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### U. S. Federalism and Intellectual Property

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## Intellectual Property

### U.S. FEDERALISM AND INTELLECTUAL PROPERTY

Jane C. Ginsburg\*

#### INTRODUCTION<sup>1</sup>

The federal structure of the U.S. government presents interesting questions for intellectual property. Which government, national or state, exercises regulatory authority? Or do both governments play a significant role? Questions of this order cannot be addressed unless one first analyzes what the term “intellectual property” comprehends. Intellectual property includes well-recognized regimes of exclusive rights in inventions (patents), literary, artistic and musical creations (copyrights), and trademarks. But it also covers more elusive, and evolving, interests, such as exploitation of one’s personal name and image (right of publicity), trade secrets, and a generalized concern with prevention of acts amounting to unlicensed appropriation of another’s time, labor, and money. To which lawmakers and judges, state or federal, then, do claimants and users look to determine the existence and scope of protection for this capacious subject matter?

At first blush, one might assume that all these varieties of intellectual property fall under exclusive federal ordering. By nature, inventions, works of authorship, trade symbols, and such, resist confinement to local boundaries. When ideas and images range widely, their subjection to discrete, and potentially conflicting, territorial regimes can frustrate their effective dissemination, and can produce commercial uncertainty and insecurity. In the U.S. federal system, however, the national government is supposed to be of limited powers; it may not regulate an area simply because uniform national regulation seems good policy. More important than the legal dimensions of U.S. federalism are its political ones. Federal intervention needs justification, and, largely for historical reasons, significant areas are thought to reside with state governments.<sup>2</sup> In the U.S., the

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<sup>1</sup> The Introduction and Part I are adapted in part from *Fédéralisme et propriété intellectuelle*, in *L'ÉTAT EN AMÉRIQUE* 193-207 (Marie-France Toinet ed. 1988). Many thanks to Steven Shaber, Columbia J.D. 1996, for research assistance with Parts II B and C.

<sup>2</sup> See Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954). The extent to which state interests are now represented in the national government is the subject of considerable dispute, but the important point is that federal intervention needs to be specifically justified.

general areas of property law, tort law, and contract law — all fields relating directly or indirectly to intellectual property — are traditionally considered the subject of state regulation.

Nonetheless, the U.S. Constitution proves quite accommodating to federal protection for many varieties of intellectual property. The document both authorizes and anticipates creation of a federal patent and copyright system, for it explicitly authorizes the national government “to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>3</sup> The little available evidence of the Framers’ intent in including this authority indicates that they recognized the inefficacy of disparate state regulation of inventions and works of authorship: in Federalist No. 43, James Madison observed, “The utility of this power will scarcely be questioned . . . . The States cannot separately make effectual provision for either . . . [copyright or patent].”<sup>4</sup>

Madison’s point would seem equally applicable to other varieties of intellectual property. Indeed, today, most commentators would acknowledge the national government’s authority to regulate all forms of intellectual property by virtue of the constitutional grant to Congress of the power “to regulate Commerce . . . among the several States.”<sup>5</sup> But the existence of authority is one thing, its exercise quite another. Here the historical dynamics of American federalism are important. The vast domain of federal power has not been fully occupied, and accordingly, outside the realm of patent and copyright, the states do play a role in the regulation of intellectual property. Moreover, state-based protections have occasionally penetrated even these core federal areas. There are various reasons for continued state intervention in at least certain intellectual property areas. Some stem from the states’ established role in governing property rights and relations in general. Another, which forms one focus of this paper, derives from the U.S. tradition of looking to the states as “laboratories” for the development of the law and social policy.<sup>6</sup> According to this tradition, state courts and legislatures experiment locally with evolving rights and modes of regulation. Subsequently, the local experience may form the basis for adoption of the same or similar laws by other states, and perhaps ultimately by the national legislature.

This paper has two parts. Part I considers the regulation of intellectual properties that come primarily within the federal domain. Part I first identifies the respective federal and state jurisdictions over various kinds of rights, and

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<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>4</sup> A. Hamilton, J. Jay, J. Madison, *THE FEDERALIST* No. 43 (Madison), 278-79 (Modern Library ed., n.d.).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3. For a discussion of the expansive reach of the Commerce Clause in contemporary American legal doctrine, see, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 232-44 (2d ed. 1978).

<sup>6</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

then examines some instances in which federal and state intellectual property interests may come into conflict. Part II addresses three examples of state-based intellectual property rights that were adopted into federal law.

## I. PRIMARILY FEDERAL SUBJECT MATTER

Federal statutes regulate patents,<sup>7</sup> copyrights,<sup>8</sup> and trademarks.<sup>9</sup> Indeed, national legislation provides that only federal law may govern copyright subject matter,<sup>10</sup> and that the federal courts alone may judge patent and copyright claims.<sup>11</sup> In addition, the United States Supreme Court has emphasized exclusive federal authority to grant patents.<sup>12</sup> By contrast, Congress has, in most instances, left trademarks to concurrent state and federal ordering,<sup>13</sup> although the national uniformity advantages of federal trademark registration and regulation are sufficiently great that congressional enactments set forth the dominant law in this realm.<sup>14</sup>

State laws affect intellectual property in several ways. Some state laws create exclusive rights in subject matter not covered by federal statutes. Examples include certain kinds of idea protection, and the exclusive right of performers and other celebrities to commercialize their names and images (in the U.S., this is called the right of publicity).<sup>15</sup> Other kinds of state laws touch federally-regulated subject matter, but they purport to respond to a range of activities broader than or different from those proscribed by federal law. For example, federal patent and copyright laws essentially forbid use or copying; state unfair competition law may strike at a variety of unethical business practices, including deception of the public, breach of a trust relationship, and conversion. In so doing, however, the state law may also prohibit unauthorized uses and reproductions.

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<sup>7</sup> 35 U.S.C. §§ 1-376.

<sup>8</sup> 17 U.S.C. §§ 101-810.

<sup>9</sup> 15 U.S.C. §§ 1051-1127.

<sup>10</sup> 17 U.S.C. § 301(a).

<sup>11</sup> 28 U.S.C. § 1338.

<sup>12</sup> *See, e.g.*, *Bonito Boats Inc. v. Thundercraft Boats Inc.*, 489 U.S. 141 (1989); *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964).

<sup>13</sup> The Lanham Federal Trademark Act contains no provision generally abrogating State authority to afford independent, parallel, trademark protection, but does prohibit state and local entities from requiring alteration of a federally registered mark, 15 U.S.C. § 1121(a). Similarly, the Lanham Act also sets forth as one of its purposes "to protect registered marks used in such commerce [within the control of Congress] from interference by State, or territorial legislation," 15 U.S.C. § 1127. *See generally Wetzel, Federal Preemption Under the Lanham Act*, 76 TRADEMARK REPTR. 243 (1986). 28 U.S.C. § 1338(a) provides for concurrent state and federal court jurisdiction over federal trademark claims.

<sup>14</sup> Thus, for example, the recent RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION (1995), reflects the analyses of the federal courts in Lanham Act (federal trademarks act) cases at least as much, if not more, than of state courts in state-law unfair competition claims.

<sup>15</sup> Of the 22 states which have now recognized a right of publicity, half do so by statute, while the rest rely on common law construction. *See generally J.T. MCCARTHY, THE RIGHTS OF PRIVACY AND PUBLICITY* § 6.3 (1987).

Occasionally, state and federal regulatory regimes may clash. That is, even though a state may not have deliberately erected a competing regime for regulating an area controlled by national law, application of state law in a given situation may produce results inconsistent with federal policy. For example, if, in order to prevent public confusion regarding the origin of the goods, a state attempts to forbid copying an article that is itself an insufficient advance over the prior art to merit a federal patent, the state intervention would accord an exclusivity that federal law has declined to extend.<sup>16</sup> For American lawyers the crucial question then becomes whether the federal level (or lack) of protection sets the sole measure, or whether the federal law in effect establishes a minimum standard of protection, leaving the states free to afford more than the national legislature has chosen to accord.<sup>17</sup> If the former, the state law is invalid — “preempted” in the American legal jargon. If the latter, there is no federal preemption.

The foregoing example reveals an important feature of American federal-state relations: determination of whether state law has been preempted by federal law is not easy. Case law on this problem abounds in many areas, and the standard formulas employed by the Supreme Court often obscure rather than illuminate. The core idea is that of conflict, but the existence of a conflict is not self-evident. A judgment of this nature requires a precise assessment of the purposes and effects of both the federal and the state laws.<sup>18</sup> In the intellectual property field, the extensive scope of federal regulation often does point to the conclusion that federal law should supply the sole measure of what interests are to be protected.

Of course, one might always argue that the federal and state authorities are in fact regulating different activities. The copying example discussed above is a good illustration. One could maintain that federal law simply proscribes the act of copying, while forbidding copying is merely an incidental side effect of the state law prohibition, which proscribes acts that may confuse the public concerning the origin of the goods in question. Nonetheless, the conflict between the laws seems unmistakable. Federal law has pronounced that some objects can be copied; state law has stepped in to prevent the reproductions. At this point the purpose of the federal law becomes crucial. If one determines that the absence of federal protection indicates the national legislator's policy that no regime, state or federal, is to prohibit the copying of the object in question, application of the state law would frustrate federal objectives. In that case, the state law must yield to the national policy.

But there are many instances where state law protection is entirely compatible with the federally prescribed regime. Suppose, for example, that one party

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<sup>16</sup> This is essentially the situation the Supreme Court confronted in the decisions cited *supra*, note 12.

<sup>17</sup> Compare *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), in which the U.S. Supreme Court held that federal laws prohibiting pregnancy discrimination in the workplace could be supplemented by state laws more generous to the pregnant employee.

<sup>18</sup> For a selection of cases and materials, see G. GUNTHER, *CONSTITUTIONAL LAW* 291-310 (12th ed. 1991).

discloses information to another, with the understanding that the information was revealed in confidence, and is not to be used unless the disclosing party supervises and exclusively benefits from the other party's use. In these circumstances the information would constitute a trade secret. Accordingly, were the recipient of the information to disclose it to third party competitors, or use it to set itself up as a competitor, most states would enjoin such violations of the trade secret.<sup>19</sup> Moreover, that action would not be deemed to violate federal policy, even if the information concerned subject matter, such as a manufacturing process, or industrial blueprints, coming within the scope of federal law.<sup>20</sup>

What features of a state intellectual property law, as well as of the national regulatory scheme, justify persistence of the state law? When state and federal laws touch on the same subject matter, it may not be enough that the state seeks to protect interests arguably different from those promoted by federal policies.<sup>21</sup> The key may lie in such considerations as the nature of the remedy sought, and the breadth of the class of persons subject to that relief. A generally applicable state law that, *inter alia*, effectively prohibits use or copying achieves the same result as does a federal patent or copyright action: potential conflict is therefore manifest. If a different, less drastic, form of relief can vindicate the state objective, principles of federalism will probably limit application of the state law to its more modest remedies.<sup>22</sup>

With regard to the reach of the state remedy, if the party invoking the state right seeks to assert it against all competitors, regardless of the presence or absence of any prior course of dealing or relationship, plaintiff would be attempting an unqualified exercise of exclusive rights. Such broad pretensions come too close to the scope of intellectual property protection regulated by federal law. If, on the other hand, as in the trade secrets example, only those who enter into or disrupt some prior contractual relationship with the plaintiff are subject to the state law,<sup>23</sup> then outsiders would not be bound by plaintiff's

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<sup>19</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION §§ 39-45 (1995); Uniform Trade Secrets Act, 14 UNIFORM LAWS ANNOTATED 437-67 (1990), 112 (Supp. 1995). The Act has been adopted in 39 states and the District of Columbia.

<sup>20</sup> This fact pattern and result describe the U.S. Supreme Court's key trade secret-patent preemption case, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). In the wake of that decision, state courts continue to uphold trade secret claims against patent preemption challenges. See, e.g., *Boeing Co. v. Sierracin Corp.*, 4 U.S.P.Q.2d 1417 (Wash. 1987).

<sup>21</sup> But, if the state interests are not qualitatively different from those at stake in the federal action, the state claim will almost certainly be held preempted. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983) (state claims at issue did not assert rights different in kind from rights protected under federal copyright law), *rev'd on other grounds*, 105 S.Ct. 2218 (1985); *Ehat v. Tanner*, 780 F.2d 876 (10th Cir. 1985) (same); *Baltimore Orioles v. Major League Baseball Players Ass'n.*, CCH Copyr. L. Dec. para. 26,024 (7th Cir. 1985) (same).

<sup>22</sup> In the same decision in which it held preempted a state law prohibiting the copying of utilitarian designs, the U.S. Supreme Court emphasized that "a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or other precautionary steps be taken to prevent customers from being misled as to the source." *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964).

<sup>23</sup> It is helpful to remember here that state law normally governs employment, fiduciary, and

assertions: they are free independently to generate and then to use the same material. In this instance, the more limited reach of the state-created remedy renders the state law more likely to coexist harmoniously with the federal scheme.<sup>24</sup>

The possible resilience of state-law protection of information in the face of preemption under the copyright statute and Patent-Copyright Clause should not obscure a different kind of federalism problem. To this point, the discussion has concerned "vertical" federalism issues, that is, whether state regulation in the intellectual property field conflicts with federal regulation of the same field. State protection of information poses both dormant commerce clause and "horizontal," or sister-state, federalism issues as well. As the Supreme Court has observed, one must inquire whether "in actual operation, the exercise of the power to grant copyrights by some States will prejudice the interests of other States."<sup>25</sup> In that particular case, the Court determined that no sister-state conflict was presented because "a copyright granted by a particular State has effect only within its boundaries."<sup>26</sup> Whatever the accuracy of this assumption in 1973 when the case was decided, and of its twin concept of state regulation of subject matter of "purely local importance,"<sup>27</sup> it seems most implausible today, particularly in the domain of digital communications. As a practical matter, if not all fifty states will protect information, or will not protect it in the same ways, one state's regulation may both disrupt the national dissemination of information as well as interfere with another state's information protection policies.

For example, suppose that Ohio, by common law or by statute, protects databases against the extraction of information for commercial purposes, including creation of derivative compilations that do not directly compete with their source. Suppose further that New York, preferring free access to and competition in information, affords no such protection; and that California law affords a remedy only against substantial verbatim copying to create a directly competing compilation. Now assume that a California database producer brings a claim in Ohio against a New York defendant who accessed plaintiff's work in New York and there compiled a directory drawn entirely from information contained in plaintiff's database. Defendant's directory is differently organized and is aimed at a different clientele than plaintiff's. Defendant has sold copies of its directory in Ohio.<sup>28</sup> What kinds of horizontal federalism problems does the

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contractual relationships.

<sup>24</sup> See e.g., *Pro CD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) ("A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights.")

<sup>25</sup> *Goldstein v. California*, 412 U.S. 546, 558 (1973).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> This example is inspired by the facts of *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988), in which a California software producer sold programs packaged with a "shrinkwrap license" that purported to prohibit purchasers from copying or decompiling the program. Defendant, a Canadian corporation, acquired plaintiff's software in Canada, and there decompiled it to generate a competing program. Some copies of defendant's program were sold in Louisiana. Plaintiff sued in

Ohio suit pose?

If Ohio declines to apply its own law to this controversy, sister-state sovereignty will be respected. However, the forum may well apply its own law, either by "homing instinct" reflex, or after some kind of conflicts inquiry.<sup>29</sup> Application of Ohio's protective law would clash both with New York's free-copying policy and with California's limited scope of protection. The Ohio court might nonetheless attempt to avoid offense to these states (and to other states whose policies differ from Ohio's) by restricting the remedy to Ohio acts. Thus, any injunction would apply only to Ohio distribution of the directory, and damages would be awarded only for copies sold in Ohio.

But even this limited application of Ohio law may as a practical matter have extraterritorial implications compromising both sister state sovereignty and national commerce. Defendant's directory travels in interstate commerce: keeping it out of Ohio may be no easy task. The problem becomes even more acute if defendant's directory is not a hardcopy document, but is itself a database, furnished to users through interstate transmission of data over a digital network. Ohio cannot erect boundaries impermeable to such communications. An Ohio injunction therefore becomes problematic. The injunction poses the potential for broad interstate effect: keeping digital transmissions (or phone, radio or satellite signals) out of Ohio entails denial of access to all within the communication's reach. The extrusive character of the remedy in turn puts pressure on a court either to decline to recognize the Ohio law claim,<sup>30</sup> or to hold the Ohio law federally preempted under the Commerce Clause,<sup>31</sup> or to hold it an

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Louisiana, alleging a violation of Louisiana's shrinkwrap license statute. The Court held the statute preempted by the federal Copyright Act.

<sup>29</sup> In this case, the pre-interest analysis *lex loci delicti* rule would support application of Ohio law, since copies were sold in Ohio. Interest analysis might also lead to application of forum law, if only because interest analysis often indicates *lex fori*. See, e.g., EUGENE SCOLES & PETER HAY, CONFLICTS OF LAWS 16-27 (1984); Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 587-88 (1983). In *Vault*, *supra* note 28, the district court, after performing a perfunctory choice of law inquiry, applied Louisiana law (and later held it federally preempted), despite the slim, at best, contacts between the state, the parties, and the bulk of sales. See 655 F.Supp. 750 (E.D. La. 1987).

<sup>30</sup> Cf. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 89-90 (2d Cir. 1940). In this case, Judge Learned Hand declined to recognize asserted equitable servitude arising out of "not for broadcast" labels on sound recordings. He acknowledged that the Supreme Court of Pennsylvania, in *Waring v. WDAS*, 37 Pa. 433, 194 Atl. 631 (1937), had reached a contrary decision, and that broadcast of the records into Pennsylvania would thus be a tort in that state; but declined to enter an injunction for the sole benefit of Pennsylvania, when all surrounding territories would not uphold the servitude: "Even if it be mechanically possible to prevent any broadcasting through the angle which the state of Pennsylvania subtends at the transmission station, that would shut out points both in front of, and beyond, Pennsylvania. We must therefore choose between denying any injunction whatever — since in our judgment the act is unlawful only in Pennsylvania — or enjoining [defendant] from broadcasting throughout the Union and in Canada in order to prevent a tort in Pennsylvania alone."

<sup>31</sup> Cf. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that the Commerce Clause-derived FCC Act preempted the state of Oklahoma's prohibition on certain kinds of television advertising; since the broadcast signals came from out-of-state, Oklahoma's law necessarily affected all states receiving the broadcast signal). To the extent that state regulation impacts on information communicated by cable or satellite, the state law may be preempted under the Federal

impermissible encroachment on sister-state interests.<sup>32</sup>

This summary presentation of federal intellectual property preemption endeavored to show that while federal law occupies much of the field, some room remains for state law. How much room may prove an elusive determination, for the boundaries between state and federal subject matter, rights, and remedies often lack clear demarcation. Nonetheless, where the border is vague, and especially where the state law seems to encroach significantly on the federal preserve (or on sister-state prerogatives), the federal law most often will provide the measure of protection. The second part of this paper will consider three instances of federal adoption of state intellectual property measures. It is important to note, however, that in all three cases, the federal law supplements, but does not completely displace, state law rights.

## II. FEDERAL ADOPTION OF STATE INTELLECTUAL PROPERTY RIGHTS

This review of federal absorption of state intellectual property norms addresses rights once outside the scope of federal enactments. Two of the examples come from the copyright domain, the other concerns trademark law. All three cases involve recent federal legislation, from 1990, 1994 and 1996.

### A. *Visual Artists' Rights Act of 1990*

The first example concerns the non-economic, "moral" rights of visual artists. The Visual Artists' Rights Act (VARA) of 1990 represents the federal copyright act's first explicit — albeit limited — incorporation of the author's personal rights to attribution of authorship, and to preserve the integrity of her work. Several states, most notably New York and California, had previously enacted statutes protecting the attribution and integrity rights of artists.<sup>33</sup> VARA may afford a partial response to those who criticized the U.S. failure, upon joining the Berne Convention, to enact specific moral rights protection.<sup>34</sup> At the time, the U.S. asserted that a combination of federal and state law protections together afforded protection equivalent to that required under Berne Convention minimum standards.<sup>35</sup>

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Communications Act.

<sup>32</sup> Cf. *Goldstein v. California*, 412 U.S. 546.

<sup>33</sup> See, e.g., Cal. Civ. Code § 987(a); New York Arts & Cultural Affairs Law § 14.03.

<sup>34</sup> See, e.g., Adolf Dietz, *Les Etats-Unis et le Droit Moral: Idiosyncrasie ou Rapprochement*, 142 REVUE INTERNATIONALE DU DROIT D'AUTEUR 223 (Oct. 1989).

<sup>35</sup> Congress relied on a study conducted by a State Department-convened Ad Hoc Working Group on U.S. Adherence to the Berne Convention, which concluded respecting moral rights:

Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the United States, the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws and the preservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention.

*Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM. J. L. & THE ARTS 513, 547 (1986). The reference to the absence of moral rights provisions in the

To appreciate the relationship of VARA to state law artists' rights measures, we will first outline VARA's coverage, and then compare it with that afforded under the New York statute. VARA's protected subject matter is defined rather restrictively:

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

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.<sup>36</sup>

The definition also explicitly excludes "any work made for hire." The parsimoniousness of the definition denotes an attempt to achieve at least two objectives: 1) to reassure large exploiters, such as publishers of periodicals, that they need not fear moral rights claims from artists creating works for their publications;<sup>37</sup> 2) to limit the law's coverage to objects of "Art," rather than of mass production.<sup>38</sup> Moreover, even if the artistic creation meets the Act's definition, it is important to understand that the Act secures rights only with respect to the two-hundred (or fewer) physical copies; the Act does not protect the "work" in the incorporeal copyright sense. In other words, the Act protects particular copies, not any "image" independently of those limited number of copies.

This distinction between copy and image carries several consequences. Most obviously, it does not forbid destruction or mutilation of any copy falling outside the definition. Most importantly, artists are afforded no general right against misrepresentation or distortion of images, even by means of large scale or gross alterations of reproductions of the works. In essence, the Act would protect Leonardo's original canvas of the Mona Lisa against Duchamp's moustache (had any copyright in Leonardo's work not expired, and had

domestic laws of some Berne adherents appears to target, *inter alia*, Australia, and (at the time), the U.K.

<sup>36</sup> 17 U.S.C. § 101. The requirement that the works be signed and, where applicable, consecutively numbered may constitute a "formality" incompatible with article 5.2 of the Berne Convention. *But see* H.R. Rep. No. 101-514, 101st Cong., 2d sess. at 12 (1990) (distinguishing numbering and marking requirement from notice of copyright).

<sup>37</sup> *Cf.* 17 U.S.C. § 203(a) (no termination right in works made for hire).

<sup>38</sup> The provision of the Visual Artists Rights Act entitling the author to prevent the destruction of a "work of recognized stature" (17 U.S.C. § 106A(a)(3)(B)) supplies further indication of Congress's intention to avoid conferring moral rights on unworthy works. However, resort to a merit criterion cuts against a long copyright tradition eschewing value or aesthetic judgments about works of authorship. As Justice Holmes cautioned in a 1903 Supreme Court decision, judges make poor art critics, and should not be pressed into that service: "It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations . . . . At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke . . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

Duchamp drawn or displayed the moustache directly on the canvas after the Act's effective date); but the Act would not prevent Duchamp from making his own copy of the Mona Lisa and drawing a moustache on that copy. Thus, an art book publisher who prints a substantially discolored version of a painting, or a poster manufacturer who enlarges and reproduces a small portion of the work,<sup>39</sup> or a magazine publisher who prints only half a photograph, would incur no liability under the Act. Nor does the Act reach the problem of exploitations of artworks that the creator finds demeaning, for example, laminating reproductions (beyond the key two hundred) of a painting onto ashtrays.<sup>40</sup>

By contrast, the New York statute protects not only the physical original (or limited edition copy) of a painting or sculpture, it also extends the integrity right to reproductions of those works. Thus, distortion of an image of a painting will violate New York law if the distorted version is presented as the artist's work.<sup>41</sup>

Because the state law protects against activities the federal law tolerates, is there a tension between VARA and the New York statute? In other words, does VARA preempt the more protective New York law? VARA contains a provision preempting "all legal or equitable rights that are equivalent to any of the rights conferred by [VARA] with respect to works of visual art to which the rights conferred by [VARA] apply."<sup>42</sup> Thus, while VARA cancels duplicative state claims, it does not preempt state moral rights protection of subject matter not covered by VARA.<sup>43</sup> As a result, federal law has incorporated and displaced

<sup>39</sup> Cf. *Wojnarowicz v. American Family Ass'n*, 745 F.Supp. 130 (S.D.N.Y. 1990) (third party defendant created and distributed photographs of fragments of plaintiff artist's collage) discussed *infra*.

<sup>40</sup> Moreover, even with respect to works covered by the law, the Visual Artist's Rights Act exempts "[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement . . . unless the modification is caused by gross negligence." sec. 603(c)(2), 17 U.S.C. § 106A(c)(2).

The limited definition of protected artworks has another unfortunate consequence. The law not only disqualifies integrity claims of salaried authors and of creators of large editions, but also fails to afford these authors an attribution claim. Whatever the merits of limiting the class of artists who may benefit from the integrity right, the arguments in favor of that limitation do not readily extend to the attribution right. The artist's interest in receiving credit for her creation, and the public's interest in knowing the creator's identity, do not diminish as the size of the edition increases. By the same token, where attribution is concerned, it should not matter whether the work is displayed in an art gallery, or on the pages of a magazine. Nor is a work-for-hire exception appropriate. The work for hire doctrine allocates ownership of the economic rights, but, despite deeming the employer the statutory "author," the doctrine is not a labeling law; it does not purport to recast a mere payor as a true creator. Recognizing employees'-for-hire attribution rights does not modify the employer's rights of economic exploitation; rights in the work remain as alienable as before. It simply requires addition of a credit line somewhere on the work of visual art.

<sup>41</sup> See, e.g., *Wojnarowicz*, *supra* note 39.

<sup>42</sup> 17 U.S.C. § 301(f)(1).

<sup>43</sup> VARA also explicitly preserves state claims arising before VARA's effective date, 17 U.S.C. § 3012(f)(2); *Pavia v. 1120 Avenue of the Americas Assoc.*, 36 U.S.P.Q.2d 1622 (S.D.N.Y. 1995). Similarly, VARA preserves state moral rights claims, even if equivalent to VARA claims, if these claims address violations that occurred after the artist's death. 17 U.S.C. § 301(f)(2). VARA includes the latter exception to preemption because the duration of VARA rights is only for the life of the artist. See 17 U.S.C. §106A(d).

state moral rights law with respect to the integrity and attribution of the physical object, but state law moral rights coverage of the artistic image remains available.

Ironically, federal law sets aside state law in the area to which state law most aptly applies: territorially discrete acts. For example, the subject matter of the federal law includes large, essentially immobile art works, such as monumental sculpture and frescos. Works of this kind are not reproduced in copies for interstate dissemination, and their bulk makes unlikely the probability that they will elude the reach of state law because the originals have been transported across the border. Nor does this subject matter lend itself to the kind of geographically pervasive illicit activity that usually characterizes violations of incorporeal intellectual property.

Granted, there may be gains from the uniformity VARA offers, as well as from ensuring protection in those states that had neither statutory nor common law guarantees of artists' rights. But the other compelling reason for federalizing intellectual property regulation — the (in theory) limited territorial reach of state law — seems weakened, if not absent, when the law targets physical rather than incorporeal property.

By contrast, federal law does not reach that aspect of state moral rights protection that does pose territoriality problems: the application of the right of integrity to the reproduction of an artwork. Images, as opposed to originals, do pervasively traverse state boundaries, thus presenting the kinds of horizontal federalism problems discussed earlier. For example, the leading decision interpreting the New York artists' rights statute concerned the dissemination of reproductions that separated and enlarged certain portions of plaintiff's collage-like works. The defendant was a resident of Mississippi, where it produced the distorted reproduction as part of a campaign denouncing public funding of the arts. A few of defendant's brochures were sent to New York: this sufficed to permit the court not only to assert personal jurisdiction in New York, but to apply New York law to defendant's largely out-of-state activities, and ultimately to "require defendants to distribute a corrective communication to all those to whom they sent the original pamphlet".<sup>44</sup> The court did not limit its injunction to New York recipients of the original pamphlet.

### *B. Performers' Rights in Unfixed Musical Performances*

Since 1978, the federal copyright law has protected all "works of authorship fixed in a tangible medium of expression . . ."<sup>45</sup> These include sound recordings, such as authorized fixations of a musical performance on a tape or CD. The 1976 Copyright Act also protected live transmissions of performances, if the transmission was being simultaneously recorded (fixed).<sup>46</sup> Missing from the scope of federal protection were live performances, including transmissions not

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<sup>44</sup> *Wojnarowicz*, *supra* note 39.

<sup>45</sup> 17 U.S.C. § 102(a).

<sup>46</sup> 17 U.S.C. § 101 (definition of "fixed").

undergoing simultaneous fixation. For example, a live performance in a concert or dance hall, or a radio broadcast not simultaneously recorded by the broadcaster, did not come within the subject matter of federal law.<sup>47</sup>

Many states, however, had developed protections for unfixed performances, through common law copyright, unfair competition,<sup>48</sup> or right of publicity<sup>49</sup> doctrines, or by specific legislation.<sup>50</sup> But the problems endemic to state intellectual property regimes prevailed: territoriality and disuniformity of protection. In addition, states afforded no protection against an important source of bootlegged recordings, foreign imports. For one thing, if the unauthorized fixation took place abroad, no violation of the state law would have occurred.<sup>51</sup> Moreover, only the U.S. Customs Service had authority to block entry of foreign recordings of unauthorized fixations, but no federal law empowered the Customs Service to act.<sup>52</sup>

Thus, effective protection required the intervention of federal law. The need for a federal regime became particularly apparent as a result of the elaboration of the TRIPs (trade-related aspects of intellectual property) agreement during the Uruguay Round of the GATT negotiations. Article 14.1 of the TRIPs agreement requires:

In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

Thus, as part of the Uruguay Round Amendments Act, Congress added a new Chapter 11 to the federal copyright act.<sup>53</sup> The federal fixation right adopts the

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<sup>47</sup> The plot of the French film *Diva* (Jean-Jacques Bénéix 1982) follows the fate of an unauthorized audiocassette of the live performance of an opera singer who refuses to make sound recordings of her performances. The protagonist made the cassette by sneaking a high-quality tape recorder into the concert hall. This kind of activity would not have violated federal law before the 1994 amendments.

<sup>48</sup> See, e.g., *Metropolitan Opera Association v. Wagner-Nichols Recording Co.*, 101 N.Y.S.2d 483 (Sup. Ct. 1950) (unauthorized recording made from radio broadcast of Metropolitan Opera performance).

<sup>49</sup> See, e.g., *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661 (App. Div. 1977). Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 443 U.S. 562 (1977) (unauthorized television broadcast of performance of "human cannonball").

<sup>50</sup> See, e.g., Cal. Civ. Code § 980(a)(1). See generally WILLIAM F. PATRY, *COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AMENDMENTS ACT 9* (1995) (describing state protections against recording live performances).

<sup>51</sup> See PATRY, *supra* at 9 & n.28.

<sup>52</sup> *Id.*

<sup>53</sup> Although Congress placed this chapter in Title 17, the authority for the legislation may emanate as much from the Commerce Clause as from the Patent-Copyright Clause of the Constitution. See PATRY, *supra* note 50, at 10-11, 18. There are two grounds for challenging the characterization of chapter 11 as a copyright law. First, it protects unfixed performances, while the constitutional Copyright Clause empowers Congress to secure exclusive rights in the "writings" of authors; the term "writings" may imply fixed works. See, e.g., *Burrow-Giles v. Sarony*, 111 U.S. 53, 58 (1884)

TRIPs requirements,<sup>54</sup> with a further specification extending copyright infringement remedies against anyone who: “distributes . . . any copy or phonorecord [of the sounds or sounds and images of a live musical performance] fixed [without authorization], regardless of whether the fixations occurred in the United States.”<sup>55</sup>

This provision deserves emphasis. While the doctrine of territoriality circumscribed state law protection for live performances, federal law has explicitly overridden territorial limitations. Under chapter 11, the act of U.S. distribution makes out the violation. Thus, for example, even if the unauthorized recording of a live performance was not unlawful in the country in which the fixation was made, distributing that recording in the U.S. would be illicit.

What of the relationship of the new federal law to state laws affording similar rights? Chapter 11 explicitly preserves state statutory and common law remedies.<sup>56</sup> In this case, unlike state moral rights laws, however, federal coverage of fixation rights in musical performances is so much more complete that the persistence of state remedies is likely to have little practical import. On the other hand, state remedies remain the only recourse with respect to fixation of non-musical performances, for example, theatrical improvisations and spectacles.

### C. Trademarks: Federal Anti-Dilution Protection

Trademark law primarily protects the trademark owner against unauthorized uses of the mark that are likely to mislead or confuse the public into believing that the trademark owner was the source of, or authorized the user's goods or services.<sup>57</sup> In U.S. trademarks law, the owner's rights in a mark are not “in gross,” as they are for copyrights and patents; rather than affording a claim against copying per se, a trademark claim fails if the unauthorized use of the mark does not create “confusion as to source.” Early trademarks case law tended to equate source confusion with direct or close competition. For example, unauthorized use of KODAK for cameras or photographic equipment, or even photograph albums, would have fit within the traditional purview of protection, but using KODAK as a brand name for bicycles would not.<sup>58</sup> Nonetheless, even if consumers would not have believed that the Eastman Kodak Company manufactured the bicycles, or licensed its name to the bicycle manufacturer, the

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(the constitutional term “writings” “include[s] all forms of writing, printing, engraving, etching, & c., by which the ideas in the mind of the author are given visible expression”). Second, chapter 11 sets forth no duration of the fixation right. This might mean that the usual copyright term applies, or, according to PATRY, *supra* note 50, at 18, that the fixation right is “perpetual.” Because the constitutional Copyright Clause restricts Congress's power to secure exclusive rights to “limited times,” that clause does not authorize the granting of perpetual rights.

<sup>54</sup> See 17 U.S.C. § 1101(a)(1)(2).

<sup>55</sup> 17 U.S.C. § 1101(a)(3).

<sup>56</sup> 17 U.S.C. § 1101(d).

<sup>57</sup> See Lanham Federal Trademarks Act [15 U.S.C. §§ 1051 et seq.] §§ 32, 43(a).

<sup>58</sup> See *Eastman Kodak Co. v. Kodak Cycle Co.*, 15 Rep. Pat. Cas. 105 (1898), discussed in Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 821-26 (1927).

bicycle purveyor would have been trading off the goodwill of the famous mark. Moreover, were the practice of unauthorized adoption of famous marks for unrelated goods to proliferate, famous marks might ultimately lose their distinctiveness as trademarks.

Although the leading U.S. article proposing protection against the usurpation of a trademark's goodwill, even in the absence of competition or consumer confusion, appeared in 1927,<sup>59</sup> states did not begin to enact statutes prohibiting the "dilution of the distinctive quality of a trademark" until twenty years later.<sup>60</sup> In 1964, the Model State Trademark bill incorporated a dilution section;<sup>61</sup> on the eve of enactment of the federal anti-dilution act, twenty-seven states had enacted anti-dilution statutes, most of them derived from the Model Bill.<sup>62</sup> The Model Bill provides:

**INJURY TO BUSINESS REPUTATION; DILUTION**

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark . . . shall be a ground for injunctive relief notwithstanding the absence of confusion as to the source of goods or services.<sup>63</sup>

As elaborated by state courts, dilution took on two forms: "blurring" of the mark's distinctive quality through unlicensed remote uses; and "tarnishment" of the mark's (or owner's) goodwill through unauthorized uses in unsavory contexts.<sup>64</sup> The two strands often overlapped, however: a mark "tarnished" by association with some inappropriate goods or services is also threatened with losing its distinctiveness because of the remote use. For example, use of the well-known slogan for the American Express Card, "DON'T LEAVE HOME WITHOUT IT," in an AIDS-era advertising campaign for condoms, not only involves goods remote from credit card services, but also puts a, presumably unwanted, sexual cast on those services.<sup>65</sup>

Although several of the twenty-seven states with anti-dilution statutes had generated a considerable case law,<sup>66</sup> dilution doctrine suffered from the usual

<sup>59</sup> Schechter, *supra* note 58.

<sup>60</sup> See RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 25, Comment b. History.

<sup>61</sup> See Andrew L. Goldstein, *Bringing the Model State Trademark Bill Into the 90s and Beyond*, 83 TRADEMARK REP. 226 (1993).

<sup>62</sup> See, e.g., Elliott B. Staffin, *The Dilution Doctrine: Toward a Reconciliation with the Lanham Act*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 105 (1995); Trademarks Legislation: Hearing on H.R. 1270 and H.R. 1295 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 2d Sess. (July 19, 1995) (Statement of Jonathan Moskin).

<sup>63</sup> Model State Trademark Bill, § 12.

<sup>64</sup> See generally Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986) (reviewing evolution of anti-dilution doctrine).

<sup>65</sup> See American Express Co. v. Vibra Approved Laboratories Corp., 10 U.S.P.Q.2d 2006 (S.D.N.Y. 1989). Tarnishment cases often involve sex and/or drugs. See, e.g., L.L. Bean, Inc. v. Drake Publishers Inc., 811 F.2d 26 (1st Cir.), cert. denied, 483 U.S. 1013 (1987) (rejecting dilution/tarnishment claim against magazine parody recasting plaintiff's mail order clothing catalogue as "L.L. Bean's Back-to-School Sex Catalogue"); Coca-Cola Co. v. Alma-Leo USA, Inc., 719 F.Supp. 795 (N.D. Ill. 1989) (upholding dilution/tarnishment claim against producer of bubblegum resembling cocaine powder sold in bottle emulating Coca-Cola trade dress).

<sup>66</sup> The New York, Illinois, and Georgia statutes, for example, have spawned a sizable body of judicial interpretation.

failings of state intellectual property protection in a federal system: disuniformity and territoriality. Indeed, for more than ten years preceding the new federal statute, commentators had called for uniform federal regulation.<sup>67</sup> In 1987 the United States Trademark Association (now the International Trademark Association, INTA) proposed a federal anti-dilution amendment as part of the 1988 trademark law revision, but the amendment was ultimately withdrawn.

A similar text passed, however, in January 1996, with the support of many trademark owners. Those who testified in favor of federalizing dilution emphasized the need for uniformity, and for nationwide injunctions.<sup>68</sup> As with the new federal right of fixation of live musical performances, the TRIPs accord may have supplied further impetus for legislative action. Article 16.3 of that agreement mandates a kind of dilution protection, more limited than that available in some states, but, of course, more extensive than that available in the twenty-three states that had no anti-dilution measures.<sup>69</sup>

The "Federal Trademark Dilution Act of 1996,"<sup>70</sup> entitles the owner of a "famous mark" to enjoin

another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution to the distinctive quality of the mark . . .<sup>71</sup>

#### The Act defines dilution as

the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of

- (1) competition between the owner of the famous mark and other parties, or
- (2) likelihood of confusion, mistake, or deception.<sup>72</sup>

#### The Act also explicitly excludes from the scope of the dilution remedy

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.<sup>73</sup>

Congress intended the exclusions to ensure that the dilution remedy would not target protected "speech," but would be limited to a third party's unauthorized

<sup>67</sup> See, e.g., Beverly Pattishal, *Dawning Acceptance of the Dilution Rationale for Trademark Identity Protection*, 74 TRADEMARK REP. 289 (1984).

<sup>68</sup> See, e.g., Statement of Mary Ann Alford, Executive Vice President, International Trademark Association, Hearings, *supra* note 62, 1995 WL 435750.

<sup>69</sup> Article 16.3 of TRIPs provides:

Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that the use of the trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

<sup>70</sup> P.L. 104-98, Jan. 16, 1996, 109 Stat. 985.

<sup>71</sup> Lanham Act § 43(c)(1), 15 U.S.C. § 1125(c)(1).

<sup>72</sup> Lanham Act § 45, 15 U.S.C. § 1127.

<sup>73</sup> Lanham Act § 43(c)(4), 15 U.S.C. § 1125(c)(4).

use of a famous mark to identify its own goods or services.<sup>74</sup> Arguably, these exclusions are superfluous: properly understood, the dilution doctrine only concerns unauthorized adoption of a famous mark as another's identifying symbol.<sup>75</sup>

The new federal law appears to leave state anti-dilution law undisturbed, with one explicit exception. It provides that ownership of a federal trademark registration

shall be a complete bar to an action against that person under the common law or statute of a State and that seeks to prevent dilution of the distinctiveness of a mark, label, or form of advertisement.<sup>76</sup>

If no state anti-dilution claim can be brought against a federally registered mark, the clear implication is that state anti-dilution claims may still be enforced against unregistered marks. Similarly, the legislative history indicates that while the Lanham Act now protects nationally famous marks against dilution, federal law "would not pre-empt existing state dilution statutes. State laws could continue to be applied in cases involving locally famous or distinctive marks."<sup>77</sup>

The preservation of state dilution claims may be problematic; it threatens to revive the "unpredictable" "patch-quilt" features of protection that lawmakers and trademark owners decried before enactment of the federal provision.<sup>78</sup> Arguably, state protection will not interfere with nationwide rights, because one can expect that any nationally famous mark would be registered. Any unpredictability inherent in disuniform state regulation would, in theory, be confined to the regulation of local trade symbols. Moreover, the preemption of state dilution claims against federally registered marks may promote federal registration for all marks, especially, perhaps, for less known marks that might form the targets of state claims. Promoting federal registration enhances national uniformity and predictability in trademark law.

Finally, the federal law expression of the dilution claim adopts the "blurring" branch of dilution, but omits explicit reference to the "tarnishment" branch. The federal text, for example, unlike the state Model Bill, does not mention "injury to business reputation." Does this mean that there is no federal claim against tarnishment? And if not, do state tarnishment claims survive? It would be tempting to argue that the absence of an explicit tarnishment claim reveals Congress's intention to cut off that branch of the dilution doctrine. After all, tarnishment claims can conflict with speech interests, even if the threatened speech is often "commercial," and hence less protected.<sup>79</sup> Nonetheless, the legislative history suggests that Congress understood the concept of loss of

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<sup>74</sup> See H.R. Rep. No. 104-374, 104th Cong. 1st Sess. (1995), 1996 U.S.C.C.A.N. 1029.

<sup>75</sup> See RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 25 and Comment a ("The rules stated in Subsection (1) apply only when an actor uses the other's mark as a means of identification for the actor's own goods, services, or business.").

<sup>76</sup> Lanham Act § 43(c)(3), 15 U.S.C. § 1125(c)(3).

<sup>77</sup> H.R. Rep. No. 104-374, *supra* note 74. Accord, Statement of INTA, *supra* note 68.

<sup>78</sup> See H.R. Rep. *supra* note 74.

<sup>79</sup> See, e.g., *Deere & Co. v. MTD Products, Inc.*, 34 U.S.P.Q.2d 1706 (S.D.N.Y. 1995).

distinctiveness to encompass disparagement and tarnishment.<sup>80</sup> As a result, it would seem that, to the extent that federal dilution law can incorporate tarnishment, without running afoul of the first amendment, so, too, can state claims. By contrast, to the extent that state antidilution doctrine has not incorporated the kinds of exclusions of noncommercial speech and comparative advertising set forth in the federal statute,<sup>81</sup> the state laws may be vulnerable to first amendment challenge. In that case, however, the new federal anti-dilution statute would not preempt the state law; rather, the state law would be set aside on constitutional grounds. Nonetheless, a comparison of the state law with the new federal law would reinforce the constitutional challenge to the state law.

### CONCLUSION

State regulation in territorially discrete (in theory) "laboratories,"<sup>82</sup> can offer useful lessons to later federal drafters. The three recent federal enactments examined here all build on prior state legislation or common law. But the federal measures respond only partially to the federalism concerns that state intellectual property regulation poses. Because the federal laws leave much of the prior state laws in place, the federal laws do not assure uniformity of national regulation. Thus, while the federal measures in some respects improve the law evolved by the states, Congress appears to accept a substantial continued risk of unpredictable resolution of conflicting rights. This risk, viewed from within the U.S. federal system, may be within our tolerance, as well as within our past experience. Seen from without the U.S., and particularly from the burgeoning system of international digital communications, the complexity of U.S. regulation of intellectual property may well appear befuddling and frustrating.

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<sup>80</sup> See H.R. Rep., *supra* note 74; Hearings, *supra* note 62; Staffin, *supra* note 62, at 152.

<sup>81</sup> Lanham Act § 43(c)(4), 15 U.S.C. § 1125(c)(4), discussed *supra*.

<sup>82</sup> See discussion, *supra*, INTRODUCTION.