

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL A. HAYDEN,	:	
	:	
Plaintiff,	:	21 Civ. 10249 (LGS)
	:	
-against-	:	<b><u>OPINION AND ORDER</u></b>
	:	
JEFF KOONS,	:	
	:	
Defendant.	:	
-----X	:	

LORNA G. SCHOFIELD, District Judge:

Plaintiff Michael Hayden brings this action against Defendant Jeff Koons alleging (i) copyright infringement under the United States Copyright Act, 17 U.S.C. § 101, *et seq.* (“Copyright Act”); (ii) publication and distribution of false copyright management information under the Digital Millennium Copyright Act, 17 U.S.C. § 1202(a) (the “DMCA”) and (iii) violation of the right of attribution under the Visual Artists Rights Act, 17 U.S.C. § 106A (“VARA”). Defendant moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In the alternative, Defendant seeks a ruling that damages are limited to the three years preceding the filing of the Complaint under the statute of limitations. For the reasons stated below, Defendant’s motion to dismiss is denied, and his motion for a ruling limiting damages is granted.

**I. BACKGROUND**

The following facts are taken from the Complaint and are assumed to be true only for purposes of this motion. *See R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 509, 512 (2d Cir. 2020).

During the late 1980s, Plaintiff worked as an artist and set designer for film and theatre in Italy. Plaintiff designed sets and props for films and live performances featuring the famous

Italian adult film star and parliamentarian Ilona Staller, also known as Cicciolina. In approximately 1988, Plaintiff created a large, original sculptural work depicting a giant serpent wrapped around a rock (the “Original Work”). The Original Work was intended to serve as a work of fine art on which Cicciolina could perform sexually explicit scenes, both live and on camera. Plaintiff inquired whether Diva Futura, the company owned by Cicciolina and her manager, might purchase the Original Work for use as a platform on which Cicciolina would perform. Diva Futura agreed to acquire the Original Work, which was kept at Cicciolina’s manager’s studio in Rome. Below are photos of the Original Work.





Plaintiff retained all copyrights in and to the Original Work, and did not assign authorship, copyright ownership or sublicensing rights to Diva Future or anyone else. Plaintiff did not intend for anyone other than Cicciolina, her manager and Diva Futura to use the Original Work commercially.

In or about 1989, Defendant traveled to Italy on several occasions to be photographed with Cicciolina in sexually explicit positions using Cicciolina's sets. The photographs became part of a new series of Defendant's works known as *Made in Heaven*. Decades later, Defendant stated that his principal motivation behind the series was to further his career and increase his fame by associating himself in a sensational manner with Cicciolina, who was more famous than Defendant at the time the series was created. The *Made in Heaven* series caused a media sensation and scandal when it premiered, and is regularly credited with launching Defendant into the art world.



Three different pieces in the *Made in Heaven* series (the “Infringing Works”) reproduced the Original Work in whole or in part. The Infringing Works include the following: (i) *Made in Heaven* (1989), a lithograph initially commissioned by the Whitney Museum of American Art and displayed as a billboard over downtown Manhattan (“Infringing Work #1”); (ii) *Jeff and Ilona (Made in Heaven)* (1990), a polychromed wood sculpture featuring a three-dimensional replica of the Original Work (“Infringing Work #2”) and (iii) *Jeff in the Position of Adam* (1990), an oil on canvas (“Infringing Work #3”).



**Infringing Work #1**





**Infringing Work #2**

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