

# U.S. STATE COPYRIGHT LAWS: CHALLENGE AND POTENTIAL

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## ABSTRACT

*With copyright law in the United States lying primarily in the realm of federal law, the laws of the U.S. states concerning copyright do not typically attract significant attention from scholars, practitioners, and policy makers. Some recent events have drawn attention to state copyright laws—for example, litigation against a satellite radio provider for infringement of state common-law public performance rights in pre-1972 sound recordings. However, in general, state copyright laws remain largely in the shadow of federal copyright law, and state law is typically not viewed as a particularly useful vehicle for pursuing the policies that copyright law should support. Yet, when used effectively, state copyright law, together with state law in other areas such as contract, tax, employment, and environmental law, may assist states in promoting state interests in innovation and creativity. This article explores the limits of state law concerning copyright and uses four copyright-related statutes of the State of Nevada to analyze problems that arise in current state copyright law. State legislatures should not only remedy the problems in state copyright law but should revise state laws to best benefit states' interests in innovation policies, taking into account developments in intellectual property law. The article reviews some of the developments that should be on the radar of state legislators as they revise their states' copyright laws.*

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## I. INTRODUCTION

Copyright law in the United States falls primarily in the domain of federal law; however, individual U.S. states (the “states”) do have state laws that concern copyright. The preemption doctrine, as applied to copyright law, leaves some space in which state copyright law may exist—both as a remnant of common law and as state statutory law.<sup>1</sup> This article focuses on state copyright-related statutes, their current condition, and their hidden potential as tools for state policies. The article has two goals: first, to illustrate the problems that currently exist in state copyright legislation and suggest why and how the statutes should be updated to serve state interests in promoting innovation and creativity; and second, to explore recent trends in state and federal intellectual property (“IP”) law that state legislatures should be aware of as they consider revising their state statutes concerning copyright.

State laws that concern IP are typically not thought of as useful vehicles for the implementation of state policies to attract innovation and creativity (“innovation policies”), particularly with regard to copyright and patent laws, which lie largely in the realm of federal law, are shaped by federal policies, and are therefore non-controllable starting points for state innovation policies that leave limited leeway for the effects of state law. Yet, state IP law should not be ignored when states implement innovation policies, and state IP-related statutes should be up to date and should correspond to the innovation policies

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1. See *infra* Part I, Section A for a discussion of the preemption doctrine.

that a state wishes to pursue.

Of course, successful innovation policies do not rely solely on well-designed and carefully balanced IP laws;<sup>2</sup> in fact, some critics may argue that the role of IP laws is negligible. Studies concerning developments in the United States and in foreign countries question whether IP statutes actually affect innovation, or affect innovation in the manner intended by the drafters of the statutes.<sup>3</sup> Additionally, there seems to be little room for legislative creativity; international law creates a general framework for national IP laws, setting a common denominator that is, at least as far as the laws on the books are concerned, shared by most countries in the world, and permits little national and/or state experimentation.<sup>4</sup> Nevertheless, international law does provide space for differences in national IP laws, and these differences can influence the course of innovation in the fields of science and technology and in particular industries.<sup>5</sup>

It is important to recognize that IP laws are far from being the only laws that affect innovation and other creative activities; contract, labor, employment, environmental, and tax laws, among others, have significant impacts on innovation, some influencing innovation arguably even more than IP laws.<sup>6</sup> In addition to laws as such, an effective judicial system and the reliable enforcement of laws can create a high degree of legal certainty that also supports an environment that might be conducive to innovation. Extra-legal aspects are also crucial

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2. IP laws need to be well-balanced in order to contribute to an appropriate environment for innovation. Finding the proper balance is difficult, and a discussion of the balance is beyond the scope of this article. While Anupam Chander is correct that “overly rigid intellectual property laws can prove a major hurdle to Internet innovations,” overly flexible or unenforceable IP laws may discourage innovation and creativity in other areas, including the innovation and creativity without which no internet venture could exist. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 643-44 (2014).

3. See, e.g., Mario Cimoli et al., *Innovation, Technical Change, and Patents in the Development Process: A Long-Term View*, in INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 57 (Mario Cimoli et al. eds. 2014); Anthony D. So et al., *Is Bayh-Dole Good for Developing Countries? Lessons from the U.S. Experience*, in INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 201 (Mario Cimoli et al. eds. 2014).

4. On international law and intellectual property, see *infra* Part I, Section C.

5. Differences may exist among countries' IP statutes, interpretation of the statutes, procedural norms, and other aspects of national law and practice.

6. E.g., Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015); James Pooley & Mark Lemley, *California Restrictive Employee Covenants After Edwards*, 23 CAL. LAB. & EMP. L. REV., Jan. 2009, at 3.

for propelling and sustaining innovation and creativity;<sup>7</sup> various incentives, such as grants, prizes, and tax breaks, and factors such as the availability of skilled workers, natural resources, a suitable geographical location, attractive living conditions, and a quality educational system also help create an environment that nurtures innovation and creativity.<sup>8</sup>

Given the multitude of factors that affect innovation and creativity and the complexity of the interaction of the various factors, it might seem that state IP laws would play only a negligible role in pursuing state innovation policies. However, it is precisely because a successful implementation of the policies must rely on a complex mosaic of multiple and varied components that state legislators should not ignore state IP laws. States should give attention to their IP statutes, particularly when competing with other states for corporate locations and relocations, startups, inventors, and creative activity that will augment the state tax base.

This article illustrates the existing challenges that state legislatures face in IP law by considering examples of statutes from the State of Nevada. Nevada is an instructive example for two reasons: First, the state has been keen on spurring innovation and creativity; for decades, Nevada officials have reiterated the state's desire to attract innovative businesses from other states, particularly neighboring California.<sup>9</sup> The most recent economic downturn, which began in 2007 and was particularly pronounced in Nevada, made the diversification of the Nevada economy, and particularly diversification that draws on innovative industries, a high priority for the state.

The second reason for which Nevada is a useful example is that the Nevada legal system suffers from structural problems that make it necessary to rely primarily on state legislation to develop state law. Because of the lack (until recently) of an intermediate appellate court, Nevada has had no robust development of state law through appellate decisions. Before 2015, all appeals in Nevada were decided by a seven-

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7. Cf. Chander, *supra* note 2, at 642 (arguing that “[l]aw played a far more significant role in Silicon Valley’s rise and its global success than has been previously understood.”).

8. Certainty about the business environment may sometimes be more important than reliable law enforcement; as lessons from foreign countries suggest, as long as certainty is achieved through some means—even if it be extra-legal means—the environment created might be conducive to business and innovation. See, e.g., Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. REV. 169 (2015).

9. See, e.g., S.B. 395, Assemb. Comm. Judiciary, May 12, 1983 (“If the state is successful in attracting more [computer] companies, . . . this bill will help to give the legal protections necessary for these companies. Thus, it will be helpful in the promotion of high tech.”).

member Supreme Court; the situation changed only in early 2015 when the newly-established Court of Appeals<sup>10</sup> began to hear appeals. However, the new court might not be able to improve the situation significantly; the Court of Appeals has been operating under a deflective model<sup>11</sup> with only three judges on the Court.<sup>12</sup> Because insufficient numbers of cases are making their way through the courts, and particularly through the Court of Appeals and the Supreme Court, the focus of lawmaking in Nevada must logically shift to the legislature. However, Nevada's legislature operates under severe time constraints: it is one of only four U.S. state legislatures that still meet only biennially.<sup>13</sup> This legislative model makes it difficult to react swiftly to developments in law and practice, particularly when other more pressing issues take precedence.

The selected Nevada statutes reviewed in this article are examples of phenomena that exist in many other states, and the article points out examples from other states throughout its analysis. The first section reviews the space in which states may legislate on copyright; the outer limits of the space are delineated by the preemption doctrine, the dormant Commerce Clause, the international commitments of the United States, and State Constitutions. Additional factors that influence the content and character of state legislation are mentioned as well. The second section of the article is divided into three subsections that discuss four selected Nevada statutes concerning copyright. Each subsection introduces a statute or statutes, reviews the legislative history of the statutes, explains their place within federal and international IP law, and provides a comparative analysis of the provisions with regard to their counterparts in other states' laws and the laws of foreign countries. After a critical review of the statutes, each subsection offers suggestions for amending the statutes. The third

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10. NEV. CONST. art. VI, § 3A (West, Westlaw through the 2017 79th Regular Session 2017); 1 NEV. REV. STAT. ch. 2A (2015). *Overview of the Appellate Courts*, NEV. CTS. (Nov. 18, 2016), [http://nvcourts.gov/Supreme/Court\\_Information/Overview\\_of\\_the\\_Supreme\\_Court\\_and\\_Court\\_of\\_Appeals](http://nvcourts.gov/Supreme/Court_Information/Overview_of_the_Supreme_Court_and_Court_of_Appeals) [https://perma.cc/L8XD-DGLG]. The Court of Appeals was approved in 2014 but began to hear cases only in 2015. *Id.*

11. In a "deflective model," "all appeals are filed in the supreme court, which then decides to transfer certain cases to the intermediate appellate court based on established screening criteria." Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal Than Others*, 23 FLA. ST. U. L. REV. 625, 669 n.308 (1996).

12. *Overview of the Appellate Courts*, *supra* note 10.

13. The other three U.S. states are Montana, North Dakota, and Texas. *Annual Versus Biennial Legislative Sessions*, NAT'L CONF. OF ST. LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/about-state-legislatures/annual-versus-biennial-legislative-sessions.aspx> [https://perma.cc/8GJ9-JXQ4].

section of the article discusses current developments in the United States that concern state IP law related to copyright, and contemplates the effects that these developments might have on a legislative reconsideration of state statutes.

There are two limitations to the analysis in this article that need to be mentioned. First, the article covers a number of topics that merit discussion in a single- or multiple-volume work. In fact, many of the topics mentioned in passing in this article *have* been covered in articles of substantial length, monographs, and treatises. The goal of the article is to suggest the range of state law issues; discussing the breath of the examples provided by the four selected Nevada statutes in some detail means that the article must abbreviate, to the minimum necessary for sufficient background, discussions of many general topics, such as the preemption doctrine and the dormant Commerce Clause. The article refers to existing literature on such topics in the footnotes, and readers are encouraged to pursue their interest in detailed discussions of the topics in the cited literature.

The second limitation is that the article focuses on only four statutes of one state and on selected statutes concerning only copyright; the article does not attempt to discuss comprehensively all of the copyright- or IP-related statutes of all states, or even of the State of Nevada. It is infeasible to analyze all state IP-related statutes in a single article or cover all Nevada IP statutes in a single article. Additional Nevada statutes exist that concern copyright law<sup>14</sup> and other areas of IP law; more detailed statutes than those that concern copyright exist on trademarks, trade secrets, and unfair competition.<sup>15</sup> These other statutes are no less significant for state innovation policies than the provisions on copyright that are reviewed in this article.

The statutes analyzed in this article were selected because they are the primary examples of copyright-related statutes that are ripe for—if

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14. *E.g.*, NEV. REV. STAT. § 597.720 (2017) (Miscellaneous Trade Regulations and Prohibited Acts—Works of Art); NEV. REV. STAT. § 205.216 (2017) (Unlawful operation of audiovisual recording function in a motion picture theater); NEV. REV. STAT. § 205.910 (2017) (Unlawful use of television or radio signals . . .).

15. *E.g.*, NEV. REV. STAT. § 205.205 (2017) (Counterfeiting trade-mark or design); NEV. REV. STAT. § 205.210 (2017) (Selling, displaying or advertising goods with false trademark); NEV. REV. STAT. § 205.215 (2017) (Fraudulent registration of trademark); NEV. REV. STAT. § 587.610 (2017) (Mislabeling, false or misleading statements or advertising unlawful); NEV. REV. STAT. ch. 598 (2017) (Deceptive trade practices); NEV. REV. STAT. ch. 600 (Trademarks, Trade Names and Service Marks); NEV. REV. STAT. ch. 600A (Trade Secrets (Uniform Act)); NEV. REV. STAT. § 603.040 (2017) (Unfair trade practices). Nevada also has a statute concerning patents: NEV. REV. STAT. § 600.500 (2017) (Employer is sole owner of patentable invention or trade secret developed by employee). For some discussion of NEV. REV. STAT. ch. 598 *see infra* Part III, Section B.

not in dire need of—amendments. The statutes are outdated to the point that some of their provisions are misleading or are preempted by federal law. The condition of the statutes is unfortunate because commentators, without a knowledge of legislative history, might not realize that the statutes were the result of an understandable and rational legislative approach when they were enacted.<sup>16</sup>

The four statutes need to be updated and improved to signal to investors, innovators, creators, and businesses that Nevada is primed for innovation, that it understands innovation-friendly laws and processes, and that it is committed to maintaining an attractive environment for sustainable business, innovation, and creativity. Although some might argue that court interpretations can resolve some of the problems created by outdated legislation, or that statutes are not worth legislative effort unless the issues in the statutes have reached the courts, the message that businesses want to hear is legal certainty through modern laws. In a state where judicial resources have been strained, legislation is the only path for developing state law; it is also the only path for a comprehensive review of state laws—a review that should be guided by the clearly defined needs, goals, and policies of the state.

## II. LIMITS OF STATE COPYRIGHT LEGISLATION

State copyright statutes exist within a space that is, like that of other state statutes, constrained by several forces: at the federal level, the preemption doctrine and the dormant Commerce Clause limit the reach of state laws, and international law that binds the United States also shapes the space for state laws. General constitutional requirements stemming from both the federal Constitution and a state's Constitution also affect state laws.<sup>17</sup> Moreover, canons of statutory interpretation and best practices of legislative work should be reflected in any legislative effort, and legal certainty, clarity, and preservation of legitimate expectations are among the principles that legislators should pursue. This section presents an overview of the federal preemption doctrine, the dormant Commerce Clause, and international law that provides a background for the discussion of the four Nevada IP statutes that follows in Part II.

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16. See *infra* note 191 and accompanying text.

17. For a discussion of an IP-related provision in the Nevada Constitution see *infra* notes 113-115 and accompanying text.

### A. Preemption

Copyright laws lie in the realm of U.S. federal law pursuant to the IP Clause of the U.S. Constitution, according to which “[t]he Congress shall have power . . . 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>18</sup> The Supremacy Clause dictates that federal law shall prevail over state law, and the preemption doctrine safeguards the supremacy of federal law.<sup>19</sup> Although copyright laws are largely a product of federal law, courts have not found copyright law to be subject to field preemption that would entirely exclude state law on copyright.<sup>20</sup> There is therefore some, albeit limited, space for state legislation. However, identifying what federal law has left to the states to legislate is often a difficult task.<sup>21</sup>

The space for state copyright law is carved out by an express preemption provision<sup>22</sup> that has been included in Section 301 of the 1976 Copyright Act.<sup>23</sup> The preemption provision calls for an assessment of two aspects—subject matter and rights. The subject matter covered by a state law must “not come within the subject matter of copyright,”<sup>24</sup> nor must the rights provided by the state law be “equivalent to any of the exclusive rights within the general scope of copyright.”<sup>25</sup> Although Section 301 was adopted to clarify the

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18. U.S. CONST., art. I, § 8, cl. 8. On the scope of the IP Clause of the U.S. Constitution see, e.g., Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355 (2007); Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1330 (2012).

19. U.S. CONST., art. VI, cl. 2.

20. *Goldstein v. California*, 412 U.S. 546 (1973); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). For a definition of field preemption see Caleb Nelson, *Preemption*, 83 VA. L. REV. 225, 227 (2000).

21. For a general discussion of preemption and federal patent and copyright law see Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 137-42 (1999).

22. For a definition of express preemption see Nelson, *supra* note 20, at 226-27.

23. 17 U.S.C. § 301 (2015). For a detailed discussion of the express preemption provision in § 301 see Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 15-106 (2007). For a discussion of the legislative history of § 301 see Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 11 SUP. CT. REV. 509, 537-50 (1983).

24. 17 U.S.C. § 301(a) (2015).

25. *Id.* See also, e.g., *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998).



preemption doctrine in copyright law,<sup>26</sup> it has not—and realistically probably could not have—achieved perfect clarity.<sup>27</sup>

Because the 1976 Act was designed to eliminate the duality of federal copyright for published works and state copyright for unpublished works by subsuming both published and unpublished works under federal copyright,<sup>28</sup> the Act expressly preempts state law on unpublished works.<sup>29</sup> State statutes are also preempted if they extend to works of the same “general subject matter categories” as the Act<sup>30</sup> but the works have “fail[ed] to achieve Federal statutory copyright because [they were] too minimal or lacking in originality to qualify [for federal protection], or because [they have] fallen into the public domain.”<sup>31</sup> For example, states cannot provide copyright protection for factual information contained in a book<sup>32</sup> or for the non-original aspects of databases;<sup>33</sup> nor may they legislate extensions to the copyright term set by federal law,<sup>34</sup> because these extensions would impermissibly constrain the public domain.

States may legislate on works that are not protected under federal copyright because the works do not fall within the subject matter covered by the Act<sup>35</sup> and/or are not fixed in a tangible medium of expression.<sup>36</sup> While it might be difficult to think of a subject matter not covered by the Act,<sup>37</sup> it is easier to picture examples of unfixed works, such as unfixed performances, in whose protection state legislation can

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26. REP. COMM. JUDICIARY, S. REP. NO. 93-983, at 165 (1974) (“The declaration of [the preemption] principle in section 301 is intended to be stated in the clearest and most unequivocal language possible. . .”). See REP. COMM. JUDICIARY, S. REP. NO. 94-473 (1975), at 114.

27. Bauer, *supra* note 23, at 2 (noting that “this goal has never been realized. Instead, there are literally hundreds of federal and state decisions interpreting [§ 301], which can charitably be described as inconsistent and even incoherent.”).

28. See, e.g., REP. COMM. JUDICIARY, S. REP. NO. 91-1219, at 4 (1970).

29. For a detailed discussion of the subject matter problems of preemption see Abrams, *supra* note 23, at 559-66.

30. Protectable subject matter is defined in 17 U.S.C. §§ 102-103 (2015).

31. H.R. REP. NO. 94-1476, at 129-33 (1976).

32. Harper & Row, Inc. v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds* 471 U.S. 539 (1985). See also National Basketball Assoc. v. Motorola, Inc., 105 F.3d 841, 848-49 (2d Cir. 1997) (rejecting the “partial preemption” doctrine).

33. See Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340 (1991).

34. 17 U.S.C. §§ 302-305 (2015). *But cf.* Goldstein v. California, 412 U.S. 546, 560-61 (1973). On Congress' decision not to permit perpetual copyright for pre-1972 sound recordings see H.R. REP. NO. 94-1476, at 133 (1976).

35. 17 U.S.C. §§ 102-103 (2015).

36. 17 U.S.C. § 102 (2015).

37. See *infra* Part II, Section C for a discussion of one example.

play an important role.<sup>38</sup> States can also, until February 15, 2067, legislate on sound recordings that were fixed in a tangible medium before February 15, 1972—the date on which federal law began protecting sound recordings.<sup>39</sup>

States may adopt laws concerning works that fall within the federally protected subject matter, are original works of authorship, are fixed in a tangible medium of expression, and are not in the public domain, but only if the laws concern rights that are not “equivalent to any of the exclusive rights” specified in sections 106<sup>40</sup> and 106A of the Act.<sup>41</sup>

It can be difficult to ascertain when state law does or does not afford rights “equivalent to any of the exclusive rights” in sections 106 and 106A of the Act.<sup>42</sup> For example, it might seem that federal copyright law should not preempt state law on trade secrets misappropriation, but the situation looks quite different when the trade secrets consist of a computer program—which is a subject matter protectable under federal copyright law—and the misappropriation occurs through copying of the computer program.<sup>43</sup> In *Computer Associates*,<sup>44</sup> the court held that although the subject matter of protection was identical, the state trade secrets law was not preempted because “the violation of a duty of confidentiality established by state law” for misappropriation of trade secrets is an “extra element [that] renders the state right

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38. *Id.*

39. 17 U.S.C. § 301(c) (2015). Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 39 (Oct. 15, 1971). *See also* Goldstein v. California, 412 U.S. 546 (1973); COMM. ON THE JUDICIARY, S. REP. NO. 91-1219, at 4 (1970); COMM. ON THE JUDICIARY, S. REP. NO. 93-983, at 166 (1974).

40. 17 U.S.C. § 301(a)-(b)(3) (2015).

41. 17 U.S.C. § 301(f) (2015). Note that by referring to §§ 106 and 106A, the Act leaves aside other rights that might stem from the Act—for example, the right to prevent the access that exists under some Circuits’ interpretations of 17 U.S.C. § 1201 (2015). *See* Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 618-20 (2012). The preemption provision also specifically leaves undisturbed state laws on “state and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected” under the Copyright Act. 17 U.S.C. § 301(b)(4) (2015), referring to 17 U.S.C. § 102(a)(8) (2015). Thus, presumably, a state could legislate, for example, that a state landmark that is a work of architecture must not be photographed without a license; such provisions would exclude the work from the application of the exception that otherwise permits pictorial representations of architectural works that are protected by copyright and are “located or ordinarily visible from a public place.” 17 U.S.C. § 120(a) (2015).

42. For a detailed discussion of the difficulties of ascertaining whether state law-based rights are equivalent to the exclusive rights in §§ 106 and 106A see Abrams, *supra* note 23, at 550-59.

43. 17 U.S.C. § 101 (2015) (defining “computer program”).

44. *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

qualitatively distinct from the federal right.”<sup>45</sup> An extra element was also present in a state law-based claim for breach of an implied-in-fact contract; compared to a claim of copyright infringement under federal law, the contractual claim in the case included an extra element of a promise to pay, and therefore the court held that the claim was not preempted.<sup>46</sup>

The assessment of equivalency of rights is also difficult when a state law-created right is not on its face equivalent to a federally created right but does in fact create a state exception on top of a federal exception to a federal right (in fact, an exception to an exception). The California resale right statute was an example.<sup>47</sup> The right entitled authors to receive a portion of a price paid for their works when the works were resold following the first sale of the works. The right might have been formally viewed as not equivalent to any of the rights in sections 106 and 106A of the Copyright Act because the right is not listed in either section. But the resale right is an exception to the federal first sale doctrine (the first sale doctrine ensures that the right to distribute a particular copy exhausts through the first sale of the copy), while the federal first sale doctrine is an exception to the distribution right, which itself is a right in section 106 of the Copyright Act.<sup>48</sup> By giving rights to the author that extend beyond the first sale, the resale right diminishes the effects of the exhaustion doctrine, and from this perspective the

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45. *Id.* See also *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 n.13 (9th Cir. 1989); *Stromback v. New Line Cinema*, 384 F.3d 283, 303-04 (6th Cir. 2004); COMM. ON THE JUDICIARY, S. REP. NO. 93-983, at 166 (1974) (noting that rights under state laws “would remain unaffected as long as the causes of action contain[ed] elements . . . that are different in kind from copyright infringement.”); COMM. ON THE JUDICIARY, S. REP. NO. 94-473, at 115 (1975).

46. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001).

47. While resale right statutes exist in numerous countries, the United States confers no federal resale right and only California ever had a state resale right statute. CAL. CIV. CODE § 986 (1982). According to a document presented in the World Intellectual Property Organization (“WIPO”), “more than 80 countries recognize the resale right in their national legislations.” *Proposal from Senegal and Congo to Include the Resale Right (droit de suite) in the Agenda of Future Work by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization*, SCCR/31/5, at 1 (Dec. 4, 2015). At the international level, the Berne Convention includes a provision on the resale right (“droit de suite”) but does not mandate that countries introduce the right. Berne Convention for the Protection of Literary and Artistic Works, Art. 14<sup>ter</sup>, Sept. 9, 1886, 1161 U.N.T.S. 1979. In December 2015, Senegal and Congo proposed that a discussion of international protection for droit de suite be placed on WIPO’s agenda. See *Proposal, supra*. Introduction of the resale right into the U.S. federal statutes has been discussed on several occasions. On the California resale right statute see also *infra* Part I, Section B.

48. 17 U.S.C. § 109 (2015).

resale right can be viewed as preempted.<sup>49</sup> This latter view was adopted by the U.S. District Court for the Central District of California, which in 2016 held that the California Resale Royalty Act conflicted with the first sale doctrine under the U.S. Copyright Act and was therefore preempted.<sup>50</sup>

In addition to receiving scrutiny for express preemption by federal copyright law, state statutes may also face scrutiny for implied preemption by federal copyright law through what is known as conflict preemption.<sup>51</sup> Conflict preemption dictates that “state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in [the intellectual property] laws.”<sup>52</sup> For example, the U.S. Supreme Court found a claim based on a state unfair competition statute to be preempted when the statute would protect against the copying of the design of a lamp that was protected by neither federal patent nor federal copyright.<sup>53</sup> In the same decision the Court provided another example—this time in the patent law area—of the application of the preemption doctrine when the Court also opined in dicta that “[o]bviously a State could not . . . extend the life of a patent beyond its expiration date.”<sup>54</sup> The same would apply to copyright.

### B. Dormant Commerce Clause

The dormant Commerce Clause of the U.S. Constitution, which is a mirror image of the Commerce Clause, also constricts states’ ability to

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49. For a different formulation of the argument in favor of preemption see Gordon P. Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 220 (1978) (arguing that “[d]roit de suite aims to achieve exactly what the preemption provisions of the Copyright Act proscribe—increasing the economic incentive to produce creative works by augmenting the copyright monopoly”).

50. *Estate of Graham v. Sotheby’s, Inc.*, 178 F. Supp. 3d 974, 981-91 (C.D. Cal. 2016). See also *id.* at 985 (“[R]ecent precedent teaches that the first sale doctrine does not simply create a void to be filled by state regulations.”). The court analyzed the state statute in light of both the express and the implied preemption doctrines.

51. For a general definition of conflict preemption see Nelson, *supra* note 20, at 227-29. For a detailed discussion of conflict preemption in IP law see David Hricik, *Remedies of the Infringer: The Use by the Infringer of Implied and Common Law Federal Rights, State Law Claims, and Contract to Shift Liability for Infringement of Patents, Copyrights, and Trademarks*, 28 TEX. TECH. L. REV. 1027, 1076-83 (1997). For a discussion of the relationship between express preemption and conflict preemption in copyright law see Abrams, *supra* note 23, at 512, 549 (“There is also the question whether the entire preemptive force of the statute is exhausted by § 301.”).

52. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

53. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

54. *Id.* In the copyright law context, see *supra* note 34.

enact state laws, including copyright laws.<sup>55</sup> The dormant Commerce Clause prohibits states from “unjustifiably . . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce.”<sup>56</sup> It prohibits state law from reaching extraterritorially and “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”<sup>57</sup>

A portion of the California resale statute that was mentioned above was found to be in violation of the dormant Commerce Clause.<sup>58</sup> The U.S. Court of Appeals for the Ninth Circuit concluded that the portion of the statute that required the payment of resale royalties from sales of fine art whenever the seller resided in California violated the dormant Commerce Clause “as applied to out-of-state sales by California residents.”<sup>59</sup> As noted in the previous Section, the portions of the statute that survived the challenge based on the dormant Commerce Clause<sup>60</sup> were later held to be preempted by federal copyright law.

Interpreting the dormant Commerce Clause is particularly difficult in cases that involve conduct on the internet or on other networks that are accessible throughout the United States;<sup>61</sup> in fact, it is not difficult to imagine that all state laws that affect activities on these networks throughout the United States could be interpreted as being in violation of the dormant Commerce Clause,<sup>62</sup> but that should not be the case. In the IP context, the question of permissibility in light of the dormant Commerce Clause of state legislation affecting conduct that occurs on the networks was raised by Sirius XM Radio, Inc. in its litigation with Flo & Eddie, Inc. Sirius argued that if a common law rule in New York existed that afforded a public performance right to pre-1972 recordings,<sup>63</sup> “[a]pplying [the] New York performance right to Sirius XM’s nationally uniform broadcasts would have the practical effect of

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55. U.S. CONST., Art. 1, §. 8, cl. 3.

56. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 991 (9th Cir. 2002).

57. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted).

58. CAL. CIV. CODE § 986 (1982); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1326 (9th Cir. 2015).

59. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015).

60. *Id.* at 1325-26 (discussing severability).

61. The term “internet” is used here in a general sense, not as a reference to a particular protocol.

62. See, e.g., Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 786-87 (2001).

63. See *infra* Part III, Section A for a discussion of state law on the public performance right in pre-1972 sound recordings.

burdening interstate commerce.”<sup>64</sup>

A decision in *Flo & Eddie* on the application of the dormant Commerce Clause to state public performance rights in pre-1972 sound recordings could have affected the application of the dormant Commerce Clause with respect to other state laws concerning activities on the internet. The District Court judge held that a common law rule in New York did provide for such rights<sup>65</sup> and that the rule as applied in the case did not violate the dormant Commerce Clause because the rule was not “directly regulating commerce in other states.”<sup>66</sup> On appeal, Sirius urged the U.S. Court of Appeals for the Second Circuit to apply the *Pike* test, the application of which would result in the invalidation of the state law if “the burden imposed on [interstate] commerce [by the law] is clearly excessive in relation to the putative local benefits.”<sup>67</sup> However, in response to a question that the U.S. Court of Appeals for the Second Circuit certified, the New York Court of Appeals held that “New York common-law copyright does not recognize a right of public performance.”<sup>68</sup> Therefore, this litigation did not clarify the application of the dormant Commerce Clause to state laws regulating activities on the internet.<sup>69</sup> Neither will a clarification result from a case concerning a state law imposing a tax on internet sales; the U.S. Supreme Court denied certiorari in the case in December 2016.<sup>70</sup>

### C. International Law

Another force that shapes the scope of state law is international law.<sup>71</sup> International law binds the United States, and it is the federal

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64. Reply Brief for Defendant-Appellant Sirius XM Radio Inc. at \*20, No. 15-1164-cv (2d Cir. Oct. 27, 2017), 2015 WL 6575734.

65. See *infra* Part III, Section A.

66. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 349 (S.D.N.Y. 2014).

67. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

68. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 589 (2016).

69. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 849 F.3d 14 (2d Cir. 2017).

70. *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), *cert. denied* Dec. 12, 2016.

71. For a discussion of how the effects of international law on state law intersect with the effects of the preemption doctrine and the dormant Commerce Clause on state law see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 7 SUP. CT. REVIEW 295, 306-07, 335-36 (1994).

government that enters into international treaties and is expected to implement the treaties.<sup>72</sup> Through the Supremacy Clause of the U.S. Constitution, international treaties have effects on state law;<sup>73</sup> in some cases, provisions of international treaties are self-executing, meaning that parties may directly rely on such provisions in courts where the provisions supersede any state law to the contrary.<sup>74</sup> Courts will enforce treaties to remedy violations of the treaties that may occur through the application of state laws that are incompliant with the treaties; as Tim Wu has noted, this type of enforcement has been “the primary and historically most significant type of treaty enforcement in the United States.”<sup>75</sup> Wu also points out that the U.S. Supreme Court “makes no effort to reconcile inconsistent State law and pays no special attention to State interpretation of a treaty.”<sup>76</sup>

A number of international treaties to which the United States is a party concern IP and copyright specifically. In addition to numerous bilateral agreements concluded by the United States,<sup>77</sup> the United States has acceded to a number of international treaties, for example the Universal Copyright Convention<sup>78</sup> and the Geneva Phonograms Convention.<sup>79</sup> In 1988 the United States became a party to the Berne

72. On the interaction between the IP Clause and the Treaty Clause of the U.S. Constitution see Dinwoodie, *supra* note 18.

73. For a discussion of whether international law is federal or state law, see Brilmayer, *supra* note 71, at 302-04. “[U]nless otherwise explicitly so stated, Congress should be presumed not to want the states to violate international law.” *Id.* at 333. See also CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 40 (2013).

74. Courts in the United States have held most IP treaty provisions not to be self-executing in the United States. *E.g.*, ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 161 (2d Cir. 2007) (“TRIPs is plainly not a self-executing treaty.”). See generally Bradley, *supra* note 73, 41-44. For a case in which IP treaty provisions were found to be self-executing see *Bacardi Corp. of America v. Domenech*, 311 U.S. 150 (1940); *but cf.* *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 128 (2d Cir. 2000).

75. Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 583-84 (2007).

76. *Id.* at 585.

77. See, e.g., INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES, U.S. COPYRIGHT OFFICE, CIRCULAR 38A, 2016, <http://www.copyright.gov/circs/circ38a.pdf> [<https://perma.cc/E9SW-9PPF>].

78. Universal Copyright Convention, 1952. The United States signed the Convention in 1952 and ratified it in 1954. See *Other IP Treaties: Universal Copyright Convention* 1952, WIPO, [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=208&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22) [<https://perma.cc/B4CA-FVPE>].

79. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, 1971 (“Geneva Phonograms Convention”). The United States signed the Convention in 1971 and ratified it in 1973. See *WIPO-Administered Treaties*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=18](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=18)

Convention<sup>80</sup>—the key international convention on copyright—and since that time the U.S. role in international IP lawmaking has intensified, with the U.S. government initiating, leading, and/or strongly influencing negotiations on, as well as joining in, other international IP treaties and trade treaties with IP law provisions.<sup>81</sup>

When states legislate on matters governed by international treaties, or when courts interpret state statutes or apply state common law on such matters, the states are de facto participating in the implementation of the treaties if a state law falls within the scope of an international treaty.<sup>82</sup> For instance, the Berne Convention applies to both fixed and unfixed works; however, it gives countries that are parties to the Convention the option to decide whether or not they will protect unfixed works.<sup>83</sup> To the extent that a contracting country does protect unfixed works by copyright, the provisions of the Convention will apply to such unfixed works. The U.S. Copyright Act does not protect unfixed works,<sup>84</sup> and any protection for unfixed works is left to state law.<sup>85</sup> If state law protects unfixed works by copyright, the state law should comply with the Berne Convention, to the extent that the Convention covers the laws. For example, the Berne Convention’s provision on national treatment<sup>86</sup> applies to state statutes, meaning that state statutes should ensure that foreign right holders “enjoy . . . the same rights as national [right holders].”<sup>87</sup>

State IP statutes typically neither mention nor refer to international treaties on IP. A Delaware statute appears to be the sole exception in this

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[<https://perma.cc/W9MA-ZBZH>].

80. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, S. TREATY DOC. NO. 99-17 (1986) (as revised at Paris on July 4, 1971, and amended Sept. 28, 1979) [hereinafter “Berne Convention”].

81. E.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter “TRIPS Agreement”]. On the introduction of IP matters into trade treaties, see, e.g., Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property*, 36 MICH. J. INT’L L. 557 (2015).

82. See, e.g., Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 505-08 & 519 (1967) (discussing examples in which U.S. compliance with international treaties was achieved through state law).

83. Berne Convention, Art. 2(2).

84. 17 U.S.C. § 102(a) (2015).

85. See *supra* Part I, Section A.

86. Berne Convention, *supra* note 80, Art. 5(3).

87. *Id.* Because the United States is also a party to the TRIPS Agreement, the TRIPS Agreement’s national treatment and most-favored-nation provisions also apply. TRIPS Agreement, *supra* note 81, Art. 3 and 4.



regard; its provision against unauthorized “[t]ransfer of sounds”<sup>88</sup> mentions the Geneva Phonograms Convention.<sup>89</sup> The statute limits the protection it affords to an “owner [who] is domiciled or has its principal place of business in a country which is a signatory to the [Geneva Phonograms] Convention.”<sup>90</sup> This limitation appears to be a unique instance of a state statute limiting its beneficiaries based on the national treatment mandated by an international IP treaty.<sup>91</sup> The Delaware statute actually does not cover all “nationals” of the other contracting states (a coverage that is required by the Convention);<sup>92</sup> nationals may or may not have a domicile or principal place of business in the country of their nationality. This inconsistency with the Geneva Phonograms Convention is of little consequence for U.S. compliance with the Convention, however; the Delaware statute is likely preempted by federal law insofar as it would apply to post-1972 sound recordings,<sup>93</sup> and the statute as applied to pre-1972 sound recordings is not within the scope of the Geneva Phonograms Convention, which does not mandate protection for pre-1972 sound recordings.<sup>94</sup>

Even if international treaties are de facto implemented by state, rather than federal law, it is the federal government that will be held responsible for any violations of international law.<sup>95</sup> Verifying the compliance of state law with international treaties to which the United States is a party is primarily the concern of courts;<sup>96</sup> Tim Wu has observed that “courts show . . . concern that allowing State breach might create reciprocity concerns that only courts are in a good position to

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88. See *infra* Part II, Section C for a discussion of similar statutes in other states, including in Nevada.

89. *Supra* note 79.

90. 11 DEL. CODE ANN. tit. 11, § 920(a) (2017).

91. Geneva Phonograms Convention, *supra* note 79, Art. 2. For limitations in federal copyright law see 17 U.S.C. § 104 (2015).

92. Geneva Phonograms Convention, *supra* note 79, Art. 2.

93. See *supra* Part I, Section A, and *infra* Part II, Section C, and Part III, Section A.

94. Geneva Phonograms Convention, *supra* note 79, Art. 7(3). The United States must apply the Convention to sound recordings fixed on or after March 10, 1974 (the date on which the Convention entered into force for the United States). See *Phonograms Convention: Phonograms Convention*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=18](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=18) [<https://perma.cc/ZDQ2-FUKK>].

95. Brilmayer, *supra* note 71, at 334-335 (“[W]here the constituent states of the Union violate international legal norms, the ultimate responsibility falls upon the federal government.”). In practice, it could theoretically be private persons and entities that face the repercussions of a government’s failure to comply with an international IP treaty—for example, if another country suspended its national treatment in retaliation for the failure.

96. Bradley, *supra* note 73, at 39-40.

remedy.”<sup>97</sup> In general, a state’s responsibility for compliance with international treaties is a sensitive matter, given that it is the federal government that enters into the treaties on behalf of the United States,<sup>98</sup> and yet in many areas of law, including IP law, the federal government will rely on state law to comply with the treaties. For example, compliance with the obligations of international law with respect to trade secrets was until recently almost entirely in the hands of the states;<sup>99</sup> similarly, proponents of U.S. compliance with the Berne Convention have referred mostly to state law to show U.S. compliance with the moral rights provisions of the Convention.<sup>100</sup>

While the federal government might rely on state law to secure U.S. compliance with international IP law, state law can successfully avoid being a vehicle for the implementation of international IP law by legislating outside IP law categories. Treaties on IP law are limited in scope; they cover IP law and IP rights, and not other areas of law or other rights. Therefore, if a state statute relates to a matter covered by an international IP treaty but the state does not categorize the statute as an IP statute and does not formulate the relevant rights as IP rights, the statute will be outside the scope of the treaty.<sup>101</sup> The state statute may still, of course, be preempted by relevant federal law.

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97. Wu, *supra* note 75, at 586.

98. *State of Missouri v. Holland*, 252 U.S. 416, 434 (1920) (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

99. TRIPS Agreement, *supra* note 81, Art. 39. *Cf.* 18 U.S.C. § 1832 (2016); the Defend Trade Secrets Act of 2016.

100. Berne Convention, *supra* note 80, Art. 6*bis*; S. Rep. No. 352, 100 Cong., 2d Sess. 9 to 10 (1988); House Report of the Berne Convention Implementation Act of 1988. H.R. Rep. No 609, 100th Cong., 2d Sess. 32 to 40 (1988); Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention at 35, 39-42, reprinted in 10 Colum. J.L. & Arts 513, 547, 551-54 (1986). On state law and moral rights see also Nimmer, *supra* note 82, at 520-523; Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 3 UTAH L. REV. 659 (2007). See also TRIPS Agreement, *supra* note 81, Article 9(1) (excluding Article 6*bis* of the Berne Convention from the scope of the TRIPS Agreement). Currently, U.S. compliance with the provision on moral rights of performers under Article 5 of the WIPO Performances and Phonograms Treaty, 1996, also must rely on state law. If the United States ratifies the Beijing Treaty, the same issue will arise concerning moral rights under Art. 5 of the Treaty. Beijing Treaty on Audiovisual Performances, June 24, 2013 (hereinafter “Beijing Treaty”), Art. 5. See also *infra* Part III, Section C.

101. See, in the international context, David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions*, 17 IIC 577, 591 (1986). *Cf.* Wilhelm Nordemann, *The Principle of National Treatment and the Definition of Literary and Artistic Works*, 25 COPYRIGHT 300, 301 (1989).

### III. SELECTED NEVADA INTELLECTUAL PROPERTY LAW STATUTES

As Part I suggests, some space for state copyright legislation, though limited, does exist. With the focus in copyright law being on federal legislation, it is not surprising that state copyright legislation typically attracts little attention, and state legislatures may often consider state copyright law revisions to be of low priority. To illustrate the problems that arise in current state copyright laws, the following three sections review and analyze four selected Nevada statutes that concern copyright; they are examples of statutes that exist, in some form, in other states and reflect problems that other state legislatures should also recognize and address.

Of all Nevada copyright-related statutes, the following four are perhaps in the most urgent need of revision. Revisions should address the aspects of the statutes that make them (a) outdated because of changes that have occurred in federal copyright law since the statutes were adopted (namely, the statutes in sections A and B below); (b) misleading because the current state of federal copyright law causes the statutes to appear as if they were drafted based on some confusion about current federal copyright law (the statutes in sections B and C); and/or (c) preempted by federal law (the statute in section C). The following three sections do not propose any specific wording for possible amendments, but the sections do suggest the considerations that might influence the amendments; they also refer to statutes in other states that might serve as models for the amendments.

#### A. *Copyright to State Works*

One area in which state legislation has a profound effect is the copyright protection of state works, where state legislation defines how state works may be utilized, and by whom. A state may become a copyright owner in various ways. First, copyright in some works vests directly in the state; these are works created as works for hire—either works created by state employees within the scope of their employment,<sup>102</sup> or specific types of works commissioned by the state.<sup>103</sup> Second, a state may own copyright that did not automatically vest in the state but that the state acquired later; for example, a state might purchase copyright, inherit copyright, or obtain copyright in a

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102. Exceptions might exist. *See infra* notes 108-110 and the accompanying text for the difference between the rules for copyright of the U.S. federal government and copyright of U.S. state governments.

103. 17 U.S.C. § 101 (2015) (defining “work made for hire”).

bankruptcy.<sup>104</sup> This section concerns primarily works for which the copyright ownership arose in the first manner; these works may include reports, maps, and other documents created by state agencies, as well as legislative materials.<sup>105</sup>

As may every copyright owner, a state may decide how to handle its copyrights; the state's treatment of its own copyrights should comport to the nature and the mission of the copyright owner—the state. The manner in which a state treats its copyrights should reflect the fact that state works are typically created or acquired with the support of state taxes and should benefit the residents of the state.<sup>106</sup> While the funding of state copyrights through state taxes might justify the placing of state works in the public domain for use by state residents and taxpayers (“state residents”) and others, the placing of the works in the public domain might not be justified in all instances—the role of the state as custodian of its property also dictates that it utilize its works for the benefit of its residents, which may be best achieved by maintaining copyright protection for at least some works and creating a mechanism for selective free utilization of the works by state residents. In many instances, free utilization of all state works in all circumstances will serve state residents best, but in other instances, the monetization of copyrights in some state works will ultimately be the most beneficial solution for state residents.<sup>107</sup>

If a state wishes to limit its copyrights to state works, it may transfer or license its copyrights in the same manner that other copyright owners would; additionally, it may adopt laws to limit its copyright. One way to limit copyright is to deny the existence of copyright altogether; in this manner, copyright never vests and a work automatically falls into the public domain. The U.S. Copyright Act adopts this approach to U.S. Government works: under Section 105, “[c]opyright protection . . . is not available for any work of the United States Government.”<sup>108</sup> While Section 105 prevents copyright from vesting in U.S. Government works, it does not preclude the U.S.

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104. For example, the State of Nevada became the owner of copyright to the musical composition of “‘Home’ Means Nevada,” the official state song, through an assignment. Recorded by the U.S. Copyright Office in V2520P261, February 12, 1990.

105. For a discussion of state court decisions *see infra* notes 113-118 and the accompanying text.

106. An Idaho state statute provides that “the state of Idaho *and the taxpayers* shall be deemed to have a copyright on the Idaho Code.” IDAHO CODE § 74-123(1) (2015) (emphasis added).

107. *See infra* notes 182-184 and the accompanying text for a note regarding public access and open records laws.

108. 17 U.S.C. § 105 (2015).

Government from “receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”<sup>109</sup>

The U.S. Copyright Act includes no corresponding provision for copyrights that vest or are otherwise owned by state governments, nor does it include any provision specifically mentioning or precluding a state from adopting a statute that would deprive state works of copyright protection. In the absence of a federal statute that would regulate the status and ownership of copyright to state works, copyright to state works follows the default rules for other works that fulfill the conditions for copyright protection.<sup>110</sup> Since March 1, 1989,<sup>111</sup> copyright in such works has vested automatically, upon their fixation in a tangible medium of expression, and the only way that copyright owners (other than the U.S. Government) may limit their copyright is to transfer or license the copyright. Although some courts have said that copyright attaches to state works only if state governments “copyright” them, this conclusion seems to stem from earlier case law that was based on the pre-1989 state of the Copyright Act.<sup>112</sup>

In Nevada, the Nevada Constitution has provided, since its passage in 1864, that “[a]ll laws and judicial decisions must be free for publication by any person.”<sup>113</sup> In the Nevada Constitutional Convention debates, J. Neely Johnson<sup>114</sup> called the provision “one of the most commendable features of the section.”<sup>115</sup> He pointed out that in California at that time, the Sacramento *Union* published California Supreme Court decisions “within a day or two after a decision [was] rendered,” while it took several months for the decisions to appear in the official *California Reports*.<sup>116</sup> Johnson argued that similar pre-publication practices would be beneficial in the State of Nevada—an approach to copyright in judicial decisions that was also in line with the

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109. *Id.*

110. 17 U.S.C. §§ 102 and 103 (2015).

111. *See infra* for an explanation of the reason for the change in the law in 1989.

112. *See, e.g.,* County of Santa Clara v. Super. Ct., 170 Cal.App. 4th 1301, 1331-1336, *as modified* (Feb. 27, 2009) (citing *Microdecisions, Inc. v. Skinner*, 889 So.2d 871, 874 (Fla. Dist. Ct. App. 2004), which cited *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 188 (2d Cir. 2001)).

113. NV CONST. Art. 15 § 8 (2016).

114. Patricia D. Cafferata, *Back Story: Second Constitutional Convention, Part One*, NEVADA LAWYER, Feb. 2013 at 54 (J. Neely Johnson of Ormsby County was a lawyer who moved to Nevada from California and served as a delegate to the first and second Nevada Constitutional Conventions in 1863 and 1864).

115. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA, ASSEMBLED AT CARSON CITY, JULY 4TH, 1864, TO FORM A CONSTITUTION AND STATE GOVERNMENT 612, 613 (Andrew J. Marsh ed., 1866).

116. *Id.*

approach adopted by the U.S. Supreme Court.<sup>117</sup> In 1834 the Court had held that no copyright would vest in court decisions; the Court observed that “copies of [court] decisions should be multiplied to any extent, and in any form required” and that, in the case of court decisions, “[p]ublicity is the very thing required.”<sup>118</sup> However, while federal law now precludes copyright from vesting in federal government works, including federal statutes, the Nevada Constitution creates a perpetual, non-exclusive, royalty-free statutory license in Nevada statutes and judicial decisions.

Most states have adopted statutes that allowed them to secure copyright in some state works. Apparently, “the principal motivation for the States to secure [copyright] in their publications [was] to enable them to give exclusive rights to a private publisher to induce him to print and publish the material at his own expense.”<sup>119</sup> It was also the publishers of state reporters who in the early 1900s opposed changes to federal copyright law that would have deprived state works of copyright protection.<sup>120</sup>

In Nevada, the 1907 version of what became NRS 344.070 authorized the State Printer to “have all publications issued by the State of Nevada copyrighted.”<sup>121</sup> A 1959 amendment changed the language to authorize the State Printer to “secure copyright,”<sup>122</sup> and other than minor amendments to it enacted in 1969 and 2005, the provision, entitled “Copyrights of State Publications,” has remained the same until today, stating, in relevant part, that “[t]he State Printer may secure copyright under the laws of the United States in all publications issued by the State of Nevada.”<sup>123</sup> Similarly, NRS 218F.730 provides, in

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117. *Id.*

118. *Wheaton v. Peters*, 33 U.S. 591, 650 (1834).

119. Caruthers Berger, *Copyright in Government Publications*, STUDY NO. 33 PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE 36 (Oct. 1959), <http://www.copyright.gov/history/studies/study33.pdf>. See also *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H.R. Comm. on the Judiciary*, 94th Cong. 178 (1975) (a letter from NASA pointing out that “copyright protection... available for Government works in exceptional circumstances... would give NASA the opportunity to enter into competitive negotiations with private publishing firms in exceptional cases so that selected NASA publications could receive the widest possible distribution...”).

120. *Arguments before the Committees on Patents: Hearing on S. 6330 and H.R. 19853 Before S. and H. conjointly*, 59th Cong. 133-138 (1906). See also 2 Patry on Copyright § 4:63.

121. 1907 Nev. Stat. 434. See also Curtis Hillyer, Compiler and Annotator, *Nevada Compiled Laws 1929* § 7486 (1930).

122. 1959 Nev. Stat. 11.

123. NEV. REV. STAT. § 344.070 (2016):

relevant part, that “[t]he Legislative Counsel is authorized to secure copyright under the laws of the United States in all publications issued by the Legislative Counsel Bureau.”<sup>124</sup> NRS 218F.730 has undergone only minor changes since it was adopted in 1971.<sup>125</sup>

The problem with the two current Nevada statutes on copyright in state works is that starting on March 1, 1989, when the Berne Convention Implementation Act came into effect in the United States,<sup>126</sup> no specific act has been required to “secure copyright.” The Berne Convention,<sup>127</sup> to which the United States acceded in 1988, requires that countries that are parties to the Convention abolish formalities as a requirement for copyright protection.<sup>128</sup> Therefore, the United States’ ratification of the Berne Convention obligated it to eliminate the formalities previously required by the U.S. Copyright Act for copyright protection, which until that date were either copyright registration or publication with a copyright notice.<sup>129</sup> Since the Berne Convention Implementation Act has been in effect, copyright has vested automatically, upon the fixation of a work in a tangible medium of expression. Although Congress maintained in the federal law several advantages for copyright owners who register their copyrights<sup>130</sup> and publish their works with a copyright notice,<sup>131</sup> neither registration of a work nor publication of a work with a copyright notice has been necessary since March 1, 1989, for an author to obtain copyright

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Copyrights of state publications.

1. The State Printer may secure copyright under the laws of the United States in all publications issued by the State of Nevada, the copyright to be secured in the name of the State of Nevada.

2. All costs and charges incurred in copyrighting such publications must be charged against the State Printing Fund, and must be paid in the same way as other charges are paid by the State.

124. NEV. REV. STAT. § 218F.730 (2016) (“Authority to secure copyrights. 1. The Legislative Counsel is authorized to secure copyright under the laws of the United States in all publications issued by the Legislative Counsel Bureau. 2. Each copyright must be secured in the name of the State of Nevada”). The statute was originally adopted as NRS 218.698.

125. 2011 Nev. Stat. 3246.

126. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

127. Berne Convention, *supra* note 80.

128. *Id.*, Art. 5(2). *See also* WIPO Performances and Phonograms Treaty art. 20, Dec. 20, 1996.

129. On the formalities in U.S. copyright law in general *see* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 322-342(2009).

130. *See* 17 U.S.C. §§ 205, 115, 410(c), 411(a), 412, and 603 (2015). *See also* 19 U.S.C. § 1337 (2015) (filing an action with the International Trade Commission).

131. *See* 17 U.S.C. § 401(d) (2015).

protection.<sup>132</sup> Given how copyright vests, it is impossible to identify an act required to “secure copyright” that would be separate from the act of fixing a work in a tangible medium of expression.<sup>133</sup>

Following the major change in U.S. copyright law effectuated by the Berne Convention Implementation Act, the language of the Nevada statutes on state copyrights is outdated; the statutes rely on an act to “secure copyright” that is no longer required by U.S. law for copyright to vest, although registration remains important for filing an infringement action and provides certain advantages. Because copyright is “secured” automatically through the fixation of a work, the statutes can only be interpreted as moot because copyright vests automatically upon fixation, leaving no work for the State Printer or the Legislative Council to “secure copyright” to. The Nevada statutes are permissive, suggesting that not all state works need to be protected by copyright, but they provide no means to exclude from automatic copyright protection any state works that are deemed appropriate for the public domain.

Nevada is not the only state with laws that lag behind the changes that were introduced into U.S. copyright law more than a quarter of a century ago.<sup>134</sup> Other state statutes exist that speak of “securing copyright” in state works; for example, some provisions in the California Education Code use this language,<sup>135</sup> as do isolated provisions of statutes in Maryland,<sup>136</sup> Texas,<sup>137</sup> Ohio,<sup>138</sup> and Florida.<sup>139</sup> Other state statutes mention the act of “copyrighting,” again as though some act still exists that is required to create copyright

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132. 17 U.S.C. § 411(a) (2015) (in the United States, copyright registration is required for a U.S. work as a prerequisite to the filing of an infringement action in court; however, registration is not required in order for copyright to vest).

133. Whether the elimination of formalities was a positive step is still debated, but the point is moot if the Berne Convention is not revised and the United States intends to comply with the Convention.

134. For comparisons of state laws on copyright to state works *see, e.g.*, JAMES G. MCEWAN ET AL., *INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS: PROTECTING AND ENFORCING IP AT THE STATE AND FEDERAL LEVEL* (Oxford University Press 2d ed., 2012). A Harvard Library webpage gives an overview of state approaches to copyright; however, it focuses on public access to public records and is therefore of limited utility for the analysis in this article. Copyright at Harvard Library, (May 10, 2017), <http://copyright.lib.harvard.edu/states/> [<https://perma.cc/QVZ6-2FYQ>]. For the relationship of copyright and public access to public records *see infra* notes 182-184 and the accompanying text.

135. CAL. EDUC. CODE §§ 1044, 32361, 35170, and 72207 (West 2017).

136. MD. CODE ANN., AGRIC. § 10-502(1) (West 2017); MD. CODE ANN., CTS. & JUD. PROC. § 13-203 (West 2017).

137. TEX. EDUC. CODE ANN. § 153.006(a)(6)(B) (2015).

138. OHIO REV. CODE ANN. §§ 149.17 and 2503.23 (2017).

139. FLA. STAT. § 943.146(2)(a) (2016).



protection beyond the fixation of a work in a tangible medium of expression; for example, the Alabama Code instructs the Code Commissioner to have legislative acts “copyrighted for the use and benefit of the state.”<sup>140</sup> Similarly, acts of “copyrighting” appear in the context of state works in isolated statutes in Arkansas,<sup>141</sup> Colorado,<sup>142</sup> Connecticut,<sup>143</sup> Florida,<sup>144</sup> Georgia,<sup>145</sup> Hawaii,<sup>146</sup> Indiana,<sup>147</sup> Kansas,<sup>148</sup> Michigan,<sup>149</sup> Minnesota,<sup>150</sup> Mississippi,<sup>151</sup> Missouri,<sup>152</sup> Montana,<sup>153</sup> Nebraska,<sup>154</sup> Oklahoma,<sup>155</sup> Oregon,<sup>156</sup> Pennsylvania,<sup>157</sup> Rhode Island,<sup>158</sup> South Dakota,<sup>159</sup> and Wisconsin.<sup>160</sup>

As the statutory provisions in these other states should, the two Nevada statutes should be amended to correct the outdated language, and, more importantly, reflect the State’s needs and policies. Although Nevada’s current needs and policies should drive any amendments, the original intent of the provisions and the practice associated with the provisions provide a useful starting point for a reconsideration of the statutes. Both statutes are permissive, suggesting that the Nevada legislature did not expect for copyright to be secured in all State works; others were intended to fall immediately into the public domain. A 1971 Opinion of the Nevada Attorney General confirms this interpretation; it stated that “[s]tate publications copyrighted in compliance with the federal copyright statute as authorized by [now

140. ALA. CODE § 36-13-5 (2017).
141. ARK. CODE ANN. § 6-20-205(a) (2017).
142. COLO. REV. STAT. § 2-5-118 (2016).
143. CONN. GEN. STAT. § 51-216a(f) (2017).
144. FLA. STAT. § 119.084(2) and (3) (2016).
145. GA. CODE ANN. § 50-18-34 (2016).
146. HAW. REV. STAT. § 206M-34 (2016).
147. IND. CODE § 5-11-1-19 (2016).
148. KAN. STAT. ANN. § 20-206 (2014).
149. MICH. COMP. LAWS § 17.401 (2015).
150. MINN. STAT. § 14.47, Subd. 1(5) (2016); MINN. STAT. § 480.11, Subd. 3 (2016).
151. MISS. CODE ANN. § 25-43-2.101(6)(a) (2005).
152. MO. ANN. STAT. § 630.095 (West 2011).
153. MONT. CODE ANN. § 1-11-304 (2017) (“The Montana Code Annotated, supplements, or other publications ancillary thereto, as published, . . . may not be copyrighted”).
154. NEB. REV. STAT. §§ 24-212(1); 49-225; 49-707 (2017).
155. OKLA. STAT. ANN. tit. 75, § 256(F)(1) (West 2017).
156. OR. REV. STAT. §§ 171.275(3); 173.770(1); 177.120(1); 183.360(1) (2017).
157. 49 PA. CONS. STAT. § 93; 71 PA. CONS. STAT. § 636; 71 PA. CONS. STAT. § 954; 71 PA. CONS. STAT. § 1340.305(a)(7) (2017).
158. 1956 R.I. GEN. LAWS § 8-1-8 (2017).
159. S.D. CODIFIED LAWS § 2-16-8 (2017).
160. WIS. STAT. ANN. § 39.115(1) (West 2017).

NRS] 344.070 have a legally binding copyright; all other state publications are in the public domain after publication.”<sup>161</sup> To date it seems that the practice in Nevada has been to leave most state works in the public domain; a search of post-1978 Nevada copyright registrations reveals surprisingly few registrations made on behalf of the State of Nevada;<sup>162</sup> however, some hundreds of registrations were made in the names of Nevada State agencies.<sup>163</sup>

U.S. states and foreign countries adopt a variety of approaches to copyright in state works. The Berne Convention leaves the decision to the contracting countries—parties to the Convention whether or not they protect “official texts of legislative, administrative and legal nature”<sup>164</sup> and “political speeches and speeches delivered in the course of legal proceedings.”<sup>165</sup> Some countries follow a model for their government works similar to the model that the United States adopted for U.S. Government works. For example, the German Copyright Act excludes from copyright protection “[l]aws, regulations, official decrees and announcements, and also decisions and official version of reasons of decisions.”<sup>166</sup> The Act also affords no copyright protection to “official works that are published in the public interest for general information.”<sup>167</sup>

Common law countries other than the United States do not seem to be as generous to the public with governmental works as the United States is with U.S. Government works. In the United Kingdom, as they are in other countries of the Commonwealth, government works are protected by copyright that vests in the Crown<sup>168</sup> or the Parliament,<sup>169</sup> depending on who created the works. However, this ostensibly restrictive approach in the United Kingdom is balanced by extensive exceptions that are included in the U.K. copyright statute and through

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161. Nev. Att’y Gen. Op. No. 71-03 (January 11, 1971).

162. *E.g.*, a general highway base map of the State of Nevada, 1984 (VA0000178399 / 1984-08-01).

163. The agencies include the Nevada Department of Highways, the Nevada Department of Motor Vehicles & Public Safety, the Nevada Department of Transportation, the State Health Division, the Division of Environmental Protection, and the Nevada System of Higher Education.

164. Berne Convention, *supra* note 80, Article 1(4).

165. *Id.*, Article 2*bis*.

166. Urheberrechtsgesetz, § 5(1), (May 10, 2017) [https://www.gesetze-im-internet.de/urhg/\\_\\_\\_5.html](https://www.gesetze-im-internet.de/urhg/___5.html) [<https://perma.cc/Y9BC-UDXK>].

167. *Id.*, §5(2).

168. Copyright, Designs and Patents Act 1988, §§ 163 and 164, <http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/X/crossheading/crown-and-parliamentary-copyright> [<https://perma.cc/G4UR-PB2E>].

169. *Id.*, §§ 165 and 166.

use of the Open Government Licence.<sup>170</sup> In Canada, copyright in government works vests in the Crown as well<sup>171</sup> and is also subject to exceptions, including the exception of fair dealing.<sup>172</sup> Between 2010 and 2013, the Government of Canada provided a public license for non-commercial uses; since 2013 it has required individual copyright clearances for uses that go beyond the general exceptions listed in the Canadian copyright statute.<sup>173</sup>

These foreign examples may be instructive in determining what a U.S. state might do when it wishes to limit its copyright. One option would be to attach a public license to state works that would define the conditions under which users would be permitted to use the works. The licenses may be tailor made, such as the license in the United Kingdom, or they may be public licenses, such as the Creative Commons licenses,<sup>174</sup> which have been adopted not only by private persons and entities, but also by a number of governments.<sup>175</sup> For example, one of the Creative Commons licenses has been used by the White House for publication of third-party content on the White House website.<sup>176</sup> States that wish to retain copyright in state works may also adopt laws with exceptions that are more generous than the exceptions and limitations included in the U.S. Copyright Act; such exceptions would then serve as a royalty-free statutory license to state works.

Both statutory licenses and public licenses have advantages and disadvantages. The advantage of a statutory license is that it is readily available in state statutes. A statutory license may apply to all state works or to a small number of general categories of state works, and a

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170. *Open Government Licence*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> [https://perma.cc/73CN-HELA].

171. Copyright Act (R.S.C., 1985, c. C-42), Art. 12, <http://laws-lois.justice.gc.ca/eng/acts/c-42/page-4.html#docCont> [https://perma.cc/D665-EMAC].

172. *Id.* Art. 29.

173. Crown Copyright Request, Government of Canada, <http://canada.pch.gc.ca/eng/1454685607328> [https://perma.cc/TDU9-FD4V]. See also Michael Geist, *Government of Canada Quietly Changes Its Approach to Crown Copyright* (November 25, 2013) <http://www.michaelgeist.ca/2013/11/crown-copyright-change/> [https://perma.cc/5PFX-WE58].

174. CREATIVE COMMONS, (May 10, 2017), <https://creativecommons.org> [https://perma.cc/7ZN8-AQ5X].

175. *Government*, CREATIVE COMMONS, (May 10, 2017) <https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/government/> [https://perma.cc/64WB-Y8PF].

176. *Copyright Policy*, WHITE HOUSE, <https://www.whitehouse.gov/copyright> [https://perma.cc/Q7HJ-U2MY]. See also, for example, the WIPO's policy for its materials at Terms of Use, WIPO, (May 10, 2017), <http://www.wipo.int/tools/en/disclaim.html> [https://perma.cc/R655-8VLA].

straightforward categorization of works can contribute to legal certainty. Of course, an overly general categorization might not allow for sufficient granularity. The advantage of a public license is that it allows for a tailored granularity; each work may be released under a different license, depending on a state's needs and policies concerning the particular work. The problem with a public license system is that its implementation requires a policy that outlines who will decide and how it will be decided what license attaches to each work. Without such a policy there can be no legal certainty about the license status of future works. Such a policy requires attention: it must be created, implemented, monitored, assessed, and potentially revised.

In addition to the statutory license and public license routes, there is theoretically yet another manner by which a state can implement a selective approach to copyright to state works: the state might decide not to enforce its copyright at all, or to do so only in rare circumstances. However, such selective non-enforcement is highly problematic; in the absence of any policy identifying when to enforce and when not, enforcement actions would be arbitrary, or perceived as being arbitrary. The major flaw of this approach is that it provides no legal certainty to users, and consequently anyone who wants to utilize state works might be deterred from doing so in light of the risk of being sued.

The two Nevada provisions on copyright to state works—NRS 344.070 and NRS 218F.730—should be amended to eliminate outdated language about “securing copyright”; instead, the provisions should reiterate the fact that the state owns copyright to state works,<sup>177</sup> and mandate that selected state works be registered within a certain period of time, who should register them, in whose name they should be registered, and potentially also where registration costs should be charged. A Colorado statute provides a useful example; it states that the state owns copyright to the Colorado Revised Statutes and “ancillary publications thereto.”<sup>178</sup> The Colorado statute also provides that a committee “may register a copyright for and in behalf of the state.”<sup>179</sup> Registering state works with the U.S. Copyright Office remains important because of the advantages that the U.S. Copyright Act maintains for copyright owners who register their copyrights, and particularly for those who register copyrights within certain periods.<sup>180</sup> These advantages are as important for the State as they are for other copyright owners; however, it is clearly infeasible for all state works to

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177. See, e.g., NRS 396.7972 (“The Board of Regents, on behalf of the Ethics Institute, may . . . [r]eceive and hold . . . patents, copyrights, . . .”).

178. COLO. REV. STAT. ANN. § 2-5-115 (West 2011).

179. *Id.*

180. See *supra* note 130.

be registered, and therefore the statute should keep registration permissive.

After clarifying the ownership and registration of copyright to state works, a statute could create a statutory license for such state works. One option would be to grant a perpetual, non-exclusive, and royalty-free license to all state works and thus de facto achieve the same result for state works that federal copyright law achieves for U.S. Government works. However, this option might not be the best for a state because it is difficult to predict what kinds of works the state will produce in the future and how private parties might seek to utilize the works. It might therefore be useful to stay within what appears to have been the intent of the current language in Nevada—to allow free use of state works unless the state wishes otherwise. If a state wants to extend free use of state works beyond the federal law framework of fair use and other exceptions and limitations, additional statutory exceptions included in the Nevada statutes would appear to be the easiest solution; preferably, such exceptions should apply to all state works, or be divided into a small number of clearly defined categories of state works.

Instead of or in addition to a statutory license to state works, as described in the previous paragraph, a state statute could also allow one, several, or all state agencies to grant public licenses, such as Creative Commons licenses, for selected state works. If this option is utilized, it would be advisable to include a provision about the policy that should guide agencies in decisions about what licenses to grant to each type of work, and mandate periodic assessments and revisions of the policy. It would of course be helpful if a single type of public license could be selected, in order to achieve consistency, contribute to easy education of the public, establish user expectations, and enhance legal certainty. Virginia grants public licenses for state works; under its statute, a policy “authorize[s] state agencies to release all potentially copyrightable materials under the Creative Commons or Open Source Initiative licensing system, as appropriate.”<sup>181</sup>

It is important to emphasize that provisions concerning copyright to state works are not part of the laws on access to public records; the two matters, although sometimes presented as being in conflict, are in fact separate and should not be conflated.<sup>182</sup> Any amendment to a state

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181. VA. CODE ANN. § 2.2-2822(B)(1) (2009).

182. See, e.g., *Cty. of Suffolk, New York v. First Am. Real Estate Sols.*, 261 F.3d 179, 191 (2d Cir. 2001) (“[T]he better reading . . . is to permit Suffolk County to maintain its copyright protections while complying with its obligations under [the New York Freedom of Information Law].”); John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1028 (1989) (“Just as open records statutes should not forfeit copyright, neither should the fact that a work is copyrighted be allowed to defeat the right to access to the work if it has become a public record.”).

law on copyright to state works must be clearly separated from a state's public records access laws; insufficient public education about the differences between copyright to state records and public access to state records can cause the public to believe that the right to public access to state records is at risk, as was recently the case with the public's reaction to a bill introduced in California.<sup>183</sup> Copyright in state works must not be used to diminish public access that is permitted and safeguarded by public access laws (and by the federal fair use doctrine and other exceptions and limitations established by federal law), and any bill that introduces amendments concerning copyright in state works should be clear about the distinction and interplay between copyright protection and public records access rules.<sup>184</sup>

### B. Copyright Registration and Trade Secrets

The following example illustrates how a state statute that was originally adopted to reflect the then-current state of law and practice has become outdated to the point at which it has become misleading and potentially harmful—not only to a state's reputation, but also to a state's innovation policies. The statute is NRS 603.050, which was added to Nevada's trade secrets provisions in 1983 to define the infringement of trade secrets of data and computer programs, and also to define when

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*See also, e.g.,* COLO. REV. STAT. ANN. § 24-72-203(4) (West 2017):

Nothing in this article [on public records open to inspection] shall preclude the state or any of its agencies, institutions, or political subdivisions from obtaining and enforcing trademark or copyright protection for any public record, and the state and its agencies, institutions, and political subdivisions are hereby specifically authorized to obtain and enforce such protection in accordance with the applicable federal law; except that this authorization shall not restrict public access to or fair use of copyrighted materials and shall not apply to writings which are merely lists or other compilations.

183. AB 2880 (May 10, 2017), [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_2851-2900/ab\\_2880\\_bill\\_20160315\\_amended\\_asm\\_v98.pdf](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2851-2900/ab_2880_bill_20160315_amended_asm_v98.pdf) [<https://perma.cc/GDZ2-CQZL>]; Ernesto Falcon, *California's Legislature Wants to Copyright All Government Works*, EFF (May 13, 2016), <https://www.eff.org/deeplinks/2016/04/ab-2880> [<https://perma.cc/X3DS-B46U>]. The bill was eventually amended under the pressure of critics. *See, e.g.,* Mitch Stoltz, *California Legislature Drops Proposal to Copyright All Government Works*, EFF (June 22, 2016), <https://www.eff.org/deeplinks/2016/06/california-legislature-drops-proposal-copyright-all-government-works> [<https://perma.cc/2QLH-7RLT>]. Apparently, an impetus for the bill was the dispute concerning protection of trademarks in Yosemite National Park. *See* A.B. 2880, California Assembly on Judiciary, April 19, 2016, pp. 3-4; *City of Inglewood v. Teixeira*, C.D. Cal., No. 2:15-cv-01815-MWF-MRW, Aug. 20, 2015.

184. In Nevada, *see* NEV. REV. STAT. 239.010(1)(2017); 1989 Nev. AG LEXIS 1 (1989).

data or computer programs are a trade secret.<sup>185</sup> Nevada's trade secret definition for data and computer programs is identical to the standard definition of trade secrets in the Uniform Trade Secrets Act,<sup>186</sup> with one notable exception: the Nevada statute in point 4 excludes data and programs that were "copyrighted because an application therefor would result in the program or data no longer being secret."<sup>187</sup>

Considering current federal law, there are three problems with the fourth condition (point 4) in NRS 603.050. First, as discussed in Section A above, since March 1, 1989, there has been no act of "copyrighting" necessary for a work to be protected by copyright. A work, including a computer program, is protected by copyright as soon as the program is fixed in a tangible medium of expression and as long as the program is an original work of authorship. International law mandates both automatic copyright protection—free of any formalities such as registration or publication with a notice<sup>188</sup>—and copyright protection for computer programs.<sup>189</sup> Point 4 of NRS 603.050 suggests, as do the two statutes discussed in Section A above, a link between copyright protection and a formality—the act of having a work "copyrighted"; this link no longer exists because formalities—a registration or a publication with a copyright notice—are no longer required for copyright protection.

The second problem with the fourth condition of NRS 603.050 is that a registration of copyright to a computer program does not have to jeopardize the secrecy of a trade secret in the computer program. The Copyright Office provides for a specially-designed registration procedure that respects the secrecy of the program. For computer programs that contain trade secrets, the Copyright Office requires "a cover letter stating that the claim contains trade secrets, along with the page containing the copyright notice, if any," and only a limited portion

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185. S.B. 395 Session Law 1983.

186. Uniform Trade Secrets Act, § 1(4).

187. NEV. REV. STAT. § 603.050 (2017):

It is an infringement of a trade secret for a person, without the consent of the owner, to obtain possession of or access to a proprietary program or a compilation of proprietary information that is stored as data in a computer and make or cause to be made a copy of that program or data if the program or data:

1. Is used in the owner's business;
2. Gives the owner an opportunity to obtain an advantage over competitors who do not know or use it;
3. Is treated by the owner as secret; and
4. Is not copyrighted because an application therefor would result in the program or data no longer being secret.

188. See *supra* note 128 and accompanying text.

189. TRIPS Agreement, *supra* note 81, art. 10; WIPO Copyright Treaty 1996, art. 4.

of the source code, the extent of which the Copyright Office defines.<sup>190</sup>

The reference in the fourth condition of NRS 603.050 to the copyright registration process led one set of current-day commentators to remark that the statute's language "reveals an important misunderstanding of Copyright Office procedures by the Nevada Legislature."<sup>191</sup> However, the statute did take into consideration the registration rules that existed in 1983 when the statute was originally adopted. It was not until 1989 that the U.S. Copyright Office adopted the special registration rule for computer programs;<sup>192</sup> before 1989, the rule called for a deposit of "the first and last 25 pages or equivalent units of the program,"<sup>193</sup> regardless of whether the pages contained a portion of the program that might have been a trade secret. Therefore, it is only in the context of post-1989 Copyright Office practice that the Nevada statute appears to be based on a misunderstanding of the practice.

In one of the versions of the draft statute discussed in the legislative process in 1983, the limitation of the trade secrets definition in the statute applied to programs or data that were "copyrighted."<sup>194</sup> This plain wording would have been better from the perspective of current practice because it stated no conclusion about the effects of an application for registration that is today incorrect as to computer programs for which only a portion of the code is submitted to the Copyright Office under the rule mentioned above. However, the plain wording, as would have the current wording, would have excluded the possibility of overlapping protection—protection by both trade secrets and copyright—for computer programs, which is unnecessarily limiting because overlapping protection is in fact possible.<sup>195</sup>

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190. 37 C.F.R. § 202.20(c)(2)(vii)(A)(2); U.S. COPYRIGHT OFFICE, CIRCULAR NO. 61: COPYRIGHT REGISTRATION FOR COMPUTER PROGRAMS, 3 (2012), <http://www.copyright.gov/circs/circ61.pdf> [<https://perma.cc/WJ8L-2S26>].

191. McEwan et al., *supra* note 134, 481-482.

192. Registration of Claims to Copyright Deposit Requirements for Computer Programs Containing Trade Secrets and for Computer Screen Displays, 54 Fed. Reg. 13173-01, (March 31, 1989) (codified at 37 C.F.R. pt. 202). Before the special rule was adopted in 1989, applicants could invoke a special waiver of the deposit rule and submit a smaller portion of the code. However, the waivers were infrequently utilized; according to the Copyright Office, as of 1989 "over 90% of computer program remitters continue[d] to submit the required 50 pages of source code without portions blocked out." *Id.*

193. 37 C.F.R. § 202.20(c)(2)(vii)(A) (1988).

194. Amendment No. 883, Nev. Assembly Judiciary Comm., 62d Sess. (Nev. 1983).

195. Although, in general, protection by overlapping IP rights is not without controversy, there is no law—either domestic or international—that prohibits overlapping protection by trade secret law and copyright law. For a general discussion of overlapping IP rights of various types *see, e.g.*, Laura Heymann, *Overlapping Intellectual Property Doctrines: Election of Rights Versus Selection of Remedies*,



The third problem of point 4 concerns its reference to data. Data are not protectable by copyright unless the data consist of works protectable by copyright, such as photographs. Typically, though, data do not consist of copyright-protectable works but rather of pieces of information—facts that do not, on their own, enjoy copyright protection.<sup>196</sup> Compilations of data might be protected by copyright, but only as to a compilation’s original selection, coordination, and/or arrangement.<sup>197</sup> When a registration of a compilation is made, the deposit is not required to include data—particularly if the data are protected as trade secrets or protected by other laws, such as the HIPAA privacy law<sup>198</sup>—but it must include the structure of the compilation that indicates the selection of data, and/or their coordination, and/or their arrangement. Therefore, even when an application for copyright registration is made—and an application is certainly not necessary for copyright protection, as explained earlier—the data protected as trade secrets do not have to be included in the application and thus do not have to lose their protection as trade secrets.

When the statute was originally adopted in 1983, point 4 seemed reasonable. At that time, copyright protection attached to a work only on the registration of the work or a publication with a copyright notice. In the absence of a special procedure for registering computer programs that were subject to trade secrets, an act of “copyrighting” would have resulted in the disclosure of the program, which would have led to the loss of the status of the program as a trade secret. Also, it was not until 1991 that the U.S. Supreme Court clarified the rules for copyright in compilations of data.<sup>199</sup> However, with the changes that have occurred in federal copyright law since 1983, point 4 no longer makes sense.

Currently, there is no provision comparable to point 4 in the Uniform Trade Secrets Act, which does not refer to copyright at all,<sup>200</sup> and there seems to be no corresponding provision in the statutes of other states.<sup>201</sup> Courts have not considered copyright registration to

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17 STAN. TECH. L. REV. 239 (2013); Doris Estelle Long, *First, “Let’s Kill All the Intellectual Property Lawyers!”: Musings on the Decline and Fall of the Intellectual Property Empire*, 34 J. MARSHALL L. REV. 851 (2001); J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994).

196. 17 U.S.C. §102(b) (2015); Berne Convention, *supra* note 80, art. 2(8); Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 350 (1991).

197. Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); U.S. COPYRIGHT OFFICE, CIRCULAR NO. 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2013), <http://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/8NEQ-36C2>].

198. 45 C.F.R. pts. 160, 162, 164 (2017).

199. *See supra* note 197.

200. UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 529 (2005).

201. No corresponding provision exists in U.S. federal trade secret legislation.

necessarily preempt trade secret protection as long as a work was not fully deposited with the Copyright Office.<sup>202</sup> While interpreting Idaho's Trade Secrets Act,<sup>203</sup> the U.S. Court of Appeals for the Ninth Circuit stated that "disclosure of a portion of the source code to the Copyright Office, in itself, is not necessarily inconsistent with maintaining the secrecy and value of the trade secret."<sup>204</sup> The Nevada statute could be viewed as being in violation of international law because it imposes a limitation that is contrary to Article 39 of the TRIPS Agreement, which requires that countries afford protection to trade secrets defined in the standard manner, with no limitation that is based on copyright protection.<sup>205</sup>

The most straightforward legislative remedy of the problems outlined above would be to delete point 4 in NRS 603.050, or delete the definition in NRS 603.050 altogether and refer to the general statute on trade secrets in NRS 600A.030. In the second case, an amendment to the provision could be considered in the framework of systemic revisions of the entire state secrets law<sup>206</sup> and the NRS chapter on computers<sup>207</sup>—a project that is beyond the scope of this article.<sup>208</sup>

In the absence of a legislative intervention (i.e. the provision is left as it is), the problems with NRS 603.050 could be remedied through court interpretation. A court could conclude that if the status of a trade secret has not been compromised in the application process, the program remains protected as a trade secret. Litigants could also rely on the general trade secrets statute in NRS 600A.030 for a claim of trade secrets misappropriation instead of NRS 603.050; NRS 600A.030 refers to "computer programming instruction or code"<sup>209</sup> in the

202. *E.g.*, *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F.Supp. 1231, 1255 n.28 (N.D.Cal. 1995) ("There is no merit to [the alleged infringer's] claim that the registration of the . . . works with the Copyright Office forfeited their trade secret status, as it appears that these works were registered in masked form." *Id.*); *Compuware Corp. v. Serena Software Int'l, Inc.*, 77 F.Supp.2d 816 (E.D. Mich. 1999).

203. IDAHO CODE ANN. § 48-801 (West 2017).

204. *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1129-1130 (9th Cir. 2013).

205. TRIPS Agreement, *supra* note 81, arti 39(2).

206. NEV. REV. STAT. § 600A, Trade Secrets (Uniform Act) (2017).

207. *Id.* § 603, Computers.

208. *See supra* Introduction for an explanation of the limitation of the scope of this article.

209. NEV. REV. STAT. § 600A.030(5) (2017):

5. 'Trade secret' means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its

definition of “trade secret” and does not include the same limitation that NRS 603.050 does in point 4.<sup>210</sup>

It does not seem advisable, however, to leave NRS 603.050 as it is. The statute may mislead those who are unfamiliar with IP law, and in several ways. A less-informed reader might conclude that data are protectable by copyright, that an application for registration is necessary to obtain copyright protection, and/or that in cases of data and computer programs a choice must be made between copyright protection and trade secrets protection, with one excluding the other. These conclusions are all incorrect and state law should not create an impression to the contrary.

### C. *The Unlawful Reproduction or Sale of Sound Recordings*

Keeping state copyright statutes current is difficult, particularly since state legislatures have many competing priorities. Not only might state legislatures be slow to reflect in their state laws all of the changes that copyright law and practice have undergone in recent decades, but legislative tasks are also complicated by the various complex overlapping of outdated state laws with current federal legislation; overlaps cause some state statutes to be preempted. Sifting through state statutes in search of non-preempted provisions and attempting to discern original legislative intent might present the difficult challenges that this next example illustrates.

Nevada statute NRS 205.217 makes certain acts of “unlawful reproduction or sale of sound recordings” category C or D felonies. The statute falls within the general category of “piracy statutes” for sound recordings—statutes that exist in almost all states in some form<sup>211</sup>—

disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

210. *Id.*

211. For a collection of state “piracy statutes” concerning sound recordings see State Law Texts, U.S. Copyright Office (2011) [http://www.copyright.gov/docs/sound/20110705\\_state\\_law\\_texts.pdf](http://www.copyright.gov/docs/sound/20110705_state_law_texts.pdf) [<https://perma.cc/JK8E-WFQZ>]. By 1975, “32 states prohibit[ed] record piracy by statute, and four more [did] so under common law.” Report from the Committee on the Judiciary, S. Rep. No. 94-473, 94th Cong., 1st Sess., at 116 (1975) See also Statement by Barbara Ringer, Register of Copyrights, in *Copyright Law Revision: Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice on H.R. 2223 Copyright Law Revision, Part 1*, 94th Cong., 1st Sess. (1975), 115 (“In the early 1970s there was an increase in record piracy because of the increasing popularity of 8-track cartridges. As a result, there was a major effort to get States to pass legislation or to enforce common law protection” of sound recordings). Protection against the unauthorized reproduction of sound recordings was mandated by the Geneva Phonograms Convention, which came into force for the

and although NRS 205.217 is not phrased as a copyright statute, its content clearly intersects with copyright law because the statute concerns tangible media of expression in which works subject to copyright protection may be fixed. The media that the statute concerns are “a phonograph record, disc, wire, tape, film or other article on which sounds are recorded”<sup>212</sup> (for simplification, the rest of this section refers to all of these media as “sound carriers”). The problem with the statute is that it is at least partially preempted by federal copyright law.<sup>213</sup>

The statute, originally enacted in 1973,<sup>214</sup> defines criminal offenses in paragraphs (1) and (2). Paragraph (1) has two subparagraphs:<sup>215</sup> Subparagraph (a) makes it a felony to knowingly “[t]ransfer or cause to be transferred any sounds recorded” on one sound carrier onto another sound carrier.<sup>216</sup> Subparagraph (b) concerns acts of knowingly and “without the consent of the person who owns [. . . a] device or article from which the sounds are derived,” such as a master disc (further referred to in this section as a “master recording”), selling, distributing, and circulating a sound carrier, and offering a sound carrier for sale, distribution, or circulation. The statute makes it a felony to commit these acts, or possess a sound carrier for the purposes of committing

United States on March 10, 1974. Geneva Phonograms Convention, *supra* note 94.

212. NEV. REV. STAT. § 205.217(1)(a) (2017).

213. On the preemption of a state criminal statute by the U.S. Copyright Act *see* *State v. Oidor*, 292 P.3d 629, 633 (Or. Ct. App. 2012) (“Applying the preemptive effect of section 301 to state civil but not criminal law could lead to the development of ‘vague borderline areas’ between federal and state protection of copyrights.” *Id.*); *People v. Williams*, 920 N.E.2d 446, 454, 457 (Ill. 2009) (“[I]t would border on the absurd to hold that Congress preempted states from making unauthorized use of copyrighted material a civil wrong, but permitted the states to make the same conduct a crime.” *Id.*, 457.).

214. Nev. Assemb. B. 406, 57th Sess. (1973). Amendments in 1979 and 1995 did not substantially change paragraphs 1-3, which are discussed in this Section. *See* S.B. 9, Comm. on Judiciary, 60th Sess. (Nev. 1979); S.B. 416 Comm. on Judiciary, 68th Sess. (Nev. 1995).

215. NEV. REV. STAT. § 205.217(1) (2017):

1. Except as otherwise provided in subsection 3, it is unlawful for any person, firm, partnership, corporation or association knowingly to:

(a) Transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded onto any other phonograph record, disc, wire, tape, film or article; or

(b) Sell, distribute, circulate, offer for sale, distribution or circulation, possess for the purpose of sale, distribution or circulation, or cause to be sold, distributed, circulated, offered for sale, distribution or circulation, or possessed for sale, distribution or circulation, any article or device on which sounds have been transferred without the consent of the person who owns the master phonograph record, master disc, master tape or other device or article from which the sounds are derived.

216. NEV. REV. STAT. § 205.217(1)(a) (2017).

these acts, or cause such acts to be committed.<sup>217</sup> Paragraph (2) concerns the labeling of sound carriers;<sup>218</sup> it makes it a felony “to sell, distribute, circulate, offer for sale, distribution or circulation[,] or possess for the purposes of sale, distribution or circulation” a copy of a sound carrier “unless the [sound carrier] bears the actual name and address of the transferor of the sounds in a prominent place on its outside face or package.”<sup>219</sup>

Paragraph (3) of NRS 205.217<sup>220</sup> includes a version of a fair use provision for the purposes of the statute. It exempts from the application of the statute “any person who transfers or causes to be transferred any sounds intended for or in connection with radio or television broadcast transmission or related uses, for archival purposes or solely for the personal use of the person transferring or causing the transfer and without any compensation being derived by the person from the transfer.”<sup>221</sup> The exemption is for the “person who transfers or causes to be transferred” and does not extend to other persons who commit the acts in (1)(b) and (2) but are not themselves the persons “transferring or causing to be transferred.”

The provisions in paragraph (1) are largely preempted by federal copyright law.<sup>222</sup> The complexity of the overlap is illustrated by Tables

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217. NEV. REV. STAT. § 205.217(1)(b) (2017).

218. NEV. REV. STAT. § 205.217(2) (2017):

2. It is unlawful for any person, firm, partnership, corporation or association to sell, distribute, circulate, offer for sale, distribution or circulation or possess for the purposes of sale, distribution or circulation, any phonograph record, disc, wire, tape, film or other article on which sounds have been transferred unless the phonograph record, disc, wire, tape, film or other article bears the actual name and address of the transferor of the sounds in a prominent place on its outside face or package.

219. NEV. REV. STAT. § 205.217(2) (2017). The provision may bring to mind the U.S. Supreme Court decision in *Dastar* where the Court refused to apply section 43(a) of the Lanham Act in a case involving the labeling of a DVD including a television series; the Court declined to use section 43(a) in a manner that would de facto create a right of attribution in this type of work, and ruled that the defendant could distribute the edited version of the series under its own name, without mentioning the plaintiff's name. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).

220. NEV. REV. STAT. § 205.217(3) (2017):

3. This section does not apply to any person who transfers or causes to be transferred any sounds intended for or in connection with radio or television broadcast transmission or related uses, for archival purposes or solely for the personal use of the person transferring or causing the transfer and without any compensation being derived by the person from the transfer.

221. *Id.*

222. In addition to its other provisions that may preempt state statutes (*see supra* note 213), the Copyright Act includes criminal law provisions that may preempt state law. Section 506(a) makes it a criminal offense to infringe copyright if the infringement was committed “for purposes of commercial advantage or private

1 and 2 below. Both tables list the types of works that are protected by NRS 205.217. “[A]ny sounds recorded” under the statute imply sound recordings in the U.S. Copyright Act’s terminology;<sup>223</sup> however, because the Nevada statute covers sounds embodied not only on phonographs and tapes but also on film, the statute also concerns motion pictures and other audiovisual works, which federal copyright law protects “together with accompanying sounds.”<sup>224</sup> In addition to the sounds potentially protected either as sound recordings or as components of audiovisual works or motion pictures, the statute also protects works that are fixed through the recording of the sounds—the underlying works that may also be protected by federal copyright.<sup>225</sup> These might be literary works (e.g., a book recorded as an audiobook)<sup>226</sup> or musical works (e.g., a composition with the accompanying words recorded in an MP3 file).<sup>227</sup>

Not all sound carriers covered by NRS 205.217 will include works that are protected by federal copyright. Sound recordings fixed before February 15, 1972, are explicitly outside the scope of federal copyright protection.<sup>228</sup> Sound recordings fixed on or after February 15, 1972, audiovisual works, and motion pictures are protected by federal copyright if they are original works of authorship<sup>229</sup> and their term of protection has not expired.<sup>230</sup> Additionally, works published before March 1, 1989 (with the exception of pre-February 15, 1972, sound recordings), are protected only if the necessary formalities were complied with.<sup>231</sup>

financial gain,” or by the reproduction and distribution of a phonorecord of a copyrighted work within a period of time and with a specified minimum total retail value, or by distribution to the public on a computer network of a work being prepared for commercial distribution, if “such person knew or should have known that the work was intended for commercial distribution.” 17 U.S.C. § 506(a)(1) (2015). Further criminal provisions in the U.S. Copyright Act concern fraudulent copyright notices, fraudulent removal of a copyright notices, and a false representation in an application for copyright registration. *Id.* § 506(c)–(e).

223. 17 U.S.C. § 101 (2015) (“Sound recordings”) and § 102(7) (2015).

224. 17 U.S.C. § 101 (2015) (“Audiovisual works” and “Motion pictures”) and § 102(6) (2015).

225. On the history of the protection of musical works in various types of copies, see *Goldstein v. California*, 412 U.S. 546, 565-566 (1973).

226. 17 U.S.C. § 101 (2015) (“Literary works”) and § 102(1) (2015).

227. 17 U.S.C. § 102(2) (2015).

228. 17 U.S.C. § 301(c) (2015). *See also supra* Part I, Section A.

229. 17 U.S.C. § 102 (2015).

230. 17 U.S.C. §§ 302, 304 (2015). *See also Maljack Prods., Inc. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996) (holding i.a. that a California statute’s “protection of ‘sound recording[s]’ does not apply to motion picture soundtracks”).

231. *See supra* Part II, Section A on the formalities required for copyright

The underlying works (i.e. literary or musical works) are also protected by federal copyright if they are original works of authorship, their term of protection has not expired, and if they were published before March 1, 1989, the formalities necessary for their protection were met.<sup>232</sup> Whether or not the underlying works are protected by copyright does not affect the copyrightability of the sound recordings, audiovisual works, and motion pictures. For example, a 2006 recording of a concerto that J.S. Bach composed in 1721 is protected by federal copyright as a sound recording, even though the underlying composition (musical work) is not protected by copyright. And, conversely, it is possible for a sound recording not to be protected while the underlying work is protected. For example, a 1967 Beatles sound recording of John Lennon's "All You Need Is Love" is not protected by federal copyright law (because it is a pre-1972 sound recording); however, the underlying work—the 1967 composition of the song with the accompanying words—is protected as a musical work.

It is possible for sounds that are recorded on a sound carrier to include works not protectable by federal copyright law. For example, a recording of bird songs, without any alteration or modification of the sounds, will have no underlying work that is protectable by federal copyright law because the songs are not works of authorship.<sup>233</sup> As for the sound recording itself, it also must be an original work of authorship, and it could be outside the protection of federal copyright law if it lacks the minimum degree of creativity required for federal copyright protection.<sup>234</sup>

NRS 205.217 covers all sounds and all underlying works recorded on a sound carrier, whether or not they are protected by federal copyright law. This is problematic in view of the preemption doctrine, particularly considering that preemption concerns not only works actually protected by federal copyright but also works that are purposefully excluded from federal protection, such as works whose copyright term has expired.<sup>235</sup>

Table 1 summarizes the application of the preemption doctrine to works and acts covered by NRS 205.217(1)(a). The provision covers

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protection before March 1, 1989. In cases of foreign works, even if the formalities were not complied with, copyright might subsist if it was restored under 17 U.S.C. § 104A (2015).

232. *Id.*

233. On the requirement of human authorship, see *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (commenting on "copyright, as the exclusive right of a man to the production of his own genius or intellect").

234. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (discussing originality as "a constitutional requirement").

235. See *supra* Part I, Section A.

acts of transferring and causing to be transferred—acts that correspond to the act of reproduction and the act of authorizing a reproduction under the U.S. Copyright Act.<sup>236</sup> There is no “extra element” that is required for a violation of NRS 205.217(1)(a)—an “extra element” that would keep the acts outside of preemption.<sup>237</sup> The NRS provision is therefore preempted whenever protected works, or unprotected works within the protectable subject matter, are concerned. The preemption conclusion does not change because of the fact that the “fair uses” listed in NRS 205.217(3) do not coincide with the uses permissible under the federal copyright law’s fair use doctrine and other exceptions and limitations under the Copyright Act. State law cannot expand what would de facto be copyright protection beyond the limits set by federal copyright law.<sup>238</sup>

NRS 205.217(1)(a) is not preempted to the extent that it applies to pre-1972 sound recordings and it is also not preempted as it applies to subject matter unprotectable under the U.S. Copyright Act.<sup>239</sup>

TABLE 1: NEV. REV. STAT. § 205.217(1)(A) AND PREEMPTION BY FEDERAL COPYRIGHT LAW<sup>240</sup>

Acts criminalized by NRS 205.217(1)(a)	Works protected by NRS 205.217(1)(a)			
	Subject matter within the scope of the U.S. Copyright Act (sound recordings, audiovisual works, motion pictures, literary works, and musical works)			Other subject matter intentionally left outside the scope of the U.S. Copyright Act
	Works not protected by federal ©		Works protected by federal ©	
	Expressly exempted from preemption (pre-1972 sound recordings)	Other unprotected works		
“Transfer or cause to be transferred”	NP	P	P	NP

236. 17 U.S.C. §106(1) (2015).

237. For the requirement of an “extra element” *see supra* Part I, Section A.

238. *See supra* Part I, Section A.

239. It is difficult to envision a kind of subject matter embodied in a sound carrier that would be outside the scope of preemption. Even a bird song (mentioned earlier) could be understood to be a musical work without the proper human authorship, and thus be a work purposefully excluded from the scope of federal copyright law. The application of the Nevada statute to the same bird song would then also be preempted.

240. In the table, “NP” stands for “not preempted,” “P” stands for “preempted.”



As opposed to paragraph (1)(b), paragraph 1(a) does not exempt from criminal offenses acts that occur with the consent of the owner of the master recording. The preemption doctrine should protect many persons and entities that have permission or a license to reproduce copyright-protected works from existing to new sound carriers; additional acts will be covered by the fair use provision in paragraph (3). The problem arises for those who reproduce sound carriers with pre-1972 sound recordings and/or other works that fall outside the scope of the subject matter protectable under federal law. NRS 205.217(1)(a) continues to criminalize reproductions of sound carriers with such works if done knowingly and for commercial advantage and private financial gain, even if the reproducer has the consent of the owner of the master recording.

It is possible that the last portion of paragraph (1)(b) was intended to apply to paragraph (1)(a) as well, meaning that both (1)(a) and (1)(b) were supposed to concern only transfers of sounds done without the consent of the owner of the master recording. But even this limitation might not change the outcome of the preemption analysis in cases of works protected by federal copyright law. Although the consent of the owner of the master recording might seem to be an “extra element” needed to defeat preemption, it would be an extra element only if the owner of the master and the potential owner of the copyright are two different persons or entities.<sup>241</sup> If the two owners are one and the same (which might be the case in practice because a music label is often the owner of both the master recording and the copyright in the sound recording, and sometimes even the underlying work), there will be no extra element. Furthermore, the provision would create a de facto perpetual right of reproduction, which would be in conflict with federal copyright law and the IP Clause of the U.S. Constitution.<sup>242</sup>

Preemption might be found even in situations in which the owner of the master recording is not the same person or entity as the owner of the copyright to the sound recording. The Supreme Court of Illinois concluded in *People v. Williams*<sup>243</sup>—a case that concerned a statute in Illinois<sup>244</sup> that is similar to the statute in Nevada—that “the fact that the

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241. See *infra* note 257 and the accompanying text for the reason that the statute uses the term “owner of the master” as opposed to “copyright owner.”

242. 17 U.S.C. §301(c) (2015); *State v. Oidor*, 292 P.3d 629, 633 (Or. Ct. App. 2012). See also *Copyright Law Revision: Hearings on H.R. 2223, Part 3 Before the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 1911 (1975) (statement of Barbara Ringer, Register of Copyrights) (proposing limits on state law protection of pre-1972 sound recordings—at that time to February 15, 2047).

243. 920 N.E.2d 446 (Ill. 2009).

244. 720 ILCS 5/16-7.

owner of the copyright might not be the actual owner of the master recording does not create an ‘extra element’ making [the state statute] qualitatively different from copyright infringement.”<sup>245</sup> The Court opined that “[t]he fact that an ‘owner’ of the master recording may not be a copyright holder does not take the [state] statute out of the realm covered by the federal Act, where the statute in question is substantially a copyright infringement statute.”<sup>246</sup>

Table 2 below, which traces the federal preemption of NRS 205.217(1)(b), treats the question of the “extra element,” which would have consisted of the consent of the owner of the master recording, as resolved by the above analysis by the Supreme Court of Illinois. As a result, whether the owner of the master recording is or is not the owner of the copyright has no bearing on the outcome of the preemption analysis.

Another question arises as to the acts in paragraph (1)(b) that have no corresponding acts in the U.S. Copyright Act, specifically the acts of possession of the sound carriers with the transferred sounds. While it could be argued that the provision de facto creates new rights above the federal copyright law framework (and therefore federal law should not preempt the provision),<sup>247</sup> it could also be argued that the provision de facto negates a carve-out that is created by the federal doctrine of fair use, and therefore federal law should preempt the provision.<sup>248</sup>

In 2012, the Court of Appeals of Oregon considered whether the acts of advertising and offering for sale were equivalent to the rights provided by the U.S. Copyright Act. The acts were covered by ORS § 164.865(1)(b), which made it a criminal offense to “[k]nowingly sell[], offer[] for sale or advertise[] for sale any sound recording that has been reproduced without the written consent of the owner of the master recording.”<sup>249</sup> The court concluded that the Oregon statute did afford protections equivalent to the federal copyright law’s right of distribution<sup>250</sup> and impermissibly “provide[d] the owner with perpetual protection that [was] not limited by copyright principles such as fair use.”<sup>251</sup> The statute’s inclusion of acts of advertising and offering for sale “enhance[d] or supplement[ed] the protection afforded to copyright

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245. *People v. Williams*, 920 N.E.2d at 459.

246. *Id.*

247. *See supra* Part I, Section A.

248. *See supra* note 47 and the accompanying text.

249. O.R.S. § 164.865(1)(b). In response to a petition for reconsideration the Court clarified its decision by stating that the decision did not consider preemption of the provision with respect to its application to pre-1972 sound recordings. *State v. Oidor*, 258 Or.App. 459, 460; 310 P.3d 671, 671 (Or. Ct. App. 2013).

250. *State v. Oidor*, 292 P.3d 629, 634 (Or. Ct. App. 2012).

251. *Id.* at 633.

owners by the federal act by prohibiting acts that can lead to unauthorized distribution by sale of copyrighted sound recordings.”<sup>252</sup>

TABLE 2: NEV. REV. STAT. § 205.217(1)(B) AND PREEMPTION BY FEDERAL COPYRIGHT LAW<sup>253</sup>

Acts criminalized by NRS 205.217(1)(b) “without the consent of the person who owns the master” recording	Works protected by NRS 205.217(1)(b)					Other subject matter intentionally left outside the scope of the U.S. Copyright Act
	Subject matter within the scope of the U.S. Copyright Act (sound recordings, audiovisual works, motion pictures, literary works, and musical works)					
	Works not protected by federal ©			Works protected by federal ©		
	Expressly exempted from preemption (pre-1972 sound recordings)	Other unprotected works		© owned by the owner of the master	© not owned by the owner of the master	
© owned by the owner of the master		© not owned by the owner of the master				
“Sell, distribute, circulate”	NP	P	P	P	P	NP
“Offer for sale, distribution or circulation”	NP	P	P	P	P	NP
“Possess for the purpose of sale, distribution or circulation”	NP	P	P	P	P	NP
“Cause to be sold, distributed, circulated, offered for sale, distribution or circulation”	NP	P	P	P	P	NP
“Cause to be ... possessed for sale, distribution or circulation”	NP	P	P	P	P	NP

252. *Id.* at 634. On advertising in this context see also *People v. Borriello*, 155 Misc.2d 261, 266 (N.Y. Sup. Ct. 1992) (“The element of ‘advertisement’ for sale is also not an ‘extra element’ that would qualitatively change the statute.”).

253. In the table, “NP” stands for “not preempted,” “P” stands for “preempted.”

It is not surprising that a number of states have amended their criminal provisions on sound recordings to make the provisions apply only to pre-1972 recordings,<sup>254</sup> given that some state courts have held that provisions similar to NRS 205.217(1) were preempted with the exception of their application to pre-1972 recordings,<sup>255</sup> and given that the U.S. Supreme Court held the California criminal provisions not preempted as to pre-1972 recordings. For instance, the application of the California statute that was at issue in *Goldstein v. California* is now limited to “those articles that were initially mastered prior to February 15, 1972.”<sup>256</sup> For pre-1972 sound recordings, state statutes often provide rights to the owner of the master recording, as opposed to the owner of copyright; because pre-1972 sound recordings enjoy no protection under federal copyright law, there is no “owner” of copyright to the sound recordings within the definition in the U.S. Copyright Act. State legislatures typically do not provide an autonomous definition of a rights owner for the purposes of the piracy statutes concerning pre-1972 sound recordings, which is why state statutes often afford rights to the owner of the master recording.<sup>257</sup>

Given the problems created by state statutes similar to NRS 205.217(1), it would be appropriate to amend the Nevada statute to avoid preemption. The application of the statute should be limited to pre-1972 recordings, and the language of the statute should be clarified to add the consent of the owner of the master to 205.217(1)(a) and simplify the list of acts in 205.217(1)(b).<sup>258</sup> One aspect worth

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254. ALA. CODE § 13A-8-81(d) (2017); ARIZ. REV. STAT. ANN. § 13-3705(C) (2017); CAL. PENAL CODE § 653h(i) (2017); COLO. REV. STAT. § 18-4-601(1.5) (2017); D.C. CODE § 22-3214(e) (2017); FLA. STAT. § 540.11(2)(a)(4) (2017); KAN. STAT. ANN. § 21-5806(c)(3) (West 2017); MD. CODE ANN., CRIM. LAW § 7-308(b)(1) (2017); MICH. COMP. LAWS § 752.1052(b)(i); MO. REV. STAT. § 570.225 (2017); N.H. REV. STAT. ANN. § 352-A:2(III)(a) (2017); N.J. STAT. ANN. § 2C:21-21(c)(1) (2017); N.Y. PENAL LAW § 275.25 (2017); N.C. GEN. STAT. § 14-433(b) (2017); OKLA. STAT. tit. 21, § 1976(A) (2017); 18 PA. CONS. STAT. § 4116(c)(2) (2017); TENN. CODE ANN. § 39-14-139(b)(2) (2017); TEX. BUS. & COM. CODE ANN. § 641.051(a) (2017); UTAH CODE ANN. § 13-10-7 (2017); WASH. REV. CODE § 19.25.020(4) (2017); W. VA. CODE § 61-3-50(a) (2017); WIS. STAT. § 943.207(1)(a) (2017).

255. See *supra* notes 243, 249.

256. CAL. PENAL CODE § 653h(i) (2017).

257. On the difficulties of defining “copyright owner” in state law, given the absence in the U.S. Copyright Act of a definition of “copyright owner” in pre-1972 sound recordings, see Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 TENN. L. REV. 167, 199 (2014).

258. The owner of the master could be replaced with an owner of the copyright to the pre-1972 recording that the statute could define by reference to federal copyright rules, or autonomously. However, interest in the protection of legal

considering could be a disclaimer of the right of public performance in pre-1972 sound recordings—a matter discussed in detail in Part III, Section A below.

As is the case with the statutes in the previous sections of this article, a state statute could also be amended in a systemic revision of all state provisions concerning sound and image recordings; some current developments, discussed in Part III, Section A below, could also affect whether and how the statute might be amended.<sup>259</sup>

It could be debated how Nevada's interest in providing an environment suitable for innovation and creation should be reflected in the statute that concerns existing works, such as pre-1972 sound recordings. Typically, arguments for increased protection for existing works claim that it is necessary to signal to current and future creators that the law will take care of their future works if the law changes to enhance protection. This is the reason for which, for example, extensions of copyright term were legislated to cover works already in existence at the time the extensions took effect.<sup>260</sup>

The protection of sound recordings under Nevada law benefits rights owners regardless of where they are located, but the law covers only infringing acts that occur in the State.<sup>261</sup> A state law that provides strong protection for pre-1972 sound recordings will therefore not influence out-of-state rights owners' decisions as to whether or not to relocate to Nevada, because wherever they are located, they will benefit from the law in Nevada. A weak provision—or no provision—covering pre-1972 sound recordings<sup>262</sup> would harm all rights owners, including those who are domiciled in Nevada, but could theoretically propel some form of innovation and creativity in Nevada that might rely on pre-1972 sound recordings. It is questionable to what extent a weak or non-existent protection for pre-1972 sound recordings would benefit Nevada innovators and creators who would like to use pre-1972 recordings; it would be short-sighted for a business to rely on such a law if the business had aspirations to expand nationally or globally, including conducting business on the internet, because of the protections that the recordings might enjoy in some other states and countries.

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certainty weighs in favor of maintaining the owner of the master.

259. See *infra* Part III, Section A.

260. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003); *Golan v. Holder*, 565 U.S. 302, 327 (2012).

261. See *supra* Part I, Section B for a discussion of the dormant Commerce Clause.

262. There is nothing in international treaties that mandates protection for pre-1972 sound recordings in the United States. See Geneva Phonograms Convention, *supra* note 79, Article 7(3).

Currently, NRS 205.217(1) is not obsolete; the statistics provided by the Office of the District Attorney for Clark County, Nevada, which includes, i.a., the large cities of Las Vegas, North Las Vegas, and Henderson (where about 73% of Nevada residents reside),<sup>263</sup> indicate that in 2012 - 2015 charges were brought in a number of cases under N.R.S. 205.217(1). Table 3 summarizes the statistics.

TABLE 3: STATISTICS OF CASES UNDER N.R.S. 205.217(1), OFFICE OF THE DISTRICT ATTORNEY FOR CLARK COUNTY, NEVADA, 2012 – 2015<sup>264</sup>

		Attempt to reproduce or sell sound recordings, first offense (category E felony)	Reproduction or sale of sound recordings, first offense (category D felony)	Reproduction or sale of sound recordings, second or subsequent offense (category C felony)	Conspiracy to reproduce or sell sound recordings (gross misdemeanor)
2012	Charged		3		
	Pleaded guilty				
	Found guilty		2		
2013	Charged		36	1	
	Pleaded guilty		2		
	Found guilty		13		
2014	Charged	1	24		6
	Pleaded guilty	1	10		
	Found guilty		2		2
2015	Charged	1	10		
	Pleaded guilty				
	Found guilty		4		

263. Clark County, Nevada, Quick Facts, Census (May 10, 2017), <http://www.census.gov/quickfacts/table/PST045215/32003> [<https://perma.cc/LKE7-HZAU>] (populations estimates, July 1, 2015); Nev., Quick Facts, Census (May 10, 2017) <http://www.census.gov/quickfacts/table/PST045215/32> [<https://perma.cc/2YE8-6G5W>] (population estimates, July 1, 2015).

264. E-mail from the Clark County District Attorney's Office to author (Aug. 22, 2016, 14:26 PDT) (on file with author).

#### IV. RECENT DEVELOPMENTS IN STATE LAWS CONCERNING COPYRIGHT

Parts I and II demonstrate that state copyright law is neither limited to obscure and inconsequential provisions, nor is dead letter. Some of the most remarkable developments in copyright law today concern state law in some fashion. The following sections discuss developments that concern rights to pre-1972 sound recordings, unfair competition claims regarding so-called “foreign IP theft,” and rights to unfixed works, including performances. The developments should inform state legislators’ thinking about revisions to state IP statutes, and may possibly result in the eventual adoption of new federal statutes that could affect some state legislative efforts. However, as pointed out below, possible federal legislation will leave some space for state copyright statutes, and other areas are still free for state legislation.

##### A. *Rights in Pre-1972 Recordings*

Perhaps no area of state IP law has received more attention recently than state laws on pre-1972 sound recordings. The U.S. Copyright Act expressly leaves these works outside of preemption.<sup>265</sup> This state of affairs in federal law has been reevaluated by the U.S. Copyright Office, which in its 2011 report on the topic recommended that federal copyright protection be extended to cover pre-1972 sound recordings. The Office proposed that federal law include “special provisions to address ownership issues, term of protection, transition period, and registration” of pre-1972 sound recordings.<sup>266</sup> However, such comprehensive inclusion of pre-1972 recordings in the U.S. Copyright Act has not yet materialized.

Instead of the comprehensive solution recommended by the U.S. Copyright Office, a partial coverage of pre-1972 sound recordings has been promoted by “Project72,”<sup>267</sup> a campaign launched in 2014 by

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265. See *supra* Part I, Section A. As for the state “piracy statutes” discussed *supra* in Part II, Section C, the Report from the U.S. Senate Judiciary Committee concluded in 1975 that “[t]here [was] no justification for exposing pre-1972 recordings to expropriation by record pirates.” S. Rep. No. 94-473 at 116 (1975).

266. U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights, Dec. 2011, at 175, <http://www.copyright.gov/docs/sound/pre-72-report.pdf> [<https://perma.cc/S8N9-7NHC>].

267. PROJECT72 (May 10, 2017), <http://www.project-72.org/> [<https://perma.cc/597F-GBYS>]. See also SoundExchange, Protecting Pre-72 Sound Recordings, available at <http://www.soundexchange.com/advocacy/pre-1972->

SoundExchange, an additional, recently established U.S. performing rights organization. The partial coverage was proposed in a bill called the RESPECT Act; the title of the bill, which was introduced in Congress in May 2014,<sup>268</sup> stood for “Respecting Senior Performers as Essential Cultural Treasures Act.”<sup>269</sup> The RESPECT Act was not adopted by the 113<sup>th</sup> Congress and was not reintroduced in the subsequent Congress; rather, a new bill was introduced in April 2015 for the Fair Play Fair Pay Act<sup>270</sup> (it was reintroduced in the 115<sup>th</sup> Congress in March 2017).<sup>271</sup> This second and substantially more detailed bill aims to equalize digital and analog audio transmissions by making the right to perform publicly apply not only to digital transmissions (as is now the case under the U.S. Copyright Act) but to all audio transmissions.<sup>272</sup> Changes to several provisions of the Copyright Act would reflect the change to the scope of the right to perform through audio transmission.<sup>273</sup> As it applies to pre-1972 sound recordings, the bill incorporates the text of the RESPECT Act, in a section entitled “Equitable Treatment of Legacy Sound Recordings.”<sup>274</sup>

The RESPECT Act included provisions concerning pre-1972 sound recordings to address uses by entities that digitally transmit sound recordings, including both non-subscription-based and subscription-based services, such as Pandora, and satellite digital audio radio services, such as Sirius XM Radio. These entities are already paying statutory royalties for performing sound recordings “publicly by means of a digital audio transmission,”<sup>275</sup> but, to date, the royalties are for only the sound recordings fixed on or after February 15, 1972—although some states have tried to enforce the collection of royalties for pre-1972 sound recordings protected by state law.<sup>276</sup> The RESPECT Act would require the entities to pay statutory royalties also for digitally transmitting pre-1972 sound recordings and for ephemeral copies of these recordings,<sup>277</sup> and the Fair Play Fair Pay Act would expand the

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copyright/ [<https://perma.cc/QJH7-5SA6>].

268. RESPECT Act, H.R. 4772, 113<sup>th</sup> Cong. §2 (2014) (hereinafter “RESPECT Act”).

269. *Id.*, Section 1.

270. Fair Play Fair Pay Act of 2015, H.R. 1733, 114<sup>th</sup> Cong. § 1 (2015).

271. Fair Play Fair Pay Act of 2017, H.R. 1836, 115<sup>th</sup> Cong. (2017).

272. *Id.*, Section 2, amending 17 U.S.C. § 106(6) (2015). This was not the first time that Congress had considered a more robust performance right to sound recordings. *See* S. Rep. No. 91-1219 at 7 (1970).

273. Fair Play Fair Pay Act of 2017, *supra* note 271, Section 2.

274. *Id.*, Section 7.

275. 17 U.S.C. §§ 106(6) (2015), 114(f) (2015).

276. *See supra* Part I, Section B.

277. 17 U.S.C. §112(e); RESPECT Act, Section 2, adding 17 U.S.C. 114(f)(4)(D)(i).



coverage to entities engaged in all types of audio transmissions.<sup>278</sup>

Neither bill addresses pre-1972 sound recordings comprehensively, as the U.S. Copyright Office proposed to do in its 2011 report;<sup>279</sup> the bills leave unaddressed for pre-1972 sound recordings issues of ownership, term of protection, and registration. Although the Fair Play Fair Pay Act would create an obligation to “make royalty payments . . . in the same manner as such person does for sound recordings that are protected under [the U.S. Copyright Act],”<sup>280</sup> this language is not designed to resolve the outstanding issues.

Because it would not address pre-1972 sound recordings comprehensively, the Fair Play Fair Pay Act would not completely preempt state laws on pre-1972 sound recordings; as the RESPECT Act did, the Fair Play Fair Pay Act states that it would “not confer copyright protection . . . upon sound recordings that were fixed before February 15, 1972.”<sup>281</sup> Therefore, the Fair Play Fair Pay Act would leave the remaining protections for such sound recordings to state laws,<sup>282</sup> meaning that even if the Act is adopted, state law would be permitted to continue to protect pre-1972 recordings against unauthorized acts of reproduction (other than ephemeral recordings under section 112(e)), preparation of derivative works, distribution, performance other than performances through an audio transmission, and possibly other acts. Therefore, states that do have a “piracy statute,” such as Nevada, could maintain the statute to a certain extent, as discussed in Part II, Section C, above.

The pressure to clarify the law as to pre-1972 sound recordings has intensified because of cases in which courts are asked to determine whether a public performance right to pre-1972 sound recordings exists based on common law. In 2016 the U.S. Courts of Appeals for the Second and Eleventh Circuits, and in 2017 the U.S. Court of Appeals for the Ninth Circuit each certified a question to the highest state courts in New York, Florida, and California, respectively, asking whether state law in the three states provides for such a right.<sup>283</sup> In December 2016, the New York Court of Appeals held that there is no common-law copyright protection for pre-1972 sound recordings in New York<sup>284</sup>;

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278. See *supra* note 274.

279. See *supra* note 266.

280. See *supra* note 274.

281. RESPECT Act, § 2, adding 17 U.S.C. 114(f)(4)(D)(iv); *supra* note 274.

282. *Id.*

283. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 272 (2d Cir. 2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 827 F.3d 1016 (11th Cir. 2016); *Flo & Eddie v. Pandora Media, Inc.*, 851 F.3d 950 (9th Cir. 2017).

284. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583 (2016). For a discussion of the ruling by the New York Court of Appeals, see Tyler Ochoa, A

in June 2017, the U.S. District Court for the District of Illinois ruled that there is no state common-law protection available for pre-1972 sound recordings under Illinois law.<sup>285</sup> Earlier, in 2014, the U.S. District Court for the Central District of California had interpreted a California statute to provide for such a right;<sup>286</sup> the statute vests “an exclusive ownership” in pre-1972 sound recordings without spelling out the rights that the ownership comprises.<sup>287</sup> The court noted that, when the California legislature adopted the provision, “there was no common law rule in California rejecting public performance rights in sound recording ownership.”<sup>288</sup> While litigation has been ongoing, bills were introduced in Tennessee to address rights in pre-1972 sound recordings in the state.<sup>289</sup>

### *B. Unfair Competition Claims for Violation of Non-U.S. IP Rights*

Another area in which state IP law has recently seen remarkable innovation is unfair competition, which has been explored for tools to combat so-called “foreign IP theft”—infringements of IP rights committed outside the United States by foreign companies that manufacture and/or sell products in the United States. The argument is that because of foreign IP infringement, such as copyright infringement, these companies gain an unfair advantage when competing with U.S. competitors. Because it is difficult and costly to pursue enforcement actions for such foreign IP infringements,<sup>290</sup> U.S. companies look to state unfair competition law to assist them in fighting such conduct. In two states, Louisiana and Washington, special unfair competition statutes have been adopted to address such conduct.

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*Seismic Ruling Revisited: No Common-Law Public Performance Rights in Pre-1972 Sound Recordings in New York—Flo & Eddie v. Sirius*, TECHNOLOGY AND MARKETING LAW Blog (Oct. 1, 2014), <http://blog.ericgoldman.org/archives/2014/10/a-seismic-ruling-on-pre-1972-sound-recordings-and-state-copyright-law-flo-eddie-v-sirius-xm-radio-guest-blog-post.htm> [https://perma.cc/N2QQ-8WU6].

285. *Sheridan v. iHeartMedia, Inc.*, -- F. Supp. 3d -- (N.D. Ill. 2017), 2017 WL 2424217.

286. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV-13-5693, 2014, PSG 2014 WL 4725382, P 30, 665, \*9 (C.D. Cal., Sept. 22, 2014) (interpreting Cal. Civ. Code §980(a)(2)).

287. CAL. CIV. CODE § 980(a)(2) (2017).

288. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, P 30, 665, \*6. *See supra* note 256.

289. Legacy Sound Recording Protection Act, S.B. 2187, 2014; Legacy Sound Recording Protection Act, H.B. 2325, 2016. *See supra* Part I, Section B for a discussion of the rights to pre-1972 sound recordings and the dormant Commerce Clause.

290. *See, e.g.*, MARKET A TRIMBLE, GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT (Oxford, 2012); Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L. REV. 339 (2015).

The special statutes adopted in the two states were only the first signs of a growing interest in unfair competition as a vehicle to fight foreign IP infringements. Shortly after the special statutes were adopted, attorneys general from 36 states sent a letter to the Federal Trade Commission (FTC) in November 2011,<sup>291</sup> urging the FTC to consider taking action at the federal level to prevent foreign IP theft and unfair competition on U.S. soil that results from such theft.<sup>292</sup> The attorneys general pointed out that “[t]heft of intellectual property is endemic in countries to which [U.S.] manufacturing jobs have been transferred,”<sup>293</sup> and that “[c]ompetition is unfairly distorted . . . when a manufacturer gains a cost advantage by using stolen information technology, whether in its business operations or manufacturing processes.”<sup>294</sup> The letter by the state attorneys general was followed in April 2012 by a letter from a group of U.S. Senators supporting the letter from the attorneys general and requesting that the FTC “use all the tools at [the FTC’s] disposal to fight the theft and use of stolen American manufacturing information technology (IT) and intellectual property (IP).”<sup>295</sup>

The state attorneys general letter mentioned Louisiana and Washington as the states that had adopted statutes to address the problem of foreign IP theft.<sup>296</sup> Louisiana’s 2010 statute makes it “unlawful for a person to develop or manufacture a product, or to develop or supply a service using stolen or misappropriated property, including but not limited to computer software that does not have the necessary copyright licenses, where that product or service is sold or offered for sale in competition with those doing business in this state.”<sup>297</sup> The Washington statute, adopted in 2011, provides

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291. Letter from the National Association of Attorneys General to the Federal Trade Commission Commissioners and the Director of the Bureau of Competition (Nov. 4, 2011), <http://www.naag.org/assets/files/pdf/signons/FTCA%20Enforcement%20Final.PDF> [<https://perma.cc/3DUU-RDH4>].

292. *Id.* at 2.

293. *Id.* at 1.

294. *Id.*

295. U.S. Senate Committee on Small Business & Entrepreneurship, Letter addressed to the Federal Trade Commission 1 (Apr. 2, 2012), [http://www.sbc.senate.gov/public/?a=Files.Serve&File\\_id=D977D22F-8FC4-4438-BD86-677C770AC87E](http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=D977D22F-8FC4-4438-BD86-677C770AC87E) [<https://perma.cc/49M6-4JTT>].

296. A similar statute was proposed in New York. *See* S.B. S5089, 2011-2012 S. (N.Y. 2011), <https://www.nysenate.gov/legislation/bills/2011/s5089/amendment/original> [<https://perma.cc/V78Z-BANS>]; *see also* S.B. S856, 2013-2014 S. (N.Y. 2013), <https://www.nysenate.gov/legislation/bills/2013/s856> [<https://perma.cc/55CG-MGY8>].

297. LA. STAT. ANN. § 51:1427(A) (2010).

protection in cases in which someone uses “stolen or misappropriated information technology”<sup>298</sup> “in the manufacture, distribution, marketing, or sales of the articles or products.”<sup>299</sup> The statute defines “[s]tolen or misappropriated information technology” as “hardware or software . . . acquired, appropriated, or used without the authorization of the owner of the information technology or the owner’s authorized licensee in violation of applicable law.”<sup>300</sup> The Washington statute was used, for example, in a dispute between Microsoft and the Brazilian aircraft manufacturer Embraer.<sup>301</sup>

Because the appeals by the state attorneys general and the U.S. Senators for a federal-level intervention were unsuccessful, some state attorneys general turned to their states’ general unfair competition statutes to address the conduct proscribed by the special Louisiana and Washington statutes. For example, the Massachusetts Attorney General invoked the Massachusetts state unfair practices statute against a Thai company that used pirated software and allegedly had an unfair advantage when it competed with companies in the United States.<sup>302</sup> The Massachusetts provision holds unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>303</sup> The State of Massachusetts settled the dispute and the Thai company paid a civil penalty and agreed not to use pirated software in connection with trade that affected the State.<sup>304</sup> In California, the Attorney General based an unfair competition lawsuit against two foreign clothing companies on a California unfair competition statute that protects, i.a., against “any unlawful, unfair or fraudulent business act or practice.”<sup>305</sup> The two clothing companies were accused of using unlicensed software to produce clothing that was imported and sold in California;<sup>306</sup> the case also settled with the

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298. WASH. REV. CODE ANN. § 19.330.010(7)(a) (West 2011).

299. *Id.* at (7)(b). For the definition of an “article or product” *see id.* at (1).

300. *Id.* at (7)(a). The definition excludes “hardware or software [that] was not available for retail purchase on a stand-alone basis at or before the time it was acquired, appropriated, or used by such a person.” *Id.*

301. Wash. State Office of the Attorney Gen., *Washington’s New Unfair Competition Law Protects Local Company from Software Piracy* (Apr. 3, 2013), <http://atg.wa.gov/news/news-releases/washington-s-new-unfair-competition-law-protects-local-company-software-piracy> [<https://perma.cc/EP9R-PG9P>].

302. The Official Website of the Attorney Gen. of Mass., *Company Fined for Using Pirated Software to Gain Unfair Advantage Over Massachusetts Businesses* (Oct. 18, 2012), <http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-10-18-narong-seafood-co.html> [<https://perma.cc/DW56-JLLY>].

303. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2017).

304. Wash. State Office of the Attorney Gen., *supra* note 301.

305. CAL. BUS. & PROF. CODE § 17200 (West 2012).

306. Compl. for Injunction and Civil Penalties, The People of the State of

companies paying a fine.

Of the states that have not adopted a special statute that is comparable to the Louisiana and Washington statutes mentioned above, not all have general unfair competition statutes that would be comparable to the Massachusetts and California statutes. For example, Nevada's statutes include an Unfair Trade Practices Act,<sup>307</sup> which is formulated as an antitrust statute; the "Deceptive Practices" Chapter<sup>308</sup> of the Nevada Revised Statutes focuses on false representation, deceptive labeling, and other fraudulent and deceptive conduct. Additionally, Nevada has a statute entitled "Unfair Trade Practices,"<sup>309</sup> which addresses only the unauthorized possession of, access to, and reproduction of a computer program or data stored on a computer and other unauthorized acts concerning the program or data.<sup>310</sup> But no statute in Nevada covers unfair competition in general. NRS 598.0953(2) mentions "unfair trade practices actionable at common law,"<sup>311</sup> but the contours of common law in Nevada regarding those practices are unclear.

Courts ought to determine what common law unfair competition covers in Nevada; as the U.S. Court of Appeals for the Ninth Circuit has noted, "the tort of unfair competition is extremely flexible, and courts are given wide discretion to determine whether conduct is 'unfair'."<sup>312</sup> The Court has further pointed out that a claim of unfair competition needs to include "some grounding in deception or appropriation of appellant's property," or simply something "dishonest or unfair."<sup>313</sup> The Supreme Court of Nevada referred to state law on unfair competition in a 1988 decision<sup>314</sup> but discussed only common-law tradename infringement,<sup>315</sup> and therefore interpreted the common law of unfair competition only within a limited scope similar to the scope of the law of unfair competition under the Lanham Act.

The Nevada legislature discussed the lack of a Nevada general unfair competition statute, but a proposal for a statute never materialized. A 1973 proposal included a definition of deceptive trade

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California v. Ningbo Beyond Home Textile Co., Ltd. et al., 2013 WL 271542, Jan. 24, 2013, point 10.

307. NEV. REV. STAT. ANN. § 598A.010 et seq (2017).

308. NEV. REV. STAT. ANN. § 598.

309. NEV. REV. STAT. ANN. § 603.040.

310. *Id.*

311. NEV. REV. STAT. ANN. § 598.0953(2).

312. *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 591 (9th Cir. 1987).

313. *Id.*

314. *A.L.M.N., Inc. v. Rosoff*, 104 Nev. 274 (Nev. 1988).

315. *Id.* at 277.

practices with only a non-exhaustive list of examples of such practices.<sup>316</sup> However, the statute as it was adopted was more restrictive, making the list exhaustive.<sup>317</sup> An example in the list that would have prohibited an “unfair method of competition” in general did not make it into the final statute.<sup>318</sup> The narrowing of the bill might be explained by the fact that at least some legislators were concerned that “the bill would allow harassment of legitimate businessmen.”<sup>319</sup> Discussions of 1999 amendments to the statute show a detailed case-by-case filling in of gaps left in the definition of deceptive trade practices in the absence of a general unfair competition clause.<sup>320</sup> In the legislative process a legislator opined that “at some point the Legislature will need to make a policy statement to the court that common sense deceptive trade practices should be included.”<sup>321</sup>

The lack of a Nevada statute governing either specific or general unfair competition that would protect companies from unfair competition by foreign companies infringing IP rights abroad has been reflected in a report by the National Alliance for Jobs and Innovation, an “association of concerned manufacturers, associations, academics and other businesses” that is “committed to ending unfair competition and stopping the theft and misappropriation of trade secrets and other IP-protected information.”<sup>322</sup> The July 2016 report includes a State Report Card that indicates whether state consumer

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316. A.B. 301 (Nev. 1973), Amendment No. 406, 232 (“[A] ‘deceptive trade practice[‘ . . . ] shall include the following. . .”).

317. A.B. 301 (Nev. 1973), § 9, 1483.

318. A.B. 301 (Nev. 1973), Amendment No. 406, 235 (“Engaging in any act or practice deemed to be an unfair method of competition or an unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act. . .”).

319. A.B. 301, Minutes, Mar. 22, 1973, p. 231.

320. A.B. 431, Assemb. Comm. On Commerce and Labor, Minutes, Mar. 24, 1999, 3 <http://www.leg.state.nv.us/Session/70th1999/Minutes/AM-CMRC-990324-ABs431,447,476,492.html> [<https://perma.cc/NFP6-XM3Z>]. See also Letter from the Nevada Attorney General to Assemblywoman Barbara Buckley, Re AB 431, Mar. 24, 1999.

321. A.B. 431, S. Comm. on Commerce and Labor, Minutes, May 5, 1999, 12 (reporting on an assertion by Chairman Townsend) <http://www.leg.state.nv.us/Session/70th1999/Minutes/SM-CL-990505-Assembly%20Bills.html> [<https://perma.cc/V8NA-2XB4>]. Assemblywoman Barbara Buckley agreed, adding that “the crime list is too narrow.” *Id.*

322. Nat’l All. for Jobs and Innovation, *Our Mission* (2017), <http://naji.org/the-issue/our-mission/> [<https://perma.cc/VUB9-4FBM>]. As of August 22, 2016, the President of the Alliance was Rob McKenna, who was the Attorney General of the State of Washington when the special Washington statute that was mentioned earlier was adopted. Board of Directors, Nat’l All. for Jobs and Innovation (2017), <http://naji.org/the-alliance/advisory-board/> [<https://perma.cc/UU6Q-KL8Z>] (last visited May 3, 2017).

protection laws are able to “provide... for enforcement against companies—including companies based overseas—that use misappropriated or stolen IP to seek an unfair competitive advantage.”<sup>323</sup> Nevada received a D on the State Report Card; the report listed the lack of a “broad unfairness prohibition” as one of the major deficiencies in Nevada’s law.<sup>324</sup> Only nine states received grades lower than Nevada.<sup>325</sup>

Enacting a general unfair competition statute in Nevada and other states that lack such a general statute would seem advisable; a special statute similar to the Louisiana and Washington model could also be considered. It should be noted, however, that the application of such statutes to “foreign IP theft” presents some challenges. Of greatest importance is that neither the Louisiana statute nor the Washington statute addresses the choice-of-law issue that arises in such cases—the question of which country’s law a court should apply to evaluate whether infringement of IP rights has occurred. In cases of “foreign IP theft” it seems logical that the applicable law should not be U.S. law, unless U.S. IP law has an extraterritorial reach in the particular circumstance;<sup>326</sup> the established choice-of-law rule for IP infringement dictates that the applicable law should be the law of the foreign country for which infringement is claimed.<sup>327</sup> A reminder of the choice-of-law rule in the statute would be useful.<sup>328</sup> Other challenges in the

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323. Nat’l All. for Jobs and Innovation, *Protection of Intellectual Property Rights Under State Consumer Protection Laws* 1 (July 14, 2016), [http://naji.org/wp-content/uploads/2016/07/PROTECTION-OF-IP-RIGHTS-UNDER-STATE-CONSUMER-PROTECTION-LAWS\\_NAJL\\_2016-07-13.pdf](http://naji.org/wp-content/uploads/2016/07/PROTECTION-OF-IP-RIGHTS-UNDER-STATE-CONSUMER-PROTECTION-LAWS_NAJL_2016-07-13.pdf) [<https://perma.cc/8MYH-U27L>].

324. *Id.* at 3.

325. *Id.* at 1.

326. On the extraterritorial reach of IP laws see, e.g., Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505 (1997); Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119 (2008); Marketa Trimble, *Extraterritorial Enforcement of Patent Rights*, in PATENT ENFORCEMENT WORLDWIDE (Christopher Heath ed., Hart Publishing, 2015). When U.S. law has extraterritorial reach and can be applied by a U.S. court, the rights owner may pursue a claim under U.S. IP law directly.

327. E.g., *Itar-Tass Russian New Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998) (“On infringement issues, the governing conflicts principle is usually *lex loci delicti*, the doctrine generally applicable to torts.”). For criticism of the application of the rule in IP cases see, e.g., Graeme B. Dinwoodie et al., *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.U. J. INT’L L. & POL. 201, 232 (2009) (“A formalistic application of *lex loci protectionis*, which flows from strict adherence to the traditional intellectual property principle of territoriality, fails to grapple explicitly with the problems of overlapping authority in today’s world.”).

328. For torts in general, Nevada adheres to the Restatement (Second) of Conflict of Laws. See *General Motors Corp. v. Eighth Judicial District Court of State*

application of the statutes are evidentiary; it might be difficult to prove that an infringement occurred in a foreign country, under foreign law, and that the infringement actually resulted in an unfair advantage in the United States.<sup>329</sup>

### C. Rights in Unfixed Works

Rights in unfixed works is another area in which state copyright law might develop; however, not all states have provisions for the protection of unfixed works. For example, Nevada has no statute that protects unfixed works. The lack of a provision in Nevada might be surprising, since a hallmark of Nevada success is the entertainment industry, and although many performances are recorded, other performances, including musical improvisations and stand-up comedy, are often not recorded—at least not recorded by the copyright owner or with his consent—and therefore are not protected by federal copyright law, or are protected in a very limited manner.<sup>330</sup>

Rights in unfixed works have received renewed attention after the 2015 *en banc* decision by the U.S. Court of Appeals for the Ninth Circuit in *Garcia v. Google, Inc.*<sup>331</sup> The majority of the court held that Ms. Garcia did not own copyright to her five-second performance in a film because (1) her work was not a work within the definition of copyrightable subject matter<sup>332</sup> and with the minimal level of creativity or originality required for copyright protection,<sup>333</sup> and (2) even if her performance were a protectable work, it was not properly fixed in a tangible medium of expression because it was not Ms. Garcia who fixed the work in the tangible medium.<sup>334</sup> Whether or not one agrees with the *Garcia* majority opinion, particularly its second prong, one might ask whether

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of Nevada, 122 Nev. 466, 473 (Nev. 2006). Application of the rule to IP infringements should lead to the application of the law of the country for which protection is sought.

329. David J. Kappos & Gregory R. Baden, *Combating IP Theft Using Unfair Competition Law*, N.Y.L.J., May 6, 2013, p. 3, <https://advance.lexis.com/api/permalink/da437057-02f5-4d28-a866-8d7a27918ead/?context=1000516>.

330. Federal copyright law provides protection for live musical performances against bootlegging. 17 U.S.C. § 1101 (2015). *See also* 18 U.S.C. § 2319A (2015). *See infra* notes 36 and 83-87 and the accompanying texts for discussions of the fixation requirement.

331. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (*en banc*).

332. *Id.* at 741.

333. *Id.* at 742. *Cf.* Judge Kozinski's dissent on the point *id.* at 749-50.

334. *Id.* at 743. *Cf.* Judge Kozinski's dissent on the point *id.* at 750. *See also* Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 842 (2009).



state law may fill in some of the space that this decision has left open.<sup>335</sup>

Live performances, even if they are recorded by the members of an audience, are not considered fixed for the purposes of the U.S. Copyright Act merely because of a recording made by an audience member, and therefore the performances will enjoy no federal copyright protection. Although federal anti-bootlegging provisions provide protection for some unfixed performances, they do not cover recordings of all unfixed performances.<sup>336</sup> The provisions target the unauthorized fixation of live *musical* performances, the unauthorized transmission or other communications of live musical performances, and the distribution of unauthorized phonorecords of live musical performances.<sup>337</sup> They therefore cover, for example, acts by an audience member who, “without the consent of the performer,” records a live musical performance on his smartphone, or uses a streaming service, such as Periscope,<sup>338</sup> to stream a live musical performance via a smartphone, or sells access to an MP3 file with the recording of the performance. However, the federal statutes do not cover, for example, non-musical live performances, such as a magic performance that one magician reproduces from another,<sup>339</sup> or a performance that reproduces someone else’s performance, such as performing live someone else’s unfixed musical improvisation.

State law may provide some protection for unfixed works; depending on the circumstances, the right of publicity, and the laws of defamation, privacy, contract, unfair competition, and trade secrets may

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335. As Jennifer Rothman pointed out, Ms. Garcia originally filed her case in a state court and included a right of publicity claim and privacy-based claims. See Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J. L. & ARTS 441, 441-42 (2016).

336. 17 U.S.C. § 1101 (2015); 18 U.S.C. § 2319A (2015). Protection against the unauthorized fixation of unfixed performances is required by the TRIPS Agreement, *supra* note 81, Article 14(1), and by the WIPO Performances and Phonograms Treaty, 1996, Article 6(ii). See also the Beijing Treaty, *supra* note 100, Article 6(ii). As of Aug. 25, 2016, the United States has not yet ratified the Treaty. See further *infra* note 349 and the accompanying text.

337. 17 U.S.C. § 1101(a) (2015); 18 U.S.C. § 2319A(a) (2015). Although 17 U.S.C. § 1101 “explicitly preserves state statutory and common law remedies[. . .] the persistence of state remedies is likely to have little practical import.” Jane C. Ginsburg, *U.S. Federalism and Intellectual Property*, 2 COLUM. J. EUR. L. 463, 475 (1996).

338. Periscope (Aug. 23, 2016), <https://www.periscope.tv/> [<https://perma.cc/T9NM-BH94>].

339. In *Teller v. Dogge*, a foreign magician reproduced in a video the performance of a magic act by Mr. Teller, a famous Las Vegas magician. Mr. Teller relied on protection for his act as a dramatic work that was filed with the U.S. Copyright Office in the form of a script, and on a federal unfair competition claim under 15 U.S.C. § 1125(a) (2015). *Teller v. Dogge*, D. Nev., 2:12-cv-00591-JCM-GWF, docket document No. 1, Apr. 11, 2012.

be used to fight unauthorized acts concerning unfixed works.<sup>340</sup> However, commentators point out that these state laws do not necessarily cover all instances of unauthorized acts concerning unfixed works.<sup>341</sup> Any remaining holes in the protection may be addressed by a special state statute. A California statute is an example of a provision that protects unfixed works broadly; it provides that “[t]he author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work.”<sup>342</sup> This broad language covers not only unfixed performances, but also any unfixed works that are performed. In other words, when a musician plays an improvisation of an unfixed musical composition, the act consists of two unfixed works—a performance and a musical composition—and the California statute protects both. The statute does not, however, protect unfixed ideas—ideas that are not formulated in a work of authorship.<sup>343</sup>

Whether or not a special statute, such as California’s statute, would be helpful in another state might be subject to debate. The published cases do not indicate that the California statute has been used frequently to protect unfixed works. Some may argue that evidentiary issues in such cases would be difficult, but that hurdle alone should not determine whether such a provision should be added to the statutes of other states.<sup>344</sup> The adoption of a general unfair provision in Nevada (that is discussed in the previous Section) could also improve the protection for unfixed works.

Some states might rely on common law copyright if courts in the state have used common law to protect unfixed works.<sup>345</sup> Under the

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340. See, e.g., Rothman, *supra* note 335, at 442; David W. Melville & Harvey S. Perlman, *Protection for Works of Authorship through the Law of Unfair Competition: Right of Publicity and Common Law Copyright Reconsidered*, 42 ST. LOUIS L.J. 363, 373-408 (1998); Ginsburg, *supra* note 337, at 474.

341. Cf. Rothman, *supra* note 335, at 443 (arguing that the right of publicity keeps expanding and is “increasingly in conflict” with copyright law).

342. CAL. CIV. CODE § 980(a)(1) (West 2017).

343. On protection of ideas see, e.g., Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 705 (2006); Jane C. Ginsburg, “An Idea Whose Time Has Come” – But Where Will It Go?, 119 HARV. L. REV. F. 65 (2005).

344. Heymann, *supra* note 334, at 853 (“[T]he fixed work is the repository for the author’s efforts. . .”). See also, e.g., in the context of protection of ideas, Miller, *supra* note 343, at 731-32 (“Although idea cases can be complicated, fact-driven, and somewhat evanescent, courts should not bar plaintiffs to save costs by avoiding difficult evidentiary inquiries and ambiguities.”).

345. See *supra* notes 258-262 and the accompanying text.

1909 Copyright Act it was the act of publication that controlled whether federal law provided protection, and with performances not recognized as acts of publication, works that were “only” performed, even if publicly performed, were not considered published and were therefore held to be outside the scope of federal copyright protection. Courts recognized common law copyright protection, for example, for a radio news announcement about President Kennedy’s assassination<sup>346</sup> and Martin Luther King’s “I Have a Dream” speech.<sup>347</sup>

States are free to legislate on unfixed works; federal copyright law does not cover unfixed works<sup>348</sup> and does not preempt their protection by state law. One problem for federal law post-*Garcia* is its possible non-compliance with international law. Federal anti-bootlegging provisions, combined with federal copyright protection, particularly as interpreted in *Garcia*, achieve only partial compliance with international obligations. The WIPO Performances and Phonograms Treaty, to which the United States is a party, requires that performers be afforded protection against unauthorized broadcast, communication, and fixation of their unfixed performances, regardless of whether the performances are musical or other performances.<sup>349</sup> The same requirement also exists in Article 6 of the Beijing Treaty; the Treaty, however, has not yet been ratified by the United States.<sup>350</sup>

## V. CONCLUSION

State IP laws, though they are not typically at the core of a state’s innovation policies, are an important component of such policies. Any state interested in attracting business and innovation and fostering creativity should review its laws as they relate to IP and consider

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346. *CBS, Inc. v. Documentaries Unlimited, Inc.*, 248 N.Y.S.2d 809, 813 (N.Y. Sup. Ct. 1964) (“A public performance in and of itself does not deprive an unpublished work from the protection accorded at common law and recognized by the federal Copyright Law.”).

347. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999).

348. On unfixed works as not being “writings” under the IP Clause of the U.S. Constitution see Craig W. Dallon, *The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations*, 13 VAND. J. ENT. & TECH. L. 255, 279-88 (2011); Heymann, *supra* note 334, at 845-46 and 852-53. On the history of the fixation requirement in federal law see Heymann, *supra* note 334, at 844-51.

349. WIPO Performances and Phonograms Treaty, art. 6, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 203. For the definition of a “performer” under the Treaty see *id.*, art. 2(a).

350. Beijing Treaty, *supra* note 100, art. 6. The *Garcia* decision puts into question whether the U.S. Copyright Act plugs some of the holes in the protection required by the Beijing Treaty. See *Garcia v. Google, Inc.*, 786 F.3d 733, 751 (9th Cir. 2015) (en banc) (Kozinski J., dissenting).

revisions that would best serve the state's policies and needs.

A deep expert debate should be conducted and a political determination should be made to consider how state statutes can be changed to enhance a state's attractiveness for innovators and creators. Clearly, changes in state IP laws cannot be the only measure; other state laws and various conditions must be combined to create incentives for innovators and creators. Sometimes circumstances completely external to a state's efforts will influence whether a particular business establishes operations in a state. State IP laws need to enhance, or at least not detract from, the other factors. Having laws on the books that have been outdated for a quarter of a century or more<sup>351</sup> does not speak well for a state's focus on innovation and creativity and does not promote confidence in a state's ability to create and maintain an environment suitable for innovative businesses.

While it is unquestionable that a state's IP statutes should be kept current with developments in federal law and the obligations of the United States under international treaties, it is much more difficult to assess when and how much a state should engage in legislative innovation. A trailblazer state statute can set a state apart from other states and provide a significant competitive advantage over other states. Nevada certainly has some experience in this regard; its early twentieth-century divorce law famously created business opportunities in the state and eventually inspired other states to change their laws. In 2008 Nevada became the first state in the United States to require that data collectors encrypt sensitive personal data.<sup>352</sup> In addition to paving the way for statutes in other states, trailblazer state statutes can also serve as test statutes for future federal legislation.<sup>353</sup>

A state's creativity in enacting state IP laws may be restrained by what some have described as a continuously expanding coverage of federal IP protection. Commentators have detected a growing influence of federal law on state law-governed IP issues through the expansion of the preemption doctrine,<sup>354</sup> through amendments of federal statutes to

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351. See *supra* Part II, Sections A, B, and C.

352. NEV. REV. STAT. ch. 603A (2017). See Stephen J. Rancourt, *Hacking, Theft, and Corporate Negligence: Making the Case for Mandatory Encryption of Personal Information*, 18 TEX. WESLEYAN L. REV. 183, 207 (2011). A Nevada statute that was adopted earlier required encryption of customers' personal information. NEV. REV. STAT. § 597.970 (repealed 2009).

353. Ginsburg, *supra* note 337, at 479 ("State regulation in territorially discrete (in theory) 'laboratories,' can offer useful lessons to later federal drafters." Internal citation omitted.).

354. E.g., Elizabeth Helmer, *The Ever-Expanding Complete Preemption Doctrine and the Copyright Act: Is This What Congress Really Wanted?*, 7(1) N.C.J.L. & TECH. 205 (2005); Tom W. Bell, *Misunderstanding Dastar: How the Supreme Court Unwittingly Revolutionized Copyright Preemption*, 65 MD. L. REV. 206 (2006).

cover IP issues previously covered by state law,<sup>355</sup> and through interpretations of federal statutes to cover aspects of state-law IP issues.<sup>356</sup> When the federal government moves in the direction of greater coverage of IP issues under federal law,<sup>357</sup> including issues previously in the states' purview, states may decide to discontinue or slow significantly their efforts to amend their existing IP statutes or enact new ones.

There might be good reasons for all IP laws to be subsumed under federal law. The internet makes the flow of goods, and particularly intangible goods, harder to confine within the borders of individual states.<sup>358</sup> Although such a confinement may be technically feasible,<sup>359</sup> it is certainly unpopular, and any laws requiring the replication on the internet of physical territorial limitations are unpopular with businesses and consumers who wish to enjoy fully the benefits of the internet.<sup>360</sup> At the country level, laws that vary state by state are antithetical to business on the internet, and internet actors' preference for federal law to govern IP issues is therefore understandable. The same preference actually applies on the global scale; in the absence of globally-uniform IP laws, and considering the multiplicity of national IP laws, federal IP law is still better than a multiplicity of state laws concerning IP rights.<sup>361</sup>

The fact that international IP law continues to expand is also an argument for moving toward more complete federal coverage of IP law. The federal government is responsible for the United States' compliance with international treaties, and the most effective way to achieve compliance is to have federal law implement international treaties. Relying on state legislatures to adopt and maintain laws that are compliant with international treaties, and relying on judges to interpret statutes and common law so that state IP law is in accord with

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355. See, e.g., protection for post-1972 sound recordings and for unfixed performances under 17 U.S.C. §1101 (2015). See *supra* Part II, Section C, and Part III, Sections A and C.

356. See, e.g., the decision that the safe harbor for service providers under the U.S. Copyright Act applies in cases of pre-1972 sound recordings protected under state law. 17 U.S.C. §512 (2015); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

357. See *supra* Part III, Sections A and C.

358. Cf. Marketa Trimble, *Extraterritorial Enforcement of National Laws in Connection with Online Commercial Activity*, in RES. HANDBOOK ON ELECTRONIC COM. L. 261 (John A. Rothchild ed., 2016).

359. See, e.g., Trimble, *The Future of Cybertravel*, *supra* note 41.

360. See *supra* Part I, Section B, and Part III, Section A.

361. See Report from the Committee on the Judiciary, S. Rep. No. 93-983, at 164 (1974) ("Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material."). See also Report from the Committee on the Judiciary, S. Rep. No. 94-473, at 113 (1975).

international law is problematic; states can and do take a long time to update their statutes that are in violation of international law, and the federal government does not always take swift action to persuade a state to change its law concerning IP rights—absent a court ruling holding the state statute in violation of an international treaty. For the federal government to foster relationships with other countries in the area of IP law, avoid potential WTO panel proceedings for violations of IP laws, and remain a leader in international negotiations on IP law, the federal government might prefer to have full control over U.S. IP law.

Notwithstanding all the strong arguments in favor of a move towards an even greater federalized IP law, at this point the states still retain many legal tools that can enable them to shape their state legal environments so as to provide the best conditions possible for local innovation and creativity. Even those who are the most skeptical about the effects of law in general, and IP law in particular, might agree that having state laws on the books that are outdated and preempted by federal law sheds an unfavorable light on a state's attractiveness for business. States should comprehensively update their IP-related statutes to achieve their best possible strategic and competitive advantage.