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Advancing the Arts Community in New Mexico through Moral Rights and Droit de Suite: The International Impetus and Implications of Preemption Analysis

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ADVANCING THE ARTS COMMUNITY IN NEW MEXICO THROUGH MORAL RIGHTS AND DROIT DE SUITE: THE INTERNATIONAL IMPETUS AND IMPLICATIONS OF PREEMPTION ANALYSIS

CHANNAH FARBER*

I. INTRODUCTION

New Mexico has a vibrant and significant arts community that ranges from the ceramic designs of Acoma Pueblo artists to the canvases of Georgia O'Keefe. The Santa Fe art market is an important economic force, and the diversity of resident artists throughout New Mexico contributes to the state's cultural identity. As a means of protecting and encouraging the arts community, intellectual property laws are necessary not only at the federal level, but also at the state level. This Comment will argue that New Mexico should expand the existing intellectual property rights afforded resident artists and will use preemption analysis to identify potential areas of expansion.

International, national, and local governments generally recognize the importance attached to preserving the integrity of artistic creations for reasons such as aesthetic significance, cultural heritage, creative inspiration, and market stability. These governmental institutions preserve artistic integrity through legal protection. Such protection exists in the form of intellectual property law, the area of law that concerns legal rights associated with creative effort. Within this area, common-law

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2. According to the Santa Fe Conventions and Visitors Bureau, Santa Fe is considered the third largest art market in the United States based on sales with 250 art galleries and dealers in the city. SANTA FE CONVENTIONS & VISITORS BUREAU, AWAY TO SANTA FE: CITY PROFILE, http://santafe.org/Media_Center/Press_Room/City_Profile/index.html (last visited Sept. 24, 2006).

3. While Santa Fe has grown as a center for contemporary art, its most historic and original art forms retain their vitality and have also grown in both popularity and dimension. SANTA FE CONVENTIONS & VISITORS BUREAU, AWAY TO SANTA FE: MEDIA CENTER (2005), http://santafe.org/Media_Center/Press_Room/Current_Releases/Santa_Fe_First_UNESCO_Creative_City_in_U_S_-_2005/index.html. As a result, Santa Fe has developed into a world-renowned center for the contemporary, folk, and Indian artists who reside in New Mexico. SANTA FE CHAMBER OF COMMERCE, ARTS & CULTURE, http://www.santafechamber.com/arts/index.asp (last visited Sept. 24, 2006).

4. See infra Part III.

5. For the purposes of this Comment, the term “artist” will denote individuals who create works of art (i.e., “artist” will not encompass individuals who create works in areas such as film, literature, music, or drama).


7. Id.

8. Id. at 3.
countries have tended to stress the economic and proprietary rights arising out of the creation of artworks.\textsuperscript{9} Accordingly, intellectual property law in the United States, as it relates to art, has traditionally centered around copyright law, which protects an artist’s pecuniary interest in the work of art he or she creates.\textsuperscript{10}

In response to international agreements, such as the Berne Convention, U.S. intellectual property law with respect to copyright has begun to develop into a body of law that encompasses rights originating in and embraced by civil-law countries.\textsuperscript{11} Specifically, U.S. copyright law has evolved to include moral rights\textsuperscript{12} and may further evolve to include droit de suite.\textsuperscript{13} In 1990, the United States expanded the Copyright Act of 1976 to include the moral rights of attribution and integrity.\textsuperscript{14} The United States has also considered implementing a federal droit de suite law and,\textsuperscript{15} given recent international developments, the United States may soon enact this additional civil-law progeny of intellectual property law.\textsuperscript{16}

Although copyright and related rights (namely, moral rights and droit de suite) are national rights implemented through federal statutes,\textsuperscript{17} several states, including New Mexico, have enacted moral rights statutes, and some have also passed droit de suite legislation.\textsuperscript{18} These laws are subject to preemption,\textsuperscript{19} at least to some extent, under the federal copyright law.\textsuperscript{20} An analysis of preemption is, therefore, instructive.

\begin{itemize}
\item[\textsuperscript{9}] Ruth Redmond-Cooper, \textit{Moral Rights, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE} 69–71 (Daniel McClean & Karsten Schubert eds., 2002).
\item[\textsuperscript{10}] SIMON STOKES, ART & COPYRIGHT 3 (2001).
\item[\textsuperscript{12}] See 17 U.S.C. §§ 101, 106A, 113(d) (2000). Moral rights protect the artist’s personal interest in the work he or she creates mainly by regulating attribution of the work to the artist and by preventing derogatory treatment of the work. \textit{See infra} Part II.A. Whereas moral rights emphasize the artist’s personal interest in the work of art he or she creates, the basis of copyright is to protect the artist’s pecuniary interest in the work. 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, \textit{LAW, ETHICS, AND THE VISUAL ARTS} 144 (2d ed. 1987). Thus, in the United States, moral rights comprise a set of rights that are substantively separate from, yet structurally interrelated with, copyright as part of the overall Copyright Act. \textit{See 17 U.S.C. §§ 101, 106A, 113(d).}
\item[\textsuperscript{13}] \textit{See infra} notes 310–314 and accompanying text. Droit de suite is the right of the artist to collect a part of the price paid each time a work is resold. \textit{See infra} Part II.B.
\item[\textsuperscript{14}] 17 U.S.C. §§ 101, 106A, 113(d).
\item[\textsuperscript{16}] \textit{See infra} notes 310–314 and accompanying text. Droit de suite is sometimes characterized as an economic right consistent with copyright. Jennifer B. Pfeffer, Comment, \textit{The Costs and Legal Impracticalities Facing Implementation of the European Union’s Droit de Suite Directive in the United Kingdom}, 24 NW. J. INT’L L. & BUS. 533, 547 (2004). The right may also be viewed as an additional moral right, however, since it derives from the moral right of attribution, which allows the artist to be identified with his or her work. Michael B. Reddy, \textit{The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty}, 15 LOY. L.A. ENT. L. REV. 509, 510 (1995). Regardless of its categorization, the right would, like moral rights, supplement U.S. copyright law as an inclusion within copyright and, thereby, serve as a related right. \textit{See infra} note 320 and accompanying text.
\item[\textsuperscript{17}] STOKES, supra note 10, at 3.
\item[\textsuperscript{18}] \textit{See infra} Part II.E.
\item[\textsuperscript{19}] Preemption occurs when a federal law takes precedence over a state law. \textit{See infra} Part III.A.
\item[\textsuperscript{20}] \textit{See infra} Part III.A.
with regard to assessing New Mexico’s current moral rights statute, the Fine Art in Public Buildings Act of 1995,\(^2\) as well as New Mexico’s possible enactment of a state droit de suite law. This Comment will analyze the impact that federal moral and resale royalty rights laws have or may potentially have on New Mexico and will discuss the opportunities this state has to supplement federal law in the areas of moral and resale royalty rights law that are not subject to preemption.\(^2\)

Part II gives a background of moral rights and droit de suite beginning with their civil-law origins\(^2\) and explains the role the Berne Convention had in introducing these rights in the United States.\(^2\) Part II also describes the introduction of moral rights and droit de suite in the United States: the implementation of federal moral rights law through the Visual Artists Rights Act; efforts to effect enactment of a federal droit de suite; the ultimate decision to forego implementation of a federal resale royalty law as a result of the Copyright Office Report on droit de suite; and the recent European Union Directive on harmonization of the droit de suite that may lead the United States to reconsider enactment of a federal resale royalty.\(^2\) Part II concludes with an overview of state moral and resale royalty rights including a summary of the law in New Mexico.\(^2\)

Part III analyzes moral rights and droit de suite in terms of the relation of state to federal law.\(^2\) Specifically, Part III describes preemption analysis in general terms and examines moral rights preemption as well as droit de suite preemption.\(^2\) The preemption analysis indicates possible areas into which New Mexico intellectual property law can be extended. Part III thus explores these areas of expansion and the rationale for doing so.\(^2\) Part IV summarizes the arguments in favor of expanding intellectual property law in New Mexico and concludes that such expansion would be beneficial.\(^2\)

II. BACKGROUND

Both moral rights and droit de suite derive from civil-law doctrine.\(^2\) The adoption of these rights in the common-law system of the United States involves incorporation into the existing copyright canon.\(^2\) While moral rights exist within the framework of U.S. copyright law, these rights retain the theoretical basis of their civil-law origins. Likewise, droit de suite, if enacted, would be incorporated into the Copyright Act but would remain substantively distinct.\(^2\) In order to understand the

\(^{22}\) See infra Part III.
\(^{23}\) See infra Part II.A-B.
\(^{24}\) See infra Part II.C.
\(^{25}\) See infra Part II.D.1-.4.
\(^{26}\) See infra Part II.E.1-.3.
\(^{27}\) See infra Part III.
\(^{28}\) See infra Part III.A-.C.
\(^{29}\) See infra Part III.D.
\(^{30}\) See infra Part IV.
\(^{31}\) See infra notes 34, 66 and accompanying text. Whereas civil law is the predominant legal system in continental Europe, common law is the legal system in the United States. BLACK'S LAW DICTIONARY 263, 293 (8th ed. 2004).
\(^{32}\) See 17 U.S.C. §§ 101, 106A, 113(d) (2000); see also infra note 320 and accompanying text.
\(^{33}\) Whether the addition of civil-law concepts to the common-law system of copyright will modify
function of these rights in the United States, it is therefore useful to examine the conceptual history of moral rights and droit de suite. Because the Berne Convention was integral to the introduction of these rights in the United States, a discussion of the convention follows the historical overview. This discussion leads into the introduction of federal moral and resale royalty rights in the United States, the next area of examination. A description of state moral and resale royalty rights legislation concludes the background of these rights in the United States.

A. Moral Rights: A Brief History

The concept of "les droit morals" originated in France and was formalized in the French Intellectual Property Code in 1957. Under civil-law doctrine, the moral right of the artist is usually classified as a right of personality, which is separate from property rights such as copyright. Whereas copyright law protects the artist's pecuniary interest in the work of art he or she creates, moral rights emphasize the artist's personal interest in the work. Essentially, moral rights protect the artist's personality, which is projected into each work of art he or she creates. John Merryman, an intellectual property law scholar, explains:

The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality.

Under the common-law system in the United States, certain moral rights were integrated into existing copyright law through the Visual Artists Rights Act of 1990 (VARA). Although moral rights in the United States do not comprise a separate prong of intellectual property law, as in France, VARA, which amended the Copyright Act of 1976, reflects the distinct focus on the artist's personality interest.
VARA sets forth two moral rights: the rights of attribution and of integrity.\footnote{For a specific description of the rights of attribution and integrity set forth in VARA, see infra Part II.D.1.} The right of attribution is the right to be identified as the author of a work of art that has entered into the public arena.\footnote{ART LAW HANDBOOK § 1.04[A], at 51 (Roy S. Kaufman ed., 2000). A work of art enters into the “public arena” when the artist no longer possesses the work and the work is accessible to a portion of the public.} Attribution also extends beyond the acknowledgment of the artist’s identity to provide the right not to be identified.\footnote{Id. Under French law, another element of attribution is protection against false attribution, the artist’s right not to have a work falsely attributed to him or her as the author. Id. In the United States, false attribution is not explicitly included as part of the right of attribution outlined in VARA, though an artist may seek recourse through the common-law doctrine of defamation or from the Lanham Act, which prohibits designations of false origin and false description. Id. at 53–54.} This aspect of attribution allows the artist to avoid derogating associations with versions of a work that are not truly representative of his or her creative efforts.\footnote{See MERRYMAN & ELSEN, supra note 12, at 144.}

The right of integrity acknowledges that the author of a work of art that has been released to the public has a continuing interest in maintaining the integrity of that work.\footnote{Id. Protecting the integrity of a work of art pertains to physical preservation of the work in its original form. The application of the integrity right is illustrated by a case involving the French artist Bernard Buffet. Buffet had painted the exterior of a refrigerator as an indivisible artistic unit. When the refrigerator was later disassembled, the artist was able to enjoin the sale of the separated individual panels. See John Henry Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1023 (1976).} The rationale for this lasting claim is based on the view that the work of art is an expression of the artist’s personality and, as such, the artist is entitled to prevent the work from being dealt with in an abusive manner.\footnote{Id. at 57.} Thus, the right of integrity enables the artist to ensure that his or her work is preserved in its authentic and unadulterated form, even after it enters into the public domain.\footnote{17 U.S.C. § 106A (2000). In keeping with its unreserved tenor regarding moral rights, French law condones destruction only as the result of “force majeure — an external, unforeseeable, and unpredictable event which makes destruction necessary.” Redmond-Cooper, supra note 9, at 76. To destroy the artist’s work would otherwise constitute disrespect for the artist’s creation and would, therefore, violate his or her right of integrity. Id.} The right of integrity may also encompass destruction.\footnote{17 U.S.C. § 106A (2000).} VARA, for example, precludes the destruction of works of a “recognized stature.”\footnote{SHERRI L. BURR & WILLIAM D. HENSLEE, ENTERTAINMENT LAW: CASES AND MATERIALS ON FILM, TELEVISION, AND MUSIC 64 (2004).}
B. The Development of Droit de Suite

Like moral rights, droit de suite is a right that derives from civil-law doctrine and may become a part of the common-law system in the United States. Droit de suite, also referred to as the "resale royalty right," is the right of an artist to collect a part of the price paid each time a work is resold. Translated from French, the phrase means "follow-up right." Droit de suite is based on the premise that artists are entitled to participate in the increase in value of their works in ways that otherwise are not addressed adequately by copyright law. An artist's expression usually is embodied in an end product, sold to a single purchaser. Since the artist's current work and reputation continue to affect the value of that earlier work, the droit de suite allows the artist to collect a commission or royalty any time the work is resold. The resale royalty, therefore, does not apply to the primary market (transfers of works by the artist who created them), but rather to the secondary market (subsequent transactions).

Some controversy exists as to whether droit de suite is an artist's right aligned with the concept of moral rights or an author's right aligned with the concept of copyright. John Merryman asserts that the right to a resale royalty, like copyright, is a property right of the artist, not a right of personality. The droit de suite primarily protects an economic interest that is consistent with the economic emphasis of copyright law. Alternatively, the right has been characterized as an additional moral right since it derives from the moral right of attribution. Still another possibility is to characterize the droit de suite as a hybrid in keeping with the 1948 Brussels Revision of the Berne Convention, which recognized the unique status of droit de suite as half moral right and half pecuniary right. This view is based on the fact that the resale royalty builds the right to participate in the future economic exploitation of a work into the right of attribution by allowing the artist to profit from his increased reputation. Regardless of how droit de suite is characterized, however, within the context of the U.S. intellectual property system, a resale royalty right would, like moral rights, serve as a related right to copyright.

Although classification of the droit de suite remains ambiguous, its origins clearly reveal its underlying rationale and purpose. The resale royalty right originated in France in 1920 and subsequently was codified as part of the French Intellectual
Property Code in 1957. French authors were initially granted the exclusive right of reproduction in 1791 and the right of performance in 1793. These two decrees were concerned solely with the pecuniary rights protected under Anglo-American copyright law and acted as the basis for French copyright law. While this antecedent copyright legislation theoretically provided fine artists with the same rights as authors of books, drama, or music, fine artists were in fact unable to exploit their works because of the unique nature of paintings and sculptures. Accordingly, the rationale supporting a resale royalty was the need to correct the inherent inequity contained in copyright law. Abel Ferry, the original sponsor of the French droit de suite bill, summarized the legal basis for this new right:

We are not asking for a share of the profits on a possible speculation, but for the extension of the laws on artistic property, regardless of the existence of an appreciation or depreciation in value. There is a gap in this developing branch of the law on literary and artistic property. Literary men, musicians, and playwrights...can exact for each recital, each performance, each publication, a fee which occasionally gives them large revenues. They derive their fortune from the people generally while the painter earns his living from the single collector. What he creates cannot be published but has, however, the character of personal property and this is why the provisions of a code drafted when literary and artistic property was not even known are urged against him. While the property of other intellectual workers is full and undivided, that of the artist is incomplete.

Under the French droit de suite, the artist receives three percent of the total sales price of his artwork each time it is sold at public auction (or in theory through a dealer), provided the sale price is above a set amount. The right is inalienable and extends to the artist for his or her life plus seventy years. The French law originally applied only to sales at auction but the 1957 revision expanded the right to include

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68. Id.
69. Protection did not extend to craftspeople, only to those artists who created "fine art" (such as paintings and sculptures of recognized quality). Id.
70. Id. Whereas, for example, the right of reproduction enabled the author of a book to reap monetary gain from the multiple copies of the book, the right did not accomplish the same benefit for the artist who produced a work of art in a one-of-a-kind form that did not lend itself to reproduction. After the initial sale of the work of art, the artist did not continue to receive royalties as did the writer. COPYRIGHT OFFICE REPORT, supra note 15, at 386.
71. See Reddy, supra note 16, at 511-13; see also COPYRIGHT OFFICE REPORT, supra note 15, at 386.
sales by dealers. Nevertheless, the 1957 codification required implementing rules, and these rules have not been issued. As a result, the French statute, in practice, continues to apply only to sales at auction. The droit de suite is collected in France primarily through two private authors' societies: Société de la Propriété Artistique et des Dessins et Models (SPADEM) and the Association pour la Diffusion des Arts Graphiques et Plastiques (ADAGP). These societies are similar to American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the societies established to enforce composers' and performers' rights in the United States.

Since its inception in France, at least thirty-six countries have adopted some form of droit de suite. Laws governing the droit de suite vary from country to country. Whereas the French theory is based on the premise that an artist has a right to participate in certain exploitive use of his or her creation, the German right is justified on the basis of intrinsic value. The rationale is that any increase in value of a work is due to the artist's earlier labors. The work's value is intrinsic in the work in latent form and the artist therefore has a right to participate in the economic benefit realized when the public becomes aware of this latent value. Accordingly, German artists are given one-fourth of the difference between the present and prior selling price, as opposed to a set percentage of the resale price, as in France. The Italian system, by comparison, is quite complex, with a sliding scale that allows the artist a larger percent of profit when the profit is greatly in excess of the original sale price. Private sales are included only if the resale price quadruples the original purchase price.

Although the United States has not adopted a federal droit de suite, California created a state droit de suite by enacting the California Resale Proceeds Right Law

75. MERRYMAN & ELSEN, supra note 12, at 214. The current law states that "authors of graphic and three-dimensional works shall have an inalienable right, regardless of any transfer of the original work, to participate in the proceeds of any sale of such work by public auction or through a dealer." French Intellectual Property Code art. L122-8, available at http://195.83.177.9/code/liste.phtml?lang=uk&c=36.
76. The current law retains this provision and states that "[a] Decree in Conseil d'Etat shall lay down the conditions under which authors may assert the rights afforded them by this Article." French Intellectual Property Code art. L122-8, available at http://195.83.177.9/code/liste.phtml?lang=uk&c=36.
77. Id. A possible explanation for this operational preference is that sales at auction are the easiest to monitor. Id. The sales are public, announced in advance, and often accompanied by widely distributed catalogs containing identification of the artists and descriptions and provenances of the works offered for sale. Id. Proponents of broader droit de suite applicability argue that operation of the statute discriminates against auctioneers. Id.
80. Id.
82. DUBOFF ET AL., supra note 58, at 358.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
of 1976.\textsuperscript{90} The California law most closely resembles the French form of droit de suite.\textsuperscript{91}

\textbf{C. Berne Convention: Impetus for the Introduction of Moral and Resale Royalty Rights in the United States}

Moral rights and the droit de suite came to the United States largely through the Berne Convention.\textsuperscript{92} The Berne Convention for the Protection of Literary and Artistic Works, an international copyright treaty regarding the protection of works of authorship, has served to unify national intellectual property legislation by introducing several standards to which its member states must adhere.\textsuperscript{93} In joining the Berne Convention, participant countries are obligated to observe two main principles: the recognition of copyright between sovereign nations and the acceptance of a minimum set of exclusive rights granted to authors.\textsuperscript{94} These "exclusive rights" apply to the artist's work and include its reproduction, adaptation, distribution, and communication to the public.\textsuperscript{95} As part of the 1971 revision in Paris, the moral rights of attribution and integrity were added to these copyright concepts.\textsuperscript{96} Article 6bis states:

\begin{quote}
Indepedently 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.
\end{quote}

The article further mandates that member states implement domestic legislation in accordance with these moral rights requirements and expresses that the duration of the specified moral rights should equal that of copyright, though abbreviation to the artist's lifetime is permitted.\textsuperscript{98}

The droit de suite was incorporated into a separate article of the Berne Convention in 1948,\textsuperscript{99} but unlike the rights of attribution and integrity stipulated by the moral rights requirement set forth in Article 6bis, the resale royalty provision constitutes an optional law for member states to adopt.\textsuperscript{100} Article 14ter(a) states that "[t]he author...shall enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."\textsuperscript{101} Article 14ter(b)
qualifies the right by stating that such protection “may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits.”

The United States became a member of the Berne Convention in 1989. In joining the Convention, the United States became subject to Article 30(a), which states that “ratification or accession shall automatically entail acceptance of all the clauses ... of this Act.” Consequently, the United States was obligated to meet the Article 6bis moral rights requirements but had the discretion to adopt or reject droit de suite legislation set forth in Article 14.

Jennifer DeWolf Paine, an art law scholar, stated that moral rights have been perceived in the United States to significantly impair the commercial exploitation of a variety of copyrightable works. As a result, Congress resisted formal recognition of such rights under U.S. law. Congress instead effected a compromise in the Berne Convention Implementation Act of 1988 by declaring that existing U.S. law adequately provided for the rights required by Article 6bis and, therefore, no special legislation was required to implement this article. Congress further stated that membership in the Convention was not evidence of a recognition by the United States of a higher degree of moral rights protection than already afforded by the Copyright Act.

D. Introduction of Moral and Resale Royalty Rights in the United States

Despite initial assertions to the contrary, ratification of the Berne Convention by the United States ultimately led to the creation of new moral rights legislation as well as more careful consideration of the droit de suite. Although certain areas of law, such as copyright, unfair competition under the Lanham Act, defamation, and contracts, provide some degree of moral rights protection, artists historically had mixed success using these methods. Perhaps in recognition of these shortcomings,

102. Id. art. 14ter(b) (emphasis added).
103. ART LAW HANDBOOK, supra note 42, § 1.04[C], at 53.
104. Berne Convention, supra note 11, art. 30(1).
105. Id. arts. 30(a), 14ter(a)-(b).
106. ART LAW HANDBOOK, supra note 42, §1.04[C], at 53. The rationale is that any right that is personal to the artist would tend to conflict with the public’s interest in a free-flowing social exchange. Patricia Alexander, Comment, Moral Rights in the VARA Era, 36 ARIZ. ST. L.J. 1471, 1472 (2004). Such rights are, therefore, considered anathema to the system of federal copyright law, founded on the U.S. Constitution, which establishes the “exclusive rights of authors as a means to maximize production of and access to intellectual creations.” See U.S. CONST. art. I, § 8, cl. 8. One way in which moral rights could impair commercial exploitation of a work of art occurs when an artist transfers copyright to the owner of a work of art such as a museum. The right of integrity may enable the artist to prevent the museum from freely displaying the work of art (and, by extension, receiving a profit from admission fees). See generally 17 U.S.C. §§ 106, 106A (2000). If the work has been damaged, for example, publicly displaying the work in its modified and inauthentic form would be prejudicial to the artist’s reputation and the artist would be entitled to enjoin such display. Id.
107. ART LAW HANDBOOK, supra note 42, § 1.04[C], at 53.
108. Id.
109. EPSTEIN, supra note 93, at 4-64.
110. ART LAW HANDBOOK, supra note 42, §1.04[C], at 54.
111. Id. The right to prepare derivative works provided by copyright, for example, does not serve to prevent modification of an artist’s work of art. See, e.g., Lee v. A.R.T. Co., 125 F.3d 580, 582-83 (7th Cir. 1997) (rejecting the artist’s claim that mounting her work on a tile constituted a derivative work and stating that if the artist was “right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of authors’ moral rights”). Using a defamation claim to achieve moral rights protection is also problematic because it poses a high standard: the artist must establish that the conduct being objected to subjected him or her to “disgrace or ridicule by...his peers.” Edison v. Viva Int’l, Ltd., 421 N.Y.S.2d 203, 207 (App.
Congress enacted explicit moral rights protections for a limited class of visual artists in the Visual Artists Rights Act of 1990, an amendment to the Copyright Act of 1976.112 VARA also acknowledged the resale royalty right contained in the Berne Convention by including a requirement that the Copyright Office conduct a study on the feasibility of enacting droit de suite in the United States.113


The Visual Artists Rights Act incorporates certain moral rights into U.S. copyright law.114 Specifically, VARA grants to visual artists the moral rights of attribution and integrity.115 The right of attribution contained in VARA grants the author of a work of visual art the right to claim authorship of the work, to prevent use of his or her name as the author of any work he or she did not create (for example, forgery), and to prevent the use of his or her name as the author of a work of visual art in the event of a physical distortion, mutilation, or other modification of the original work that would be prejudicial to his or her honor or reputation.116 The right of integrity set forth in VARA provides the author of a work of visual art with the right to prevent any intentional distortion, mutilation, or other modification of that work that would be prejudicial to his or her honor or reputation.117 This right also includes the right to prevent intentional or grossly negligent destruction of a work of visual art, provided that the work is of a "recognized stature."118 The protection afforded by the right of integrity includes several exceptions: unless caused by gross negligence, the destruction, distortion, mutilation, or other modification of a work of visual art that results from the passage of time, the inherent nature of materials, conservation, or public presentation is not prohibited by the right of integrity.119

The rights of attribution and integrity provided by VARA pertain to a narrow range of subject matter. To this end, VARA offers protection to a more limited class of works than does the Copyright Act.120 Whereas copyright pertains to "original works of authorship fixed in a tangible medium of expression,"121 the moral rights

Div. 1979). Furthermore, defamation cannot protect against destruction of a work of art because liability attaches only for relaying a false message to a third party; when a work of art is destroyed, no message is created, thus no liability results. See Cort v. St. Paul Fire & Marine Ins. Co., 311 F.3d 979, 986 (9th Cir. 2002). Contract theory can provide some protection, provided the artist has preserved rights that fall under the moral rights doctrine, yet these rights created by contract exist only between the parties, not universally. Dane S. Ciolino, Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights, 69 Tul. L. Rev. 935, 950–51 (1995).

112. 17 U.S.C. §§ 101, 106A, 113(d) (2000); see also ART LAW HANDBOOK, supra note 42, § 1.04[C], at 54.
115. Id. § 106A.
116. Id.
117. Id.
118. Id. § 106A(3)(B).
119. Id.
121. Copyright protection extends to literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Id. § 102.
provided in VARA extend only to works of "visual art." \(^{122}\) A work of "visual art" is a painting, drawing, sculpture, or photograph produced for museum purposes only that exists in a single copy or limited edition. \(^{123}\)

VARA protection does not extend to 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 production; nor any merchandising item or advertising, promotional descriptive covering, or packaging material or container." \(^{124}\) In addition, VARA precludes from its coverage any work made for hire and any work not subject to copyright protection under the Copyright Act. \(^{125}\)

The rights granted under VARA inhere only in the artist. \(^{126}\) Thus, with respect to the artist's work of visual art, transfer of ownership, copyright, or any exclusive right of copyright constitutes neither a waiver nor a transfer of the artist's moral rights. \(^{127}\) Although the artist's rights of attribution and integrity may not be transferred, those rights may be waived if the artist expressly agrees to such waiver in writing. \(^{128}\) Moral rights run for the life of the artist, or in the case of joint artists, for the life of the last surviving artist. \(^{129}\)

VARA does not provide protection equivalent to that provided by Article 6bis of the Berne Convention. Unlike VARA, Article 6bis provides a right of anonymity (the right to publish a work anonymously and to stop anonymous publication); a right of pseudonymity (the right to publish under a pseudonym and to stop publication under a pseudonym); and moral rights that are coextensive with economic rights. \(^{130}\) Most significant, Article 6bis applies to all works of art produced by an author as opposed to a limited class of "visual art." \(^{131}\)

2. Initial Efforts to Introduce a Federal Droit de Suite in the United States

Although the United States has enacted federal legislation with regard to moral rights, it has yet to do so with regard to droit de suite. The first efforts to introduce a droit de suite in the United States were made as early as 1940 by individual artists,
writers, and lawyers who pressed for a resale right through unions, art journals, or private contracts for sales of art works.\textsuperscript{132} Proposals for bringing the droit de suite to the United States were made in two seminal law review articles published in the early 1960s.\textsuperscript{133} It was not until 1973, however, that the idea of a resale royalty became well-known.\textsuperscript{134} The widely reported confrontation between painter Robert Rauschenberg and art dealer Robert Scull brought the issue to the public's attention.\textsuperscript{135} At a New York auction, Rauschenberg became incensed when Scull received an enormous profit on the resale of the artist's painting, "Thaw."\textsuperscript{136} Within five years of that incident, Congress and the Ohio and California legislatures considered the first resale royalty bills.\textsuperscript{137}

Unsuccessful efforts to amend the Copyright Act of 1976 to include droit de suite have been made in both houses of Congress periodically since the late 1970s.\textsuperscript{138} Representative Henry Waxman of California introduced the Visual Artists Residual Rights Act of 1978, which called for a seven percent royalty of the gross sales price of works sold in interstate or foreign commerce whenever the sale price was 150% over the purchase price.\textsuperscript{139} In 1986 and 1987, Senator Edward Kennedy and Representative Edward Markey introduced a bill proposing the Visual Artists Rights Act.\textsuperscript{140} The bill, which was aimed primarily at guaranteeing visual artists the basic moral rights protections contained in Article 6bis of the Berne Convention (attribution and integrity rights),\textsuperscript{141} also provided for the payment of a royalty of seven percent from the resale profit whenever the sale price of a work of fine art was 150% above the purchase price.\textsuperscript{142} Due to opposition from art dealers, gallery owners, auction houses, and others, the resale royalty provision was dropped when the bill was reintroduced in 1989.\textsuperscript{143} Instead, the Copyright Office was required to study various ways visual artists could share in the increased value of their work, including a resale royalty.\textsuperscript{144} When VARA was ultimately passed in 1990, the

\begin{thebibliography}{144}
\bibitem{132} Copyright Office Report, supra note 15, at 383.
\bibitem{134} Eden, supra note 72, at 127.
\bibitem{135} Id.
\bibitem{136} Id. Scull had purchased the painting from Rauschenberg for $1,000 and resold it for $85,000. Copyright Office Report, supra note 15, at 383.
\bibitem{137} Reddy, supra note 16, at 521.
\bibitem{138} Id. at 524.
\bibitem{139} Id. at 525.
\bibitem{140} Id.
\bibitem{141} Berne Convention, supra note 11, at art. 6bis.
\bibitem{142} Reddy, supra note 16, at 525.
\bibitem{143} Id. A likely reason why these art sellers opposed the resale royalty provision is that without a collection agency in place to locate artists and to distribute the royalty, the burden to do so would be placed directly on the seller. Telephone Interview with George Bingham, General Counsel, The Peters Corp., in Santa Fe, NM (Feb. 14, 2006). The seller would include the royalty in the resale price paid by the buyer and then forward the royalty amount to the artist. Id. The resulting additional paperwork would be time-consuming and would incur additional expenses for the gallery or auction house. Id. These expenses would have to be compensated in some manner.
\bibitem{144} Reddy, supra note 16, at 525.
\end{thebibliography}
requirement for a study on the practicability of enacting droit de suite in the United States was retained.\textsuperscript{145}

3. Copyright Office Report on Droit de Suite: The Decision to Forego Enactment of a Federal Resale Royalty Law in the United States

The Visual Artists Rights Act required the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art.\textsuperscript{146} Accordingly, on December 1, 1992, the Register of Copyrights released to Congress its 400-page, two-volume report on the artist's resale royalty.\textsuperscript{147}

The Copyright Office ultimately advised Congress not to adopt the droit de suite.\textsuperscript{148} Based on its analysis of the foreign and California experiences with droit de suite, the administrative record, and independent research, the Copyright Office found that sufficient economic and copyright policy justifications did not exist to establish a resale royalty in the United States.\textsuperscript{149} There was "insufficient empirical data to accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique copies."\textsuperscript{150} Moreover, no clear evidence existed to indicate the frequency for resale works of fine art.\textsuperscript{151} Thus, even if Congress had determined that the Copyright Act treats visual artists less favorably

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{COPYRIGHT OFFICE REPORT, supra note 15, at 381.}
\textsuperscript{147} Reddy, \textit{supra} note 16, at 525. The report was divided into five parts, an Appendix volume, and an executive summary.

Part I provides an overview of the history and evolution of the resale royalty in specific nations like France, Belgium, Germany, Uruguay, and Czechoslovakia, as well as efforts to enact droit de suite legislation internationally. Part II reviews the American experience with resale royalties with a special focus on both the California law and the various failed attempts to enact a Federal Resale Royalty. Part III contains the Copyright Office's analysis of the testimony given at hearings in New York and San Francisco and of the written comments that were submitted.

\textit{Id.} In particular, the Copyright Office sought comment from artists, dealers, auction houses, investment advisors, fine art collectors, and art museum curators. Berne Convention, \textit{supra} note 11, at 381.

Part IV examines the various arguments made by the proponents and opponents of the droit de suite. Part V explains the conclusions and recommendations of the Copyright Office regarding the artist's resale royalty. The Appendix [of the report] contains copies of the comment letters and transcripts of the hearings analyzed in Part III.

Reddy, \textit{supra} note 16, at 525-26. The Copyright Office concluded the report by providing a model resale royalty system for Congress to use if it later decided to amend the 1976 Copyright Act. \textit{COPYRIGHT OFFICE REPORT, supra} note 15.

\textsuperscript{148} \textit{COPYRIGHT OFFICE REPORT, supra note 15, at 390.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} The Copyright Office considered the argument that the resale royalty is justified by the difference in copyright's treatment of fine visual artists, on the one hand, and authors and composers on the other. \textit{Id.} at 386. Proponents of the droit de suite argued that the principle benefit of copyright is to authors who exploit multiple copies of works through either reproduction or performance, yet artists cannot fully avail themselves of these economic rights since they create in unique or limited copies and their principal means of exploiting their intellectual property rights is through the sale of their works or public display (subject to the first sale doctrine). \textit{Id.} at 386-87. Opponents of the droit de suite argued that the comparison is inapposite. \textit{Id.} at 387. Although authors who create numerous copies can reap the benefits of multiple exploitations of their works, they also have to sell a large number of copies because they make such a small royalty on each copy. \textit{Id.}
\textsuperscript{151} \textit{Id.}
than authors or composers, it was not clear to the Copyright Office that the resale royalty would be the best means to offset this disadvantage.\footnote{152}

While the Copyright Office Report stressed the lack of conclusive empirical evidence, it nevertheless expressed concern regarding a number of arguments made against the droit de suite.\footnote{153} The Copyright Office recognized that the notion of an encumbrance attaching to an object that has been freely purchased is antithetical to the common-law tradition of free alienability of property.\footnote{154} Other deterrents included the fact that the royalty raises privacy concerns with art transactions, the royalty may have an adverse effect on the existing market for fine art, the administration of the right is problematic, the royalty may benefit too few artists, and the royalty may be unfounded due to the existence of factors other than the continuing efforts of the artist that raise the value of the work.\footnote{155} These arguments against droit de suite have been vigorously refuted by art scholars and other members of the art world.\footnote{156}

Although the Copyright Office recommended against federal enactment of droit de suite legislation, the report itself is not definitive because it was based solely on the non-exhaustive evidence that was gathered by the Copyright Office during a

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\footnote{152}{Id. The Copyright Office noted that a broader public display right, a commercial rental right, compulsory licensing, or federal grants and funding for art in federal buildings were alternative means by which to offset the disadvantage. Id. at 390–91.}

\footnote{153}{Id. at 387–88.}

\footnote{154}{Id. at 387.}

\footnote{155}{Id. at 387–88.}

\footnote{156}{See Eden, supra note 72; Reddy, supra note 16; Carol Sky, Report of the Register of Copyrights Concerning Droit de Suite, the Artist’s Resale Royalty: A Response, 40 J. COPYRIGHT SOC’Y U.S. 315 (1992). In response to the argument that the droit de suite is an encumbrance that interferes with the free alienability of property, the National Artists Equity Association pointed to the fact that there is a long tradition of real estate encumbrances in the United States such as deed restrictions and zoning laws. Sky, supra, at 320.}

Regarding collector privacy, proponents of the droit de suite argue that France and Germany automatically inform the artist and/or the registry of name, address, and selling price of all sales, hence privacy is not a real issue. Id. Furthermore, a number of galleries in the United States already follow this practice. Id.

Those in favor of a droit de suite also reject the assertion that the primary art market would experience a sharp decline in price due to the resale royalty right. Id. at 319; see also Eden, supra note 72, at 149–50. While opponents argue that buyers will take into account a possible resale royalty fee and therefore pay less for the art in the primary market, research indicates the opposite. Id. at 149. France, Germany, and Belgium, which have had a droit de suite longer than any other country and therefore have the most experience with resale royalties, have reported a steady increase in resale royalties and no decrease in the price of first sales due to the resale royalty. Id. Similarly, in a 1986 California Bay Area Lawyers for the Arts study of the California art market, all responding art dealers said the state resale royalty had not significantly affected their sales. Id. at 150. In practice, the resale royalty has been absorbed into the art market without significant effect. Id.

Advocates of the droit de suite also dismiss administration concerns by arguing that a royalty on the direct sale of an art object would be far less challenging to collect than a royalty for music played on the radio, which has been accomplished in the United States for many years. Sky, supra, at 321. Finally, individuals in support of a federal droit de suite counter the argument that too few artists would benefit by pointing to the lack of empirical evidence in the United States to support this assertion. Id. Moreover, the French experience has not proven so narrowly beneficial. The French collection agency for auction sales, ADAGP, gathered $10.5 million in resale royalties in 1990 on behalf of 1,650 artists. Id. The estimate from these figures indicated that 1,600 artists shared approximately eight million dollars, while only fifty artists received over $40,000 each. These figures demonstrate that the majority of artists to benefit will not be the most wealthy. Id. Even if the resale royalty were to benefit primarily wealthy, popular artists, proponents argue that this result would not render the royalty ineffective. Eden, supra note 72, at 147. This is so because the royalty is not intended as welfare legislation; rather, the resale royalty right for an artist is similar to royalty rights for an author under copyright law: the royalty is intended to reward successful authors and to create incentive for less successful authors. Id.
limited period of time. Moreover, the report suggested that Congress might reconsider the merits of droit de suite should the European Community decide to harmonize its existing droit de suite laws, and particularly if the European Community elects to extend the royalty to all its member states.


The Copyright Office Report described developments that might prompt reconsideration of a federal droit de suite in the United States, and these developments recently took place. In 2001, the European Union passed a directive requiring member countries to implement a droit de suite on the resale of art. The directive lays down a common system of droit de suite with a uniform scale of charges throughout the European Union. The Council of the European Union, an institution of the European Union, found that the absence of the levy in some European Union countries, its presence in others, and the varying ways in which it operates unfairly distorted the European Union art market. Under the rules of the European internal market, the Council considered it necessary to eradicate such distortions of free competition. In its prefatory statement, the Council stated that “the Treaty [establishing the European Community] provides for the establishment of an internal market...and for a system of ensuring the competition in the common market is not distorted. Harmonisation of Member States’ laws on the resale right contributes to the attainment of these objectives.”

The deadline for the implementation of the directive was January 1, 2006. The European Union, however, decided to give an extension to countries that did not

158. COPYRIGHT OFFICE REPORT, supra note 15, at 390.
159. Council Directive 2001/84 of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32 [hereinafter Council Directive]. Note that the Council of the European Union issues directives on the recommendation of the European Commission and the European Parliament. These three institutions comprise the European Community, one of the three pillars forming the European Union. Since directives serve as one type of European Union legislation, they may be referred to as European Union directives despite the fact that, technically, they are the product of the European Community and its three main institutions.
160. Pierre Valentin, Keeping Up with Art and Cultural Assets, WITHERS NEWSL. (Withers, London, United Kingdom), Summer 2005. Key terms set forth by the directive are as follows: The right, which is inalienable and cannot be waived, is for the benefit of the author of an “original work of art.” Council Directive, supra note 159, at 34. Such works are defined as “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.” Id. at 35. The royalty is based on the sale price obtained for any resale of the work, subsequent to the first transfer. Id. at 34. It applies to all acts of resale involving sellers who are intermediary art market professionals (in other words, any dealers in works of art). Id. Each member state may set a minimum sale price but that price may not exceed EUR 10,000. Id. at 35. The royalty is set at a prescribed rate scale. Id. The royalty is payable to the seller by the author of the work and, after his or her death, to those entitled under him or her. Id. at 35. The term of protection corresponds to copyright protection. Id.
161. Valentin, supra note 160.
162. Id.
164. Id. at 36.
have any droit de suite legislation prior to the directive.\textsuperscript{165} The deadline for these countries, which include the United Kingdom, is January 1, 2010.\textsuperscript{166} Even then, the member state may be able to obtain a further extension of two years, provided it can offer the European Union a persuasive reason for the extension.\textsuperscript{167} It is, therefore, possible for the United Kingdom to delay the implementation of the droit de suite for over a decade.\textsuperscript{168}

Beyond requiring its European Union member states to implement droit de suite legislation based on the common terms set forth in the directive, the Council also expressed an interest in extending such harmonization to member states of the Berne Convention.\textsuperscript{169} The Council stated that “[t]he process of internalization of the Community market in modern and contemporary art...makes it essential for the European Community, in the external sphere, to open negotiations with a view to making article 14b [the droit de suite provision] of the Berne Convention compulsory.”\textsuperscript{170}

Although such an amendment to the Berne Convention has not occurred thus far, the convention has already significantly affected federal legislation in the United States. As discussed above, the Berne Convention led to the enactment of a federal moral rights law\textsuperscript{171} and to the consideration of a federal resale royalty rights law. Despite the Copyright Office’s recommendation to forego enactment of a federal droit de suite, the European Union directive will likely result in further consideration of this particular right by the United States, even without a mandate to do so resulting from an amendment to article 14b of the Berne Convention.\textsuperscript{172}

E. State Economic and Moral Rights: A Separate Body of Legislation That Coexists with Federal Law

In conjunction with national as well as international advances in moral rights and droit de suite legislation, the law governing these rights also developed on the state level.

1. State Droit de Suite Legislation

California became the first state to adopt droit de suite legislation when it enacted its resale royalty law in 1976, which went into effect on January 1, 1977, and subsequently was amended in 1982.\textsuperscript{173} Since the California Resale Royalties Act

\begin{flushleft}
\textsuperscript{165} Id. at 35.  \\
\textsuperscript{166} Id.  \\
\textsuperscript{167} Id.  \\
\textsuperscript{168} In the past, British governments considered and rejected droit de suite on several occasions, most notably when the Whitford Committee on Copyright examined it in 1977. Valentin, supra note 160. The Committee concluded that the droit de suite was impractical and that it should not be introduced in English law. Id. Given its dislike for the royalty, it is not unlikely that the United Kingdom will capitalize on the twelve-year grace period provided by the directive. Id.  \\
\textsuperscript{169} Council Directive, supra note 159, at 32.  \\
\textsuperscript{170} Id.  \\
\textsuperscript{171} See supra Parts II.C, II.D.1–2.  \\
\textsuperscript{172} See infra notes 310–314 and accompanying text.  \\
\textsuperscript{173} MERRYMAN & ELSEN, supra note 12, at 232.
\end{flushleft}
(CRRA) has been in place for thirty years, it has been a primary source for analysis concerning the operation of the resale royalty right in the United States. 174

The California law requires the seller of any work of "fine art" sold for more than $1,000 to withhold five percent of the resale price for the benefit of the artist, provided that the resale price is greater than the original purchase price. 175 Fine art is defined as "an original painting, sculpture or drawing, or an original work of art in glass." 176 The law applies when a work is resold in California or resold elsewhere by a California resident. 177 In addition, at the time of resale, the artist must be a resident of California for two years or a U.S. citizen. 178

Although the artist cannot waive the right to receive royalties, he or she may assign the right to collect them. 179 If the seller cannot locate and pay the artist or the assignee within ninety days, then the royalty must be transferred to the California Arts Council, which must in turn attempt to locate and pay the artist. 180 If, after seven years, the council has not been able to locate the artist, it may use the money to acquire fine art for public buildings. 181 To collect an unpaid royalty, the artist must bring an action for damages within three years of the resale or within one year of receiving actual notice of it, whichever is later. 182 The royalty lasts for the artist's lifetime plus twenty years. 183

The California resale royalty has withstood one judicial challenge. 184 In Morseburg v. Balyon, an art dealer brought an action challenging the constitutionality of CRRA and asserting that the Copyright Act of 1909 preempted the legislation. 185 The Ninth Circuit Court of Appeals held that CRRA was not preempted by the 1909 Copyright Act, that CRRA did not violate Due Process, and that it did not violate the Contracts Clause. 186 There are serious doubts, however, about whether the California resale royalty statute could withstand the same kind of scrutiny under the current copyright law, which contains an amended, more explicit preemption clause. 187 To this end, the 1992 Copyright Office Report on droit de suite stated:

Any state resale royalty scheme may be preempted under section 301 of the 1976 Act because it inhibits the section 106 distribution right as modified by the section 109 "first sale" doctrine (which allows the owner of a lawfully-made copy, including an original, to dispose of the copy as he or she pleases). 188

175. CAL. CIV. CODE § 986 (West 1994).
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id. At this time the artist's resale right terminates. Id.
182. Id.
183. Id.
184. Eden, supra note 72, at 129; see Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980).
185. Morseburg, 621 F.2d at 975.
186. Id. at 972.
188. COPYRIGHT OFFICE REPORT, supra note 15, at 384.
Furthermore, while the CRRA was upheld with regard to Due Process and the Contracts Clause of the U.S. Constitution,\textsuperscript{189} impermissible interference with interstate commerce is another potential ground for constitutional attack that has not been the subject of judicial review.\textsuperscript{190}

Beyond its legal viability, CRRA has received criticism regarding its operation. Such criticism includes the law's application to sales outside California; treating the difference between purchase price and the resale price as "profit" with no recognition of commission, expenses, or inflation; giving the artist five percent of the gross resale rather than a percentage of a profit, if any, on the resale; and application to the resale of works acquired before enactment of the law.\textsuperscript{191} Conclusions as to the law's practical value are more varied. One scholar observed in 1987 that the statute "appears to have had little impact on the activities of most museums, dealers, and collectors and seems to have generated little additional income for artists."\textsuperscript{192} Similarly, the Copyright Office Report of 1992 stated that "the law is widely criticized as underused and under enforced."\textsuperscript{193} By contrast, art advocates, as well as studies commissioned by Bay Area Lawyers for the Arts (BALA), show that many California artists have received significant royalty payments.\textsuperscript{194}

Since 1976, two additional jurisdictions in the United States have enacted resale royalty provisions.\textsuperscript{195} First, the state of Georgia recognizes the droit de suite as part of its "Art-in-State-Buildings Program," under which the state agrees to pay a royalty upon the resale of any art purchased with public funds other than as part of the sale of a building.\textsuperscript{196} Second, the Commonwealth of Puerto Rico passed a comprehensive moral rights law in 1988 that includes a requirement that sellers must pay a five percent royalty to the artist from the profit realized on the resale of a work.\textsuperscript{197}

2. State Moral Rights Legislation

Whereas only a few states have enacted droit de suite legislation, a greater number have adopted moral rights laws. Prior to VARA, several states enacted legislation to protect, to varying degrees, artists' moral rights.\textsuperscript{198} Statutes in

\begin{itemize}
  \item\textsuperscript{189} Morseburg, 621 F.2d at 975.
  \item\textsuperscript{190} MERRYMAN \& ELSEN, supra note 12, at 233.
  \item\textsuperscript{191} Id.
  \item\textsuperscript{192} Id. at 238.
  \item\textsuperscript{193} COPYRIGHT OFFICE REPORT, supra note 15, at 384.
  \item\textsuperscript{194} Reddy, supra note 16, at 524.
  \item\textsuperscript{195} Id.
  \item\textsuperscript{196} GA. CODE ANN. § 8-5-7 (1991).
  \item\textsuperscript{197} 31 P.R. LAWS ANN. § 1401(h) (1991).
  \item\textsuperscript{198} U.S. COPYRIGHT OFF., LIBRARY OF CONG., WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (Dec. 1, 1992), available at http://www.copyright.gov/reports/exsum.html [hereinafter WAIVER OF MORAL RIGHTS].
\end{itemize}
California, Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island all restrict uses of works of fine art in altered or mutilated forms and grant authors a right of attribution. Louisiana, Maine, New Jersey, New York, and Rhode Island exclude from the integrity right the destruction of a work of art. Other state statutes such as those of Georgia, and Montana, grant certain protections to artists who create works on commission for state sponsored programs. New Mexico enacted legislation after VARA to protect against alteration or destruction and to ensure proper attribution, but the law applies only to works publicly displayed in state buildings.


Although New Mexico has not enacted droit de suite legislation, it is one of ten states to adopt moral rights protection. In 1995, New Mexico enacted the Fine Art in Public Buildings Act (FAPBA). The Findings section of the statute sets out broad recognition of moral rights principles:

The legislature finds that the physical alteration or destruction of fine art, which is an expression of the personality of the artist, is detrimental to the reputation of the artist and artists therefore have an interest in protecting their works of fine art against such alteration or destruction. The legislature also finds that there is a public interest in preserving the integrity of cultural and artistic creations.

Furthermore, FAPBA offers protection to a more extensive class of works than that prescribed by VARA. Whereas VARA covers "visual art" only (paintings, drawings, prints, sculptures, and certain photographs), the New Mexico law applies to "fine art," which it defines as "any original work of visual or graphic art of any media including any painting, drawing, sculpture, craft, object, photograph, audio or

199. CAL. CIV. CODE § 987 (West 1994).
206. 73 PA. STAT. ANN. §§ 2101-2110 (West 1986).
208. ART LAW HANDBOOK, supra note 42, at 58.
213. ART LAW HANDBOOK, supra note 42, at 58.
214. NMSA 1978, §§ 13-4B-1 to -3 (1995); see also U.S. WAIVER OF MORAL RIGHTS, supra note 198. Based on the limited applicability of the right of attribution and integrity provided in the New Mexico law, some scholars have expressly omitted New Mexico from the group of states that protect moral rights. LANDES & POSNER, supra note 209, at 270.
216. id. § 13-4B-1.
visual tape, film, hologram or any combination of such media of recognized quality.\textsuperscript{218} The scope of FAPBA is limited, nevertheless, because it grants artists the right of integrity and the right of attribution only with respect to fine art in public buildings, a restriction not imposed by VARA or by other state moral rights statutes.\textsuperscript{219}

With regard to integrity, the New Mexico law prohibits the intentional commission of any physical defacement, mutilation, alteration or destruction of a work of fine art in public view (on the exterior of a public building or in an interior area of a public building).\textsuperscript{220} The attribution right provided by the statute allows the artist to "claim and receive credit under his own name or under a reasonable pseudonym or, for just and valid reason, to disclaim authorship of his work of fine art."\textsuperscript{221} These rights endure for the artist's lifetime plus fifty years.\textsuperscript{222} After the artist is deceased, the attorney general may assert the rights of the artist on the artist's behalf and commence an action for injunctive relief with respect to any work of art in public view.\textsuperscript{223}

The central focus of FAPBA protection pertains to the removal of fine art from public buildings.\textsuperscript{224} The New Mexico law provides that, if the fine art in public view cannot be removed from a building without substantial physical defacement, the artist's moral rights are deemed waived unless they were expressly reserved in writing.\textsuperscript{225} If, however, the removal of a work of fine art from a public building can be accomplished without substantial harm to the work of art, the owner of the building must give the artist ninety-days notice so as to provide the artist an opportunity to remove the work himself or to pay for its removal.\textsuperscript{226} Under such circumstances, the artist may waive his or her moral rights in a written, signed document.\textsuperscript{227}

Since FAPBA proscribes moral rights to the public buildings context only,\textsuperscript{228} the New Mexico moral rights statute provides narrower protection than that provided by other state moral rights legislation.\textsuperscript{229} In addition, as mentioned above, New Mexico has no resale royalty rights legislation. While current New Mexico law with respect to moral and resale royalty rights is limited, New Mexico artists, nevertheless, receive protection from the federal moral rights law, VARA.\textsuperscript{230} Furthermore, should the United States implement a federal resale royalty rights law, New Mexico artists would also receive protection from this law.

\begin{thebibliography}{9}
\bibitem{218} NMSA 1978, § 13-4B-2.
\bibitem{219} Id. §§ 13-4B-2 to -3. The Act defines "public building" as a building owned by the state or any of its branches, agencies, departments, boards, instrumentalities or institutions. Id.
\bibitem{220} Id. § 13-4B-2.
\bibitem{221} Id.
\bibitem{222} Id.
\bibitem{223} Id. This provision implicitly recognizes the public interest in maintaining cultural property that runs concurrent to the artist's personal interest in his work. See supra note 38 and accompanying text.
\bibitem{224} See NMSA 1978, § 13-4B-3.
\bibitem{225} Id.
\bibitem{226} Id.
\bibitem{227} Id.
\bibitem{228} Id.
\bibitem{229} See supra note 214 and accompanying text.
\end{thebibliography}
III. ANALYSIS

The intellectual property rights of New Mexico artists must be viewed in light of the interrelation between federal and state laws. Preemption analysis of federal moral and resale royalty rights indicates the areas of protection New Mexico may choose to pursue. While federal law may preempt state law, those areas that are not included within federal law and are therefore not preempted by it are open to state legislation. This analysis examines federal moral and resale royalty rights in relation to New Mexico law in order to identify how New Mexico might expand its legislation to protect resident artists and foster its art market.

A. Preemption Generally

Under the Supremacy Clause of the U.S. Constitution, the laws of the United States are "the supreme Laws of the land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Accordingly, when a state law conflicts with a federal statute, the federal law preempts the state law. Nevertheless, a federal statute must contain a clear indication that Congress intended the federal law to take precedence in order for preemption of a state law to occur. Congress can reveal its intention to preempt state laws either explicitly or implicitly. Preemption law has, therefore, evolved into two distinct, but nonexclusive, analyses by which courts will decide the validity of state laws.

First, express preemption occurs when Congress has written a preemption clause into the federal statute and the contested state law falls within the scope of that clause. The Copyright Act of 1976, for example, contains a preemption clause that precludes state laws providing rights that are equivalent to those contained in the federal statute. The "extra element" test is the prevailing test for determining whether a state-created right is equivalent to the federal right. Accordingly, state moral and resale royalty rights laws that add additional rights may escape preemption.

Second, implied preemption occurs when the federal statute contains no preemption clause, or when the express language of a preemption clause does not encompass the state law at issue, but preemption can be inferred. Implied preemption may take two forms. Conflict preemption arises when the state law conflicts with the federal statute either by rendering compliance with both laws
impossible or by frustrating the congressional purposes of the federal statute. Field preemption is found by inferring from extensive federal regulation of an area that Congress intended to occupy that field fully, leaving no room for the states to supplement the regulation.

The categories of preemption analysis are not exclusive. Thus, preemption may result from both express and implied indicia of congressional intent that a federal statute shall preempt state law.

B. Preemption of New Mexico Moral Rights Law

The New Mexico moral rights law, embodied in the Fine Art in Public Buildings Act of 1995, has not yet been the subject of a preemption challenge. This absence of judicial review, however, by no means indicates that the state law is immune from preemption. To the contrary, the Copyright Act of 1976 specifically states that federal law preempts the field for items within its scope, thus eliminating common-law copyright, and VARA, which is codified as part of the Copyright Act, enjoys the same preemptive effect. In other words, the preemption clause of the Copyright Act provides express preemption of both state copyright legislation and state moral rights laws. With regard to moral rights, section 301 of the Copyright Act, which extends to VARA, states that "all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art...are governed exclusively by section 106A with respect to works of visual art...are governed exclusively by section 106A and section 113(d)." Accordingly, VARA preempts state moral rights laws to the extent that the state laws provide equivalent rights of integrity and attribution to those provided under VARA.

Congress noted in the legislative history of VARA that the federal statute preempts state law if two conditions are met: (1) the works in which rights are sought to be vindicated under state law must fall within the subject matter of copyright as specified in 17 U.S.C. sections 102 and 103 and (2) the right is the same or "equivalent" to those granted by VARA. These two conditions offer guidance as to how to apply the preemption language in the federal statute. Based on this express preemption, it is probable that most of the New Mexico moral rights law would be found invalid.

The Fine Art in Public Buildings Act protects "fine art" which, in large part, satisfies the first VARA preemption condition regarding subject matter. New Mexico defines "fine art" as "any original work of visual or graphic art of any media
including any painting, print, drawing, sculpture, craft, object, photograph, audio or visual tape, film, hologram or any combination of such media of recognized quality.\textsuperscript{253} Since crafts and holograms are not included within the definition of copyrightable material set forth in sections 102 and 103 of the Copyright Act,\textsuperscript{254} the moral rights protection granted artists with respect to these types of works is not preempted by VARA.

Furthermore, it is possible that works of "fine art" that qualify as copyrightable but not as "visual art" may also escape preemption. Although legislative history suggests that only those works that fall outside the scope of copyrightable material may escape preemption,\textsuperscript{255} the language of the preemption clause itself suggests that those works that fall outside the scope of works covered by VARA, a significantly narrower category, may also escape preemption.\textsuperscript{256} The preemption provision pertains to all "rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art."\textsuperscript{257} Until this preemption language is amended to state more explicitly the congressional intent revealed by legislative history, one can make a strong argument for finding that state moral rights involving works of art not included within VARA protection are not preempted by federal moral rights.\textsuperscript{258}

This approach to the first element of VARA preemption would allow New Mexico artists to receive state moral rights protection for a broader range of subject matter.\textsuperscript{259} Since VARA defines a "work of visual art" as a "painting, drawing, print, sculpture, or photograph produced solely for museum purposes, that exists in a single copy or limited edition,"\textsuperscript{260} New Mexico moral rights law with regard to crafts, audio or visual tapes, films, and holograms would not be invalidated by the first VARA preemption condition.\textsuperscript{261} The rationale is that when a state statute provides additional rights, such as the more expansive definition of protected works in the New Mexico statute, the additional protections are not preempted by VARA.\textsuperscript{262} Based on this approach, moral rights concerning any painting, printing, drawing, sculpture or limited edition photograph would still arise from federal law only.\textsuperscript{263}

With regard to the second VARA preemption condition, "equivalent" rights, the Fine Art in Public Buildings Act grants artists the rights of attribution and integrity for "fine art" in public buildings.\textsuperscript{264} These rights are a limited equivalent to those provided under VARA since the federal statute provides the rights of attribution and

\textsuperscript{253} NMSA 1978, § 13-4B-2.
\textsuperscript{254} 17 U.S.C. §§ 102-03.
\textsuperscript{255} Soho Int'l Arts Condo., 2003 WL 21403333, at *12.
\textsuperscript{256} 17 U.S.C. § 301(f).
\textsuperscript{257} Id. (emphasis added).
\textsuperscript{258} DUBOFF ET AL., supra note 58, at 350.
\textsuperscript{259} See id. at 350; Sirota, supra note 130, at 479.
\textsuperscript{260} 17 U.S.C. § 101.
\textsuperscript{261} See supra note 250 and accompanying text.
\textsuperscript{262} DUBOFF ET AL., supra note 58, at 350; see also Sirota, supra note 130, at 479.
\textsuperscript{264} NMSA 1978, § 13-4B-3.
integrity without restricting these rights to a public buildings context.\textsuperscript{265} The holding in \textit{Board of Managers of Soho International Arts Condominium v. City of New York}\textsuperscript{266} is instructive on this point because, like New Mexico, the language describing the rights of attribution and integrity set forth in New York’s moral rights statute is largely equivalent to that in VARA.\textsuperscript{267} The court held that VARA preempted New York’s moral rights statute, the Artists’s Authorship Rights Act, because both statutes were “equivalent” given their nearly identical provisions regarding attribution and integrity rights.\textsuperscript{268} Since the provisions in the New Mexico statute that define attribution and integrity likewise closely resemble those in VARA,\textsuperscript{269} the New York court’s decision suggests that New Mexico attribution and integrity rights involving works of “fine art” that fall within the scope of “visual art” would be preempted by VARA.\textsuperscript{270} The state-created attribution and integrity rights would not be preempted, however, for works of “fine art” that fall outside the scope of “visual art.”\textsuperscript{271}

Since the VARA preemption analysis indicates that New Mexico moral rights involving “fine art” that is not “visual art” are not subject to preemption,\textsuperscript{272} it is worth considering the viability of other provisions in the Fine Art in Public Buildings Act with respect to these rights (in other words, attribution and integrity rights concerning crafts, audio or visual tapes, films, and holograms).\textsuperscript{273} The New Mexico statute provides, for example, that after the artist is deceased, the attorney

\textsuperscript{265} \textit{Compare id.}, with 17 U.S.C. § 106A.

\textsuperscript{266} No. 01 Civ.1226 DAB, 2003 WL 21403333, at *12 (S.D.N.Y. July 29, 2003).

\textsuperscript{267} \textit{Compare N.Y. ARTS & CULT. AFF. LAW} § 14.03 (McKinney 1983), with 17 U.S.C. § 106A. \textit{See also supra} note 265 and accompanying text.

\textsuperscript{268} \textit{Soho Int’l Arts Condo.}, 2003 WL 21403333, at *15.

\textsuperscript{269} There are two aspects of the New Mexico provisions regarding attribution and integrity rights that are arguably different from those in VARA, yet these differences do not significantly detract from the equivalence of the two statutes and therefore do not overcome preemption. First, whereas the VARA integrity right provision states that an artist may prevent destruction of a work of recognized stature, the New Mexico integrity right provision states that an artist may prevent destruction of a work but omits the “of recognized stature” caveat. \textit{Compare 17 U.S.C. § 106A(3)(B), with NMSA 1978, § 13-4B-3(A) (1995).} The New Mexico statute defines “fine art,” however, as “of recognized quality,” which is essentially the same as “of recognized stature.” The caveat regarding destruction is therefore built into the New Mexico statute in a separate section. \textit{See id.} § 13-4B-2(B).

Second, whereas the VARA integrity right provision conditions protection upon prejudice to the artist’s honor or reputation, the New Mexico integrity right provision does not include this condition. The court in \textit{Soho International Arts Condominium}, 2003 WL 21403333, at *13, addressed this issue and stated that [VARA] will preempt a State law granting the right of integrity in paintings or sculpture, even if the State law is broader than the Federal law, such as providing a right of attribution or integrity with respect to covered works without regard to injury to the author’s honor or reputation.

It is worth noting that, according to this view, a state moral rights law that is broader than VARA by virtue of omission is, nevertheless, preempted, \textit{id.}, but a state moral rights law that is broader than VARA by virtue of addition (for example, broader subject matter) is not necessarily preempted. \textit{See infra} note 296 and accompanying text.

\textsuperscript{270} The attribution and integrity provisions in the New Mexico statute not only closely resemble those in VARA, but also those in the New York statute. \textit{Compare NMSA 1978, §§ 13-4B-3(A)-(B) (1995), with N.Y. ARTS & CULT. AFF. LAW} § 14.03 (McKinney 1983). This similarity adds additional support to the likelihood that, as with New York, New Mexico attribution rights involving works of “fine art” that are not “visual art” would be preempted by VARA.

\textsuperscript{271} \textit{Compare 17 U.S.C. §§ 101, 106A, 301(f), with NMSA 1978, §§ 13-4B-2 to -3.} \textit{See also supra} notes 250, 255–262 and accompanying text.

\textsuperscript{272} \textit{Id.}

\textsuperscript{273} \textit{See generally NMSA 1978, §§ 13-4B-2 to -3.}
general may assert the rights of the artist on the artist’s behalf and commence an
action for injunctive relief with respect to any work of art in public view. Because
this state provision constitutes an addition to the rights of attribution and integrity
defined in the federal statute, it is unlikely that VARA would preempt this provision
when it is applied to works of “fine art” that are not “visual art.” It is less clear,
however, whether the attorney general would encounter a preemption issue by
enforcing an artist’s moral rights in works of “fine art” that are included within
VARA protection as “works of visual art.”

As opposed to the provision that allows enforcement by the attorney general, the
two provisions in the New Mexico statute that pertain to removal of fine art from
public buildings do not provide additional rights. Rather, the provision regarding
removal that is possible without damage or destruction to the work of art is nearly
identical to its VARA counterpart, and the provision regarding removal that
would cause damage or destruction to the work of art presents a direct conflict with
its VARA counterpart. Regardless of equivalence or conflict, however, VARA
preemption analysis indicates that New Mexico moral rights law involving works
outside the scope of VARA protection is subject to neither express nor implied
preemption. Hence, with regard to “fine art” that is not “visual art,” the New
Mexico provision that reduces an artist’s moral rights in favor of a building owner’s
rights is not subject to implied conflict preemption even though it is contrary to the
VARA provision on this matter. Under VARA, if a work of visual art cannot be
removed from a building without damaging or destroying the work, the artist retains
moral rights in the work unless the artist has waived those rights in a written
instrument. By contrast, under similar circumstances in New Mexico, an artist’s
rights are deemed waived unless expressly reserved in a written document.

Given the likely outcome of a VARA preemption challenge, New Mexico may
wish to modify its existing moral rights law to capitalize on protecting those areas

274. Id. § 13-4B-3.
275. DUBOFF ET AL., supra note 58, at 350.
276. See 17 U.S.C. §§ 101, 106A. “Fine art” that is “visual art” satisfies the first element of the VARA
preemption analysis concerning subject matter. See supra notes 250, 255–258 and accompanying text. The New
Mexico provision regarding the attorney general, however, is an additional right rather than an equivalent right, and
it therefore does not clearly satisfy the second element of the VARA preemption analysis. See supra notes 240, 250
and accompanying text. Whether the New Mexico provision would be subject to preemption for “fine art” that is
“visual art” depends upon whether a court would be willing to find that the provision qualifies as an “extra element”
in relation to this specific body of art that is reserved for VARA protection. See supra note 240 and accompanying

277. NMSA 1978, §§ 13-4B-3(F)-(G).
278. Id. § 13-4B-3(G); 17 U.S.C. § 113(d)(2).
279. NMSA 1978, § 13-4B-3(F); 17 U.S.C. § 113(d)(1).
280. The New Mexico law concerning these works escapes preemption by the federal law because “fine art”
that is not “visual art” does not meet the first VARA preemption element. See supra notes 250, 250–262 and
accompanying text.
281. Compare NMSA 1978, § 13-4B-3(F) (providing that if a work of fine art cannot be removed from a
building without physical defacement, mutilation, alteration, or destruction of the work, the artist’s rights are
deemed waived unless expressly reserved in a written document), with 17 U.S.C. § 113(d)(1) (providing that if a
work of visual art cannot be removed from a building without destruction, distortion, mutilation, or other
modification of the work, the artist retains moral rights in the work unless the artist has waived those rights in a
written instrument).
283. NMSA 1978, § 13-4B-3(F).
that are not subject to preemption and, therefore, receive no protection under federal law. Since moral rights involving works of "fine art" that are not "visual art" would not be preempted,\textsuperscript{284} New Mexico could further expand the scope of "fine art."\textsuperscript{285} In addition, New Mexico could extend the application of attribution and integrity rights to areas other than public buildings.\textsuperscript{286} Finally, New Mexico might reconsider the provision concerning removal of fine art from a building that would cause damage or destruction to the work.\textsuperscript{287}

\subsection*{C. Preemption of State Resale Royalty Legislation}

Whereas preemption analysis of New Mexico state-created moral rights may offer insight into the viability of the current state law and reasons for modifying this law, preemption analysis of state resale royalty legislation may offer insight into how New Mexico should approach potential enactment of a state-created resale royalty right.

At present, a state law that provides a resale royalty right almost certainly would be preempted by the Copyright Act of 1976.\textsuperscript{288} Although the existing state resale royalty laws remain intact (neither the California law nor the more recent Georgia and Puerto Rico laws have been judicially reviewed for copyright preemption under the current federal statute\textsuperscript{289}), it is unlikely that any of the three laws could withstand a challenge based on section 301, the amended preemption clause of the 1976 Copyright Act.\textsuperscript{290} The 1992 Copyright Office Report on droit de suite affirmed the currently tenuous nature of state resale royalty legislation by concluding that "any state resale royalty scheme may be preempted under section 301 of the 1976 [Copyright] Act because it inhibits the section 106 distribution right as modified by the section 109 'first sale' doctrine."\textsuperscript{291}

The Copyright Office's conclusion follows from the two-part analysis for preemption under the federal copyright act.\textsuperscript{292} This analysis is based on express preemption and derives from the language of section 301 of the Copyright Act, which provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...and come within the subject matter of copyright...are governed exclusively by this title."\textsuperscript{293} Accordingly, copyright preemption comprises two elements: "(1) the work in question must be

\begin{thebibliography}{99}
\bibitem{284} See supra notes 250, 255–262.
\bibitem{285} See NMSA 1978, § 13-4B-2(B).
\bibitem{286} See NMSA 1978, §§ 13-4B-3(A)-(B).
\bibitem{287} The implications of these amendments to New Mexico moral rights law are discussed in Part III.D.1.
\bibitem{288} COPYRIGHT OFFICE REPORT, supra note 15, at 384.
\bibitem{289} GA. CODE ANN. § 8-5-7 (1991); 31 P.R. LAWS ANN. § 1401(h) (1991).
\bibitem{290} See, e.g., Reddy, supra note 16, at 523.
\bibitem{291} COPYRIGHT OFFICE REPORT, supra note 15, at 384. Section 301 of the Copyright Act is a preemption clause that defines the extent to which federal copyright law preempts state law relating to copyright. 17 U.S.C. § 301 (2000). Section 106 of the Copyright Act enumerates the exclusive rights of the copyright owner. \textit{Id.} § 106. The distribution right set forth in section 106(3) of the Copyright Act provides the copyright owner the exclusive right to distribute copies (including the original copy) to the public by sale or other transfer of ownership. \textit{Id.} § 106(3). Section 109 of the Copyright Act modifies this distribution right by allowing the owner of a copy (including the original copy) to sell it without the authority of the copyright owner. \textit{Id.} § 109.
\bibitem{292} See infra note 294 and accompanying text.
\bibitem{293} 17 U.S.C. § 301(a).
\end{thebibliography}
within the subject matter of copyright as defined by 17 U.S.C. sections 102 and 103, and (2) the state law created right must be equivalent to any exclusive copyright rights in 17 U.S.C. section 106. A right that is the "equivalent of copyright" is one that is infringed by an exclusive right of copyright: the act of reproduction, performance, distribution, or display. If the state law provides different rights than are available under the federal copyright law, the state law is not preempted.

Although the two-part copyright preemption analysis appears to be designed to prevent state copyright legislation, the Copyright Office's conclusion explains how the analysis should be extended to include state laws that relate to copyright, such as the resale royalty. To begin with, a resale royalty law pertains to works of art that fall within the broad subject matter set forth in sections 102 and 103 of the Copyright Act. The first element of the analysis therefore does not require modification. The Copyright Office's application of the second element, however, signifies an adaptation of the copyright preemption analysis. According to the plain language of section 301 of the Copyright Act, the resale royalty right is not a right that is the "equivalent of copyright" because none of the exclusive rights of copyright infringe upon the resale royalty right (in other words, reproduction, performance, distribution, or display of a work of art do not impede the artist's ability to collect royalties from the sale of the work of art in the secondary market). Rather, the resale royalty right infringes upon an exclusive right of copyright, the section 106 right of "distribution," as modified by the section 109 "first sale" doctrine. The royalty inhibits the resale of a work of art, which is an aspect of distribution. Under the first sale doctrine, this particular aspect of distribution is a right held by the owner of the work of art, irrespective of whether the owner acquired copyright in the work. Such interference renders the resale royalty right sufficiently "equivalent" to a copyright right and justifies preemption.

Implementation of a federal resale royalty law would require the qualification of the first sale doctrine. Section 109 of the Copyright Act entitles the owner of a work of art to sell the work without having to take into account the rights of the

296. Wojnarowicz, 745 F. Supp. at 135. This component of preemption analysis is referred to as the "extra element test." Id.
297. See supra note 294 and accompanying text.
298. See supra note 291 and accompanying text.
300. See supra note 294 and accompanying text.
301. See 17 U.S.C. § 301 (2000); see also supra note 295 and accompanying text.
303. Id. § 106(3).
304. Id. § 109.
305. An alternate explanation of the conclusion contained in the Copyright Office Report is that the Copyright Office has added implied preemption (based on the conflict between the resale royalty right and the distribution right) to the express preemption analysis under section 301 in order to find that the federal copyright act preempts state resale royalty laws. See supra Part III.A.
306. COPYRIGHT OFFICE REPORT, supra note 15, at 390.
copyright owner. If a resale royalty right is added to the exclusive rights enumerated in section 106 of the Copyright Act, however, this new right would qualify the first sale doctrine in that the owner of a work of art would have to observe the resale royalty right when he sells the work. Section 109 therefore would be modified to reflect the effect of the new right. If such a change occurs, the preemption analysis with regard to state resale royalty legislation will undergo revision.

There is a strong possibility that Congress may indeed enact a federal resale royalty law. In advising against enactment of such a law in 1992, the Copyright Office Report suggested that Congress reconsider enactment if certain international developments involving droit de suite take place. Specifically, the Copyright Office Report stated that, "[s]hould the European Community succeed in harmonizing existing droit de suite laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member states." These developments have taken place. The recent European Union Directive implemented January 1, 2006, requires that its member states harmonize existing droit de suite laws and extends the royalty to all European Union member states.

Given the Copyright Office's recommendation and the recent European Union Directive, Congress will likely consider establishing a federal resale royalty right. Because unification in the art market is essential to its effectiveness for artists, the harmonization of European Union droit de suite legislation presents a compelling reason for the United States to establish a federal resale royalty right. In effect, harmonizing U.S. law with that of the European Union will enable artists to benefit fully from the resale royalty right by reducing negative consequences such as a substantial shift in the market to countries without a resale royalty as well as sham sales. The European Union Directive reflects the European Union's strong interest in accomplishing such increased internationalization of the art market. The directive suggests revision of the Berne Convention to make the droit de suite provision set forth in article 14 mandatory for member states. Accordingly, this nation can further enhance its leadership role in promoting international copyright law by passing legislation that creates, in accordance with article 14 of the Berne Convention, an American version of droit de suite.

308. See supra notes 302–307 and accompanying text.
309. See infra notes 325–328 and accompanying text.
310. See infra notes 311–314 and accompanying text.
311. COPYRIGHT OFFICE REPORT, supra note 15, at 390.
312. Id.
313. See supra Part II.D.4.
315. Eden, supra note 72, at 136.
316. Id.
318. Id.
The Copyright Office Report provided a model droit de suite system for Congress to use if it later decided to amend the 1976 Act to include a resale royalty right. According to this model, administration of the resale royalty would be the responsibility of a private authors’ rights collecting society comparable to ASCAP and BMI. The royalty would apply initially only to public auction sales and would comprise a flat fee of between three and five percent on the total gross sales price of the work. The term of the resale royalty right would be coextensive with copyright and would be applied to foreign artists on the basis of reciprocity. The royalty would apply only to works of visual art as defined in VARA and codified in section 101 of the 1976 Copyright Act.

Although the model droit de suite system presented in the Copyright Office Report did not address preemption, the addition of a resale royalty right to the Copyright Act would likely include an amendment to the section 301 preemption clause. The Copyright Office Report stated that “any droit de suite that is enacted in the United States should be at the federal level.” Moreover, in passing VARA, Congress demonstrated its ability to use section 301 of the Copyright Act to confine copyright and related rights to the federal domain. It did so by adding express language regarding moral rights laws to the section 301 preemption clause.

The enactment of a federal resale royalty right, including the consequent modification to the section 109 first sale doctrine and the likely amendment of the section 301 preemption clause, would have significant implications for state resale royalty legislation. The resulting revision of the preemption analysis regarding droit de suite would enable states to establish laws that expand the rights provided by the federal resale royalty law. Using the VARA preemption provision in

320. COPYRIGHT OFFICE REPORT, supra note 15, at 392. It is clear that a federal resale royalty law would comprise an addition to the Copyright Act since the federal moral rights law (which was considered in conjunction with a federal resale royalty right prior to its enactment) comprises an addition to the Copyright Act. See 17 U.S.C. §§ 101, 106A, 113(d) (2000). These rights are integrally related to copyright and do not constitute a separate corpus of law. Moreover, the fact that the Register of Copyright produced the Copyright Office Report further affirms that Congress views a federal resale royalty right as within U.S. copyright law. See COPYRIGHT OFFICE REPORT, supra note 15.

321. COPYRIGHT OFFICE REPORT, supra note 15, at 392.
322. Id.
323. Id. at 393.
324. Id. at 393–94. Although the terms outlined in the model are consistent with those set forth in the European Union Directive, they are narrower with respect to subject matter and scope of application. Compare COPYRIGHT OFFICE REPORT, supra note 15, with Council Directive, supra note 159. See also supra notes 160, 320–324 and accompanying text. Whereas the U.S. royalty would pertain to a limited category of “works of visual art,” the European Union royalty extends to a broader group of “original works of art,” and while the U.S. royalty would involve auction sales only, the European Union royalty attaches to both auction and gallery sales. COPYRIGHT OFFICE REPORT, supra note 15; Council Directive, supra note 159. Congress may wish to consider these disparities in striving to most effectively harmonize U.S. law with that of the European Union. In 1992, the Copyright Office could not have anticipated the terms of the European Union directive passed in 2001 and may now recommend a model with provisions that more closely resemble those set forth by the European Union.

325. See infra notes 326–328 and accompanying text.
326. COPYRIGHT OFFICE REPORT, supra note 15, at 384.
328. Id.
329. See infra Part II.D.2.
330. One concern regarding implementation of a droit de suite in New Mexico is that the new legislation would cause the art market to move jurisdictions. The California model, however, mitigates this concern. Although
section 301 as a model, one can predict that the first prong of the preemption analysis would remain the same: the work of art would have to fall within the subject matter of copyright. The second prong, however, would change to assess whether the state-created right is equivalent to the federal resale royalty right, just as the VARA preemption analysis assesses whether the state-created right is equivalent to the federal moral rights. The analysis would shift from copyright preemption to droit de suite preemption. It would no longer be necessary to assess whether the state-created right is equivalent to an exclusive right of copyright since copyright preemption would no longer be at issue given the modification of the first sale doctrine that would accompany enactment of a federal resale royalty right.

The "extra element" test is the prevailing test for determining whether a state-created right is equivalent to the federal right. Accordingly, state laws that add extra elements to the federal resale royalty law would likely escape preemption. As discussed in Part III.D.2, if the United States establishes a federal resale royalty, New Mexico could consider enacting a state resale royalty that applies to gallery sales. Additionally, state legislation might provide a resale royalty for a broader range of subject matter such as that included within the definition of "fine art" under the state moral rights law.

D. Implications of Preemption Analysis: Opportunities for Expansion of Art Law in New Mexico

Preemption analysis of state moral and resale royalty rights indicates that New Mexico has an important opportunity to capitalize on the areas of these laws that would not be subject to preemption. In so doing, New Mexico would foster and encourage the state's prominent art market, sizable artistic community, and diverse cultural heritage.

1. Amendments to New Mexico Moral Rights Law

New Mexico should consider modifying its existing moral rights law, the Fine Art in Public Buildings Act, to protect more fully the areas that are not subject to preemption and therefore receive no moral rights protection under federal law. First, because moral rights involving works of "fine art" that are not "visual art" would not

California experienced a downturn in the local art market after the California Resale Royalty Act became effective in 1977, the Los Angeles art market remains one of the three largest art markets in the United States. Eden, supra note 72, at 151 n.193; Los Angeles at a Glance, CNN.coM (2000), http:lledition.cnn.com/ELECTION/2000/conventions/democratic/features/la.glance. The initial adjustment in the Los Angeles art market, therefore, did not adversely affect the market in the long term. Rather than diminish the Santa Fe art market, a resale royalty in New Mexico would contribute to standardization of the major art markets within the United States.

331. See supra note 294 and accompanying text.
332. See supra notes 248-249, 294 and accompanying text.
333. See supra notes 248-249, 294 and accompanying text.
334. See supra notes 306-309 and accompanying text.
336. See infra Part III.D.2.
337. See infra Part III.D.2.
338. See infra Part III.D.2.
339. See supra notes 1-3 and accompanying text.
be preempted.\textsuperscript{341} New Mexico could expand the scope of "fine art."\textsuperscript{342} One such area of expansion that would be particularly relevant in New Mexico is Indian Art.\textsuperscript{343} Although New Mexico's Indian Arts and Crafts Sales Act (IACSA) provides the partial equivalent of an attribution right,\textsuperscript{344} this law does not provide the full benefit of moral rights protection to Indian artists. By explicitly including "Indian art" within its definition of "fine art," the New Mexico statute could extend moral rights protection to these artists.\textsuperscript{345}

Second, New Mexico should consider extending the application of attribution and integrity rights to areas other than public buildings. By granting moral rights to artists whose works are displayed in museums or galleries, owned privately, or used commercially, for example, New Mexico would act consistently with the stated intention of FAPBA.\textsuperscript{346} The Findings section of the statute indicates a broad recognition of moral rights in the statement: "The legislature finds that...artists...have an interest in protecting their works of fine art against...alteration or destruction."\textsuperscript{347} By confining artists' integrity right to art incorporated into public buildings, however, New Mexico withholds protection for a considerable portion of "fine art."\textsuperscript{348}

By expanding attribution and integrity rights beyond the confines of the public buildings context, New Mexico would not only act consistently with the aims expressed in FAPBA, but it could also significantly develop its artistic community. An economic study by William Landes shows that artists prefer to reside in states

\textsuperscript{341} See supra notes 250, 255–262.
\textsuperscript{342} NMSA 1978, § 13-4B-2(B); see supra note 285 and accompanying text.
\textsuperscript{343} Indian Art is a mainstay of the Santa Fe art market. See supra note 3 and accompanying text. Indian artists from the Zuni, Acoma, and Zia pueblos, for example, have created renowned ceramic designs. ART OF THE NORTH AMERICAN INDIANS 206–19 (Gilbert T. Vincent et al. eds., 2000).
\textsuperscript{344} NMSA 1978, § 30-33-6 (1991). IACSA requires every person selling a product that is represented to be authentic Indian arts or crafts to make due inquiry of his suppliers into the true nature of the materials. Id. While this requirement protects against fraud and false dealing, the IACSA offers only general protection with respect to attribution. Id. The IACSA does not fully effectuate the moral right of attribution because it does not enable the individual Indian artist to be identified as the author of his or her specific works. See generally 17 U.S.C. § 106A (2000). While Indian art, such as ceramic design, for example, is often attributed to a particular pueblo, the specific design is in fact attributable to an individual Indian artist and/or his or her family. Telephone Interview with Joyce Szabo, Indian Art & Art History Professor, University of New Mexico (Feb. 17, 2006). The potter's signature is almost universal today but it is a recent phenomenon of the last few decades. HAYES & BLOM, supra note 1, at 22–23.
\textsuperscript{345} The right of attribution would enable an individual Indian artist to be identified with his or her creations. See 17 U.S.C. § 106A. Tourist material containing a photograph of a ceramic pot, for example, would identify the specific Indian artist who created the work. The right of attribution would also allow an Indian artist to control his or her reputation; an Indian artist could prevent identification as the author of a particular art object, for example, when photographs of that object are used in marketing materials that the artist finds distasteful. Id. The right of integrity would also benefit Indian artists who, like contemporary Western artists, would enjoy the right to prevent against physical mutilation of their works. Id. The integrity right would be particularly valuable in the context of preservation. While the right of integrity does not protect against modification resulting from conservation, the right of integrity does enable an artist to prevent modification resulting from gross negligence. Id. The right would, therefore, allow an Indian artist to ensure that his or her work is maintained in proper preservation conditions.
\textsuperscript{347} Id.
\textsuperscript{348} The artists whose works are sold in the over 250 galleries in Santa Fe or are exhibited in private museums and cultural centers throughout the state do not receive moral rights protection for these works. See id., §§ 13-4B-1 to -3.
with moral rights laws.\textsuperscript{349} In fact, his study indicates that state moral rights laws increased by approximately ten percent the number of artists that reside in that state.\textsuperscript{350} New Mexico’s law is far more limited than those in the nine states that comprised Landes’s regression analysis.\textsuperscript{351} His study therefore supports the view that New Mexico could substantially increase the size of its artistic community by expanding its moral rights law.\textsuperscript{352}

Finally, New Mexico might reconsider the provision concerning removal of fine art from a public building that would cause damage or destruction to the work.\textsuperscript{353} Although the disparity between the New Mexico provision and its VARA counterpart does not give rise to implied conflict preemption for works of “fine art” that are not “visual art” since these works are outside the scope of VARA coverage, it is nevertheless worth considering the fact that the state provision is inconsistent with the spirit and purpose of the integrity right set forth in the federal statute.\textsuperscript{354} VARA enables artists to protect their works of visual art from damage and, in some instances, destruction.\textsuperscript{355} The federal statute therefore creates a presumption that the integrity right exists when the work of visual art may be damaged or destroyed as a result of removal from a building.\textsuperscript{356} In establishing the reverse presumption, the New Mexico law moves away from the purpose that underlies an artist’s integrity right: to protect artwork from damage or destruction.\textsuperscript{357} Moreover, this portion of the New Mexico law calls into question the priorities accomplished by the state statute.\textsuperscript{358} The findings section of the statute recognizes a “public interest in preserving the integrity of cultural and artistic creations” and the provision that enables the attorney general to enforce the artist’s rights after the artist is deceased furthers this interest.\textsuperscript{359} Yet the provision that deems an artist’s rights waived if removal of his or her work from a public building would result in damage or destruction impedes cultural preservation by favoring the interests of developers and building owners.\textsuperscript{360}


\textsuperscript{350} Id.

\textsuperscript{351} Id. at 301–02; LANDES & POSNER, supra note 209, at 270 n.2.

\textsuperscript{352} After Landes’s regression analysis, New Mexico enacted state moral rights law through the Fine Art in Public Buildings Act of 1995. NMSA 1978, §§ 13-4B-1 to -3. Unlike the results in Landes’s study, the percentage of artists (painters, sculptors, craft-artists, and artist print makers) in the total civilian labor force of New Mexico remained essentially the same. In 1990 artists comprised 0.3% of the labor force whereas in 2000 artists comprised 0.29%. See BUREAU OF BUS. & ECON. RESEARCH (BBER), UNIV. OF N.M., NEW MEXICO NONEMPLOYER STATISTICS (on file with author); BUREAU OF ECON. RESEARCH & ANALYSIS, N.M. DEP’T OF LABOR, AFFIRMATIVE ACTION INFORMATION (1990). The fact that Landes and his colleague omitted New Mexico from the group of states that protect moral rights explains the result. LANDES & POSNER, supra note 209, at 271. In effect, the protection provided by the New Mexico moral rights statute does not amount to the same protection provided by the other nine states and, therefore, enactment of the state law did not produce an increase in artist residency as it did in the other nine states. Id.

\textsuperscript{353} NMSA 1978, § 13-4B-3(F); see supra notes 279–283, 287 and accompanying text.


\textsuperscript{355} 17 U.S.C. § 106A.

\textsuperscript{356} See id. § 113(d)(1).

\textsuperscript{357} See id. § 106A.

\textsuperscript{358} See NMSA 1978, § 13-4B-1.

\textsuperscript{359} Id. § 13-4B-3(F).

\textsuperscript{360} Id.
2. Enactment of a New Mexico Resale Royalty Right Law

If the United States establishes a federal resale royalty, New Mexico should consider enacting a state resale royalty that applies to gallery sales and includes a broader range of subject matter such as the works of "fine art" enumerated in the state moral rights law. As with potential amendments to the state moral rights law, the broader range of subject matter could include Indian art.

A primary justification for the resale royalty in general is that droit de suite addresses the unfair treatment of artists by current copyright law. According to this view, copyright law mainly protects creations capable of being reproduced or "copied" rather than individual objects. A work of art is fundamentally different from the other subject matter of copyright because its ultimate value lies in its unique quality as a one-of-a-kind original, not in its potential for mass reproduction or performance. As a result, artists are cut off from any further participation in the subsequent economic exploitations of their work. Given the inherent limitations for the economic exploitation of a work of art by the artist who created it, proponents of the resale royalty argue that the traditional rights granted under copyright law should be augmented with an additional right, the droit de suite, which enables artists to receive a royalty for the ongoing enjoyment of their work just as writers, composers, and other authors do. If, therefore, one of the central purposes of the resale royalty is to remedy an inequality, then providing the royalty for auction sales but not for gallery sales creates a new inequality. By providing a resale royalty for gallery sales in New Mexico, the state law would not only address this new inequality with regard to the sale of art in New Mexico, but it would also serve as a model for potential expansion of the federal law to address this inequality.

Establishing a resale royalty right in New Mexico would also serve as an incentive for creation, thereby promoting the artistic community and fueling the local art market. Economic analysis of the droit de suite reveals that the residual interest in early works provided by the resale royalty gives the artist an incentive to maintain the value of those works that is absent without the resale royalty. Since the art market in New Mexico is predominantly driven by gallery sales, the

361. Id. § 13-4B-2(B).
362. See supra notes 342-345 and accompanying text.
364. Id. at 534.
365. Id.
366. Id.
367. Id.
368. The issue of inequality within New Mexico is somewhat secondary since the art market is driven primarily by gallery sales. See infra note 370 and accompanying text. The fact that Santa Fe is one of the three largest art markets in the United States, however, means that a state droit de suite that applies to gallery sales would address the inequality on a national level. See supra note 2 and accompanying text.
370. A significant art auction in New Mexico is the annual Santa Fe art auction. Santa Fe Art Auction Home Page, http://www.santafeartauction.com (last visited Sept. 24, 2006). There are several other small art auctions in New Mexico but "auctions are not where the market is." Telephone Interview with George Bingham, General Counsel, The Peters Corp., Santa Fe, NM (Feb. 14, 2006). Rather, the real force behind the New Mexico art market is the thriving gallery scene in Santa Fe. Id.
increased revenue provided by a resale royalty for gallery sales would encourage artists’ productivity and would in turn benefit the art market. New Mexico could draw on the California model to increase the likelihood of this result.\textsuperscript{371} The California law places responsibility for collection and payment of the royalty with the seller and, consequently, the law has been criticized as “underused and under enforced.”\textsuperscript{372} New Mexico could avoid this problem by centralizing collection through a state agency such as the Cultural Affairs Department.\textsuperscript{373} Alternatively, collection could be accomplished through a private collection agency.\textsuperscript{374}

IV. CONCLUSION

As internationalization of the art world continues and the intellectual property law in the United States adapts accordingly, state law will continue to develop as well. It is important for New Mexico to assess federal copyright law and its related rights so as to encourage and protect its own segment of the art world to a fuller extent. Preemption analysis of state moral and resale royalty rights indicates that New Mexico has an important opportunity to capitalize on the areas of these laws that would not be subject to preemption. New Mexico should consider expanding its moral rights law to encompass a broader range of subject matter and to apply in contexts other than works of art that are incorporated into public buildings. In addition, if the United States enacts a federal resale royalty right, New Mexico should consider establishing a resale royalty law that attaches to a broader range of subject matter and that applies to gallery sales. These state laws would not only benefit the New Mexico art market and artistic community but would also serve as a model for progressive change on the federal level.

\textsuperscript{371} Supra Part II.E.1.
\textsuperscript{372} COPYRIGHT OFFICE REPORT, supra note 15, at 384.
\textsuperscript{373} NMSA 1978, § 9-4A-4 (2004). The department would require additional infrastructure to accomplish such administration of the resale royalty. See id.
\textsuperscript{374} According to John Cacciatore, President of the Dartmouth Street Gallery, organizing a private collection agency would be of great interest to art business entrepreneurs like himself. Telephone Interview with John Cacciatore, President, Dartmouth Street Gallery, Albuquerque, NM (Feb. 14, 2006).