

Activist Artists Cite Novel N.Y. Win to Sue Over Threats to Work

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- 5Pointz case created blueprint for artists to follow
- Law can be used to advance social justice messages

Artists who work in public spaces are increasingly seeking court protection for their works, citing the rarely invoked federal statute behind last year’s multimillion-dollar judgment for those whose paintings were whitewashed from New York’s 5Pointz graffiti art space.

The Visual Artists Rights Act of 1990 is now “understood by many artists as a powerful tool of resistance to the hegemony of western, white power structures,” said art expert Renée Vara, who testified in the 5Pointz case. And legal action is becoming an “alternative path” to the ultimate goal of some artists—changing society.

“If you want to seek social justice, what better way to seek it than through the legal process?” Vara said.

Between October—when the U.S. Supreme Court [let stand](#) a \$6.75 million judgment against a developer for violating VARA—and December 2020, artists filed at least a half dozen VARA claims, four of them over the destruction or removal of public art.

Those six cases in just three months compare to around 100 cases total brought since 1997—about four cases a year—under this relatively untested part of the Copyright Act, according to a Bloomberg Law analysis.

Before the 5Pointz ruling, artists with limited financial resources may not have been inclined to test the limits of VARA, which protects their “moral rights” in their work.

“Now, both artists and their lawyers have guidance on a previously obscure statute and a template to follow for potential success,” said professor Sue Liemer of North Carolina’s Elon University School of Law.

Among the latest cases are [a sculpture that used cheese](#) as a medium to mock former President Trump’s U.S.-Mexico border wall, a [mural called a symbol](#) of San Francisco’s LGBTQ community, and a work [highlighting Vermont’s role in the Underground Railroad](#).

“I filed this lawsuit to vindicate my rights as an artist and the rights of all artists to their works,” Cosimo Cavallaro, the artist behind the “Cheese Wall,” told Bloomberg Law.

“I created the Cheese Wall to show the absurdity of the border wall,” he said. “Its destruction violated my rights under the VARA, and it is important to send a message that rights under VARA cannot be violated with impunity, and the message underlying art cannot be silenced.”

‘Real Dollars at Stake’

In *Cohen v. G&M Realty LP*, a federal court in Brooklyn [awarded \\$6.75 million](#) to aerosol artists after a property owner removed their works from a professionally curated New York art space made of abandoned warehouses. The U.S. Court of Appeals for the Second Circuit [upheld the ruling](#).

“I do think there’s been an increase in awareness, on the part of both artists and property owners,” said Kate Lucas, a lawyer at Grossman LLP, a Manhattan boutique firm with expertise in art law. “As we saw in 5Pointz, there can be real dollars at stake if a potential issue is not handled properly.”

VARA protects an artist’s “moral rights,” which include the right to have his or her work properly attributed, prevent it from being intentionally distorted or modified, and keep it from being destroyed if it’s of “recognized stature.”

Legal recognition of such rights is rare in the U.S., but more common in other countries.

“Artist moral rights definitely align with social justice goals,” Liemer said. “Depending on the specific wording of a country’s legislation, moral rights can protect artists’ creative processes and decisions, protect the society’s interest in the creative work, and preserve the cultural patrimony.”

The artists who have sued since October want to use the law to preserve—or recover damages for the destruction of—artistic statements on social justice issues, cultural heritage, and the history of marginalized groups.

Cavallaro’s wall—made from more than 400 blocks of expired Cotija cheese weighing over 50 pounds each—was allegedly destroyed by government contractors working on the real border wall while he was building his on private property leased by the nonprofit Art Above Ground. The Cheese Wall was nearly 70 feet long, and Cavallaro planned for the finished wall to stretch 1,000 feet.

His [complaint](#) said the work was meant to “encourage people to think of the ‘Trump wall’ differently by considering the ephemerality of walls and the waste inherent in building any wall, whether made of cheese or steel.”

A group of LGBTQ artists who painted murals outside The Stud—which [the complaint](#) calls San Francisco’s “oldest continually operating queer bar”—sued a developer who had whitewashed their works shortly after the bar closed permanently. The complaint says the murals had become “a symbol of the LGBTQ community’s fight to stay in San Francisco” and promoted “a message of queer safety and solidarity.”

“Defendants’ choice to destroy the Murals, without warning, and during the historic 50th anniversary of San Francisco’s Pride festival, demonstrated their clear disdain for, and degradation of the Artists and the San Francisco LGBTQ community,” the complaint says.

Asian-American artist David Lew created 88 pieces hanging from clotheslines like Chinese red lanterns, made for Los Angeles’ Chinese American Museum to celebrate his heritage. Lew [said the works were destroyed carelessly](#) by trash removal crews “in what was no more than an operation to rid themselves of garbage.”

Lucas notes that VARA cases “often involve some disparity in bargaining power, in that you have an artist whose less tangible ‘moral rights’ in their work are coming up against a property owner who, from a legal perspective, has long-established tangible property rights.”

“So maybe there is some parallel or resonance with some social justice issues that are trying to elevate less-tangible human rights within systems that perhaps traditionally tend to better protect businesses, property owners, and those who already have more traditional forms of power,” Lucas said.

‘Paint Hard Questions’

“An explicitly racial justice message would support a VARA claim, but what happens when there is colorable disagreement as to what that racial message is?” said professor Lateef Mtima of the Howard University School of Law in Washington. “What if the racial/social justice message or interpretation has evolved over time? It’s not clear how VARA would work in those cases.”

One of the recent VARA complaints raises the issue.

Quebec-based artist Sam Kerson [sued the Vermont Law School](#) to preserve his mural celebrating the state’s role in the Underground Railroad. Kerson’s work depicts both the brutality of slavery and slaves seeking and obtaining freedom, and [his website says](#) the mural “celebrates the efforts of Black and White Americans in Vermont and throughout the United States to achieve freedom and justice.”

But the school decided to permanently cover the mural based on [student complaints](#) that it portrays White people in a way that “perpetuates white supremacy, superiority, and the white savior complex” and features exaggerated depictions of Black people that are “eerily similar to Sambos” and other anti-Black caricatures. The students also cited earlier complaints that the work raises “unsettling and negative feelings about African Americans and African American history.”

Kerson said the parts of the mural depicting slavery were meant to show the “drama and pain” of history, and questioned how to show the “whole awful history of racial relations in the U.S.” without it. He also said he had heard from Black students who opposed removing the mural, and a [petition to save it](#) is nearing 1,000 signatures.

But Kerson also told Bloomberg Law his work was “open to interpretation.”

“I don’t think everyone has to see the mural the same way I do,” he said.

Kerson said murals are meant to inspire discussion, and the removal of works like his may send the message not to “paint hard questions if you want them to stay on the wall.”

‘Recognized Stature’

Kerson said that while the 5Pointz ruling “certainly” caught his attention, he wasn’t motivated to sue for monetary reasons. His complaint argues the mural has “recognized stature” under VARA and can’t be removed without his permission.

The case raises the [complex question of what kind of stature the law requires](#), and who decides what works have it. In the 5Pointz case, the Second Circuit said the “relevant community” to determine stature would typically include fellow artists, historians, critics, curators, and other members of the art community, but also noted recognition by the general public.

In a [Jan. 20 motion](#) to block the school from covering the mural, Kerson includes three statements from local experts vouching for the significance of the work, in stark contrast to the student complaints. Vermont’s state curator, David Schutz, said the mural was “brilliantly colored and typical of Kerson’s style” of “challeng[ing] the benign myths of history while advancing the interests of those who have been left out of America’s Eurocentric storytelling.”

“The Vermont Law School murals are important works that show the artist at his best,” Schutz said. “I believe we must ensure that Vermonters and others in the years to come are able to see the work of this compelling painter.”

Lucas said that “with something like the Vermont case, it’s unclear how problematic racial undertones of an artwork might impact a ‘recognized stature’ analysis, especially where in that case it seems like the problematic nature of the piece is hard to untangle from the aesthetics of it.”

“There’s also an interesting temporal question there—is it possible that a work might have been of ‘recognized stature’ at one time, but could lose that status if it has fallen out of favor?” Lucas said. “And fallen out of favor with whom?”