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**\$6.75 Million Judgment in Favor of Aerosol Artists Affirmed by
United States Court of Appeals for the Second Circuit**

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In a major development in the law of moral rights in the United States, the \$6,750,000 judgement obtained for destruction of the aerosol art complex at 5Pointz was affirmed on February 20. Without reviewing in detail the conclusions I reached in a lengthy article on the dispute published just after the trial was completed,[1] it is worth commenting on a few of the conclusions reached in the lengthy opinion written by the esteemed Judge Barrington D. Parker.[2]

Much of Judge Parker's opinion reminded readers that reversing findings of fact made by a trial court is extremely difficult. In the absence of a conclusion that the facts found lacked a solid foundation, they are simply affirmed. Similarly, discretionary decisions, such as the size of a statutory damage award in copyright cases, will be affirmed in the absence of an abuse of discretion. These standard rules made it very difficult for Gerald Wolkoff, the primary developer, to gain traction on appeal. As a result, the trial court holdings that the aerosol works at issue in the case were of recognized stature, that Wolkoff acted inappropriately when he white washed the art works long before he intended to demolish the buildings for replacement with condominiums, that his state of mind when the pieces were white washed with cheap paint and left badly damaged for millions passing in the nearby subway to see was strong evidence of malice supporting enhanced damage relief, and that imposing the maximum award of \$150,000 per work was based on ample evidence of significant misbehavior were all deemed acceptable on appeal.

Nonetheless, there are certain other fascinating conclusions reached by the court that are worth a bit of attention. First, the Circuit Court's conclusion that the works in issue were of recognized stature under 17 U.S.C. §106A(a)(3)(B) has now become part of a growing trend to construe liberally the code's moral right provisions protecting against destruction of works of fine art. [3] Rather than requiring special evidence widespread acceptance of the work by the cognoscenti, the court held "that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a *relevant community*." (Emphasis added) In this case that meant that the testimony of other aerosol artists had to be taken seriously. Therefore, Jonathan Cohen, who served as the curator of the site at the request of the property owner for over twenty years, gave very important evidence about how he organized the site, ran a well-structured program to select artists given permission to paint there, and created systems for deciding when works would be covered over and replaced. As a very well-known member of the aerosol art community his testimony had substantial influence on the result. And to cap off this result, Judge Parker reminded us of Justice Holmes' famous admonition that it is "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of" a work of art.[4]

Second, Wolkoff vigorously argued that most of the art works at 5Pointz would exist for only a short time and that such works could not attain recognized stature. Judge Parker dismissed such a contention, noting among other things that *Gates*, the famous Christo installation of 7,503 metal gates with hanging orange drapes in Central Park that lasted only two weeks, certainly was a work of recognized stature.[5] It is not temporality, but stature in a relevant community that controls. This is a critically important recognition given the contemporary prominence of, not only street art, but a wide array of other types of work installed for short periods of time.

Third, Wolkoff also claimed that the location of the art at 5Pointz should not have been taken into account in making a determination of recognized stature. Judge Parker carefully responded by noting that location of a work may be part of its stature in an artistic community. And that location

need not only be a famous museum. It also might be a site widely recognized in a “relevant community” as important, or a well curated location, or simply a placement amid other important works by the same artist or others. This is an important aspect of moral right that has not previously been widely recognized. Placement among other works of the same artist or other artists is often an important element of how viewers perceive and understand the art in issue. It is similar to the composition of a single standalone piece. Good artists not only care deeply about how parts of a single painting fit together, but many also pay great attention to how and where the work will be displayed. Environment is often as important as the contours of work hung all by itself.

In short, the *5Pointz* opinion is a sophisticated essay on both the dispute itself, but also on the nature of much of the contemporary art scene. It is welcome evidence that some courts have found ways to open their minds to the dynamic possibilities inherent in an ever changing, intellectually challenging, and open-minded visual arts world.

[1] Richard Chused, *Moral Right: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 Colum. J. L. & Arts 583 (2018).

[2] *Castillo v. G&M Realty L.P.* ___ F.3d ___ (2nd Cir. Feb. 20, 2020), 2020 WL 826392.

[3] See, e.g., *Martin v. City of Indianapolis*, 193 F.3d 608 (7th Cir. 1999); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y.1994).

[4] *Bleistein v Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

[5] I made the same argument in Chused, note 1 supra, at 597.