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VISUAL ARTISTS RIGHTS ACT ("VARA") AND THE PROTECTION OF DIGITAL WORKS OF "PHOTOGRAPHIC" ART

Llewellyn Joseph Gibbons *

I. INTRODUCTION

In a 2002 article examining the Visual Artists Rights Act of 1990" ("VARA"), Dean Laura Gasaway observed that "[i]t is unclear how VARA will work in the digital age. Most art forms that use digital technology do not meet the definition of visual art under VARA, because they are not signed, limited editions." She further speculated that VARA may need to be changed to adequately protect digital works. In the intervening years, VARA has not been amended, and still most digital works are not signed, limited editions, which begs the question of whether VARA is sufficiently robust to protect digital works of visual art. VARA

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* Associate Professor, University of Toledo College of Law. The author would like to thank the Symposium Editors for permitting him to submit this short homage to Dean Laura Gasaway, a well-respected voice of reason and principled moderation in the on-going copyright wars, and my wonderful administrative assistant Ms. Diane Bohn, without whom I could never have finished this article in a timely manner. Of course, the opinions, errors, and omissions in this article are solely those of the author.


3 Id.

4 State laws protecting the moral rights of authors and artists in copyrighted works not covered under VARA are not preempted by VARA. See H.R. REP. No. 101-514, at 21 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6931. Consequently, states may desire to complete any actual or perceived gaps in VARA's protection. For example, Massachusetts protects digital works of fine art. See MASS. GEN. LAWS ch. 231, § 85S(b) (2000) (defining "fine art" as "any
poses numerous challenges to creators of digital visual art. The artist must navigate between protected and unprotected subject matter, while simultaneously complying with VARA’s statutory formalities within the context of specific and evolving technologies.5

This article will serve as a logical footnote to Dean Gasaway’s article and address two questions. First, this article will determine if a completely digital work of visual art may be classified under VARA as a “painting, drawing, print, or sculpture,” or “a still photographic image produced for exhibition purposes only,” and not a “motion picture or other audiovisual work.” Second, this article will evaluate whether digital works can realistically meet VARA’s requirements that such works be a limited edition of fewer than 200 copies, individually signed, and consecutively numbered by the artist. This article will then conclude that the language of VARA is sufficiently expansive to protect some digital works of photographic art.6 However, as digital photographic works move away from the chemical and photographic paper model of the past towards newer forms of digital art, courts will find it increasingly difficult to protect newer forms of digital original work of visual or graphic art of any media which shall include, but not limited to any...photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality”). Alternatively, artists may achieve VARA-like protections using digital rights management systems. See generally Jane C. Ginsburg, Have Moral Rights Come of (Digital) Age in the United States?, 19 CARDOZO ARTS & ENT. L.J. 9 (2001).

5 VARA uses the term “authors” to describe the creators of works of visual art. The article will follow the norm of describing the creators of works of visual art as “artists.” Actually, “photographer” may be a better term, but it seems less accurate in light of the range of possible digital photographic (still-image) works.


7 Id.

photographic art unless Congress amends VARA to be medium-neutral.\footnote{Cf. Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright § 8D.06[A][1] (Matthew Bender, rev. ed. 2009) ("Staid courts confronting avant-garde artists may run into problems at the margin in evaluating whether a work qualifies. The plaintiff bears the burden of proof on this, as all other issues affecting the prima facie case."); Note, Visual Artists’ Rights in a Digital Age, 107 Harv. L. Rev. 1977, 1988 (1994).}

**II. VARA’S PROTECTIONS AND STATUTORY REQUIREMENTS**

VARA helps to ensure that the artist’s signature on a work of art represents that individual artist’s level of quality, such that artistic works that fall below that level of artistic quality are not passed off in the cultural marketplace as those of the artist, thereby harming the reputation or goodwill of the artist.\footnote{See H.R. Rep. No. 101-514, supra note 4. One of the differences between VARA and trademark law or unfair competition law is that trademark law protects the public from deception or confusion while VARA protects the work itself.} Assuming the work meets the requirements of VARA, the artist is entitled to some rights that are similar, but are not strictly equivalent, to the European or civil law concepts of moral rights.\footnote{Lucille M. Ponte, Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?, 15 B.U. J. Sci. & Tech. L. 34, 39–40 (2009); Peter E. Berlowe et al., In This Digital Age, Are We Protecting Tomorrow’s “Masterpieces”?: Protection of the Moral Rights of the Digital Graphic Artist, 81 Fla. B.J. 30, 31 (2007).} The artist has the right of attribution and the right to prevent the artist’s name from being associated with a work that the artist did not create.\footnote{17 U.S.C. § 106A(a)(1)(A) (2007).} Under VARA, the artist also possesses the right to prevent the use of his or her name when the artist’s work is distorted or mutilated, if use of the artist’s name associated with the work would be prejudicial to the artist’s honor or reputation.\footnote{17 U.S.C. § 106A(a)(2) (2007).} Furthermore, the artist also enjoys the right to prevent intentional distortion or mutilations of a work that would be prejudicial to the artist’s honor or reputation and 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."\textsuperscript{14} VARA does not protect against distortions or mutilations of a reproduction of the work, however prejudicial to the artist’s reputation.\textsuperscript{15} Finally, an artist may waive his or her rights under VARA only in writing and by specifically identifying which VARA rights are being waived.\textsuperscript{16} Given the numerous rights afforded to artists under VARA, it provides a clear advantage for digital visual artists whose digital works of visual art meet the statute’s definitional requirements.\textsuperscript{17}

A. Digital Works of Art

Courts, consistent with VARA’s legislative history, have broadly interpreted the forms of art eligible to fall within VARA’s subject matter limitations.\textsuperscript{18} First, to be eligible for VARA’s protection, the work of art must be a “painting, drawing, print, or sculpture” or “a still photographic image produced for exhibition

\textsuperscript{15} WILLIAM F. PATRY, 5 PATRY ON COPYRIGHT § 16:10 (West 2009) see also Roberta Rosenthal Kwall, Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong, 2007 UTAH L. REV. 741 (2007); PETER K. YU, ed., INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS 100-01 (Greenwood Press 2007).
\textsuperscript{16} 17 U.S.C. § 106A(e)(1) (2007); Martin v. City of Indianapolis, 982 F. Supp. 625, 636-37 (S.D. Ind. 1997) (“[A] waiver of an artist’s rights under VARA must be specific as to use and should be strictly construed . . . .” (internal citations omitted).
\textsuperscript{17} Kristina Mucinskas, Note, Moral Rights and Digital Art: Revitalizing the Visual Artists’ Rights Act?, 2005 U. ILL. J.L. TECH. & POL’Y 291, 291 (2005) (“If collectors cannot rely on proper attribution and some degree of permanence, digital art will have little value in the marketplace.”).
\textsuperscript{18} See Kelley v. Chi. Park Dist., 2008 WL 4449886, at 4–5 (N.D. Ill. 2008) (holding a Wildflower Works exhibit consisting of living plants was a sculpture or painting within the subject matter of VARA). The court sagely declared: [T]his Court is loath to take too literalist an approach to determining whether a given object qualifies as a sculpture or a painting. There is a tension between the law and the evolution of ideas in modern or avant garde art; the former requires legislatures to taxonomize artistic creations, whereas the latter is occupied with expanding the definition of what we accept to be art. While Andy Warhol’s suggestion that “art is whatever you can get away with” is too nihilistic for the law to accommodate, neither should VARA be read so narrowly as to protect only the most revered work of the Old Masters.
purposes only." \(^{19}\) VARA specifically excludes many types of works, including a "motion picture or other audiovisual work." \(^{20}\) Second, the work of visual art must exist in single copy or a limited edition of 200 or fewer copies that are individually signed and consecutively numbered by the artist. \(^{21}\) Of the statutorily eligible categories of works, the most analogous to an eligible digital work of art is a "photographic image produced for exhibition purposes only." \(^{22}\) Therefore, one must evaluate whether a digital visual work embodied in a digital medium meets the

\[19\] VARA is an extremely limited statute. It protects "works of visual art," which are defined as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) 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.


\[20\] While VARA specifically excludes:

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire


\[21\] Id.

\[22\] The category of "print" under VARA also had promise as a potential source of statutory protection of digital works of art. See Dictionary.com, http://dictionary. reference.com/browse/print ("23. a picture, design, or the like, printed from an engraved or otherwise prepared block, plate, etc.; 29. Photography, a picture, esp. a positive made from a negative; 30. any reproduced image, as a blueprint."). This article leaves the resolution of interpreting the statutory taxonomy of art works and various dictionary denotations of "print," some of which are inconsistent with other terms as used in the statute and legislative history and which constitute indistinct boundaries in the context of digital or new media works to another commentator.
Digital works come in many forms, but this article will use the model of digital photography to analyze the application of VARA in the context of digital works of visual art. Digital photography can be incorporated into works of visual art in three general ways. First, a photographer takes a photograph using a traditional camera and photographic film, and the film is chemically processed in a darkroom, resulting in a diapositive (slide) or negative. This image is then converted to a digital format and modified using software; the resulting image is subsequently printed onto a physical medium, usually photographic paper. Second, a photograph originates in a digital format, is manipulated with software, and is ultimately printed onto physical medium. Finally, at the greatest digital departure from the 1990 VARA norm, a photograph is initially fixed in a digital medium and is manipulated with software, but remains solely recorded in a digital medium, so that the resulting image can be observed by a human viewer only with the aid of some machine or device. This last level of the art of photography, completely digital works, is the most problematic under VARA.

Whether an artist may under VARA digitally sign and consecutively number a work of visual art poses interesting statutory as well as technical questions. VARA serves many purposes, from bringing the United States into colorable conformity with its obligations as a member of the Berne Convention to assuring the integrity of the information conveyed about a work of visual art and its artist in the broad cultural marketplace. Since most artists create works that fall

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23 17 U.S.C. § 101 (defining work of visual art, audio-visual works, and motion pictures).
24 Of course, there are interesting permutations on this model. For example, if one takes a single frame of an audiovisual work and presents it as a still image, or a single frame with accompanying music or sounds. Compare 17 U.S.C. § 101 (definition of audiovisual work) with 17 U.S.C. § 101 (definition of VARA eligible work).
25 Among these issues include questions such as how digital works should be classified if they are contained in physical media; there is also a question as to whether an artist’s signature can be embedded in each copy of a digital work.
along the continuum from pure art to pure commodity, VARA treats the individual painting and the commercial poster of the painting quite differently.\footnote{H.R. REP. NO. 101-514, supra note 4, at 11 (example of differing protected and unprotected uses of a newspaper photograph).}

The U.S. Supreme Court has repeatedly stated that any interpretation of a statute must start with the plain meaning of the statutory text.\footnote{See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989).} "Strict adherence to the language and structure of the Act is particularly appropriate [when] a statute is the result of a series of carefully crafted compromises."\footnote{Id. at 748 n.14.} But, as one noted commentator observed, "[t]he legislative history suggests that courts 'use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.'"\footnote{Nimmer ON COPYRIGHT, supra note 9, § 8D.06 (quoting H.R. REP. NO. 101-514, supra note 4, at 11, 17 U.S.C. § 106A at 6921).} In the context of interpreting copyright law, courts often delve into the legislative history as a matter of course, without first determining whether the statutory language is ambiguous.\footnote{Patry, supra note 15, § 2:37.} It light of the above, this article may range a bit far afield to develop a better understanding of VARA.

B. Defining Production and Exhibition Under VARA

One must evaluate when digital photographic visual works of art embodied in a digital medium are "produced" and what constitutes "exhibition purposes." The term "produced" relates to the individual embodiment of the work for which the artist is asserting VARA's protections. One commentator has observed that "photos meet the statutory criteria only if 'produced for exhibition purposes,' thereby disqualifying the vast majority of products resulting when someone snaps a camera shutter."\footnote{Nimmer ON COPYRIGHT, supra note 9, § 8D.06[A][1].} As this commentator makes clear later, this limitation is not literally true. The purpose for which the individual snaps the shutter is irrelevant to the analysis. The "snap" is the moment of creation or
fixation that defines when the copyright first subsists.\footnote{17 U.S.C. § 102(a) (2006).}

"Production," on the other hand, often takes place later, for example, when the photograph is printed. Thus, a photographic negative that was not initially created for exhibition purposes may later yield a photographic print that is produced ("created") for exhibition purposes.\footnote{H.R. REP. No. 101-514, supra note 4, at 11 ("[I]t is the initial purpose for which the image is produced that controls whether a photograph is covered.").} Alternatively, the photographic negative itself could be produced for exhibition as a work of visual art in its own right.\footnote{See Flack v. Friends of Queen Catherine, Inc., 139 F. Supp. 2d 526, 533 (S.D.N.Y. 2001) (holding that a clay model for an eventual bronze statute is not excluded from VARA as a model but rather a work of visual art in its own right); H.R. REP. No. 101-514, supra note 4, at 11 ("The bill covers both 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.").}

The process by which the work of visual digital art was created is immaterial as long as the final embodiment for which the artist is claiming protection under VARA is for exhibition purposes only.\footnote{H.R. REP. No. 101-514, supra note 4, at 11.}

"Exhibition purposes" could be given a very narrow meaning, such as only for the purpose of display in a museum, art gallery, or similar specialized location dedicated to displaying works of fine art.\footnote{JULES ADELINE, ET AL., ADELINE'S ART DICTIONARY 153 (1891) (defining exhibition as "[a] temporary collection of works of art got together sometimes for the purposes of sale, sometimes for the illustration of the work of some particular artist or period").} Alternatively, it could equally be given a much broader meaning that encompasses only public displays as a work of visual art, or the interpretation urged here, displays as art for art's sake. This latter interpretation is consistent with the legislative history and the purposes of VARA. Other provisions of copyright law and VARA seem to distinguish "art" as created by artists from art that is created as part of a commercial entity.\footnote{Under copyright law, a work created by an employee is a work-for-hire and the author and owner of the copyright is the employing entity, the copyright term is 95 to 120 years, and the author does not have termination of transfer rights. An individual artist is considered the author and owner of the copyright,}
photographer may take a photograph of a newsworthy event. The reproductions of that photograph that appear in a newspaper are not protected by VARA; however, a print from the same negative that is made for exhibition would be protected. VARA distinguishes between the preparatory works made in the process of creating a work-of-visual art and the final work, unless the intermediate works are themselves works of visual art. The public or private nature of the exhibition or display is irrelevant as to whether the photographic work was produced solely for the purposes of display as “art” in the aesthetic sense of the term.

the term of copyright is life plus seventy years, and the author may terminate transfers of copyright ownership. 17 U.S.C. §§ 101, 201, 203, 302, and 304. See also Stuart K. Kauffman, Note, Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as “Author”, 17 CARDOZO ARTS & ENT. L.J. 749, 758 (1999); Susan P. Liemer, How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 3 (2005). In order to avoid mucking up the rest of copyright law, VARA endeavored to distinguish between art as something that artists create and art as a product of commerce. This distinction can most clearly be seen in the exclusion of art produced as a work-for-hire and in the exclusions of types of works that are generally produced commercially as objects of commerce. This “fine art” versus “commercial produced art” distinction fails to recognize the long tradition of the artist as a businessperson. For example, the work of artist Rembrandt Harmenszoon van Rijn has been called into question in recent years, as “[s]cholars suspect that drawings by Rembrandt’s pupils were routinely mixed in with their teacher’s work in albums that entered the marketplace. . . . By some counts a good three out of four drawings once believed to be by Rembrandt were actually done by his students.” Jori Finkel, A Rembrandt Identity Crisis, N.Y. TIMES, Dec. 4, 2009, at AR37. The status of Rembrandt’s great works, works attributed to him, or school of Rembrandt works under VARA would be problematic. See NIMMER ON COPYRIGHT, supra note 9, § 8D.06[A][1]. Because under modern U.S. copyright law, the painting created by an artist working in Rembrandt’s studio was a work-for-hire, Rembrandt could not convert it to a VARA protected work by retouching or redoing his students’ work or by merely placing his signature of approval on the work. Of course, all this would be a very fact-specific analysis and depend on the level of authorial control that Rembrandt exercised over the painters working for him.

38 See H.R. REP. NO. 101-514, supra note 4, at 11.
39 Flack, 139 F. Supp. 2d at 533.
40 See H.R. REP. NO. 101-514, supra note 4, at 11 (“The nature or location of the exhibition is not relevant to the determination of whether the photograph is produced only for exhibition purposes.”).
Thus, both a digital camera image resulting in a photographic print fixed on a tangible medium intended for exhibition, and a digital camera photograph resulting in a virtual digital image displayed by a machine or device for exhibition may equally meet VARA’s requirement that the photograph be created solely for exhibition purposes.

C. "Limited Editions" Under VARA

VARA requires that a visual work of art exists either in a single copy or in a limited edition of 200 or fewer copies that are individually signed and consecutively numbered by the author.41

Purely digital work of visual art may exist in numerous virtual "copies" in order for that work to become visually observable. VARA does not address whether these copies, which are essential to viewing the work of visual art, are considered copies for the purposes of limiting reproduction to 200 copies. Frequently, fleeting transitory copies are made or copies are loaded into RAM as part of using a machine or device to view a work of digital art.42 While loading a copy of a digital work into RAM is considered by some courts to be a reproduction under the 1976 Copyright Act,43 these mechanical reproductions should not be considered part of

41 17 U.S.C § 101. The term “limited edition” is not defined in VARA, but the term has been similarly interpreted by state courts and legislatures. See, e.g., McGreal v. Jackie Fine Arts, Inc., 654 P.2d 149, 150 n.2 (Wyo. 1982) (“‘Limited Edition’ means original prints produced by or under the supervision of the Artist which are numbered and signed by the Artist.”); GA. CODE ANN., § 10-1-430(e) (2009) (“‘Limited edition’ means fine art multiples produced from a master all of which are the same image and which bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples or which are otherwise held out as limited to a maximum number of multiples.”); MICH. COMP. LAWS ANN. 442.351a(c) (2009) (“‘Limited edition’ means a number of multiples which are produced from a single master, all of which depict the same image, and which bear numbers or other markings to denote that production of multiples from that master is limited to a stated maximum number, or which are otherwise held out as limited to a maximum number.”).

42 See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. 2007) (citing MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 517–18 (9th Cir.1993)).

43 Id.
the limited edition under VARA. First, for VARA purposes, the original is the signed and numbered copy on the physical media storing the digital work. The other copies are mere reproductions and, like a digital television transmission of a VARA protected photograph, do not change the legal status under of the original work.\footnote{Cf. H.R. REP. NO. 101-514, supra note 4, at 12.} Second, there is a clear intention in the 1976 Copyright Act to excuse these essential reproductions necessary to use a digital work.\footnote{See Mucinskas, supra note 16, at 309; cf. 17 U.S.C. § 117 (2006) (stating that making a copy or adaptation of a computer program that is necessary to use the program does not infringe the copyright owner's 17 U.S.C. § 106 rights).} Accordingly, the intermediate copies created as part of the process to render the digital work visible are not considered copies under VARA.

VARA is silent on when, how, and where the work should be signed and numbered. Before creation, there is no work of visual art on which the artist may put his or her imprimatur. At best, there may be materials, such as paper or canvas, which will ultimately be incorporated into a work of visual art. In this context, the signature is the visible manifestation that the artist recognizes paternity in this particular embodiment of the work as original “art,” as differentiated from numerous other possibly identical or indistinguishable embodiments that are mere identical reproductions of the work and not protected under VARA.\footnote{See Silberman v. Innovation Luggage, Inc., No. 01 Civ. 7109(GEL), 2003 WL 1787123, at 4-5 (S.D.N.Y. Apr. 3, 2003) (distinguishing between VARA protected works and posters of the same work).} Considering the purposes of VARA, if the artist desires VARA's protections, then the individual embodiments of the work should be individually signed and consecutively numbered simultaneously with the production of the specific embodiment of the work. At a minimum, the work should be signed and numbered no later than before the first sale of a specific embodiment of the work. At the time of sale, the artist’s economic rights and physical control of the work are usually terminated, such that the artist may no longer have access to the work in order to place his or her signature on the work.
By analogy, the case law involving the work-for-hire doctrine may be instructive as to when the work must be individually signed and consecutively numbered. A work-for-hire arrangement requires an express written agreement signed by both the artist and the employer to change the default copyright rules governing authorship and ownership of the copyright.\(^47\) The purpose of the work-for-hire writing requirement is to “enhanc[e] predictability and certainty of copyright ownership.”\(^48\) There are two lines of cases.\(^49\) The U.S. Court of Appeals for the Seventh Circuit has adopted a bright line rule that the written work-for-hire formalities must take place prior to the creation of the work.\(^50\) The U.S. Court of Appeals for the Second Circuit wisely rejected this fetish of temporal formalities and ruled that as long as the writing is a mere formality to confirm an earlier understanding by the parties, the work was a work-for-hire.\(^51\) As the Second Circuit noted, sometimes rigid adherence to strict formal requirements that have been narrowly interpreted may defeat the intent of Congress to create a predictable copyright regime by adding unnecessary uncertainty.\(^52\) Therefore, as long as the artist’s provable intent at the time of producing the work was to make an identifiable original embodiment of the work and the artist eventually complies with VARA’s statutory formalities, then, merely because the artist failed to formally place a signature on or to consecutively number that individual embodiment of the work, the initial omission should not defeat the artist’s assertion that the work is protected under


\(^{48}\) Cmty. for Creative Non-Violence, 490 U.S. at 750 (citing H.R. REP. NO. 94-1476 at 129).


\(^{50}\) Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992) (“The writing must precede the creation of the property in order to serve its purpose of identifying the (noncreator) owner unequivocally.”).

\(^{51}\) Playboy Enter., Inc. v. Dumas, 53 F.3d 549, 559 (2d. Cir. 1995) (“We are not convinced, however, that the actual writing memorializing the agreement must be executed before the creation of the work. The Nimmers make a convincing argument in their treatise on copyrights that such a requirement could itself create uncertainty.”).

\(^{52}\) Id.
VARA as long as the work ultimately complies with VARA's statutory formalities. These requirements serve to provide "notice" to the first purchaser and subsequent owners that the work is protected by VARA. Under VARA, different rules apply to different types of works of visual art. Single copies of paintings, drawings, prints, and sculptures do not have to be signed, while single copies of photographs must be signed by the photographer.

"Artists need not deface the work itself in numbering and marking. For example, placement on the back of the work on the matting surrounding it is sufficient." Section 106A grants broad discretion to the artist in the case of either physical or digital works on when, where, and how to mark the work, and the VARA requirements are met so long as the subject matter of the work falls within the statutory purpose of § 106A and purchasers are placed on notice.

In the context of purely physical works, the signature and numbering must be physically on or collocated with the work of visual art (for example, a signature on the front or back of the photograph or on the matte surrounding the photograph). Digital visual works are not so limited. There may be a physical writing on the media containing the digital work, such as number and signature on the CD-ROM that contains the digital work. The artist may choose to embed the required information into the digital work itself, the program that displays the digital work, or even in the form of digital rights management that requires verification of the status of the work before the work is displayed. The legislative history is not in conflict with the plain language of section 106A. Congress instructed courts to "be flexible in determining whether the placement of the numbering and marking

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54 See 17 U.S.C. § 101 (2009); H.R. Rep. No. 101-514, supra note 4, at 13. A court may elect to use its equitable powers to estop the artist from asserting VARA rights against an alleged infringer who was not on notice as to the artist's claim that the work was subject to VARA's protection. Cf. id. (declaring that the purpose of the signature and writing requirement is to assure limited edition and to put prospective purchasers on notice).
56 Id.
57 Id.
is adequate" to identify which works are protected by section 106A and to put prospective purchasers on notice as to the work's protected status. Other notice and marking provisions of the Copyright Act are consistent with this interpretation of how VARA's signature and numbering requirement should be applied.

III. THE NEW PARADIGM OF DIGITAL WORK—IS VARA COMPLIANCE POSSIBLE?

A. Classification of Purely Digital Work Under VARA

To return to the three paradigmatic models of photographic works, the first two models that resulted in a physical embodiment of the work readily visible by the human eye were clearly within the rubric of the types of visual works Congress intended to protect under VARA. The third and harder case is more interesting. Under VARA, whether a digital photographic work that is only perceptible with the aid of a machine or device is protected remains an open question. Imagine a photographer who takes a digital photograph. The photographer never prints it onto a physical medium, but rather sells the photograph in a digital format.

Assuming that all of these digital embodiments are

59 The copyright notice provision of the Copyright Act provides a similar function, as its goal is to put potential users on notice as to the copyright status of a work and enhance the possible remedies available to a copyright owner in case of copyright infringement. See 17 U.S.C. § 401(d) (2009) (“If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).”). Section 401(a) provides that “a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.” See 17 U.S.C. § 401(a) (2009); Copyright Office Cir. 3, http://www.copyright.gov/circs /circ03.pdf.
61 Perhaps the photographer would place it in a digital frame, sell it on a Universal Serial Bus (“USB”) drive, or permit a collector to download the
intended solely for exhibition purposes, the first VARA requirement that the work is “produced for an exhibition purposes only” is a relatively easy standard for an artist to meet. The artist merely has to produce the work for exhibition purposes and not for some ancillary purpose. Under the present hypothetical, the specific embodiment of the work of art is produced for sale at an art gallery.

However, VARA does not address the question of whether the aid of a machine or device in order to perceive the work is permissible under VARA. Other provisions of the Copyright Act specifically use statutory language such as “the work can be visually perceived, either directly or with the aid of a machine or device.” Congress did not use such language in VARA, thereby suggesting that VARA may be limited to works of visual art that are physically visually perceptible without the aid of a machine or device. This would also be a fair reading of the statute in light of the examples given in VARA—paintings, drawings, sculptures, and photographs. None of these enumerated examples requires the aid of a machine or device to be visually perceptible, and the specific exclusion for audio-visual works and motion pictures, which usually do require the assistance of a machine or device in order to perceive the work of visual art, seems to indicate that a literal reading of VARA would not apply its protection to purely digital works of art. Another and better reading of VARA is that a “work of visual art” is “a painting, drawing, print, or sculpture, digital work so that there is never a physical transfer of a specific original embodiment of the work.

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64 See NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) (“While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.... Yet when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.”).
66 Id.
existing in a single copy, in a limited edition of 200 copies.” The Copyright Act then defines “copies” as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

By reading the Copyright Act's definition of copies in pari material, one must also read into VARA the possibility of a VARA work as one capable of being perceived with the aid of a machine or device. Although it is by no means free from doubt, in light of Congress’s intent to draft a technology-neutral Copyright Act, the better reading of VARA would encompass digital works of visual art that require the aid of a machine or device in order to be visually perceptible. A digital work embodied in a tangible medium that is capable of being perceived with the aid of a machine or device should be protected under VARA, whether it is sold in a digital picture frame, on a USB drive, or through digital downloading, as long as VARA’s other statutory requirements are met.

B. Limited Editions of Purely Digital Works

The next element that a digital work of visual art must satisfy under VARA is that the specific embodiments of the art exist in a limited edition of 200 or fewer copies that are individually signed and consecutively numbered by the artist. To continue the earlier hypothetical, the simplest situation is when the digital work is embodied in a digital frame. The artist can sign and consecutively number 200 or fewer copies of the picture frame. The signature and numbering could be on the picture frame itself. In a departure from the 1990 VARA model, the artist could

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67 Id.
69 See H.R. REP. No. 94-1476 at 52 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5665 (“Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device now known or later developed.”).
70 See supra Part III.
individually place a physical signature and consecutive number on the physical record or embodiment of the work (for example, the CD-ROM, floppy disk, or USB drive). Again, this seems to fall within the clear language of VARA. However, if the work is sold in a downloadable format where there is no transfer of a physical fixation, courts may have a harder time finding an electronic signature and consecutive electronic numbering which complies with VARA. The question of the VARA status of purely digital works will be addressed later in this article.

C. Can Purely Digital Works Be “Signed”?

Whether VARA requires that a signature has to be some physical marking on the objet d’art or physically collocated with it is an open question. One prominent law professor testified before Congress that:

The original or few copies with which the artist was most in contact embody the artist’s “personality” far more closely than subsequent mass produced images. Accordingly, the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies . . . . Were the original defaced or destroyed, we would still have the copies, we would all know what the work looked like, but I believe, we would all agree that the original’s loss deprives us of something uniquely valuable.

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71 15 U.S.C. § 7006(5) (2006) (“The term ‘electronic signature’ means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”). An electronic signature is basically any electronic communication intended to serve as a signature. For example, typing your name at the end of an email message would constitute an electronic signature. A digital signature is a type of electronic signature that usually involves a mathematical algorithm or some form of asymmetric cryptography. Accordingly, all digital signatures are electronic signatures, but not all electronic signatures are digital signatures.

72 Cf. Kwall, supra note 15, at 745 n.20 (“The legislative history on the signature requirement is muddied, but it has been suggested that the real reason for the signature requirement was to meet ‘unreasonable demands by the book publishing industry, which was determined to eliminate even the most implausible hypothetical scenario for liability.’”) (citations omitted).

73 H.R. REP. NO. 101-514, supra note 4, at 10 (statement of Prof. Jane Ginsberg before the subcommittee on VARA).
There may be a unique physicality to VARA’s requirement that original embodiments be individually signed and consecutively numbered by the author to assure this personal nexus between the artist and the work. This is not a strained reading of VARA; the invisible touch of the artist distinguishes the original from the reproduction. Several states have adopted laws that require originals that are part of a limited edition be personally signed by the artist and specifically exclude mechanical signatures.74

However, one can draw a different conclusion by exploring the language of the statute. VARA does not define the term signature, so one must look to other sources for guidance. The General Provisions Act of the United States Code, more commonly called the Dictionary of the United States Code, defines a signature as “inquid[ing] a mark when the person making the same intended it as such.” A mark in this context is a symbol intended to substitute for a signature.75 For example, a person unable to write his or her name may write the letter X as his or her mark in lieu of a traditional signature. This definition of mark seems to be sufficiently broad to encompass an electronic signature. In the Electronic Signatures in Global and National Commerce Act (“eSIGN”) Congress declared a specific goal of promoting the use of electronic signatures in commercial transactions.77 Although eSIGN was intended to obviate compliance with state statutes of frauds provisions that required a physical writing or a signature, eSIGN is applicable to “any statute, regulation, or other rule of

74 See, e.g., GA. CODE ANN., § 10-1-430(9) (“Signed means autographed by the artist’s own hand, and not by mechanical means of reproduction, after the multiple is produced.”); Mich. Comp. Laws Ann. § 442.351a(j) (“Signed means autographed by the artist’s own hand, and not by means of mechanical or photographic reproduction, after the multiple was produced, whether or not the master was signed.”).


76 Id.

77 15 U.S.C. § 7001(a) (2006) (“Notwithstanding any statute, regulation, or other rule of law . . . , with respect to any transaction in or affecting interstate or foreign commerce—(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form . . . .”).
law" that affects "interstate or foreign commerce." eSIGN contains no provisions that exclude the Copyright Act from the broad sweep of this language, so one could argue that eSIGN governs any commerce that Congress could lawfully regulate, including visual works under VARA. A decision that eSIGN's broad definition of an electronic signature applies to VARA works would avoid the more challenging task of determining whether an electronic signature is sufficient under VARA by looking to other provisions of federal law, the Restatement (Second) of Contracts, or other state law principles of law governing "signatures."

In Community for Creative Non-Violence v. Reid, the United States Supreme Court held that if Congress uses a common law term in the Copyright Act but does not define it, one must look to the common law for guidance. The Restatement (Second) of Contracts defines a signature as "any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." The comment then explains that "[t]he traditional form of signature is of course the name of the signer, handwritten in ink. But initials, thumbprint or an arbitrary code sign may also be used . . . ." A signature under the Uniform Commercial Code is "any symbol executed or adopted by a party with present intention to adopt or accept a writing." A writing is defined as "printing, typewriting or any other intentional reduction to tangible form." Courts interpreting the U.C.C. have found electronic means of communication such as telegraph messages or email to be sufficiently "tangible" to meet the writing requirements under the U.C.C. Both the Restatement (Second) of Contracts' and the Uniform Commercial Code's definitions of the term signature seem to encompass an electronic signature.

79 NIMMER ON COPYRIGHT, supra note 9, § 10.03[A][1].
81 RESTATEMENT (SECOND) CONTRACTS § 134 (2009).
82 Id. at cmt. a (emphasis added).
83 U.C.C. § 1-201(37) (2004).
84 U.C.C. § 1-201(43) (2004).
Finally, at least one court has held that a downloadable standard form contract was a writing for contractual purposes under the Federal Arbitration Act. As the signature requirement under VARA serves an evidentiary function, courts may draw guidance from an observation by another court evaluating an electronic signature in an evidentiary context that “[d]igital signatures are commonplace at this time, and often take the place of an ink signature.” However, regardless of the federal or state statutory or common law definitions of a signature, there appears to be nothing in VARA or these bodies of law that limits the term signature to a physical mark or pen and ink signature.

The method as to how an artist is to personally sign and number purely digital works of art to meet VARA’s requirements remains an open question. VARA is unclear as to whether an artist of purely digital work may authorize a software program (electronic agent) to add an electronic signature and consecutively number each copy as it is sold, while also simultaneously deleting a master copy as it downloads, so that at all times there is only one original copy of that embodiment. The simultaneous deletion of the master-source copy as the work is transferred seems to be necessary if the VARA requires that only one copy with a

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88 The artist might have to personally type his or her name using a keyboard, or personally hit “Enter” for each electronic copy; the artist might also give a single instruction to affix a signature and consecutively number 200 or fewer copies; in addition, theoretically the artist could delegate an electronic agent to sign and number the works. Cf. Nimmer, supra note 9, § 8D.06[A][1] n.23 (questioning whether an assistant could place the artist mark on the work for the artist).
89 Alternatively, one could only make 199 copies so one copy can be downloaded and fixed without the total number of copies in existence ever exceeding 200. A first sale under copyright law is legally significant. Before a first sale of the work, the artist’s exclusive rights under 17 U.S.C. § 106 are sufficient to protect the artist’s moral rights; for example, an intentional mutilation or distortion is arguably creating an unauthorized derivative work. See H.R. REP. NO. 101-514, supra note 4, at 9. But see Kwall, supra note 15. Of course, there may be state laws that protect the artist’s personal property rights in specific physical embodiments.
signature and specific consecutive number exist at any point in time. Furthermore, this would facilitate a digital mimicking of a physical world transaction. This model of simultaneous copying and deletion is analogous to buying a work, disassembling it at one location, and reassembling it at another.

If such an arrangement is possible under VARA, e-commerce possibilities are endless. For example, the artist could permit the work to be transferred from the same digital master under differing copyright licensing or sales terms. Some copies could be mere licenses, others will be digital first sales, and some will be digital first sales complete with an electronic signature, consecutive numbering by the artist, and instructions that the digital copy was sold solely for the purposes of exhibition. Medium neutrality and principles of digital neutrality should permit all of these options as these are common marketing techniques in the real world. Digital rights management programs can ensure that only 200 or fewer copies are downloaded and contain appropriate attribution and consecutive numbering, but it is unknown if that would constitute consecutive numbering by the artist under VARA. The most conservative interpretation of VARA is that the artist should personally type his or her electronic signature and then consecutive number on each copy of the digital work to model as closely as possible to the real-world paradigm.

90 The language of the legislative history casts some doubt on purely digital copies. "[W]hen an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered." H.R. REP. NO. 101-514, supra note 4, at 9. However, it is hard to draw a principled distinction between the paper photograph produced from a negative and a digital image fixed in a limited quantity.


92 H.R. REP. NO. 101-514, supra note 4, at 11 ("Artists may work in a variety of media, and use any number of materials in creating their works.").

93 See supra Part III.C.
IV. CONCLUSION

The status of digital works of visual art under VARA is by no means free from doubt. The language of the statute and its legislative history is sufficiently robust so that some digital works of visual art will be protected, while other equally creative and artistically significant works will fall outside of VARA's protection. However, as art and technology move from the 1990 paradigm of physical works into new, unexplored forms of art, it will be increasingly unlikely that courts will grant VARA's protection to these new works. Artists who seek VARA's protection should structure their art in a physical digital medium and arrange subsequent transactions in a manner that is clearly analogous to the 1990 VARA paradigm. The absence or uncertainty of VARA protection may not harm the cultural marketplace, nor deny artists an adequate incentive to create new works of digital art in light of the protection provide other provisions of the Copyright Act, Federal and state trademark law, state law analogues to VARA, and provisions under the Digital Millennium Copyright Act that prohibit the circumvention digital rights management technology. Assuredly, Dean Gasaway was correct in that VARA does need to be amended to protect new technology works of art. In light of our twenty-year experiment with VARA, perhaps Congress will eventually provide a more modern definition of works of visual art that will adequately protect reputational and economic interests of the new media artist as well as the interests of the marketplace for works of art.

94 Changes to VARA—while necessary for clarity and predictability in the legal arena—may be irrelevant to new media artists. The literature suggests that while the attribution right is important to new media artists, the integrity of the work is “not as big a deal if the art is hacked when it is digital instead of marble.” Brooke Oliver, The Artists Perspective in the Acquisition, Exhibition, and Preservation of New Media Works, SKO61-AL1-ABA 161, 171 (2005).

95 See Nat’l Ass’n for Stock Car Auto Racing, Inc. v. Scharle, 356 F. Supp. 2d 515, 528–29 (E.D. Pa. 2005) (“Congress, however, recognized the problems inherent in expanding VARA protection too broadly, and it, therefore, went to extreme lengths to narrowly define the works of art to be covered by the act.”); H.R. Rep. No. 101-514, supra note 4, at 9–10 (noting that the granting artists rights of attribution and integrity “might conflict with the distribution and marketing” of audio-visual works and other works-for-hire).