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INTELLECTUAL PROPERTY

The use of VARA to treat someone else's real property as an artist's inviolable canvas may violate the Constitution's Takings Clause.

## Painting Your Way to a Lifetime Tenancy Through the Visual Artists Rights Act



BY WILLIAM L. CHARRON AND JASON S. MENCHER

Recently, in the case of *Cohen v. G&M Realty L.P.*, 13-cv-05612 (E.D.N.Y. Nov. 7, 2017), a New York federal jury issued its “advisory” verdict that a real estate developer violated the U.S. Visual Artists Rights Act of

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1990, 17 U.S.C. § 106A, when he whitewashed and later tore down a building complex in Long Island City to make way for a condominium redevelopment.

This application of VARA—which treats someone else's real property as an artist's inviolable canvas—may violate the Fifth Amendment's Takings Clause to the U.S. Constitution.

VARA grants certain “moral rights” to the authors of works of visual art, including in particular the right “to prevent any destruction of a work of recognized stature” during the artist's lifetime. The complex had hosted graffiti art that had become a popular sensation since 1993: known as 5Pointz, the 200,000 square foot space had been known as a graffiti mecca.

On behalf of more than 20 graffiti artists, the curator of 5Pointz sued the developer and property owner, Gerald Wolkoff, for damages, asserting that the art had taken on a “recognized stature” that should not have been destroyed (the complex was demolished in 2014). The jury agreed, although Judge Frederic Block of the U.S. District Court for the Eastern District of New York will issue the final ruling in the case.

The trial in *Cohen* focused on the “stature” of the graffiti art at 5Pointz, but a more fundamental issue was not addressed: whether a remedy under VARA in this situation would be an unconstitutional “taking” under the Fifth Amendment to the U.S. Constitution.

If the jury's verdict is upheld, then that will effectively mean that the graffiti art had been entitled to a lifetime tenancy that had been violated. Put another way, *Cohen* may stand for a rule that VARA bars property owners from exercising their traditional rights and disposing of their property when the property is itself a “canvas” for a work of visual art with “recognized stature.” This would appear to be a serious reshaping of landowner rights.

## The Moral Rights Purpose Behind VARA

Unlike certain countries in Europe, the United States does not generally recognize claims for violations of an artist's moral rights, meaning the right of an artist to protect the integrity of a work according to the artist's own sensibilities. VARA is an exception under U.S. law.

VARA, an amendment to the U.S. Copyright Act, is designed to recognize certain "moral rights" in works of visual artistic expression. In particular, under VARA, "the author of a work of visual art . . . shall have the right . . . to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." This right endures "for a term consisting of the life of the author" unless the author (i.e., the artist) has expressly waived it earlier in a signed writing.

The facts in *Cohen* reflect that Wolkoff had permitted graffiti artists to use the walls of his property to create a forum for street art. 5Pointz eventually became a sort of open-air museum to locals and tourists alike.

Wolkoff had apparently indicated to the artists that he would likely one day tear down the complex, but there were no signed writings between the artists and him reflecting a waiver of any potential VARA rights.

Indeed, it may be that the parties did not consider the issue at all—which would be entirely understandable in the case of Wolkoff, who may not have perceived a danger that by allowing his building complex walls to be used as a forum for street art, he was effectively granting the art itself "moral" tenancy rights in the complex through the lifetimes of the various artists. This would appear to present constitutional problems under the Takings Clause to the U.S. Constitution.

## Per Se Takings Under the Takings Clause

The Takings Clause of the U.S. Constitution says that "private property [shall not] be taken for public use, without just compensation." There are two forms of takings that appear relevant to the situation in *Cohen*.

First, the U.S. Supreme Court has recognized that certain governmental actions constituting physical occupations of private property may be per se takings that require just compensation to the affected property owners. This rule was established in *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982), which addressed a municipal statute requiring apartment building owners to allow small portions of their properties to be occupied by cable television equipment.

Reversing New York's Court of Appeals, the Supreme Court found that the cable equipment statute violated the Takings Clause as a per se taking because it imposed a "permanent physical occupation" on the property and not merely a "temporary invasion" of the property owner's rights.

The distinction, according to *Loretto*, is whether the government action permanently, physically occupies the property or occurs "outside the owner's property [and] causes consequential damages within" the property. The statute implicated in *Loretto* imposed "permanent" physical occupation because the property owner was required to suffer the cable equipment directly on

its property for "[s]o long as the property remains residential and a CATV company wishes to retain the installation, . . ." In particular, the court said:

*Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." . . . To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights . . .*

*Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. . .*

*Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.*

It may be argued that VARA imposes permanent physical occupations in cases like *Cohen*. Although Wolkoff had agreed to allow graffiti artists to make use of his property for what Wolkoff understood to be a circumscribed period of time, VARA would transform that occupation to be permanent through the lifetimes of the artists (if the art is deemed to be of "recognized stature").

Regardless of Wolkoff's intentions, VARA may have created a durable moral rights easement on his property, thereby denying him his traditional property rights.

## Regulatory Takings Under The Takings Clause

The Supreme Court has also recognized that certain governmental actions may constitute "regulatory takings." This rule was established in the apposite decision of *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), which addressed New York City's Landmarks Preservation Law and the requirement that owners of designated landmarks must keep their building exteriors "in good repair" and must obtain Landmarks Preservation Commission approvals to make exterior alterations.

In that case, the Supreme Court affirmed the New York Court of Appeals in holding that the Preservation Law did not violate the Takings Clause. The court announced what amount to "essentially ad hoc, factual inquiries" into whether a government's restriction on property use constitutes a regulatory taking. Of substantial importance are the:

*economic impact of the regulation on the [property owner] and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.*

Looking primarily to the character of the regulation, which was to preserve historic landmarks for the general, public welfare, *Penn Central* found that the Preservation Law did not constitute a regulatory taking.

The court rejected as “simply untenable” the owners’ argument that their investment-backed expectations were defeated because they could not freely develop air rights in the future; the court instead found that “the law does not interfere with what must be regarded as [the owner’s] primary expectation concerning the use of the parcel” and, thus, the owner’s “reasonable return” on its investment.

The court also found it significant that the property owners could obtain judicial review of landmark designation decisions under the Preservation Law, thereby protecting against “arbitrary” and “capricious” determinations.

The Preservation Law in *Penn Central* is analogous to VARA, but there are important distinctions. First, the character of VARA is primarily geared towards protecting the moral rights of individual artists, not necessarily towards saving “history” and improving the general, public welfare (although that is a derivative benefit of protecting art and fostering future forms of artistic expression).

In addition, in cases like *Cohen*, the building owners should more likely be viewed as losing their “reason-

able returns” on investment when they must essentially forfeit their properties to become de facto painting canvases for others. (Although query whether building walls may be removed and kept intact, at someone’s expense, to preserve the art.)

Further, whether art is of a “recognized stature” seems to be more prone to arbitrary and capricious decision-making—or at least to more unsettled decisions based upon community standards of particular juries. Also note that VARA does permit property owners to expressly contract in writing with artists to waive their “lifetime” moral rights.

## Conclusion

The situation presented in *Cohen* may not be a typical VARA case, but it is an important one. VARA’s goal of promoting artistic expression is commendable, but it is not at all clear that Congress intended to interfere with the rights of property owners like Wolkoff.

The Takings Clause offers an avenue for property owners like Wolkoff to explore and potentially advocate in the future. The irony of the jury’s advisory decision in *Cohen* is that it may be Wolkoff who deserves “just compensation” under the Takings Clause to reimburse any damages awarded to the graffiti artists.