

applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; . . . any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; . . .” *Id.*

Read §106A and the definition of a “work of visual art” found in §101 of the Copyright Act, and then consider the following cases.

≡≡≡ *Lilley v. Stout*  
≡≡≡ 384 F. Supp. 2d 83 (D.D.C. 2005)

FRIEDMAN, J.: This case arises from a disputed collaboration between the two named parties in the production of a work of art. . . .

## I. Background

. . . Lilley is a “photographer [who] has been taking photographs since at least 1992.” . . . From 1993 to mid-2000, he and defendant Renee Stout, who is also an artist, “collaborated on several projects.” For an unspecified period of time during that period, they also were “involved in a personal relationship,” . . . the failure of which has led, at least in part, to this dispute.

In the summer of 1998, Stout asked Lilley to “take some photographs at a friend’s home . . . as studies for paintings [Stout] planned to create.” . . . At the friend’s home, Lilley photographed a “red” room using his own camera and choosing the subject matter of each photograph. After the photographs were developed, Stout “reviewed [them] with [Lilley] and discussed which frames would make good studies” for her paintings. After this review session, Lilley allowed Stout to keep the photographic prints and negatives so that she could finalize her project.

Stout created one painting from the photographs and decided to use the photographs themselves as part of an artwork. This resulting work, entitled “Red Room at Five,” is central to the parties’ dispute. . . .

“Red Room at Five” consists of six of Lilley’s photographs that had been “selected and arranged by [Stout] and placed in a binder with a red cover and illustration.” When Lilley received the work, it did not include a colophon, “a notice that accompanies a work and provides information relating to the publication and authorship.” Lilley subsequently requested a copy of the colophon but was told it was incomplete. The personal relationship between the parties ended in August 2000, and Lilley continued to request copies of the colophon to no avail. Finally, in April 2001, Lilley received a draft colophon that stated: “Photographs by the artist and by Gary Lilley at the direction of the artist.” Lilley contends that the language of the colophon amounts to improper attribution of his “work[s] of visual art” under VARA. In addition, Lilley claims that Stout is selling both “Red Room at Five” and individual photographs taken by Lilley as her own works, thereby violating the Copyright Act. . . .

## II. Discussion . . .

### A. *Visual Artists Rights Act of 1990*

Plaintiff has alleged a claim under the Visual Artists Rights Act of 1990 (“VARA”). Congress enacted VARA to “protect[ ] both the reputations of certain visual artists and the works of

art they create.” H.R. Rep No. 101-514, at 7, *reprinted in* 1990 U.S.C.C.A.N. 6915 (“House Report”). These protections are enumerated in the individual rights of “attribution” and “integrity,” known collectively as “moral rights.” *Id.* As described in the House Report accompanying the legislation, “[t]he former ensures that artists are correctly identified with the works of art they create, and that they are not identified with works created by others. The latter allows artists to protect their works against modifications and destructions that are prejudicial to their honors or reputations.” *Id.* Specifically, the rights of attribution include the right to (a) claim authorship of a work he or she created, and (b) prevent the use of one’s name as the author of a work that he or she did not create. *See* 17 U.S.C. §106A(a)(1)-(2). The rights of integrity permit an author to (a) prevent any intentional distortion, mutilation, or other modification of his or her work, and (b) prevent any destruction of a work of recognized stature. *See* 17 U.S.C. §106A(a)(3).

As “moral rights” legislation, VARA vested immutable rights in an author that generally could not be assigned or transferred . . . and that are “independent of the exclusive rights provided in [Section] 106.” Thus, ownership of the copyright in a work is irrelevant to an author’s standing to bring a VARA claim. Indeed, even if an author wishes to waive his or her rights under VARA, such a waiver can be effected only by a written instrument signed by the author that specifically identifies the work and the specific uses of that work.

Absent this waiver, a court must consider whether the artistic work qualifies as a “work of visual art.” Recognizing the broad scope of protections afforded to eligible authors, Congress created a tightly circumscribed definition for qualified works. Thus, VARA established a new and distinct genus of art: “work[s] of visual art,” which differs in many respects from the pre-existing categories in Section 102(a) of the Copyright Act. *See* 3-8D Nimmer on Copyright §8D.06(A)(1) (2004).

For a photographic work to qualify for protection as a “work of visual art” under VARA, it must meet the statutory definition: “a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.” 17 U.S.C. §101. The Court concludes that the statutory term “still photographic image” in Section 101 has a plain and unambiguous meaning. It is clear from a plain reading of the statute and the specific context in which the language is used that both photographic prints and negatives qualify as “still photographic image[s]” and that both therefore are eligible for protection as “work[s] of visual art” under VARA. *See* House Report at 6921 (definition of a “still photographic image” encompasses a wide range of artistic works, including “positives (for example, prints, contact sheets, and transparencies such as slides) and negatives (negative photographic images or transparent material used for printing positives) of a photograph.”).

In addition to demonstrating that photographs or negatives are “works of visual art,” a plaintiff to succeed under VARA also must satisfy the remaining statutory requirements under the Visual Artists Rights Act: intent to exhibit, uniqueness, and signing. *See* 17 U.S.C. §101. Defendant argues that plaintiff’s complaint fails to make a sufficient intent to exhibit allegation under the statute — that is, that his prints or negatives were “produced for exhibition purposes only” — or that the prints and negatives in question have been “signed by the author.” According to the defendant, plaintiff’s claim that the photographs at issue were taken “as studies for paintings defendant planned to create” is sufficient to demonstrate that they fall outside the relevant definition of a “work of visual art.” Plaintiff replies that he has averred the facts necessary to demonstrate the proper intent to exhibit and that “community standards” should be applied to the signing requirement.

The question of intent to exhibit is especially challenging in the realm of photography. While it may appear simple to distinguish between an amateur photographer taking snapshots

on vacation and an artist producing photographs “for exhibition only,” few artists would characterize their work as the latter. Indeed, many notable “fine art” photographers pursued their work in quite utilitarian contexts. See Jennifer T. Olsson, *Note: Rights in Fine Art Photography: Through a Lens Darkly*, 70 Tex. L. Rev. 1489, 1499-1500 (1992) (“Eugene Atget’s revered photographs of a vanishing Paris were initially made as reference documents for painters to copy. Weegee photographed crime scenes in the service of photojournalism. . . . August Sander’s self imposed mission was to create a virtual catalog of the German people.”)

The technical realities of photography also complicate the question. At least three distinct phases comprise the photographic process that results in a positive print: practical camera handling, negative development, and printing. Thus, in the course of creating her art, a photographer almost always will create two images, first a negative and then a print, for which VARA protection may be justified. As plaintiff Lilley notes, the term “for exhibition purposes only” cannot be limited to the author’s “purpose” at the moment she clicks the camera’s shutter. If that were the case, then only the photographic negative would ever be protected, as its production and purpose were contemporaneous with the click of the shutter. Instead, it seems more reasonable that the intent or purpose of the author be examined as of the time the unique work in question is “produced.”

This method of analysis comports with the uncertain time frame expressed in the term “produced” in Section 101 and responds to the reality that a negative “produced” in one instant and a print “produced” in another may correspond to different intentions or purposes of the author. While courts have expounded on how the process of practical camera handling “imbue[s] the medium with almost limitless creative potential,” *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000), few opportunities have arisen for courts to explore the opportunity for creativity in the process of developing negatives or producing prints. As many professional photographers and artists recognize, however, the process of producing a print from a negative contains room for originality. Thus, plaintiff Lilley’s intent when clicking the shutter of his camera and creating the negatives is irrelevant to his claim. His probably different purpose in developing the negatives to produce the prints is the real issue. Were they “produced for exhibition purposes only”?

Plaintiff’s case presents a good example of the potential for the fact that a single work of visual art may be created for a variety of purposes. As a result, it may be difficult to assign a specific intent. Plaintiff Lilley admits that the photographs were taken to serve “as studies for paintings defendant [Stout] planned to create.” Contrary to defendant’s assertion, VARA does not pose a *per se* bar to protection for preparatory works, such as studies. See, e.g., *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526 at 533 (holding that a clay model, which was part of a larger, unfinished b[r]onze sculpture, qualified as a “work of visual art.”) In addition, it may be fair to infer from the facts plaintiff alleges—at least on a motion to dismiss for failure to state a claim—that, when taking the photographs of the “red” room, Lilley intended to exhibit the resulting prints. This inference could be drawn from plaintiff’s artistic background, past experience as a photographer, and previous collaboration with the defendant to create art for exhibition. While these inferences might be relevant if the issue before the Court related to the negatives Lilley produced, the circumstances of the photographic prints can be resolved more easily.

Plaintiff’s own assertions demonstrate quite clearly that the discrete photographic prints at issue were not “produced for exhibition purposes *only*.” 17 U.S.C. §101 (emphasis added). His complaint states that once the photographs were developed, he and the defendant “reviewed the photographs . . . and discussed which frames would make good studies for a series of paintings.” The photographic prints at issue—those that were “reviewed” with defendant and comprise “Red Room at Five”—therefore were not “produced for exhibition

purposes only.” Rather, they had the primary purpose of assisting defendant Stout in her artistic endeavor. Indeed, the only suggestion that plaintiff had any alternative motivation for producing the images comes from a statement in his opposition to the motion that he “alleged that the photographs were intended for ‘exhibition purposes only.’” This statement, however, appears nowhere in plaintiff’s amended complaint. . . .

But even if the claim had been pled in the complaint, it is belied by plaintiff’s acts of reviewing the photographs with defendant and turning over possession to her. It is difficult to conceive how plaintiff could have exhibited these prints once they were incorporated into “Red Room at Five.” Because plaintiff’s own assertions demonstrate that the discrete photographs at issue were not produced solely for exhibition purposes, his photographic prints fail to satisfy the definition of “work[s] of visual art” in Section 101, and his amended complaint thus fails to state a claim under VARA. . . .

≡≡≡ ***Martin v. City of Indianapolis***  
 ≡≡≡ 192 F.3d 608 (7th Cir. 1999)

WOOD, J.: We are not art critics, do not pretend to be and do not need to be to decide this case. A large outdoor stainless steel sculpture by plaintiff Jan Martin, an artist, was demolished by the defendant as part of an urban renewal project. Plaintiff brought a one-count suit against the City of Indianapolis (the “City”) under the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. §101 *et seq.* . . .

## I. Background

Plaintiff is an artist, but in this instance more with a welding torch than with a brush. He offered evidence to show, not all of it admitted, that his works have been displayed in museums, and other works created for private commissions, including a time capsule for the Indianapolis Museum of Art Centennial. He has also done sculptured jewelry for the Indiana Arts Commission. In 1979, at the Annual Hoosier Salem Art Show, plaintiff was awarded the prize for best of show in any medium. He holds various arts degrees from Purdue University, the Art Institute of Chicago and Bowling Green State University in Ohio. Plaintiff had been employed as production coordinator for Tarpenning-LaFollette Co. (the “Company”), a metal contracting firm in Indianapolis. It was in this position that he turned his artistic talents to metal sculpture fabrication. . . .

Plaintiff went to work on the project and in a little over two years it was completed. He named it “Symphony #1,” but as it turns out in view of this controversy, a more suitable musical name might have been “1812 Overture.” Because of the possibility that the sculpture might someday have to be removed, as provided for in the Project Agreement, Symphony #1 was engineered and built by plaintiff so that it could be disassembled for removal and later reassembled. The sculpture did not go unnoticed by the press, public or art community. . . .

[The City subsequently acquired the land on which Symphony #1 was located. During the negotiations that led to the sale the City was repeatedly told that the sculpture could be moved if the City did not want it. The City promised to notify the plaintiff if it planned to remove the sculpture. Despite these assurances, shortly after the City acquired the land, it had the sculpture demolished without notice to the plaintiff.] . . . This lawsuit resulted in which summary judgment was allowed for plaintiff. However, his victory was not entirely satisfactory to him, nor was the City satisfied. The City appealed, and plaintiff cross-appealed.