cause destruction, distortion, mutilation or other modification of the work," the artist's "moral rights" in that work may be waived only if done so via a written agreement signed by the owner of the building and that artist.

While the specific facts of *Castillo* clarify that the developer Gerald Wolkoff not only acted willfully in destroying the art but did so, in the Court's words, in an "act of pure pique and revenge"—a level of willfulness resulting in an award of the statutory maximum of \$150,000 for each of the 45 works destroyed—the decision is a warning to all developers who have in their sights a building with graffiti on the walls.

The big legal issue is whether that graffiti qualifies as a "work of recognized stature." If so, it is protected under VARA. Okay, but what exactly is a work of "recognized stature"?

According to the Court, "quality" is the most important factor in determining "recognized stature." How does one determine "qualify"?



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As the Court explained: "Aside from the rare case where an artist or work is of such prominence that the issue of recognized stature need not be tried, expert testimony or substantial evidence of nonexpert recognition will generally be required to establish recognized stature."

So for now, unless you want to find yourself embroiled in an expensive battle of experts before a judge and jury, proceed with caution if you discover graffiti spray-painted on the side of one of the buildings you've targeted for demolition.

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