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Fine Art and Moral Rights: The Immoral Triumph of Emotionalism

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I. INTRODUCTION

Recent years have seen the emergence of state constitutional bases for civil liberty protections. As the federal judiciary has struggled with competing constitutional ideologies, state courts have increasingly relied on state constitutional provisions to provide the basis for decision-making. This dramatic and arguably dynamic development has overshadowed an equally fascinating dichotomy in federal-state relations: the development of state statutory protection for the "moral rights" of creators of intellectual property. To date, nine states have adopted what may loosely be termed limited moral rights legislation. These laws are limited both as to the class of


2. States are free to provide more generous rights under their individual constitutions than those afforded by the federal Constitution. See, e.g., State v. Caraher, 293 Or. 741, 750-51, 653 P.2d 942, 947 (1982); State v. Badger, 141 Vt. 430, 449, 450 A.2d 336, 347 (1982). See generally sources cited supra note 1. As Justice Brennan has stated:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the Federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extended beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Brennan, supra note 1, at 491. A number of state courts have held, for example, that privacy is a fundamental right protected by the state constitution. See, e.g., Ravin v. State, 537 P.2d 494 (Alaska 1975); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981).

works protected and the scope of protection provided. This Article examines the various statutory schemes for the protection of artists' moral rights, their shortcomings, and the extent to which they are preempted by federal copyright law. It concludes by noting the confusion resulting from independently developing bodies of state and federal law, a scheme unaltered by the ratification and implementation of the Berne Convention. Resolution of the competing statutory claims of artists and copyright owners is essential if consistency and predictability are to be maintained.

II. BACKGROUND AND ISSUES

At the outset, it is important to define the term "moral rights" and to understand its place in American jurisprudence prior to the recent increase in state legislative action. As the term is commonly understood, "moral rights" refers to the creator's personal right to control his creation. It encompasses the right to claim, or, under appropriate circumstances, to disclaim authorship, and to prohibit (some say control) physical alteration of the work. Professor 


4. See infra notes 52-278 and accompanying text.
5. See infra notes 337-76 and accompanying text.
6. See infra notes 279-336 and accompanying text.
7. See infra notes 337-76 and accompanying text.
9. See infra notes 337-78 and accompanying text.
10. Moral rights are usually referred to as personal rather than property rights. See, e.g., Diamond, Legal Protection for the "Moral Rights" of Authors and Other Creators, 68 TRADEMARK REP. 244, 245 (1978). Property rights are pecuniary in nature and are protected by federal copyright laws. See Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 VAND. L. REV. 1, 2 (1985). The personal rights basis of moral rights is not fully embraced by the state statutory schemes.
11. See Note, Moral Rights and the Compulsory License for Phonorecords, 46 BROOKLYN L. REV. 67, 70 (1979) (authored by Madelaine Berg). "Control" presupposes an ability to authorize alteration. Some of the new state statutes permit an artist to waive any right to prohibit intentional physical alteration, mutilation, or defacement of a work of fine art. See, e.g., infra note 87 and accompanying text (California); infra note 117 and accompanying text (Massachusetts); infra note 122 and accompanying text (Connecticut); infra notes 147-49 and accompanying text; infra notes 166-91 and accompanying text; infra notes 263-78 and accompanying text; infra notes 88-117 and accompanying text; infra notes 213-27 and accompanying text; infra notes 192-212 and accompanying text; infra notes 135-65 and accompanying text; infra notes 238-62 and accompanying text.
Nimmer provides a broad definition and identifies the author's moral rights as the right:

to be known as the author of his work; to prevent others from being named as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the view of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing.13

At least one commentator has asserted that the right to be free from excessive criticism, to publish a reply to such criticism, and to be protected from "a whole category of unpredictable injuries to . . . honor and reputation" are distinct branches of an author's moral rights protection.14 These rights are said to flow from the expression of the artist's personality in the work.16 They remain vested in the creator even after transfer of ownership of the work and its copyright.16 The Berne Convention,17 to which the United States has now assented,18 expressly recognizes part of the moral rights concept.19

accompanying text (Pennsylvania). This ability to waive the statutory protections implies that rights provided by the statute are intended to serve the interests of the artist, regardless of actual or potential conflict between the artist's interest and broader social interests in the preservation of fine art.


14. See Roeder, supra note 12, at 573.


Recognition of artists' moral rights is usually urged on two distinct grounds. The first is that the failure to attribute authorship, the false attribution of authorship, or the alteration of a work may interfere with a creator's ability to market his reputation and talent. This is a purely economic argument, grounded in the adverse impact on the creator's ability to fully exploit the monetary reward of creativity. The second is that interference with moral rights is offensive to the artist and constitutes an insult to his person.

These concepts of moral rights find no express provision in federal copyright law. Federal protection of "copyrightable" subject efforts to ratify the Berne Convention. One of the several forces blocking ratification was the controversy over the Convention's moral right provision. It had long been a concern that the absence of federally legislated moral rights precluded United States adherence to the Convention. See generally Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 COLUM. J.L. & ARTS 513, 547-58 (1986) (reporting on the degree of compatibility between United States copyright law and the moral rights provision of the Berne Convention). However, in enacting the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2853, Congress implicitly asserted that § 106 of the federal Copyright Act of 1976, § 43(a) of the Lanham Act, and state common law remedies provide sufficient moral rights protection to bring the United States within the terms of the Convention. The Act provides that all "obligations of the United States in adhering to the Berne Convention" are satisfied by the Act, id. § 2(3), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2853, and that the existing mix of federal, state, and common law affecting moral rights is not "expand[ed] or reduc[ed]" by United States adherence to the Convention, id. § 3(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2853.

19. See Berne Convention, supra note 17, at art. 6bis. Article 6bis of the Berne Convention provides:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.

Id. (as revised in Paris on July 24, 1971).

20. See Roeder, supra note 12, at 557.
21. See id.
22. See id. at 558-74; Strauss, supra note 12, at 508-17.
23. The exception is the limited moral right offered the composer in tandem with the compulsory license provisions for sound recordings. Section 115(e) of the Copyright Act gives a musical composer the exclusive right to entirely prohibit the initial mechanical reproduction of his or her copyrighted composition. See 17 U.S.C. § 115(e) (1982). Once a composer allows another to mechanically reproduce his work, however, anyone can make "similar use" of it with certain procedural formalities. See id. Thus, artists rearranging a copyrighted composition have only limited freedom to experiment with the material, and these limits are grounded in a crude recognition of moral rights. See Note, supra note 11, at 76.
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matter has always been tied to a system which creates and promotes economically exploitable rights." This tendency flows directly from the language of the Constitution providing that "Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Framers recognized that the accumulation and dissemination of knowledge and information was fundamental to the material and spiritual advance of society and chose to promote that development by rewarding individual incentive. In Mazer v. Stein, the Supreme Court concluded that "[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ." More recently, in Goldstein v. California, the Supreme Court reiterated the economic philosophy behind the Copyright Clause as describing "both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts. . . . To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works."

The Framers' use of the phrase "to promote the Progress of Sci-

24. Kwall, supra note 10, at 2. Section 106 of the Copyright Act of 1976 provides exclusive rights to do or authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.


26. Mazer v. Stein, 347 U.S. 201, 219 (1954); see also The Federalist No. 43, at 267 (J. Madison) (H.C. Lodge ed. 1902) (stating that "[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both individuals.").


28. Id. at 219.


30. Id. at 555 (footnote omitted).
ence and useful Arts” suggests a nobler purpose than the enrichment of creative individuals. The emphasis on commercial benefit was intended to serve the broad social interest in the development of art, literature, and useful things.\textsuperscript{31} That society’s benefit is the primary concern is clear from the Court’s statement in \textit{Sony Corp. of America v. Universal City Studios}\textsuperscript{32} that “[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”\textsuperscript{33} It has also been asserted that the concept of copyright “is designed to secure, not to surmount, the public’s interest” by encouraging creation and dissemination.\textsuperscript{34}

Accordingly, protection for the so-called “moral rights”\textsuperscript{35} has been left to various state common law theories,\textsuperscript{36} including the right of privacy,\textsuperscript{37} the right of publicity,\textsuperscript{38} defamation,\textsuperscript{39} unfair competition,\textsuperscript{40} and contract.\textsuperscript{41} Within limited contexts, federal courts have

31. The Patent and Copyright Clause, reflecting common 18th century usage, employed the term “useful Arts” to refer to those areas governed by patent law, and “Science” to refer to those areas governed by copyright law. See 1 M. Nimmer & D. Nimmer, supra note 13, § 1.03[A], at 1-31 n.1.


33. \textit{Id.} at 429.


35. \textit{See supra} notes 10-19 and accompanying text. Diamond discusses the derivation of the term moral rights from the French “droit moral,” and notes that Dr. Stephen P. Ladas suggested that a more appropriate term is the German “urheberpersonlichkeitsrecht,” meaning “right of the author's personality.” \textit{See} Diamond, supra note 12, at 244.

36. \textit{But see} Note, \textit{supra} note 34, at 1501-06 (arguing that the federal Copyright Act of 1976 “creates a limited federal basis of rights in artistic reputation”).


40. Prouty v. National Broadcasting Co., 26 F. Supp. 265, 266 (D. Mass. 1939) (recognizing that the equitable doctrine of unfair competition is violated by a radio station's unauthorized broadcast of a skit which misappropriated the principal characters of the plaintiff's novel in a manner injurious to the plaintiff's reputation). The doctrine of unfair competition
recognized some statutory rights to prevent distortion or mutilation of one's work.\textsuperscript{42} For various reasons, however, the common law remedies have been criticized as inadequate and too narrow to protect the values embodied in the concept of moral rights.\textsuperscript{43} Proposals for a federal moral rights bill have been introduced on several occasions,\textsuperscript{44} but none have ever reached the floor of Congress for a vote. Recently, Congress passed the Berne Convention Implementation Act of 1988.\textsuperscript{46} Although Berne has a broad moral rights provision,\textsuperscript{46} the Implementation Act provides that an author's right under federal, state, and common law to claim authorship or object to any distortion, mutilation, modification, or other derogatory action with re-
spect to his work is not expanded or reduced.47

Nevertheless, American copyright law provides the true "moral" foundation of American intellectual property protections. As noted by Roeder, "The very basis of all creative work lies in the protection of the right to create, which is a function of the right of individual liberty. . . . By and large, . . . modern liberal social philosophy and jurisprudence support the view that one of man's basic rights is the freedom to create."48 The failure of Congress to act with respect to artists' moral rights may thus reflect its collective conclusion that current federal law contains sufficient protection by providing that such rights are divisible and exploitable through contract.49 Congress may also have felt constrained by a concern that the delicate balance between copyright, the first amendment, and the doctrine of fair use would have been affected in unforeseen and unpredictable ways by the adoption of a moral rights amendment. Whatever the forces checking Congress, nine states, encompassing approximately one-third of the nation's population,50 have been motivated to adopt some form of moral rights legislation affecting works of fine art.51

This development, while commendable in the abstract, threatens to undermine the critical distinction between the rights of a creator and the public's interest in the creation. The state statutes are uniformly intended to preserve the integrity of works of fine art and provide the artist with an assurance of recognition for his work regardless of who owns the copyright. However, this legislative concern with the integrity and reputation of artists has created statutory schemes that subordinate the public's interest in its cultural heritage to the interests and control of the individual artist without adequate justification or safeguard.

51. See statutes cited supra note 3.
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III. INDIVIDUAL STATE ANALYSIS

Before launching into an examination of the various state laws, certain threshold concepts must be understood. The statutes do not protect all creations or even all copyrightable subject matter. They are universally limited in applicability to works of fine art and generally exclude from protection works created by employees within the scope of their employment or prepared under a contract for various kinds of commercial use. Each statute provides an artist with the right to claim paternity of his work, and with the exception of Connecticut, to disclaim authorship in appropriate circumstances.

State moral rights statutes are generally of two broad types. First, there are those which prohibit intentional and, in some circumstances, grossly negligent acts of physical defacement, alteration, mutilation, or destruction of works of fine art. Second, there are those which under certain circumstances prohibit the public display of fine art in a mutilated, altered, or modified form. Generally, the

52. Section 102(a) provides, in part:
Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

53. See infra note 61 and accompanying text (California); infra notes 91-92 and accompanying text (Massachusetts); infra notes 120-21 and accompanying text (Connecticut); infra note 138 and accompanying text (Pennsylvania); infra note 184 and accompanying text (Louisiana); infra note 208 and accompanying text (New York); infra note 217 and accompanying text (New Jersey); infra note 243 and accompanying text (Rhode Island); infra note 271 and accompanying text (Maine).

54. See infra note 77 and accompanying text (California); infra note 105 and accompanying text (Massachusetts); infra note 124 and accompanying text (Connecticut); infra notes 152-53 and accompanying text (Pennsylvania); infra notes 180-83 and accompanying text (Louisiana); infra note 201 and accompanying text (New York); infra notes 225-26 and accompanying text (New Jersey); infra note 250 and accompanying text (Rhode Island); infra note 269 and accompanying text (Maine).

55. See infra notes 60-87 and accompanying text (California statute); infra notes 88-117 and accompanying text (Massachusetts statute); infra notes 118-34 and accompanying text (Connecticut statute).

56. See infra notes 135-65 and accompanying text (Pennsylvania statute); infra notes 166-91 and accompanying text (Louisiana statute); infra notes 192-212 and accompanying text (New York statute); infra notes 213-37 and accompanying text (New Jersey statute); infra notes 238-62 and accompanying text (Rhode Island statute); infra notes 263-78 and
former impose a recognized quality standard in their definition of fine art while the latter do not. Finally, as a general principal, those states prohibiting the physical act of defacement, alteration, mutilation, or destruction of fine art express a policy objective of protecting both the reputation and professional careers of artists and the public's interest in the preservation of its cultural heritage embodied in fine art. Those states which prohibit the public display of mutilated, altered, or modified fine art express a policy objective of protecting the artist's reputation and professional career but most do not, at least expressly, recognize any broader public interest in preserving the artistic work.

While these generalizations are a useful method for describing the thrust of the statutes, they are inadequate for a thorough understanding of state moral rights legislation. What follows is a state by state breakdown of the statutes.

A. California

Under California law, a work of fine art is limited to "an original painting, sculpture or drawing, or an original work of art in glass, of recognized quality." The statute excludes "work prepared accompanying text (Maine statute)."

57. The California and Massachusetts statutes prohibit the intentional physical defacement, alteration, mutilation, or destruction of works of fine art and incorporate a "recognized quality" standard in their definition of fine art. See infra note 60 and accompanying text (California); infra note 89 and accompanying text (Massachusetts). But see infra note 118 and accompanying text (noting that the Connecticut statute's definition of fine art does not apply a "recognized quality" standard even though the statute prohibits intentional physical alteration). Alternatively, New York, New Jersey, Rhode Island, and Maine prohibit the public display of fine art in a mutilated, altered, or modified form and do not incorporate a "recognized quality" standard. See infra note 193 and accompanying text (New York); infra note 213 and accompanying text (New Jersey); infra note 242 and accompanying text (Rhode Island); infra note 263 and accompanying text (Maine). But see infra note 136 and accompanying text (noting that Pennsylvania has adopted a public display statute that incorporates a "recognized quality" standard); infra note 167 and accompanying text (same for Louisiana).

58. See, e.g., CAL. CIV. CODE § 987(a) (West Supp. 1989); MASS. GEN. LAWS ANN. ch. 231, § 85S(a) (West Supp. 1988).

59. See infra notes 174-79 and accompanying text (discussing the requirement of injury to the artist's reputation under the Louisiana statute); infra note 200 and accompanying text (same under the New York statute); infra note 219 and accompanying text (same under the New Jersey statute); infra note 266 and accompanying text (same under the Maine statute). But see infra note 248 and accompanying text (stating that there is no requirement of injury to the artist's reputation in Rhode Island); infra text accompanying note 362 (setting forth the preamble to the Pennsylvania statute which recognizes, both protection of the artist's reputation and preservation of the public welfare as the purposes of the statute).

under contract for commercial use by its purchaser.” 61 The critical issue is the determination of “recognized quality.” 62 In making that determination, the statute provides that “the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.” 63 Once a work may be classified as fine art, no one except the artist who created, owns, and possesses the work “shall intentionally commit, or authorize . . . any physical defacement, mutilation, alteration, or destruction of [the work].” 64 Additional provision is made for persons who frame, 65 restore, 66 or conserve 67 such works; the proper exercise of their functions will presumptively not be interpreted as a physical defacement, mutilation, alteration, or destruction within the statutory meaning of those terms. 68 Liability may result, however, when those functions are performed in a grossly negligent manner. 69

The statute’s prohibitions do not apply to works of fine art that “cannot be removed from a building without substantial physical defacement, mutilation, alteration or destruction.” 70 This provision seems to be directed to works of fine art located within a building. Notwithstanding this exception, however, the rights and duties of the artist may be reserved by an instrument signed by the owner of the

61. Id. “Commercial use” is defined as “fine art created under a work for hire arrangement for use in advertising, magazines, newspapers, or other printed and electronic media.” Id. § 987(b)(7); see also Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 644, 205 Cal. Rptr. 620, 624 (1984) (holding that architects’ plans, while arguably a “drawing” within the definition of fine art, are nonetheless excluded when they were prepared for commercial use by the buyer).


63. Id.

64. Id. § 987(e)(1).

65. Id. § 987(b)(4).

66. Id. § 987(b)(5).

67. Id. § 987(b)(6).

68. Id. § 987(c)(2).

69. Id. “Gross negligence” is defined as “exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.” Id.

70. Id. § 987(h)(1). Section 989 does, however, contain special provisions concerning works of fine art “of substantial public interest” which are located in or form a part of a building and cannot be removed without physical damage. See id. § 989(e). The statute provides for notice to the artist before the work is removed. Id. § 989(e)(2)(A) (incorporating the notice provisions of § 987(h)). In the absence of action by the artist (who may remove or pay for the removal of the work and thereby acquire title), standing to represent the public interest is bestowed upon non-profit entities who may attempt to obtain injunctive relief “to preserve the integrity of the work of fine art . . . .” Id. § 989(e)(1).
building and properly recorded.71 Once the instrument is properly recorded it “shall be binding on all subsequent owners of such building.”72 In the event the fine art is a part of a building and cannot be removed without substantial harm, the prohibition on physical defacement and other alteration does not apply so long as the building owner diligently attempts without success to provide notice to the artist or, having provided notice, the artist fails to remove or pay for the removal of the work.73 Furthermore, if the removal is paid for by the artist, “title to such fine art shall pass to [him].”74 It should be noted that the entire provision concerning “fine art which is a part of such building”75 comes into force only if the owner of the building intends to cause or permit the physical defacement, mutilation, alteration, or destruction of the work in the course of or after its removal.76

California further provides that an artist may at any time “claim authorship, or, for just and valid reason . . . disclaim authorship of his or her work of fine art.”77 The statute does not provide any guidance as to what circumstances constitute just and valid reason.

In order to “effectuate the rights created” by the statute,78 the artist, or “his heir, legatee or personal representative” if he is deceased,79 may commence an action for injunctive relief,80 actual damages,81 punitive damages,82 reasonable attorneys’ and expert wit-
ness fees,\textsuperscript{83} and any other relief the court may deem proper.\textsuperscript{84} All rights created under the statute run for the life of the artist plus fifty years.\textsuperscript{85} The statute of limitations is three years from the act complained of or one year from discovery, whichever is longer.\textsuperscript{86} The statute also provides, in what is arguably its most controversial provision, that any rights and duties created under the statute may be waived by a written instrument signed by the artist.\textsuperscript{87}

B. Massachusetts

A work of fine art under the Massachusetts statute is defined more broadly than in California, although the “recognized quality” standard is retained.\textsuperscript{88} The definition provides that “any original work of visual or graphic art of any media . . . or any combination thereof, of recognized quality” shall constitute a work of fine art.\textsuperscript{89} The statute provides several examples, “including, but not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film [or] hologram . . . .”\textsuperscript{90} While works created by employees within the scope of their employment are excluded\textsuperscript{91} no mention is made, as in California, of works created under a contract for commercial or trade use.\textsuperscript{92} As in California, the critical issue of the determination of recognized quality is left to a case by case analysis.\textsuperscript{93} The statute directs that the court shall rely on the opinions of a similar body of experts encountered in the California statute.\textsuperscript{94} The fundamental difference between the two states is Massachusetts’ in-

\textsuperscript{83} Id. § 987(e)(4).
\textsuperscript{84} Id. § 987(e)(5).
\textsuperscript{85} Id. § 987(g)(1).
\textsuperscript{86} Id. § 987(i).
\textsuperscript{87} Id. § 987(g)(3). But cf. id. § 987(h)(1) (providing that if a work of fine art is part of a building and cannot be removed without substantial harm to the work, the artist’s rights under the statute are deemed waived unless expressly reserved in an instrument signed by the building owner).
\textsuperscript{88} See MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1988); see also supra note 60 and accompanying text (discussing the definition of fine art in the California statute).
\textsuperscript{89} MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1988).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} See supra note 61 and accompanying text.
\textsuperscript{93} See MASS. GEN. LAWS ANN. ch. 231, § 85S(f) (West Supp. 1988); see also supra note 63 and accompanying text (discussing the determination of “recognized quality” under the California statute).
\textsuperscript{94} MASS. GEN. LAWS ANN. ch. 231, § 85S(f) (West Supp. 1988); see supra note 63 and accompanying text (discussing the experts referred to by the California statute).
clusion of any original works of "visual or graphic art in any media," whereas California strictly limits the media which it will recognize.

Similar to California, no one but the artist who owns or possesses a work of fine art that he has created may intentionally deface, mutilate, alter, or destroy it. "Intentional" is defined to include "action taken deliberately or through gross negligence," the latter of which itself is defined as the "exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." California, however, limits the application of the gross negligence standard to cases involving framers, restorers, and conservers. No such limitation can be found in the Massachusetts statute.

Massachusetts has a provision virtually identical to that of California with respect to the removal of fine art from a building when substantial harm to the work cannot be avoided. Generally, the prohibitions on intentional physical defacement, alteration, mutilation, or destruction created under the statute do not apply unless the building owner signs an instrument providing otherwise and the instrument is properly recorded, all prior to the installation of the art in the building. Once recorded, the instrument is binding on all subsequent owners of the building. Thus, the same provisions as those discussed in California apply with respect to fine art which is a part of any building and cannot be removed without substantial harm.

Artists are granted "the right to claim and receive credit . . . or,

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96. See supra note 60 and accompanying text.
97. See **Mass. Gen. Laws Ann.** ch. 231, § 85S(c) (West Supp. 1988); cf. supra note 64 and accompanying text (discussing the California statute requirement that the artist create, own, and possess the work of fine art before he may authorize any alteration).
99. Id. § 85S(b).
100. See supra notes 65-69 and accompanying text.
101. **Mass. Gen. Laws Ann.** ch. 231, § 85S(h)(1) (West Supp. 1988); see supra notes 70-76 and accompanying text (discussing the analogous California provision). As in California, these provisions deal only with unavoidable "substantial" physical injury to the work of fine art located in or forming a part of a building. **Mass. Gen. Laws Ann.** ch. 231, § 85S(h)(1), (2) (West Supp. 1988); see supra notes 70-76 and accompanying text (discussing the analogous California provision).
103. Id.
104. See supra notes 70-76 and accompanying text (discussing the analogous California provision).
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for just and valid reason, to disclaim authorship of [their] work[s] of fine art." Such credit will depend on the medium used and the nature and extent of the artist’s contributions to the work. As is the situation in California, no provision is made for determining what constitutes a “just and valid reason” to disclaim ownership.

The statute provides that an artist or his authorized representative may bring an action for injunctive or declaratory relief, actual damages, reasonable attorneys’ and expert witness fees and all other costs of the action, or any other relief which the court may deem proper. There is no provision for punitive damages. The statute, however, expressly dispenses with a showing of actual damages, special damages, or general damages as a prerequisite to a suit. Of particular interest is a provision that the state attorney general may commence an action for injunctive relief if the artist is deceased and the particular work of fine art is in public view.

The rights created have a duration of the artist’s life plus fifty years. The statute of limitations is two years from accrual of the cause of action or one year from discovery, whichever is later. Finally, as in California, the artist may waive any and all of the rights he acquires under the statute so long as he does so in a signed writing specifically referring to and identifying the work.

C. Connecticut

Connecticut’s definition of fine art includes an array of specific media. However, in a striking departure from other states, Con-

106. *Id.*
107. *See supra* note 77 and accompanying text.
108. *Mass. Gen. Laws Ann.* ch. 231, § 85S(e) (West Supp. 1988). The statute is unique in that it permits the artist to authorize “any bona fide union or other artists’ organization” to commence suit in his stead. *Id.*
109. *Id.* § 85S(e)(3)(i).
110. *Id.* § 85S(e)(3)(ii).
111. *Id.* § 85S(e)(3)(iii).
112. *Id.* § 85S(e)(3)(iv).
113. *Id.* § 85S(e).
114. *Id.* § 85S(g). “Public view” is defined to mean “on the exterior of a public owned building, or in an interior area of a public building.” *Id.* § 85S(b).
115. *Id.* § 85S(g).
116. *Id.* ch. 260, § 2C.
117. *Id.* ch. 231, § 85S(g); *see also supra* note 87 and accompanying text (discussing the waiver provision of the California statute).
118. *See 1988 Conn. Acts* 284, § 1(2) (Reg. Sess.). “Works of fine art” include: any drawing; painting; sculpture; mosaic; photograph; work of calligraphy; work of
necticut does not limit fine art to original works of authorship. Accordingly, the Connecticut statute may apply with equal force to “knock-offs,” unauthorized derivative works, and originals. Works prepared by an employee within the scope of his employment duties are excluded from the definition of fine art. Commissioned works prepared under contract for trade or advertising use are protected unless the artist, prior to creating the work, executes a written waiver of his right to prevent alteration. This provision is distinct from the general waiver provision which permits waiver of rights under the statute by written instrument without regard to when the waiver is executed.

The basic provisions of the statute prohibit the intentional commission or authorization of the intentional commission of “any physical defacement or alteration of a work of fine art.” The right to claim authorship is provided but there appears no right to disclaim authorship. Artists may commence actions for injunctive relief, actual damages, reasonable attorneys’ and expert witness fees, and any other relief deemed proper by the court. There is no provision for punitive damages.

Fine art which cannot be removed from a building without “substantial physical defacement or alteration” is not protected by the statute unless it is an instrument, executed and witnessed in the same manner as a deed, reserves the rights set forth in the statute. If properly recorded, such an instrument is binding on the building owner and all subsequent owners. Unlike the California statute,
there is no provision in the statute concerning art restorers, framers, or conservers.\textsuperscript{131}

The rights provided in the statute "exist until the fiftieth anniversary of the death of [the] artist."\textsuperscript{132} The statute of limitations is three years from the act complained of or one year after discovery,\textsuperscript{133} but in no event may an action be commenced more than ten years after the act complained of.\textsuperscript{134}

D. Pennsylvania

The Pennsylvania statute tracks the Massachusetts statute in its definition of "fine art."\textsuperscript{135} Original works "of recognized quality created using any medium" are included within the definition.\textsuperscript{136} As in Massachusetts, non-limiting examples of various medium are set forth.\textsuperscript{137} As in California, a work "created under contract for advertising or commercial use" is excluded.\textsuperscript{138} However, unlike California, the parties are free to provide otherwise in their written agreement.\textsuperscript{139} The problem of determining recognized quality is dealt with by directing the trier of fact to rely on the same cavalcade of experts set forth in both the California and Massachusetts statutes.\textsuperscript{140}

The basic prohibition, as in both California and Massachusetts, is the intentional physical defacement, mutilation, alteration, or de-

\footnotesize{131. See supra notes 65-69 and accompanying text (discussing the California provision).
132. 1988 Conn. Acts 284, § 5(1) (Reg. Sess.). After the artist’s death, actions under the statute may be commenced by the artist’s heir, legatee, or designated personal representative. Id.
133. Id. § 7.
134. Id.
135. See PA. STAT. ANN. tit. 73, § 2102 (Purdon Supp. 1988); see also supra notes 88-90 and accompanying text (discussing the definition of “fine art” contained in the Massachusetts statute).
136. See PA. STAT. ANN. tit. 73, § 2102 (Purdon Supp. 1988).
137. See id.; see also supra note 90 and accompanying text (discussing the examples provided by the Massachusetts statute). The examples include, but are not limited to, painting, drawing, or sculpture. PA. STAT. ANN. tit. 73, § 2102 (Purdon Supp. 1988).
138. See PA. STAT. ANN. tit. 73, § 2107(3) (Purdon Supp. 1988); see also supra note 61 and accompanying text (discussing this exclusion under the California statute). However, California’s statutory definition of “commercial use” narrowly limits the exclusion in that state. See supra note 61.
139. See PA. STAT. ANN. tit. 73, § 2107(3) (Purdon Supp. 1988).
140. Id. § 2106; see also supra note 63 and accompanying text (discussing the determination of “recognized quality” under the California statute); supra note 93 and accompanying text (same under the Massachusetts statute). Although implicit in both the California and Massachusetts statutes, Pennsylvania specifically provides that the issue of recognized quality is to be determined by “a preponderance of the evidence.” PA. STAT. ANN. tit. 73, § 2106 (Purdon Supp. 1988).}
struction of a work of fine art. Similarly, the Pennsylvania prohibition does not apply to an artist who created, owns, and possesses the work. Pennsylvania tracks the California statute's provision relating to physical damage caused by the gross negligence of framers, conservers, and restorers of fine art and provides a similar definition of gross negligence: a degree of care so slight "as to justify the belief that a person acted with indifference toward the physical integrity of a work of fine art." Unlike the Massachusetts statute, however, the Pennsylvania statute does not apply the gross negligence standard to the public at large.

The provisions with respect to removal of fine art from buildings where such removal cannot be accomplished without substantive physical injury or alteration are, for the most part, the same as those in California and Massachusetts. However, two important differences exist. As in both California and Massachusetts, the exemption from coverage for fine art that cannot be removed from a building without substantial physical defacement, alteration, mutilation or destruction may be waived if such waiver is contained in a written instrument signed by the building owner. However, there is no requirement that the instrument be recorded. Nevertheless, the waiver "shall be binding on subsequent owners of the building." This implicitly amends the recording statutes in Pennsylvania so as to provide for an effective encumbrance on title without recording,

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141. See Pa. Stat. Ann. tit. 73, § 2104(a) (Purdon Supp. 1988); see also supra note 64 and accompanying text (discussing the basic prohibition of the California statute); supra note 97 and accompanying text (same under the Massachusetts statute).

142. See Pa. Stat. Ann. tit. 73, § 2104(a) (Purdon Supp. 1988); see also supra note 64 and accompanying text (noting the analogous exemption under the California statute); supra note 97 and accompanying text (same under the Massachusetts statute).

143. See Pa. Stat. Ann. tit. 73, § 2104(b) (Purdon Supp. 1988); see also supra notes 65-69 and accompanying text (discussing this provision of the California statute).

144. Pa. Stat. Ann. tit. 73, § 2104(c) (Purdon Supp. 1988); see also supra note 69 (discussing the definition of "gross negligence" under the California statute).

145. See supra notes 98-100 and accompanying text (noting the broader application of the Massachusetts gross negligence standard).

146. See Pa. Stat. Ann. tit. 73, § 2108(a), (b) (Purdon Supp. 1988); see also supra notes 70-76 and accompanying text (discussing the corresponding provisions of the California statute); supra notes 101-04 and accompanying text (same under the Massachusetts statute).

147. See Pa. Stat. Ann. tit. 73, § 2108(a) (Purdon Supp. 1988); see also supra note 71 and accompanying text (discussing the analogous California provision); supra note 102 and accompanying text (same under the Massachusetts statute).

148. Cf. supra notes 71-72 and accompanying text (noting the recording requirement under the California statute); supra notes 102-03 and accompanying text (same under the Massachusetts statute).

and thus, priority. Second, building owners are wholly exempted for "emergency situations" where there is "no opportunity" to provide proper notice to the artist.\textsuperscript{180} This protection applies regardless of a prior waiver by the building owner.\textsuperscript{181}

The artist at all times retains the right to claim or disclaim authorship.\textsuperscript{182} Rather than condition the right of disclaimer on "just and valid reason" as does California and Massachusetts, Pennsylvania expressly provides that the right to disclaim authorship arises whenever intentional physical defacement, mutilation, alteration, or destruction occurs.\textsuperscript{183}

In the event of a violation the artist is given the right to commence an action for injunctive relief,\textsuperscript{184} actual damages,\textsuperscript{185} punitive damages,\textsuperscript{186} reasonable attorneys' and expert witness fees,\textsuperscript{187} and any other proper relief.\textsuperscript{188} The right created by the statute endures for the life of the artist plus fifty years\textsuperscript{189} and may, in the event of his death, be exercised by his heir, legatee, or personal representative.\textsuperscript{190} There is no provision for an action by the attorney general or artists' unions or other organizations designated by the artist, as there is in Massachusetts.\textsuperscript{191} The statute of limitations period is three years from a violation of the statute or one year from discovery, whichever is longer.\textsuperscript{192} The artist may waive any of his rights so long as it is done in a writing signed by him.\textsuperscript{193}

In a stark departure from the California and Massachusetts

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\footnotesize
150. Id. § 2108(d).
151. Id.
152. Id. § 2103.
153. See id.; see also supra note 77 and accompanying text (discussing the "just and valid reason" requirement of the California statute); supra notes 105-07 and accompanying text (same under the Massachusetts statute). Changes resulting from the gross negligence of restorers, framers, or conservers would also give rise to the disclaimer right. See Pa. Stat. Ann. tit. 73, § 2103 (Purdon Supp. 1988).
155. Id. § 2105(2).
156. Id. § 2105(3). As in California, punitive damages are not awarded to the plaintiff. See supra note 82. Rather, they are awarded to an organization engaged in charitable or educational activities involving the fine arts in Pennsylvania. Pa. Stat. Ann. tit. 73, § 2105(3) (Purdon Supp. 1988). The organization is selected by the trial judge in the exercise of his discretion. See id.
158. Id. § 2105(5).
159. Id. § 2107(1).
160. Id.
161. See supra notes 108, 114 and accompanying text.
163. Id. § 2107(2).
\end{flushleft}
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statutes, the Pennsylvania act provides that it “shall apply only to works of fine art displayed in a place within [the] Commonwealth accessible to the public.”\textsuperscript{164} It further defines “display” to mean exhibition “in a manner customarily considered to be appropriate for a work of fine art in the particular medium.”\textsuperscript{165} This provision effectively converts the law from one prohibiting defacement to one prohibiting display of a defaced work, a variant of the five remaining state moral rights statutes, albeit without any need to show those states’ statutory elements of harm to the artist’s reputation and display of the work as that of the artist.

E. Louisiana

Like Pennsylvania, Louisiana has adopted a public display law\textsuperscript{166} that incorporates a “recognized quality” standard.\textsuperscript{167} Unlike Pennsylvania, however, prohibited displays are tied to the likelihood of reputational harm, as in New York and New Jersey.\textsuperscript{168} The definition of fine art is broad, including “any original work of visual or graphic art of recognized quality.”\textsuperscript{169} The definition contains several non-limiting examples\textsuperscript{170} and expressly excludes “sequential imagery such as motion pictures.”\textsuperscript{171} “Recognized quality” is itself defined as “those attributes of a work of fine art that enhance its value.”\textsuperscript{172} The trier of fact is left to determine “whether or not these attributes exist” and is instructed to base its determination on the opinions of the same gang of industry experts set forth in the statutes of other “rec-

\begin{thebibliography}{99}
\bibitem{164} Id. § 2110(a).
\bibitem{165} Id. § 2102.
\bibitem{166} See LA. REV. STAT. ANN. § 51:2153 (West 1987); see also supra notes 164-65 and accompanying text (discussing the display provisions of the Pennsylvania statute). The Louisiana statute provides that “no person other than the artist . . . shall knowingly display to others, make accessible to the public, or publish” works of fine art or reproductions “in an altered, defaced, mutilated, or modified form,” LA. REV. STAT. ANN. § 51:2153(1), (2) (West 1987), and no person may display a work if damage to the artist’s reputation is reasonably likely to result, id. § 51:2153(3).
\bibitem{167} See LA. REV. STAT. ANN. § 51:2152(4) (West 1987); see also supra notes 136, 140 and accompanying text (discussing Pennsylvania’s “recognized quality” standard).
\bibitem{168} See LA. REV. STAT. ANN. § 51:2153(3) (West 1987), discussed supra note 166; see also infra note 200 and accompanying text (noting analogous provisions under the New York statute); infra note 219 and accompanying text (same under the New Jersey statute).
\bibitem{169} LA. REV. STAT. ANN. § 51:2152(7) (West 1987).
\bibitem{170} See id. The examples provided include “painting, drawing, print, photographic print, or sculpture of a limited edition of no more than three hundred copies . . . .” Id.
\bibitem{171} Id.
\bibitem{172} Id. § 51:2152(4).
\end{thebibliography}
ognized quality” states. This creates a hopelessly circular quandary—“fine art” must satisfy the “recognized quality” standard, yet the definition of recognized quality presupposes fine art since it identifies “recognized quality” as an attribute of fine art. This resolves nothing and makes it extremely difficult to identify the subject matter governed by the statute.

The protections provided are tied to the knowing “display to others” of fine art in an altered, defaced, mutilated, or modified form. However, it is not clear from the language and structure of the statute if likelihood of reputational harm is an element of the prohibited conduct. The relevant section of the statute, section 2153, is divided into three subsections. The first and second subsections address “works of fine art” and “reproductions,” respectively, and appear to prohibit their display if they are in an altered, defaced, mutilated, or modified form. The third subsection prohibits displays of both originals and reproductions when the work is “generally regarded by the public as that of the artist, or under circumstances in which it would be reasonably regarded as being the work of the artist, and damage to the artist’s reputation is reasonably likely to result therefrom.” The difficult question is whether the subsections are independent prohibitions or whether the prohibitions on the display of altered, defaced, mutilated, or modified works of fine art and reproductions are further conditioned on the public identification of the works as being those of a particular artist and on the likelihood of reputational harm.

If the three subsections are wholly independent, then the public display of unaltered and carefully maintained works of fine art is prohibited if a particular artist is identified in the public’s mind as the creator and the display is reasonably likely to harm his reputation. This conclusion results from the absence of any reference to alteration, defacement, mutilation, or modification in the third subsection of section 2153. Such a construction is patently absurd, since it would have nothing to do with the display of a deformed work of

173. Id; see supra note 63 and accompanying text (discussing the determination of “recognized quality” under the California statute); supra note 94 and accompanying text (same under the Massachusetts statute); supra note 140 and accompanying text (same under the Pennsylvania statute).

174. LA. REV. STAT. ANN. § 51:2153(1) (West 1987). Publication of such works and/or making them accessible to the public are also prohibited. Id.

175. Id. § 51:2153(1).

176. Id. § 51:2153(2).

177. Id. § 51:2153(3).
fine art. The chilling effect on the exercise of first amendment liberties would be overwhelming. Poor draftsmanship has clouded this section of the act. Most of the other states adopting public display statutes tie protection to public identification of an altered, defaced, mutilated, or modified work as that of the artist and to a reasonable likelihood of reputational harm.\footnote{178} Indeed, the section of the Louisiana statute that addresses disclaimers of authorship by artists requires a nexus between unauthorized alteration, defacement, mutilation, or modification and actual or reasonably likely damage to the artist's reputation.\footnote{179} With this in mind, the most reasonable construction of section 2153 is one in which the third subsection, requiring public identification of the work as that of the artist and likelihood of reputational harm, conditions the two preceding subsections, which prohibit the display of altered, defaced, mutilated, or modified works of fine art and reproductions.

Artists may claim,\footnote{180} or, for just and valid cause, disclaim,\footnote{181} authorship of their works of fine art. This includes the right to have one's name appear as the artist "on or in connection with the work."\footnote{182} Just and valid cause such as to warrant a disclaimer of authorship requires an unauthorized physical change and the likelihood of reputational injury.\footnote{183}

Works created under contract for advertising or trade use are excluded from coverage unless the parties' written agreement provides otherwise.\footnote{184} Conservation and restoration will not give rise to any liability unless a physical change is produced which results from the conserver's or restorer's negligence.\footnote{185} As elsewhere, changes resulting from the passage of time or from the inherent nature of the materials used will not, in and of themselves, provide a basis for

\footnote{178} See infra note 200 and accompanying text (New York); infra note 219 and accompanying text (New Jersey); infra note 266 and accompanying text (Maine). The exception is Pennsylvania, which modeled its statute on California's "recognized quality" statute, see supra note 140 and accompanying text, and then added a provision limiting the applicability of the statute to works of fine art displayed in a place within Pennsylvania that is accessible to the public, see supra note 164 and accompanying text. That stands in stark contrast to the Louisiana statute, which is similar in structure to the other "display" states.

\footnote{179} LA. REV. STAT. ANN. § 51:2154C (West 1987).

\footnote{180} Id. § 51:2154B.

\footnote{181} Id. § 51:2154C.

\footnote{182} Id. § 51:2154B.

\footnote{183} Id. § 51:2154C.

\footnote{184} Id. § 51:2155D.

\footnote{185} Id. § 51:2155C.
liability.\textsuperscript{186} Provisions relating to the removal of fine art which is located within or forms a part of a building are similar to those in California and Massachusetts.\textsuperscript{187}

An aggrieved artist may sue for legal and injunctive relief.\textsuperscript{188} Such actions must be commenced within three years from the date of the act complained of or one year from "actual or constructive discovery of such act," whichever is longer.\textsuperscript{189} Since only the artist may commence suit,\textsuperscript{190} the duration of protection is implicitly limited to the life of the artist. Furthermore, it is clear that the artist may waive his rights since the necessary element of public display must occur without the artist's consent.\textsuperscript{191}

\textbf{F. New York}

New York defines a work of fine art in narrow terms: "painting, sculpture, drawing, or work of graphic art, and print, but not multiples."\textsuperscript{192} This is similar in approach to California's limitation on recognized media, but fundamentally differs from California, Massachusetts, Pennsylvania, and Louisiana in its universality within the given media; that is, there is no "recognized quality" requirement.\textsuperscript{193} However, the conduct prohibited in relation to the work creates substantial limitations on the statute's applicability\textsuperscript{194} which can only be determined on a case by case basis. The act of physical defacement, committed intentionally, negligently, or otherwise, is not necessarily prohibited.\textsuperscript{195} As in Pennsylvania, it is the public \textit{display} of fine art in an altered, defaced, mutilated or modified form that is prohibited.\textsuperscript{196} Similarly, the publication or reproduction of such altered

\begin{itemize}
\item \textsuperscript{186} See \textit{id.} § 51:2155A.
\item \textsuperscript{187} See \textit{id.} § 51:2155F(1), (2); see also \textit{supra} notes 70-76 and accompanying text (discussing the analogous California provision); \textit{supra} notes 101-04 and accompanying text (same under the Massachusetts statute).
\item \textsuperscript{189} \textit{Id.} § 51:2156B.
\item \textsuperscript{190} See \textit{id.} § 51:2156A.
\item \textsuperscript{191} See \textit{id.} § 51:2153.
\item \textsuperscript{192} \textit{N.Y. Arts \& Cult. Aff. Law} § 11.01.9 (McKinney Supp. 1988).
\item \textsuperscript{193} See \textit{supra} note 60 and accompanying text (noting the "recognized quality" requirement of the California statute); \textit{supra} note 89 and accompanying text (same under the Massachusetts statute); \textit{supra} note 136 and accompanying text (same under the Pennsylvania statute); \textit{supra} note 167 and accompanying text (same under the Louisiana statute).
\item \textsuperscript{194} See \textit{N.Y. Arts \& Cult. Aff. Law} § 14.03(1) (McKinney Supp. 1988).
\item \textsuperscript{195} See \textit{id.} § 14.03(3)(a)-(c) (describing those acts of alteration, defacement, mutilation, or modification which do not constitute a violation of § 14.03(1)).
\item \textsuperscript{196} See \textit{id.} § 14.03(3)(e); see also \textit{supra} notes 164-65 and accompanying text (discuss-
works is also prohibited. The statute applies only where the public display was knowingly made. Furthermore, the prohibition is conditioned on two important evidentiary conclusions: (1) the work must be displayed, published, or reproduced "as being the work of the artist" (or under circumstances in which the displayed work could reasonably be regarded as that of the artist), and (2) it must be reasonably likely that the artist’s reputation will be damaged as a result.

Artists may claim, and, for just and valid reason, disclaim, authorship of their works. Just and valid reason exists when the work has been publicly displayed in an altered, defaced, mutilated, or modified form without the artist’s consent. While there is no need to establish how the physical change occurred or whether it was the result of intentional, reckless, or negligent conduct or an act of God, the artist must establish that the transformation is reasonably likely to result or has resulted in damage to his reputation in order to disclaim authorship. Changes occurring to a work “resulting from the passage of time or the inherent nature of the materials,” unless occasioned by gross negligence in maintaining or protecting the work, do not alone give rise to a claim of alteration or the right to disclaim authorship. Similarly, changes which ordinarily occur in a given process of reproduction will not alone constitute an actionable change or give rise to the right to disclaim authorship. The statute also provides that any act which fits within the statutory definition of “conservation” “shall not constitute an alteration, defacement, mutilation or modification” unless such work is performed negligently.

As in Pennsylvania, the statute does “not apply to work pre-

198. Id.
199. Id. § 14.03(1).
200. Id.
201. Id. § 14.03(2)(a).
202. Id.
203. Id.
204. Id. § 14.03(3)(a).
205. Id. § 14.03(3)(b).
206. Id. § 14.03(3)(c). “Conservation” is defined as “acts taken to correct deterioration and alteration and acts taken to prevent, stop or retard deterioration.” Id. § 11.01.7.
207. Id. § 14.03(3)(c).
pared under contract for advertising or trade use unless the contract so provides.\textsuperscript{208} The statute provides that the aggrieved artist "shall have a cause of action for legal and injunctive relief"\textsuperscript{209} but makes no further provision as to the types of remedies available. While no mention is made of the duration of the rights created, they must necessarily lapse at the artist's death since there is no provision for any person other than the artist to commence an action in the event of a violation.

The statute of limitations is three years from the act complained of or one year from "constructive discovery," whichever is longer.\textsuperscript{210} Since it is not a violation to display a mutilated work with the artist's consent,\textsuperscript{211} and since only the artist may commence suit in the event of a violation,\textsuperscript{212} it is clear that the protections of the statute may be waived by the artist.

G. New Jersey

New Jersey broadly defines "fine art" to include "any original work of visual or graphic art in any medium."\textsuperscript{213} There is no "recognized quality" requirement. Non-limiting examples of various media are set forth\textsuperscript{214} and expressly include limited editions of no more than three hundred copies.\textsuperscript{215} Expressly exempted from the statute is "sequential imagery," such as motion pictures.\textsuperscript{216} The New Jersey statute also echoes the common exclusion for work "prepared under contract for advertising or trade use unless the contract so provides."\textsuperscript{217} As in New York, this seemingly broad definition may be significantly curtailed by other provisions relating to the display of such works that have been mutilated, altered, or defaced.\textsuperscript{218} Under this statute, an artist must establish that the work, having been altered, defaced, mutilated, or modified, was then knowingly displayed.

\textsuperscript{208} Id. § 14.03(3)(d); see supra notes 138-39 and accompanying text (discussing the analogous provision in the Pennsylvania statute).
\textsuperscript{209} N.Y. ARTS & CULT. AFF. LAW § 14.03(4)(a) (McKinney Supp. 1988).
\textsuperscript{210} Id. § 14.04(b).
\textsuperscript{211} See id. § 14.03(1).
\textsuperscript{212} Id. § 14.03(4)(a).
\textsuperscript{213} N.J. STAT. ANN. § 2A:24A-3e (West 1987).
\textsuperscript{214} See id. The examples set forth in the statute include "paintings, drawings, prints, and photographic prints or sculptures of a limited edition of no more than 300 copies . . . ." Id.
\textsuperscript{215} Id.; see supra note 214.
\textsuperscript{216} N.J. STAT. ANN. § 2A:24A-3e (West 1987).
\textsuperscript{217} Id. § 2A:24A-7.
\textsuperscript{218} See id. § 2A:24A-4; see also supra notes 194-200 and accompanying text (discussing the analogous New York provisions).
in a place accessible to the public as the work of the artist and that damage to his reputation is reasonably likely to result. This is a more difficult evidentiary burden than the New York statute, since New York prohibits display under circumstances in which it is reasonable to regard the work as being that of the artist, whereas New Jersey requires that the work in fact be displayed as that of the artist. Similar prohibitions exist for publication and reproduction of altered fine art. Such publication or reproduction must not only be reasonably likely to damage the artist’s reputation, but must also be published or reproduced as being the work of the artist by actually using the name of the artist in conjunction with the publication or reproduction.

The artist’s right to claim authorship is protected, as is his right, for just and valid cause, to disclaim authorship. “Just and valid cause” is defined to include the alteration, defacement, mutilation, or modification of the work, by someone other than the artist, without the artist’s consent. In addition, there must be proof that the artist’s reputation is reasonably likely to be or has been damaged and that the work was “knowingly displayed in a place accessible to the public or published or reproduced in [New Jersey].” With respect to physical changes in the work resulting from the passage of time or the inherent nature of the materials used, and changes ordinarily occurring in a particular medium of reproduction or through conservation efforts, the relevant provisions in New Jersey’s statute are precisely the same as the New York statute.

As in New York, the statute provides that an “aggrieved artist”

220. See supra note 199 and accompanying text.
222. See id.
223. Id.
224. Id.
225. Id. § 2A:24A-5.
226. Id.
227. Id.
228. Id.
229. Id. § 2A:24A-7.
230. See id. § 2A:24A-6(a).
231. See id. § 2A:24A-6(b).
232. See id. § 2A:24A-6(c).
233. See supra notes 204-07 and accompanying text (discussing the analogous provisions of the New York statute).
has a cause of action for "legal and injunctive relief." Similarly, there is no further elaboration of the remedies available. Moreover, the rights and obligations created by the statute presumably dissolve upon the artist's death since no provision exists to the contrary. The statute of limitations, however, is considerably longer than New York's—six years from the act complained of or two years from "constructive discovery," whichever is longer. As in New York, the statutory language permits an offending display whenever the artist consents, effectively writing a waiver clause into the statute. Similarly, the artist's consent to the defacement, alteration, mutilation, or modification appears to waive his right to disclaim authorship.

H. Rhode Island

Rhode Island's definition of "fine art" is the same as New Jersey's, including within its scope any original work of visual or graphic art and limited edition multiples of no more than three hundred copies, and expressly excluding "sequential imagery such as that in motion pictures." As typical with other "display" laws, there is no "recognized quality" requirement. The statute also adapts New Jersey's language excluding "work prepared under contract for advertising or trade use unless the contract so provides." As in New York and New Jersey, the provisions governing display of such works in an altered condition may dramatically affect the stat-
ute’s impact. The Rhode Island statute prohibits anyone but the artist or a person acting with his consent from knowingly displaying an altered, defaced, mutilated, or modified work of fine art in a public exhibition. The statute also prohibits publication or reproduction of such altered fine art. In all cases, however, the work must be displayed, published, or reproduced as being that of the artist or, as similarly required in New York, “under circumstances under which it would reasonably be regarded as being the work of the artist.” Unlike New York or New Jersey, but more in line with Pennsylvania, there is no requirement that such display, publication, or reproduction be reasonably likely to damage or in any other way affect the reputation of the artist. This is particularly surprising since Rhode Island does not follow the Pennsylvania requirement of recognized quality. It is even more surprising in view of the artist’s paternity right in Rhode Island, which entitles the artist to claim, or for just and valid reason, disclaim, authorship of his work. Just and valid reason includes, as in New York and New Jersey, that the work has been altered, defaced, mutilated, or modified by someone other than the artist, and without the artist’s consent. In addition, the statute requires that the work be knowingly displayed in a place accessible to the public within Rhode Island or is published or reproduced in the state. Furthermore, a just and valid reason to disclaim authorship requires a showing that damage to the artist’s reputation is reasonably likely to result or has resulted. While necessary to disclaim authorship, that requirement is not applicable to the substantive prohibition on the display, publi-

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244. See supra notes 194-200 and accompanying text (discussing the analogous New York provisions); supra notes 218-24 and accompanying text (same under the New Jersey statute).


246. See id.

247. Id.; see supra notes 197-99 and accompanying text (discussing the analogous New York provision).

248. Cf. supra note 200 and accompanying text (noting the reputational injury requirement of the New York statute); supra note 219 and accompanying text (same under the New Jersey statute).

249. See supra note 136 and accompanying text (noting Pennsylvania’s “recognized quality” requirement).


251. Id.; see supra note 202 and accompanying text (discussing the analogous New York provision); supra note 227 and accompanying text (same under the New Jersey statute).


253. Id. § 5-62-4.
cation, or reproduction of altered fine art.\textsuperscript{254}

The provisions applicable to changes resulting from the passage of time or the inherent nature of the materials used,\textsuperscript{255} and changes ordinarily resulting from a particular method of reproduction\textsuperscript{256} or through conservation efforts,\textsuperscript{257} are the same as New York's.\textsuperscript{258}

In the event of a violation of the statute, the aggrieved artist "shall have a cause of action for legal and injunctive relief."\textsuperscript{259} As in New York and New Jersey, the right appears to terminate on the artist's death since only the artist is given the right to commence suit.\textsuperscript{260} Furthermore, again in accordance with the New York and New Jersey statutes, the artist may consent to offending displays or alteration, and thereby waive the rights created under the statute.\textsuperscript{261}

The statute of limitations is three years from the act complained of or one year from "constructive discovery," whichever is longer.\textsuperscript{262}

I. Maine

A work of fine art under the Maine statute includes any original work of visual or graphic art except sequential imagery, thereby excluding motion pictures.\textsuperscript{263} Limited edition multiples of no more than three hundred copies are also included in the statutory definition.\textsuperscript{264}

The statute prohibits the knowing nonconsensual display of altered, defaced, mutilated, or modified works in places accessible to the public, provided the work is displayed as that of the artist\textsuperscript{265} and such display is reasonably likely to damage the artist's reputation.\textsuperscript{266}

As in the other public display statutes, the applicable prohibitions

\textsuperscript{254} See id. § 5-62-3.
\textsuperscript{255} See id. § 5-62-5(a).
\textsuperscript{256} See id. § 5-62-5(b).
\textsuperscript{257} See id. § 5-62-5(c).
\textsuperscript{258} See supra notes 204-07 and accompanying text (discussing the analogous provisions in the New York statute).
\textsuperscript{259} R.I. GEN. LAWS § 5-62-6(a) (1987).
\textsuperscript{260} See id.; see also supra note 209 and accompanying text (discussing the analogous provision of the New York statute); supra note 234 and accompanying text (same under the New Jersey statute).
\textsuperscript{261} See R.I. GEN. LAWS §§ 5-62-3 to -4 (1987); see also supra notes 211-12 and accompanying text (discussing the analogous New York provision); supra notes 236-37 and accompanying text (same under the New Jersey statute).
\textsuperscript{262} R.I. GEN. LAWS § 5-62-6(b) (1987).
\textsuperscript{263} See ME. REV. STAT. ANN. tit. 27, § 303(1)(D) (1988).
\textsuperscript{264} Id.
\textsuperscript{265} Id. § 303.2. This condition is satisfied if the work is displayed "under circumstances under which it would reasonably be regarded as being the work of the artist." Id.
\textsuperscript{266} Id.
extend to publication or reproduction of the work.\textsuperscript{267} In all cases, the display, publication, or reproduction must occur within the State of Maine.\textsuperscript{268}

Artists at all times retain the right to claim or, for just and valid reason, to disclaim, authorship of their works of fine art.\textsuperscript{269} Just and valid cause justifying such a disclaimer includes nonconsensual alteration, defacement, mutilation, or modification of the work which is reasonably likely to or has resulted in damage to the artist's reputation.\textsuperscript{270}

The statute excludes works "prepared under contract for advertising or trade use, unless the contract so provides."\textsuperscript{271} Conservation efforts are protected unless performed in a grossly negligent manner.\textsuperscript{272} Changes resulting from the passage of time or the inherent nature of the materials used are also excluded from the reach of the statute unless the changes are the "result of gross negligence in maintaining or protecting the work."\textsuperscript{273} Furthermore, changes which ordinarily result from a particular medium of reproduction are beyond the scope of the statute.\textsuperscript{274}

In the event of a violation of the statute, an aggrieved artist is entitled to legal and injunctive relief.\textsuperscript{275} Injunctive relief is limited to the claiming or disclaiming of authorship as described above.\textsuperscript{276} There are no provisions for attorneys' fees, costs, or punitive damages. Actions brought under the act must be commenced "within 3 years of the act complained of or one year after the artist or his personal representative discovered or reasonably should have discovered the act, whichever is longer."\textsuperscript{277}

There is no provision limiting the duration of protection. It would appear that the artist's personal representative may com-
mence suit at any time after the artist's death so long as the time limits relating to the commencement of suit following discovery of the act complained of are satisfied. No other state having adopted similar legislation provides, either expressly or implicitly, such an unlimited duration of protection. Finally, it is clear that the artist may waive his rights since the public display element of the statute's provisions must occur without the artist's consent. 278

IV. PREEMPTION

The significance of the state statutes will depend on the extent, if any, of federal copyright preemption. Section 301 of the federal Copyright Act of 1976 is the basis for federal preemption of state common law and statutory provisions which purport to create rights with respect to federal copyrightable subject matter. 279 Section 301(a) provides, in part:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. 280

Section 301(b) expressly exempts from preemption:

any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within . . . sections 102 and 103 . . . ; or

. . .

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright or specified by section 106 . . . 281

Any inquiry concerning preemption of the various state artists' rights statutes must therefore focus on the two prong test set forth in section 301; namely, is the subject matter addressed by the state stat-

278. See id. § 303(2).
280. Id. § 301(a).
281. Id. § 301(b).
utes included within the scope of sections 102\textsuperscript{282} or 103\textsuperscript{283} and, if so, are the rights created "equivalent" to any of the exclusive rights enumerated in section 106?\textsuperscript{284}

A. Subject Matter

Section 102 includes within the scope of copyrightable subject matter all "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."\textsuperscript{285} While section 102 sets forth seven illustrative categories of copyrightable subject matter,\textsuperscript{286} they are not exclusive and merely set forth "the general area of copyrightable subject matter . . . with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories."\textsuperscript{287} Indeed, Congress has recognized that "[a]uthors are continually finding new ways of expressing themselves . . . [and that] it is impossible to foresee the forms that these new expressive methods will take."\textsuperscript{288} Accordingly, the "two fundamental criteria" of federal copyright subject matter are "originality and fixation in tangible form."\textsuperscript{289}

In each of the nine states adopting moral rights legislation, the subject matter within the ambit of the acts is "fine art," defined in a number of ways. Some states include any original work of visual or graphic art in any medium,\textsuperscript{290} while others specify the media.\textsuperscript{291} In

\textsuperscript{282}See id. § 102 (regulating the subject matter of copyright in general).

\textsuperscript{283}See id. § 103 (regulating the subject matter of copyright in compilations and derivative works).

\textsuperscript{284}See id. § 106(1)-(5); see also 2 M. Nimmer & D. Nimmer, supra note 13, § 8.21[C][2], [3], at 8-255 (examining potential preemption of both the California and New York statutes).


\textsuperscript{286}See id. Section 102 provides the following categories of works of authorship: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographics works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." Id.


\textsuperscript{288}Id. at 51, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5664.

\textsuperscript{289}Id.

\textsuperscript{290}See, e.g., supra notes 89-90 and accompanying text (Massachusetts); supra notes 135-36 and accompanying text (Pennsylvania); supra notes 169-71 and accompanying text (Louisiana); supra notes 213-16 and accompanying text (New Jersey); supra notes 238-41 and accompanying text (Rhode Island); supra notes 263-64 and accompanying text (Maine).

\textsuperscript{291}See, e.g., supra note 60 and accompanying text (California); supra note 118 and
each case, however, the work is necessarily one that is fixed in a tangible medium of expression. The language of the basic provisions of the state statutes deals with physical defacement, alteration, mutilation, or destruction of the work or its public display after it has been altered, mutilated, or modified. In either case, physical change is a necessary prerequisite, thereby assuming fixation in a tangible medium. As noted by Professor Nimmer, the California Art Preservation Act employs the term "original" in the definition of fine art in its copyright sense, which is to denote creation and conceptual origin. The same use of the term "original" occurs in each state's definition of "fine art" except Connecticut. Since the state statutes incorporate the same two criteria for subject matter as the federal copyright act (originality and fixation in a tangible form), it is clear that the subject matter addressed therein is included within the scope of section 102. Therefore, the state acts are prime candidates for preemption if the rights created are "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106."

B. Equivalency

Section 106 provides that the copyright owner has the exclusive right to: (1) reproduce the copyrighted work, (2) prepare derivative works based upon the copyrighted work, (3) publicly distribute the copyrighted work, (4) publicly perform the copyrighted work, (5) prepare derivative works based upon the copyrighted work, (6) publicly display the copyrighted work, (7) perform the copyrighted work publicly, and (8) make derivative works based upon the copyrighted work. These rights are exclusive to the copyright owner and cannot be exercised by anyone else without the owner's consent.

accompanying text (Connecticut); supra note 192 and accompanying text (New York).


293. 2 M. NIMMER & D. NIMMER, supra note 13, § 8.21[C][2], at 8-257 n.34.3.

294. See supra note 60 and accompanying text (California); supra note 89 and accompanying text (Massachusetts); supra note 136 and accompanying text (Pennsylvania); supra note 169 and accompanying text (Louisiana); supra note 192 and accompanying text (New York); supra note 213 and accompanying text (New Jersey); supra notes 238-41 and accompanying text (Rhode Island); supra notes 263-64 and accompanying text (Maine).

295. By defining fine art as "any drawing, painting, sculpture" or similar work, 1988 Conn. Acts 284, § 1(2) (Reg. Sess.), Connecticut reaches works fixed in a tangible form, whether original or not. To the extent the definition encompasses material outside the scope of federal copyright subject matter (e.g. non-original works of fine art), the preemption issue does not arise. Accordingly, if federal law preempts the Connecticut statute, it does so only to the extent it addresses original works. The irony is that Connecticut may well have more securely protected non-original works and knock-offs than original and presumably more deserving works.


297. Id. § 106(1).

298. Id. § 106(2).

299. Id. § 106(3). Public distribution may be "by sale or other transfer of ownership, or
work, and (5) publicly display the copyrighted work. If preemption of the state statutes is to be found under section 301, it would arise from the exclusive right granted by section 106(2) to the copyright owner to make a derivative copy of the work. In the so-called “display” states, preemption may also arise from the exclusive rights granted by section 106 to reproduce, publish, perform, and display the work.

The determination of whether the new statutorily created state rights are the equivalent of any of these section 106 rights requires an examination of the meaning of the terms “alter,” “mutilate,” “deface,” “modify,” and “destroy” as they are used in the state statutes and the terms “derivative work,” “publish,” “display,” and “perform” as they are defined in section 101 of the Copyright Act. Each of the terms used in the state statutes have separate and distinct meanings. Thus, “alter” has a different meaning than “deface,” and the same is true of “mutilate” and “destroy.” In determining the meaning of the words used by the various legislatures, the general rule of statutory construction is to apply the plain or common meaning of those terms. This is entirely satisfactory for the present inquiry since each term has a distinct meaning. “Alteration” is the “act or result of altering,” which itself means “to change.” “Mutilate,” in one context, means “to deprive . . . of a by rental, lease, or lending.”

300. Id. § 106(4). The right to perform applies to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” Id.

301. Id. § 106(5). The right to display applies to “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.” Id.

302. See supra notes 135-278 and accompanying text (discussing the “display” statutes of Pennsylvania, Louisiana, New York, New Jersey, Rhode Island, and Maine).


304. See id. § 101.

305. See 2A J. Sutherland, Statutes and Statutory Construction § 46.01, at 73-74 (rev. 4th ed. 1984) (discussing the development of the plain meaning rule). Sutherland argues that the plain meaning rule of statutory construction “coincides with a high degree of literalism in the Court’s approach to the process of interpretation which emphasized the importance of the legislative text. A court may speak of the plain meaning of the language of an act as being the best evidence of legislative intent.” Id. at 74. But see Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 Wash. U.L.Q. 2, 23 (1939) (noting that the plain meaning rule is a controversial one which excludes extrinsic evidence as to the meaning of a statute since “a judge can have no assurance that the meaning which the statute suggests to him is the meaning which it suggested to individuals acting upon the statute, unless he has canvassed all of the possible interpretations of which the statutory language is subject.”).

306. Funk & Wagnalls New Comprehensive International Dictionary of the
limb or essential part” and included in the primary definition of the term is the synonym “maim.” “Deface” means “to mar or disfigure the face or surface of” and “destroy” means “[t]o ruin utterly; consume; dissolve.” Finally, “modify” means “to make somewhat different in form [or] character . . . .” It thus becomes clear that the state legislatures were employing those terms which would reach the widest possible scope of physical change.

A derivative work is “a work based upon one or more preexisting works, such as . . . [an] abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” In order to constitute a derivative work, the adaptation must “incorporate [a] sufficient [amount] of the preexisting work” to constitute an infringement of the reproduction or performance right. The physical destruction of a work cannot, therefore, result in a derivative work if destruction means the utter ruin of the original. Thus, the prohibition of physical destruction in state law is not preempted since it is not “equivalent” to the applicable exclusive right set out in section 106. The prohibition on alteration of the work, however, would appear to be the precise equivalent of the derivative work right, and is therefore preempted. The remaining prohibitions on physical defacement and mutilation are less clear.

“Defacement” denotes disfigurement or marring of the surface and “mutilation” signifies maiming. Both evoke the spirit of vandalism and wantonness, and as used in the state acts imply evilness of motive and design. Under such a construction, defacement and mutilation would include only changes resulting from physical acts intended to disfigure and maim rather than merely transform or adapt the work. Thus, the sawing of an arm from The Mermaid in Copenhagen, which occurred in 1984, would constitute a “mutilation” and arguably a “defacement,” but not an “alteration” or its kindred

ENGLISH LANGUAGE 43 (Encyclopedic ed. 1982).
307. Id. at 839.
308. Id.
309. Id. at 335.
310. Id. at 338.
311. Id. at 818.
315. See supra note 306 and accompanying text (defining the term “alteration”).
316. See 2 M. Nimmer & D. Nimmer, supra note 13, § 8.21[C][2], at 8-261.
spirit, a "derivative work." This seems an entirely satisfactory resolution of the issue for the "recognized quality" states, especially in light of the alternative. As Professor Nimmer points out, any other interpretation of the statutory language "defacement" or "mutilation" would compel the subjective aesthetic judgment of whether alteration constitutes defacement or mutilation. If such a construction is adopted by the courts, then the defacement and mutilation prohibition would be preempted in the same way "alteration" is likely preempted.

With respect to the so-called "display" states, different section 106 rights are implicated. These statutes seek to regulate the right to publicly display, reproduce, and publish modified works. Here the prohibitions appear to be aimed directly at the section 106 exclusive rights of distribution, performance, and display.

Section 101 defines "display" as showing a copy of a work or "in the case of a motion picture . . . show[ing] individual images nonsequentially." "Perform" is defined as "recit[ing], render[ing], play[ing], danc[ing], or act[ing] . . . or, in the case of a motion picture . . . show[ing] its images in any sequence . . . " "Publication" is the distribution of the work to the public. In the display states, it is precisely those activities which gives rise to the artist's cause of action. They provide the artist with a veto over the exercise of exclusive rights granted by Congress to the copyright owner. Federal preemption in these states would appear complete, both as creating rights essentially "equivalent" to section 106 exclusive rights and as abrogations of those exclusive rights which diminish their economic exploitability. A number of commentators have argued otherwise.

318. See supra notes 60-134 and accompanying text (discussing the "recognized quality" statutes of California, Massachusetts, and Connecticut).
319. See supra notes 164-65 and accompanying text (discussing the "display" provision of the Pennsylvania statute).
321. Id. Nimmer expresses the hope that the courts construe the terms "defacement" and "mutilation" by objective standards so as to avoid preemption. See id.
322. See supra notes 135-278 and accompanying text (discussing the "display" statutes of Pennsylvania, Louisiana, New York, New Jersey, Rhode Island, and Maine).
323. See supra notes 135-278 and accompanying text (discussing the "display" statutes of Pennsylvania, Louisiana, New York, New Jersey, Rhode Island, and Maine).
325. Id. § 101.
326. Id.
327. Id.
suggesting that the state rights have additional elements making them distinct from and non-equivalent to the section 106 rights.\textsuperscript{328} While it is true that some courts have applied an “elements test” to the analysis of section 301 preemption,\textsuperscript{329} a wooden comparative analysis of the elements of various rights or actions may be offensive to the overriding purpose of section 301 and is seldom advanced. Most of the courts applying the so-called “elements test” emphasize that regardless of the existence of additional elements in a state-created right, they remain equivalent to section 106 rights unless those additional elements are “qualitatively different” than those matters regulated by section 106.\textsuperscript{330} As the House Report accompanying the Copyright Act stated:

The intention of section 301 is to preempt and abolish any rights . . . that are equivalent to copyright . . . . The declaration of this principle . . . is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.\textsuperscript{331}

Tests which fail to address this clear intention but focus instead on a

\textsuperscript{328} See, e.g., Engdahl, Moral Rights in State Statutes: A Comparison of the California Art Preservation Act and the New York Artists’ Authorship Rights Act, 34 COPYRIGHT L. SYMP. (ASCAP) 203, 238 (1987) (noting that the New York statute requires the artist to show the element of “alteration,” which the author argues is not part of the federal statute); Davis, \textit{supra} note 15, at 248-49 (commenting that one such extra element might be the state statutes’ protection of moral rights as opposed to federal copyright protection of economic interests).

\textsuperscript{329} For a discussion of these cases, see Francione, \textit{The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict}, 31 COPYRIGHT L. SYMP. (ASCAP) 105, 130 (1984).


\textsuperscript{331} H. R. REP. NO. 1476, 94th Cong., 2d Sess. 130, \textit{reprinted in} 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5746 (emphasis added). The legislative history also contains the following statement:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. . . . The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.

wooden analysis of the elements would result in intolerable state meddling with section 106 rights. Statehouse drafters would need only to graft a new element onto an otherwise equivalent right to escape preemption under an overly rigid elements test.328

One commentator has suggested that preemption need not rely on section 301.329 Drawing on the constitutional principal that preemption is unavoidable when the state right “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,”330 he argues that actual conflict provides a basis for preemption in the absence of equivalence, relying on the Supremacy Clause331 itself rather than section 301 of the 1976 Act.332 It is unclear, however, if any federal court would go beyond section 301—to date, none have done so.

V. DISCUSSION

In defining “fine art” some states include any visual or graphic art, regardless of medium,333 which may include limited edition multiples of no more than three hundred copies.334 Others include only those forms specifically set forth in the statute, such as painting, sculpture, drawing, or print.335 The fundamental distinction, however, is between those states which impose a “recognized quality”

332. See Francione, supra note 329, at 138-39.
333. See id. at 139. The commentator notes that if a state passed a law providing that the exercise of a right granted by federal copyright law violates a state-created right, the state-created right would be preempted “not because the state rights were equivalent to federal rights, but because state rights conflicted directly with the federal rights.” Id. (emphasis in original).
335. U.S. Const. art. IV, cl. 2. The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Id.
336. See Francione, supra note 329, at 138-39; see also Note, supra note 43, at 526-27 (arguing that a state publicity action against the colorist of a black and white film is likely to be preempted under the Supremacy Clause since the right of publicity clashes with the purpose of federal copyright law).
337. See, e.g., supra notes 89-90 and accompanying text (Massachusetts); supra notes 135-36 and accompanying text (Pennsylvania); supra notes 169-71 and accompanying text (Louisiana); supra notes 213-16 and accompanying text (New Jersey); supra notes 238-41 and accompanying text (Rhode Island); supra notes 263-64 and accompanying text (Maine).
338. See, e.g., supra note 215 and accompanying text (New Jersey); supra note 240 and accompanying text (Rhode Island); supra note 264 and accompanying text (Maine).
339. See, e.g., supra note 60 and accompanying text (California); supra note 118 and accompanying text (Connecticut); supra note 192 and accompanying text (New York).
standard and those states which do not.

One consequence of a recognized quality standard is the difficulty encountered in making such a determination. Although states retain some independence in regulating copyrightable subject matter, they do not escape Justice Holmes' warning in *Bleistein v. Donaldson Lithographing Co.* that “[i]t would be a dangerous undertaking for persons trained only to the law” to judge the quality of artistic endeavor:

At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, [protection] would be denied to pictures which appealed to a public less educated than the judge.

The point is well illustrated by the reaction, both within and without the artistic communities of the day, to Auguste Rodin's *Balzac.* Seldom has the art world witnessed an uproar comparable to that accompanying the unveiling of *Balzac* in 1898. Critics and much of the public ridiculed the statue as “an obese monstrosity,” “a monstrous abortion,” “a colossal foetus,” and “an inconceivable piece of folly.” Still others saw it as a “monument to insanity and impotence,” lacking even “the vulgar merit of being upright.” A group of six young artists reportedly plotted to vandalize the *Balzac* by knocking it off its pedestal. In the eyes of one French journalist, the sculpture was proof “of the degree of mental aberration at which we have arrived at the end of this our century.”

Yet even as “the upholders of the status quo detested the *Balzac* . . . the avant garde admired it as a symbol of the freedom to

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340. See, e.g., supra note 60 and accompanying text (California); supra note 89 and accompanying text (Massachusetts); supra note 136 and accompanying text (Pennsylvania); supra note 167 and accompanying text (Louisiana).
341. See Goldstein v. California, 412 U.S. 546, 556-57 (1972) (stating that “[a]lthough the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is in all cases, unnecessary or precluded.”).
342. 188 U.S. 239 (1903).
343. Id. at 251-52.
345. See id.
346. Id. at 374.
347. Id.
348. Id.
349. Id.
which they aspired." Many sympathetic to Rodin's work touted its qualities, referring to the figure as "powerful and magnificent," "trembling with passion and muscular energy, a block feverish with life itself," and "the proudest and most intense expression of energy ever realized by the art of the sculptor." The debate raged beyond civility. The Committee of the Société des Gens de Lettres, which had commissioned the work, rejected it as a "rough model" and declined to recognize it as a statue of Balzac, much less one of recognized quality.

The controversy over Balzac serves as a useful illustration of the problems inherent in tying protection to work of "recognized quality." The crude attempt by the respective state legislatures to delegate the responsibility of determining "recognized quality" to the trier of fact compounds the problem. All three "recognized quality" statutes list the experts who "shall" be relied upon by the fact finder. Yet none include art professors or art historians. Perhaps professors may be included in the statutory term "other persons involved with the creation or marketing of fine art." But that in itself raises a problem common to that class of experts and to those described as "collectors of fine art." Both include the term "fine art" as a part of the definition. Thus, collectors of something other than fine art or persons included in the creation of something other than fine art are not competent experts under the statute. Any expert offered on such a basis would be a prime target for challenge. Opposing parties may stipulate that such persons are collectors of art, but not "fine art"—that is to say, not art of "recognized quality." Nor does the inclusion of artists, curators of art museums, and art dealers as experts solve the underlying problem illustrated by the example of Rodin's Balzac, for it was the very categories of experts itemized in the statutes that yielded the vicious dispute as to the merit of Balzac. The art world is not homogenous and has its own in-fighting. Disputes are certain to occur. Yet each state adopting the recognized quality standard directs that the trier of fact "shall rely" on the

350. Id.
351. Id. at 375-76.
352. Id. at 377.
353. See supra notes 62-63 and accompanying text (discussing the determination of "recognized quality" under the California statute); supra notes 93-94 and accompanying text (same under the Massachusetts statute); supra note 140 and accompanying text (same under the Pennsylvania statute); see also supra notes 172-73 and accompanying text (same under the Louisiana "display" statute).
354. See supra notes 344-52 and accompanying text.
opinions of the experts. The statutes are drafted in mandatory terms. They appear to exclude any other experts on the issue of recognized quality. But it cannot be seriously maintained that the legislatures intended to deny juries the ability to choose between conflicting expert opinions. Indeed, such choices are the essence of fact finding, without which any dispute between experts would paralyze the judicial process. If we concede that juries are free to discount or disregard some experts in the face of the statutory language, then by all reason, they should, in accordance with the general rule, be able to accept all, some, or none of the expert opinion offered. Certainly no responsible jurist would suggest that the fact finder is obliged to accept the credibility of a witness. If this is so, what is to be gained by limiting the occupations of those qualified to testify as experts to the issue of recognized quality rather than leaving the qualifications of experts to the traditional tests of education, training, and experience?  

What all this points out is the likelihood of inconsistent verdicts on the issue of what constitutes recognized quality. Therein lies the paradox of such quality control—it may actually discourage vigorous enforcement by the artist out of a well-founded fear that a particular jury may decide that his work fails to meet a recognized quality standard. Such a negative verdict could do more harm to the artist’s reputation than the physical defacement of his work.

States that do not impose such quality standards do not avoid the tangle. Those states, with the exception of Connecticut, do not prohibit the act of physical defacement, as do the recognized quality states, but instead prohibit the knowing display of defaced works in public. In Louisiana, New York, and Rhode Island, such display is prohibited when the work is exhibited as that of the artist or under circumstances under which it may be reasonably perceived as such. That condition may be evaded by a sufficiently conspicuous disclaimer distinguishing the artist from the work in its altered form. Louisiana, New York, New Jersey, and Maine also condi-

355. Rule 702 of the Federal Rules of Evidence sets forth the traditional criteria for a witness’ qualification as an expert: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702.

356. See supra note 177 and accompanying text (discussing the relevant Louisiana provision); supra note 199 and accompanying text (same under the New York statute); supra note 247 and accompanying text (same under the Rhode Island statute).

357. One could debate what constitutes a “sufficiently conspicuous disclaimer,” but the
tion the prohibited conduct on a reasonable likelihood of damage to the artist's reputation. This second condition may be even more difficult for the artist to prove. How does one establish reputational damage? How is such damage quantified? If the artist's commercial success is not hampered, where is the damage? If commercial success is in issue, as either a measure of damages or a reflection of reputational harm, do the plaintiff-artist's financial records become discoverable? Does a past devoid of commercial success weaken the artist's case? Regardless of the standard by which it is measured, requiring reasonable likelihood of reputational damage operates as a significant disincentive to the artist by increasing the chance of a negative verdict and potentially opening his prior commercial success to dissection.

The problem lies in the failure of the state legislatures to give adequate weight to the public interest in preserving its cultural heritage and placing too much emphasis on the artist's economic and personal interests, thereby creating what amounts to a system of incentive and protection of questionable efficiency. Some of the states do not even refer to a public interest in their legislative findings of fact accompanying the acts. They focus solely on the interests of the individual artist, his personality as reflected in his creation, and the unfairness and prejudicial impact that may befall his professional career in the absence of legislative protection. The three "recognized quality" states, on the other hand, each identify interests of another sort. California's legislative findings of fact declare that in addition to the state's concern for the artist, "there is also a public interest in preserving the integrity of cultural and artistic creations." The Massachusetts statute contains an identical declaration and the Pennsylvania legislature, in the statute's preamble, states, in part:

The ongoing creation and preservation of fine art contributes to the cultural enrichment and, therefore, general welfare of the

358. See supra notes 177-79 and accompanying text (discussing the Louisiana statute); supra note 200 and accompanying text (same under the New York statute); supra notes 219, 223 and accompanying text (same under the New Jersey statute); supra note 266 and accompanying text (same under the Maine statute).


In order to protect artists, and ultimately preserve art for the benefit and enjoyment of the public, it is necessary to afford artists certain legal rights and remedies in relation to their works of fine art.\footnote{362}

It may be argued that focusing on the failure of some states to explicitly recognize a paramount public interest, or any public interest for that matter, may obscure the implicit recognition of such an interest in the very function of the statute. After all, the statutes represent a certain legislative judgment about the relationship of incentive and creation which presupposes a broad societal interest in the creation of fine art. Yet, creation is not synonymous with preservation and the lack of any express recognition of such a public interest seems to have translated into display laws tied directly to the artist’s economic interests. In other states, the express reference in the legislative findings to a broad public interest in the preservation of fine art must mean something, and its translation in the statutes appears to be the trade-off between the requirement of recognized quality, with all its inherent difficulties, and the prohibition against the intentional physical act of defacement, mutilation, alteration, and destruction. In other words, those statutes prohibit intentional physical modification rather than knowing display, and, therefore, more nearly approach an expression of public interest in preserving the work itself and not merely the artist’s exploitable interest.

Pennsylvania’s departure from this scheme is inexplicable. While shaping its statute on the California model, it makes a radical change by adding a section which makes the act applicable only to works of fine art on public display within Pennsylvania, thus effectively converting the Pennsylvania statute into a “display statute.”\footnote{363} “Display” statutes, however, are primarily concerned with the artist’s reputational interest and impose an element of real and demonstrable prejudicial impact generally taking the form of a requirement that the display will be reasonably likely to cause injury.\footnote{364} A close analogy exists with the Louisiana statute, a public display law with a “recognized quality” requirement.\footnote{365} Unlike Pennsylvania, however,

\footnotesize{\begin{itemize}
\item \footnote{363}{See supra notes 164-65 and accompanying text (discussing this aspect of the Pennsylvania statute).}
\item \footnote{364}{See supra note 358 and accompanying text.}
\item \footnote{365}{See supra notes 166-67 and accompanying text.}
\end{itemize}}
Louisiana also requires a reasonable likelihood of reputational harm.\(^{366}\)

Ultimately, all of the state statutes fail to protect the artist or the public. Those artists with sufficient negotiating power (usually those with established reputations) can obtain all desired protection for their works by contract. The statute adds nothing to their stock. It is the emerging talent, the unknown, the struggling, who are the intended beneficiaries of the statute. They often lack the bargaining leverage to demand contractual protection for their works' integrity and their paternity rights. But it is the unknown talent who is most vulnerable to the statutes' most subversive provision—the waiver. The artist's ability to waive any and all of the protections under the statutes undermine one of the central purposes for their adoption. Whether one views the statutes as protecting artists alone or both artists and the public, waiver is a dagger in the heart of the protection. If the intended beneficiary is the public, there is no justification for waiver that rests within the discretion of the artist or his personal representative. If the protections in the statute are designed solely for the artist, how would prohibiting waiver damage or impinge on any legitimate expectancy of the artist? It would be the rarest of individuals who claimed his incentive to create fine art was stimulated by the knowledge that he may some day waive his right to prohibit the work's physical defacement.\(^{367}\) Presumably, an individual consciously endeavoring to create fine art is not concurrently contemplating a grant to another to deface it. If there exists such artists, how can law, consistent with reasoned justice, label their expectancy reasonable or legitimate?

One other provision is directly related to the interests protected by the statutes. With the exception of Maine, all of the state statutes provide protection for only a limited duration—some limited by in-

\(^{366}\) See supra notes 174-79 and accompanying text.

\(^{367}\) Adapting what one writer has commented about incentives in another context (dealing with the duration of copyright), I suggest that the unknown artist, struggling in obscurity, "would very much rather have . . . twopence to buy a plate of shin of beef of a cook's shop underground," than go to sleep hungry but content in the burning knowledge that he may waive his right to prevent the defacement of his work. Chafee, Reflections on the Law of Copyright (pt. 2), 45 Colum. L. Rev. 719, 720 (1945) (quoting 8 T. Macaulay, Works 203 (G. Trevelyan ed. 1879)). If it can be shown "'that the prospect of this boon roused him to any vigorous effort, or sustained his spirits under depressing circumstances,'" id. (quoting 8 T. Macaulay, Works 203 (G. Trevelyan ed. 1879)), or saw him pass up a handsome profit by refusing to waive his statutory rights, I would gladly yield the debate. Certainly there are artists tall on principle, who would not yield. But if the great mass be mortal men, waiver will become a common thing.
ference to the life of the artist, others limited expressly to the artist's lifetime plus fifty years. This would be a minor issue if the artist's interests are the only concerns. But if there is a public interest—expressly recognized in some states, subsumed in the remainder—what purpose does limited duration serve? To protect this generation and perhaps the next? Can tradition and the cultural heritage of a society take so short a view? How does the creator's death diminish the public interest in preserving its cultural heritage? Limited duration seems inconsistent with the interest of preservation. Perpetual duration offends neither the artist nor the deeper public interest. At best, this aspect of the state statutes represents a legislative compromise, at worst a lack of understanding and a worrisome confusion over the purpose of the law.

In a recent article, one writer commented that the protection offered in the state statutes is the preservation of the work's integrity "even after the artist has sold the work and has no further economic interest in it . . . ." This statement is typical of the romantic confusion surrounding the statutes. Each state expressly premised its statutes, in whole or in part, on the continuing economic relevance of the physical condition of fine art on an artist's career. To suggest that an artist has "no further economic interest" in his works of fine art merely because the copyright and title have been transferred ignores much of the rationale behind the statutes. Some states also express a public interest in preserving cultural heritage. No state has ever adopted a law providing for the so-called moral right to control the physical condition of one's work on the theory that art is not property. In fact, nothing could be further from the truth. Despite claims of elitists such as Richard Serra, art is property. Its exploitability as such is largely responsible for the richness of cultural expression in our society, thereby attesting to the wisdom of the

368. See supra note 190 and accompanying text (discussing the duration of protection under the Louisiana statute); supra note 209 and accompanying text (same under the New York statute); supra note 234 and accompanying text (same under the New Jersey statute); supra note 260 and accompanying text (same under the Rhode Island statute).

369. See supra note 85 and accompanying text (discussing the duration of protection under the California statute); supra note 115 and accompanying text (same under the Massachusetts statute); supra note 132 and accompanying text (same under the Connecticut statute); supra note 159 and accompanying text (same under the Pennsylvania statute).


371. In his fight to prevent the removal of his Tilted Arc from Federal Plaza in New York City, Mr. Serra recently commented, "The Government has to learn that art is not property." Lacayo, The "Moral Rights" of Artists, TIME, Mar. 14, 1988, at 59.
Framer's recognition of art and the fruits of other intellectual endeavor as property. Supplanting the competitive process and introducing a form of trade regulation will enrich artists, but not art.

In addition to the apparent confusion over purpose and design, the multiplicity of these statutes and their adoption in states that are traditional cultural and artistic centers raise concerns about the statutes' jurisdictional reach. Pennsylvania, New York, New Jersey, Rhode Island and Maine expressly limit the applicability of their statutes to works located within the boundaries of the state. While the California, Massachusetts, and Connecticut statutes contain no such provision, the limitation appears mandated by the Supreme Court's decision in Goldstein v. California. The Court in Goldstein upheld a state copyright law prohibiting record and tape piracy, stating that "a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere." Louisiana has attempted to circumvent the language of Goldstein by extending the applicability of its statute not only to works displayed within the state but also "to acts in violation of this chapter by a person who is subject to the jurisdiction of this state." While this clever drafting appears to extend the reach of the statute beyond Louisiana's state lines, it clearly intrudes on the sovereignty of other states and is likely invalid unless Louisiana's courts interpret it to mean that, with respect to the prohibitions contained in the statute, the state's jurisdiction over persons extends only so far as the state borders.

Accordingly, circumvention of any one statute may be accomplished by removal of a particular work to a jurisdiction without moral rights legislation. Even removal from a "recognized quality" state to a "public display" state would have important consequences, both to the artist and to the owner of the work. It cannot be reasonably anticipated that artists and art buyers will fully appreci-
VI. CONCLUSION

To the extent this developing state statutory system of contrary purpose and design is not preempted by federal copyright law, it has left the protection of art treasures to artists. This in itself is a dangerous step on the path to totalitarian art. At the same time it offers disincentives to enforcement and undervalues the public interest in the preservation of its cultural heritage. In enacting the Berne Convention Implementation Act of 1988, Congress passed on an opportunity to unify the developing bodies of federal and state law. It will now fall to the courts to resolve the conflicting claims of those holding unlimited exclusive rights under a federal copyright and artists seeking vindication for physical alterations of their work. A reaffirmation of the economic philosophy of copyright and the supremacy of section 106 of the Copyright Act would go a long way in providing predictability and consistency in this area.

