

One can debate whether graffiti art can achieve “recognized stature,” but the courts decided it could. One can also debate whether work that is regularly but not universally painted over should earn that label, but the courts decided it could.

The owner’s actions seemed to annoy the judges, because the owner had painted over the graffiti quickly and carelessly once the litigation was underway, without prior notice or even letting the artists take pictures. Maybe if the owner had been nicer about it or used thicker and better white paint, the courts (and the artists) would have been happier. In practice, the owner probably panicked and just wanted to make a highly visible problem go away before it got worse — a decision that backfired monumentally and highly visibly.

Beyond paying damages to the graffiti artists, the property owner also had to pay their legal fees, a total of an additional \$2 million according to a court filing made in December 2020.

The damages and attorneys’ fees recovered in 5Pointz invite an immediate gut response: property owners should never allow any graffiti on their buildings. Very likely, they should not allow any artwork at all. That would probably amount to an overreaction, but it’s still probably the most likely response.

Owners who consider allowing installation of any form of artwork should remember the federal VARA law – take it seriously and keep it in mind before proceeding. The courts have now unambiguously defined VARA-protected artwork in a way that goes far beyond traditional old-fashioned expectations. In today’s art world, someone recently paid \$120,000 for a banana attached to a wall with duct tape.

If an owner contemplates allowing or commissioning any decorative element that might conceivably be considered artwork, that owner should consider VARA.

Now here’s the good news: artists can easily waive their rights under VARA. The building owner and the artist just need to sign a document that allows the owner to destroy the artwork as a result of its removal. Getting that piece of paper signed is not a difficult requirement. If the owner remembers to do it, that should solve the problem. It’s just a speed bump, another nonintuitive legal requirement that unknowing property owners ignore at their peril. Maybe VARA penalties are a special tax imposed for failing to hire the right lawyers.

Conceivably, an artist asked to sign a VARA waiver might refuse. In that case, the owner can either find another artist or negotiate terms for a possible future removal of the artwork. For example, the owner might agree to give the artist 90 days notice so the artist can relocate the artwork. In most cases, though, the artist will probably sign a VARA waiver, so the parties will end up exactly where they would have been without VARA. It amounts to just another disclosure law requiring someone to get someone else to sign a piece of paper and then keep it in the file for a long time.

Proper VARA compliance for 5Pointz would, however, have required the signing of a huge numbers of waivers followed by a continuing program to match the signed waivers to the artists on site. This probably would not have been practical. So a law designed to protect artistic endeavors would, if properly followed, probably have entirely prevented the artistic endeavors at 5Pointz.

Anyone with a long-term interest in real estate, not just a property owner, should pay attention to VARA. For example, loan documents should and often do prohibit the borrower from installing permanent artwork without proper VARA waivers. Ground lessors have similar concerns.

VARA doesn't require all that much in the typical case. It shouldn't deter anyone from allowing installation of ordinary artwork in a building. But owners ignore it at their peril.



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