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A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?

by
*Edward J. Damich**

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Introduction

The concept of moral rights embraces the theory that an artistic work represents the personality of the artist. As such, artistic work deserves protection in addition to the economic rights given artists under the Copyright Act of 1976.¹ The passage of the Visual Artists Rights Act of 1990² (VARA) on December 1, 1990, marked a significant advance in the recognition and protection of the moral rights of a segment of American artists. Until the passage of VARA, if an artist were fortunate enough to live in a state that had a moral rights statute, she could rely on that to protect her moral rights. Otherwise, the artist had to protect her moral rights through various legal mechanisms, such as § 43(a) of the Lanham Act,³ the doctrine of misappropriation, or the common-law doctrine of unfair competition.

Eleven states have legislation that protects the right of attribution and the right of respect—the two basic rights that comprise moral rights.⁴ New York and California, generally recognized as the centers of the arts in the United States, are two such states. In 1979, California became the first state to enact moral rights legislation, but the statute protected only works “of recognized quality.”⁵ In 1984, New York enacted the New York Artists’ Authorship Rights Act, but the Act primarily attempted to protect an artist’s reputation.⁶

The actual rights accorded artists, as well as the subject matter protected, vary among the states. In addition, state protection is not the same as the protection under VARA. A comparison between VARA’s provisions and state moral rights statutes underscores the superiority of state statutes in many instances. VARA protects a limited subset of copyrightable works of art. State statutes, on the other hand, increase

1. Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541 (1976).

2. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 506 (Supp. III 1992)).

3. 15 U.S.C. §§ 1051-1127 (1988).

4. CAL. CIV. CODE § 987 (West 1992); CONN. GEN. STAT. ANN. § 42-116s to -116t (West 1990); LA. REV. STAT. ANN. §§ 51:2152-:2156 (West 1992); ME. REV. STAT. ANN. tit. 27, § 303 (West 1991); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1992); NEV. REV. STAT. ANN. §§ 598.970-.978 (Michie 1991); N.J. STAT. ANN. § 2A:24A-1 to -8 (West 1992); N.M. STAT. ANN. §§ 13-4B-2 to -3 (Michie 1992); N.Y. ARTS & CULT. AFF. LAW §§ 14.01, 14.03 (McKinney 1992); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Supp. 1991); R.I. GEN. LAWS §§ 5-62-2 to -6 (1991).

5. CAL. CIV. CODE § 987(b)(2).

6. N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.5 (McKinney 1992); Edward J. Damich, *The New York Artists’ Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1741 (1984) (“Clearly, the thrust of the New York statute is more toward protection of the artist’s reputation than toward protection of the work.”).

the categories of protected works and protected subrights under the two basic moral rights of attribution and respect.

I

Kinds of Work Protected

By enacting VARA, Congress acknowledged the need to protect the rights of attribution and respect while continuing to protect the rights of copyright owners and users.⁷ VARA's purpose is "to preserve and protect *certain limited categories of works of visual art that exist in single copies or in limited editions.*"⁸ Protected works include a single painting, a drawing, a print, a sculpture, a signed still photographic image produced for exhibition, and limited editions of these works that number 200 or fewer, which are signed and consecutively numbered.⁹ VARA specifically excludes works that are protected under the 1976 Copyright Act¹⁰ in the categories of "pictorial, graphic and sculptural works," "audiovisual works," and "literary works."¹¹

In marked contrast to VARA's definition of protected works, some state statutory definitions of "fine art" cover an extraordinarily broad range of artistic creations. For example, the Connecticut statute's definition of "work of fine art" includes works of calligraphy, works of graphic art, works of mixed media, photographs (without restriction), craft works in clay and masters from which copies can be made.¹² Similarly, Massachusetts and New Mexico enacted broad definitions of "fine art" which, in some aspects, extend beyond the definition in the Connecticut statute. In addition to original works of visual and graphic art, these three states include audio or video tapes, films, holograms, or any combination of works of recognized quality.¹³

However, states that give rights generously with one hand, restrict rights with the other. One vexing restraint on the scope of protected artistic works is the requirement that the work be of "recognized qual-

7. "The Visual Artists Rights title is very sensitive to the concerns of the copyright community that the bill not inadvertently impact on important business activities." 136 CONG. REC. S16302-08 (daily ed. Oct. 19, 1990) (statement of Sen. DeConcini).

8. 136 CONG. REC. E3716-17 (daily ed. Nov. 2, 1990) (statement of the Hon. Carlos J. Moorhead) (emphasis added).

9. 17 U.S.C. § 101.

10. "A work of visual art does not include— (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication." 17 U.S.C. § 101.

11. *Id.*

12. CONN. GEN. STAT. ANN. § 42-116s(2).

13. MASS. ANN. LAWS ch. 231, § 85S(b); N.M. STAT. ANN. § 13-4B-2(B).

ity.” Five of the eleven state statutes contain this qualification.¹⁴ These states require members of the art community to make such an assessment of quality when the need arises.¹⁵ Under VARA, however, the standards of the artistic community only determine whether the work falls within the statutory definition, and are not used to assess the work’s quality.¹⁶ State statutes which limit moral rights protection to those artistic works that are of “recognized quality” emphasize a policy choice to protect works of public interest over the individual artist’s right to personality in general.

Although VARA does not use a “quality” characteristic to classify artistic creations, it does specify that an artist has a right to prevent the destruction of a work of “recognized stature.”¹⁷ Arguably, a work of “recognized stature” may not be a work of “recognized quality,”¹⁸ but the underlying policy rationale for the qualification is basically the same—to designate specific works for preservation due to public interest. In fact, those states that do not place quality limitations on protected art work do not grant a subright against destruction within the right of respect.¹⁹

VARA also narrows the scope of protected subject matter by including in the definition of “works of visual art” limited editions of 200 copies or fewer that are signed and consecutively numbered.²⁰ In contrast to VARA, six state statutes have a limited edition provision that includes copies of 300 or fewer.²¹ The state statutes seem to protect more kinds of works, but the extent of that protection is unclear under the preemption

14. CAL. CIV. CODE § 987(b)(2); LA. REV. STAT. ANN. § 51:2152(7); MASS. ANN. LAWS ch. 231, § 85S(b); N.M. STAT. ANN. § 13-4B-2(B); PA. STAT. ANN. tit. 73, § 2102.

15. The determination of the work’s quality attributes rests on the opinions of artists, art dealers, curators of art museums, collectors of fine art, and other persons involved with the creation or the marketing of fine art.

16. “The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.” H.R. REP. NO. 514, 101st Cong., 2d Sess. 11 (1990).

17. “(3) [S]ubject to the limitations set forth in section 113(d), [the author of a work of visual art] shall have the right . . . (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” 17 U.S.C. § 106A(a)(3)(B).

18. See *infra* text accompanying notes 43, 44.

19. Louisiana, however, places a “recognized quality” restriction on the scope of protected works, although it does not provide for protection against destruction. LA. REV. STAT. ANN. § 51:2152(4).

20. The definition also includes limited editions of multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author. 17 U.S.C. § 101.

21. LA. REV. STAT. ANN. § 51:2152(7); ME. REV. STAT. ANN. tit. 27, § 303(1)(D); NEV. REV. STAT. ANN. § 598.970(3); N.J. STAT. ANN. § 2A:24A-3(e); N.Y. ARTS & CULT. AFF. LAW § 14.03(1); R.I. GEN. LAWS § 5-62-2(e).

doctrine.²² Because VARA will preempt a state statute if a court determines that the statute covers the same subject matter as VARA, the question is whether a limited edition of 200 or fewer copies is a single and distinct category from a limited edition of 300 or fewer copies, or alternatively, whether the copies numbered 201 through 300 fall outside the scope of the subject matter embodied in VARA. Resolution of this issue will determine whether the state statutes actually provide more protection under VARA.

The primary advantage of the state moral rights statutes over VARA is the protection of reproduction. The six states that include limited edition provisions also include the right to prevent unfaithful reproductions.²³ Section 106A(a)(1)(2) of VARA, however, expressly denies any protection for reproductions.²⁴ VARA's stated rationale for expressly excluding reproductions of "works of fine art" is that the artist has less personal contact with reproductions than she has with limited editions.²⁵ Under this theory, reproductions are perceived as possessing less of the artist's personality because of the diminished contact with the artist; consequently, reproductions deserve less protection. Despite this purported loss of personality, the inclusion of reproductions as protected subject matter is a strength of the state statutes that is clearly missing from VARA.²⁶

The commercial use exception is another subject that is treated differently by VARA and the state moral rights statutes. All but two of the state statutes contain an exception for commercial use, advertising, or

22. See *infra* notes 73-75 and accompanying text.

23. LA. REV. STAT. ANN. § 51:2153(2); ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1); R.I. GEN. LAWS § 5-62-3.

24. "The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101 . . ." 17 U.S.C. § 106A(c)(3) (emphasis added).

25. "The bill recognizes the special value inherent in the original or limited edition copy of a work of art. The original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images. Accordingly, the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies." *The Visual Artists Rights Act of 1989: Hearings on H.R. Rep. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 27 (1989) (statement of Prof. Jane C. Ginsburg).

26. See *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990) (recognition that deliberate alteration of a reproduction of an artist's work can harm the reputation of an artist and distort the public's perception of the artist's viewpoint); see also *Damich*, *supra* note 6, at 1738-39.

trade use.²⁷ California and Nevada take the same approach as VARA; their definitions of "fine art" exclude works prepared under contract for commercial use by the purchaser.²⁸ Other states protect works of fine art created under contract if the contract expressly reserves the substantive rights.²⁹ Connecticut takes a different approach with respect to commissioned works. Under Connecticut's statutory definition of a "work of fine art," commissioned works prepared under contract for trade or advertising use receive complete protection, unless prior to the creation of the work the artist signed an agreement that the work may be altered without consent.³⁰

VARA's definition of "work of visual art" expressly excludes works made for hire. A work made for hire consists of two distinct categories: 1) a work prepared by an employee within the scope of his or her employment, and 2) specified commissioned works.³¹ Four of the eleven state moral rights statutes contain an exception for works created within the scope of employment. Connecticut and Nevada expressly exclude these works from their "work of fine art" definitions,³² whereas Massachusetts and New Mexico exclude these works under the definition of "artist."³³

In each of the subject matter subcategories, some state statutes extend the scope beyond that articulated under VARA. No state statute, however, is superior to VARA in all subcategories. Each statute has specific strengths and limitations. Nevertheless, this diversity among the state statutes offers the opportunity to explore new combinations of rights and the subsequent effects these rights will have on artists and related industries.

II

The Scope of Moral Rights Protection

Both VARA and the state statutes recognize, in varying degrees of specificity and comprehensiveness, the two basic moral rights of attribu-

27. CAL. CIV. CODE § 987(b)(2); CONN. GEN. STAT. ANN. § 42-116s(2); LA. REV. STAT. ANN. § 51:2155(D); ME. REV. STAT. ANN. tit. 27, § 303(4); NEV. REV. STAT. ANN. § 598.970(3); N.J. STAT. ANN. § 2A:24A-7; N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d); PA. STAT. ANN. tit. 73, § 2107(3); R.I. GEN. LAWS § 5-62-5(d).

28. 17 U.S.C. § 101; CAL. CIV. CODE § 987(b)(2); NEV. REV. STAT. ANN. § 598.970(3).

29. LA. REV. STAT. ANN. § 51:2155(D); ME. REV. STAT. ANN. tit. 27, § 303(4); NEV. REV. STAT. ANN. § 598.970(3); N.J. STAT. ANN. § 2A:24A-7; N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d); R.I. GEN. LAWS § 5-62-5(d).

30. CONN. GEN. STAT. ANN. § 42-116s(2).

31. 17 U.S.C. § 101.

32. CONN. GEN. STAT. ANN. § 42-116s(2); NEV. REV. STAT. ANN. § 598.970(3).

33. MASS. ANN. LAWS ch. 231, § 85S(b); N.M. STAT. ANN. § 13-4B-2(A).

tion and respect.³⁴ The right of attribution is the right of the author to control the association of his or her name with the work. The right of respect is the right of the author to have his or her work treated as a work that embodies the personality of the author and accurately communicates through time the vision and concept of the author. Thus, the right of attribution encompasses more than merely the right to have the author's name associated with the work, and the right of respect encompasses more than the right to ensure the physical integrity of the work. The general right of attribution, for example, encompasses the right either to remain anonymous or to use a pseudonym, and the right of respect encompasses the right to control the fidelity of reproductions. As a whole, the state statutes more completely embody the basic rights of attribution and respect.

In order to obtain a clearer picture of the differences between VARA and the state statutes, it is necessary to break down the basic rights of attribution and integrity into subrights. The right of attribution can be broken down into the following subrights: (1) the subright to claim authorship, (2) the subright to disclaim authorship, (3) the subright to prevent the use of the author's name in connection with his or her work (*i.e.* the right to prevent attribution), (4) the subright of anonymity, and (5) the subright to use a pseudonym. The right of respect can be broken down into the following subrights: (1) the subright against physical acts either done to the work itself or to a reproduction of the work (*i.e.* the right against modification), (2) the subright against destruction, (3) the subright against unfaithful reproduction, and (4) the subright against acts—other than physical acts and unfaithful reproductions—that distort the accuracy of the author's communication through the work, such as improper presentation (*i.e.* the right against distortion).

The state statutes provide more comprehensive protection of the right of integrity by recognizing the subright against unfaithful reproduction, which is absent in VARA. State statutes also provide broader protection under the subrights embodied in the right of attribution.

A. The Right of Respect

VARA and all eleven state statutes recognize the subright against modification.³⁵ Under VARA, however, this subright requires an inten-

34. The right of respect is termed the "right of integrity" in both state and federal statutes. These terms are used interchangeably throughout the rest of this article.

35. 17 U.S.C. § 106A(a)(3)(A); CAL. CIV. CODE § 987(c); CONN. GEN. STAT. ANN. § 42-116t(a); LA. REV. STAT. ANN. § 51:2153(1); ME. REV. STAT. ANN. tit. 27, § 303(2); MASS. ANN. LAWS ch. 231, § 85S(c); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.M. STAT. ANN. § 13-4B-3(A); N.Y. ARTS & CULT. AFF. LAW § 14.03(1); PA. STAT. ANN. tit. 73, § 2104; R.I. GEN. LAWS § 5-62-3.

tional act as well as prejudice to the author's honor or reputation.³⁶ Under at least two state statutes, the subright against modification is violated by an act of gross negligence.³⁷ Three other state statutes provide that the subright is violated by any physical defacement of the work, whether or not it affects the author's honor or reputation.³⁸ Some states also extend the subright against modification to reproductions.³⁹ The subright against modification embodied in VARA, however, is broader than some state statutes, which require that the work be divulged to the public in some manner,⁴⁰ that the work be associated with the author,⁴¹ and that damage to the author's reputation be at least likely.⁴²

VARA and some state statutes recognize the subright against destruction. In VARA, this subright is restricted to works "of recognized stature,"⁴³ whereas in the state statutes the restriction applies to works "of recognized quality."⁴⁴ Most state statutes, however, do not recognize the subright against destruction. Neither VARA nor the states that recognize the subright against destruction inquire into the effect the destruction may have on the artist's honor or reputation.⁴⁵ Arguably, the state statutes recognizing the subright against destruction are broader than VARA because "recognized quality" is more inclusive than "recognized stature."

36. 17 U.S.C. § 106A(a)(3)(A).

37. MASS. ANN. LAWS ch. 231, § 85S(c); N.M. STAT. ANN. § 13-4B-3(A).

38. CAL. CIV. CODE § 987(c)(1); CONN. GEN. STAT. ANN. § 42-116t(a); MASS. ANN. LAWS ch. 231, § 85S(c).

39. LA. REV. STAT. ANN. § 51:2153(2); ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1); R.I. GEN. LAWS § 5-62-3.

40. LA. REV. STAT. ANN. § 51:2153; ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-7; N.M. STAT. ANN. § 13-4B-3(A); N.Y. ARTS & CULT. AFF. LAW § 14.03(1); PA. STAT. ANN. tit. 73, § 2110; R.I. GEN. LAWS § 5-62-3.

41. All states, except New Mexico, that require public disclosure as a prerequisite for invoking the right of respect also require that the work be associated with the artist. Unlike the other states, New Mexico also grants the artist an express right to claim and receive credit under a pseudonym. See N.M. STAT. ANN. § 13-4B-3(B). These refinements in the New Mexico statute make a finer distinction between the right of respect and the right of attribution.

42. LA. REV. STAT. ANN. § 51:2153; ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1).

43. 17 U.S.C. § 106A(a)(3)(B); see *supra* text accompanying note 17.

44. CAL. CIV. CODE § 987(b)(2); LA. REV. STAT. ANN. § 51:2152(7); MASS. ANN. LAWS ch. 231, § 85S(b); N.M. STAT. ANN. § 13-4B-2(B); PA. STAT. ANN. tit. 73, § 2102.

45. See 17 U.S.C. § 106(a)(3)(B); LA. REV. STAT. ANN. § 51:2152(4).

Although the subright against unfaithful reproduction is not found in VARA, it is recognized in six states.⁴⁶ Those states that provide for a subright against unfaithful reproduction, however, require that the reproduction be divulged to the public in some manner.⁴⁷ Five of the six states provide protection only where there is a reasonable likelihood of damage to the artist's reputation.⁴⁸

Arguably, only VARA includes the subright against distortion. The right of integrity uses the word "distort,"⁴⁹ and the wording of the public presentation exception to the right implies that grossly negligent public presentation may violate the right of integrity.⁵⁰ According to this interpretation, VARA would provide broader protection since none of the state statutes uses the word "distort" and none mentions public presentation.

B. The Right of Attribution

VARA and all eleven state statutes recognize the subright to claim authorship, but some states impose a requirement of public divulcation.⁵¹ Nevertheless, both the subright to claim authorship and the subright to disclaim authorship are fundamental subrights within the right of attribution.

It is difficult, however, to compare VARA and the state statutes regarding the subright to disclaim authorship and the subright to prevent attribution. All the states except Connecticut provide for the subright to *disclaim* authorship,⁵² while only VARA recognizes the subright to *prevent* attribution.⁵³ The question is: What is the meaning of "disclaim?" Arguably, "disclaim" means that the author has the option to have his name associated with the work as long as there is an appropriate disclaimer. She may, for example, prefer to have a physically modified

46. LA. REV. STAT. ANN. § 51:2153(2); ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1); R.I. GEN. LAWS § 5-62-3.

47. *Id.*

48. LA. REV. STAT. ANN. § 51:2153; ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1).

49. 17 U.S.C. § 106A(a)(3)(A).

50. *Id.* § 106A(c).

51. LA. REV. STAT. ANN. § 51:2154; ME. REV. STAT. ANN. tit. 27, § 303(3),(4); N.J. STAT. ANN. §§ 2A:24A-4, :24A-7; N.Y. ARTS & CULT. AFF. LAW § 14.03(2), (3)(e); PA. STAT. ANN. tit. 73, §§ 2103, 2110; R.I. GEN. LAWS § 5-62-3.

52. CAL. CIV. CODE § 987(d); LA. REV. STAT. ANN. § 51:2154(C); ME. REV. STAT. ANN. tit. 27, § 303(3); MASS. ANN. LAWS ch. 231, § 85S(d); NEV. REV. STAT. ANN. § 598.972(2); N.J. STAT. ANN. § 2A:24A-5; N.M. STAT. ANN. § 13-4B-3(B); N.Y. ARTS & CULT. AFF. LAW § 14.03(2); PA. STAT. ANN. tit. 73, § 2103; R.I. GEN. LAWS § 5-62-4(a).

53. 17 U.S.C. § 106A(a)(1)(B); *see id.* § 106A(a)(2).

painting labeled: "by Jane Doe (altered version)." Therefore, the subright to prevent attribution would be more narrow than the subright to disclaim authorship. On the other hand, it could be argued that the subright to prevent attribution allows the author to insist that the work not be attributed to him or her. The question is further complicated by the statutes of some states which declare that the right to prevent attribution is the right to disclaim authorship.⁵⁴

Assuming that the subright to disclaim authorship and the subright to prevent attribution are coextensive, the state statutes provide broader protection because almost all the states permit the exercise of the subright to disclaim for a "just and valid reason."⁵⁵ VARA, on the other hand, limits the subright to prevent attribution to two instances: (1) where the author did not create the work, and (2) where the right of integrity has been violated.⁵⁶

VARA provides more protection than the state statutes regarding the subright to remain anonymous and the subright to use a pseudonym. According to House Report 514, these subrights are included in VARA despite the failure of VARA to expressly mention them.⁵⁷ There is no indication that any state statute recognizes the subright of anonymity, but Massachusetts and New Mexico expressly recognize the subright to use a pseudonym.⁵⁸

C. Other Provisions Affecting Moral Rights

VARA and the state statutes may also be compared regarding duration of rights, waiver, works in buildings, joint works, and express exceptions. In the aggregate, the state statutes provide more protection than VARA in these areas.

Unlike the state statutes, VARA expressly limits its moral rights to the life of the author.⁵⁹ Five states expressly recognize a "life-plus-fifty" term;⁶⁰ the remaining states are silent. It may be argued that, since the

54. LA. REV. STAT. ANN. § 51:2154(C); ME. REV. STAT. ANN. tit. 27, § 303(3).

55. CAL. CIV. CODE § 987(d); LA. REV. STAT. ANN. § 51:2154(C); ME. REV. STAT. ANN. tit. 27, § 303(3); MASS. ANN. LAWS ch. 231, § 85S(d); NEV. REV. STAT. ANN. § 598.972(2); N.J. STAT. ANN. § 2A:24A-5; N.M. STAT. ANN. § 13-4B-3(B); N.Y. ARTS & CULT. AFF. LAW § 14.03(2); PA. STAT. ANN. tit. 73, § 2103; R.I. GEN. LAWS § 5-62-4(a).

56. 17 U.S.C. § 106A(a)(1)(B); *see id.* § 106A(a)(2).

57. "Proposed section 106A(a)(1) creates a right of attribution that extends not only to the right to be identified as the author of a work, or to prevent use of the author's name when he or she is improperly identified as the author of a work of visual art, but also to the right to publish anonymously or under a pseudonym." H.R. REP. NO. 514, *supra* note 16, at 14.

58. MASS. ANN. LAWS ch. 231, § 85S(d); N.M. STAT. ANN. § 13-4B-3(B).

59. 17 U.S.C. § 106A(d).

60. CAL. CIV. CODE § 987(g)(1); CONN. GEN. STAT. ANN. § 42-116t(d)(1); MASS. ANN. LAWS ch. 231, § 85S(g); N.M. STAT. ANN. § 13-4B-3(E); PA. STAT. ANN. tit. 73, § 2107(1).

states that are silent about duration also require a likelihood of damage to reputation, the moral rights terminate at the author's death.⁶¹

Under the provisions of VARA, artists may waive their moral rights in a signed writing that specifically identifies the works and uses, even though these rights may not be transferred.⁶² Six states also recognize written waivers, but none of these states requires the identification of specific uses.⁶³ The remaining states are silent about waivers, suggesting that moral rights may be waived.⁶⁴

Additionally, works of art incorporated into buildings receive individualized attention under VARA and the statutes of six states.⁶⁵ If the work of art cannot be removed from a building without substantial physical defacement or alteration, the general rule under VARA and the state statutes is that the artist waives her right of integrity unless she expressly reserves it in a writing signed by the owner of the building.⁶⁶ On the other hand, if the work of art can be removed from the building without substantial harm, the artist retains the right of integrity until the owner makes a good faith attempt to notify the artist of the intended removal and the artist fails to respond in a timely fashion.⁶⁷

VARA also contains express exceptions for the passage of time, the inherent nature of the materials, conservation, and public presentation.⁶⁸ Aside from public presentation, these exceptions appear in the state statutes. In addition, express exceptions exist in the state statutes for both the medium of reproduction and framing.⁶⁹

61. At common law, for example, the dead cannot be defamed. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 778 (5th ed. 1984).

62. *See* 17 U.S.C. § 106A(e).

63. CAL. CIV. CODE § 987(g)(3); CONN. GEN. STAT. ANN. § 42-116t(d)(3); MASS. ANN. LAWS ch. 231, § 85S(g); NEV. REV. STAT. ANN. § 598.976; N.M. STAT. ANN. § 13-4B-3(E); PA. STAT. ANN. tit. 73, § 2107(2).

64. In American law, alienability is presumed.

65. 17 U.S.C. § 113(d); CAL. CIV. CODE § 987(h); CONN. GEN. STAT. ANN. § 42-116t(e); MASS. ANN. LAWS ch. 231, § 85S(h); N.M. STAT. ANN. § 13-4B-3(F), (G); PA. STAT. ANN. tit. 73, § 2108.

66. *See id.*

67. Five of the six statutes contain express provisions to this effect. Connecticut, however, is silent on this aspect, possibly indicating an implicit understanding that the artist's right of respect remains inviolate if the work of art can be removed from the building without substantial harm.

68. *See* 17 U.S.C. § 106A(c).

69. For example, the California statute contains an express exception for a person who frames, conserves, or restores a work of fine art. *See* CAL. CIV. CODE § 987(c)(2).

III Conclusion

As a whole, the state statutes extend moral rights protection to more kinds of works than VARA. For example, although Massachusetts limits protection to works "of recognized quality," it protects motion pictures—a category of work specifically excluded under VARA.⁷⁰ Furthermore, despite the requirements of public disclosure and damage to reputation, several states protect reproductions.⁷¹

On balance, the scope of moral rights protection is broader in the state statutes than in VARA. For example, in almost all the states the artist may disclaim authorship as long as she has a "just and valid reason," while under VARA the subright to prevent attribution may be exercised only if either the work is not the artist's or the artist's right of respect has been violated. More significantly, several states recognize the subright against unfaithful reproduction.⁷²

Clearly, the artist who lives in a state without a moral rights statute is better off because of VARA; however, depending on the work and the right asserted, the artist may get the most protection in one of the eleven states with moral rights statutes. However, the doctrine of preemption may preclude the artist from taking advantage of a state's moral rights statute.

A prior version of VARA stated that state moral rights statutes would not be preempted "except to the extent that such . . . statutes would diminish or prevent" the exercise of federal moral rights.⁷³ Instead, VARA contains a provision that closely tracks the preemption provision for § 106 rights under the Copyright Act of 1976. There are, however, at least three arguments that support an approach to preemption for moral rights that is more narrow than preemption for § 106 rights. First, the language of the VARA preemption provision is not as broad as the § 106 preemption provision.⁷⁴ Second, the VARA preemption provision provides a specific exception for rights "which extend beyond the life of the author."⁷⁵ Third, since Congress relied on the state statutes to demonstrate United States compliance with the moral rights provisions of the Berne Convention, it would be absurd for Congress to

70. Mass. Gen. Laws Ann. ch. 231, § 85S(b); 17 U.S.C. § 101.

71. LA. REV. STAT. ANN. § 51:2153(2); ME. REV. STAT. ANN. tit. 27, § 303(2); NEV. REV. STAT. ANN. § 598.974(1); N.J. STAT. ANN. § 2A:24A-4; N.Y. ARTS & CULT. AFF. LAW § 14.03(1); R.I. GEN. LAWS § 5-62-3.

72. *See id.*

73. Version in the author's personal file.

74. For example, the VARA provision does not contain the phrase "within the general scope of copyright." *See* 17 U.S.C. § 301(a).

75. *Id.* § 301(f)(2)(C).

pass a federal moral rights statute that weakened the moral rights protection available in the United States.

VARA and the state statutes combined do not produce the kind of moral rights protection envisioned by article *6bis* of the Berne Convention.⁷⁶ Hopefully, courts will not lessen the sum-total of moral rights protection in the United States by a draconian preemption analysis.

76. See The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. *6bis* (Paris Revision), reprinted in SAN RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 456 (1987).

