

their facilities. This policy has encouraged public debate but can also be open to misuse by those who wield power on both sides of the equation. The number of broadcasters who have also been candidates is small, but considering how important communication is to both industries, it would not be surprising to see an increase in this type of candidate. Since the FCC relies upon the broadcaster to regulate political power on the airwaves, a conflict of interest arises when a broadcaster and political candidate are the same individual.

A broadcaster-candidate is still subject to the fairness and equal opportunity doctrines, but as the important link in the enforcement process, the broadcaster-candidate can easily avoid his responsibilities. The broadcaster-candidate can also deploy subtle techniques through the use of general programming, selection of advertisers, and other broadcast practices to adjust public opinion in ways beneficial to his candidacy.

There is no perfect resolution of the conflict of interest created when a broadcaster becomes a candidate. An effective approach, however, may be the establishment of an open access period. During open access, candidates opposing the broadcaster-candidate would be allowed to use the broadcaster's station for direct political use so as to counteract any subtle tactics, whether or not intentional, which would tend to promote the broadcaster's candidacy. Open access would augment current political broadcasting rules to which all candidates would still remain subject. The time to be divided by the opposing candidates would have to be studied, but two percent of the broadcast day has been recommended as fair.

Open access upholds democratic ideals, limits government intrusion, minimizes a conflict of interest, and is consistent with the goals of the fairness and equal opportunity doctrines.

Neil S. Meisel

USING LONG ARM PRINCIPLES TO EXPAND ARTISTS' RIGHTS: WILL IT WORK?

I. INTRODUCTION

Five states have recently enacted statutes that seek to restrict a buyer's free choice to do what he likes with works of art that he has purchased. California,¹ Maine,² Massachusetts,³ New York,⁴ and Pennsylvania⁵ have all passed laws that preserve certain rights of the artist even after the sale of his work.⁶ Generally, the statutes restrict a buyer's ability to alter or deface a work of art and prohibit the display of the piece in an altered fashion.

Prior to the enactment of these statutes, the position of the artist vis-à-vis his creation after its sale was tenuous at best.⁷ The artist had no recourse against purchasers who either displayed works in an altered state or totally destroyed them.⁸ It was theoretically possible for works to be altered so dramatically that they bore no resemblance to the original. Nevertheless, they were attributed to the artist because the artist's signature or logo was still on the work.⁹

The statutes in California, Maine, Massachusetts, New York, and Pennsylvania all describe protection of the artist's reputation as their goal.¹⁰ This goal is met by prohibiting the display of an

¹ California Art Preservation Act, CAL. CIV. CODE §§ 987-89 (West Supp. 1987). See *infra* note 10 for specific provisions of the statute.

² ME. REV. STAT. ANN. tit. 27, § 303 (West Supp. 1986). See *infra* note 10.

³ MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1987). See *infra* note 10.

⁴ New York Artists Authorship Rights Act, N. Y. ARTS & CULT. AFF. LAW §§ 14.01-03 (McKinney Supp. 1987). See *infra* note 10.

⁵ Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1987). This Act was signed into law on December 11, 1986 to take effect in February, 1987. Telephone interview with Paula Czajka, Public Information Officer for the Pennsylvania Council on the Arts (Mar. 10, 1987). See *infra* note 10.

⁶ Prior to the passage of these acts it was difficult for an artist to protect his work. He could, however, expressly contract for the preservation of his work. See 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21[C], at 250 (1987) [hereinafter NIMMER]. This method of protecting works was not widely used and proved to be an ineffective means of assuring that works of art were not altered. *Id.*

⁷ American courts have long recognized that once a party sells any property, he relinquishes all rights and control over the future disposition of that piece of property. See *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 405 (1911); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. New York County 1949). One definition of a sale is: "[a] contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment . . . of a certain price in money, transfers to the latter the title and the possession of property." BLACK'S LAW DICTIONARY 1200 (5th ed. 1979) (emphasis added).

⁸ See *Crimi*, 194 Misc. at 570, 89 N.Y.S.2d at 813.

⁹ See *infra* note 35 and accompanying text.

¹⁰ The California statute states in part:

artist's work in an altered fashion while that work remains associated with the artist and can affect his reputation.¹¹ In the art world, a reputation can be crucial to the survival of the artist.

The statutes explicitly discuss the procedures to be followed when violations occur within each respective state.¹² It is not unusual, however, for art collectors to travel all over the country, or

(a) Legislative findings and declaration. The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

CAL. CIV. CODE § 987(a).

The Massachusetts statute is almost identical. It states:

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

MASS. GEN. LAWS ANN. ch. 231, § 85S(a).

The Pennsylvania statute states:

The General Assembly finds and declares that:

(1) The careers and professional reputations of artists depend on the physical integrity of their works of fine art.

(2) The ongoing creation and preservation of fine art contributes to the cultural enrichment and, therefore, general welfare of the public.

(3) The act of altering, defacing, mutilating or destroying a work of fine art jeopardizes and can cause irreparable damage to the professional and economic interests of the artist.

Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1987) (preamble).

The New York statute takes a somewhat different approach:

[N]o person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art of that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

N.Y. ARTS & CULT. AFF. LAW § 14.53.

The Maine statute follows the New York approach:

[N]o person, other than the artist or a person acting with the artist's consent, may knowingly display in a place accessible to the public or publish a work of fine art of that artist or a reproduction of a work of fine art of that artist in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result from the display, publication or reproduction.

ME. REV. STAT. ANN. tit. 27, § 303(2) (Supp. 1986).

¹¹ CAL. CIV. CODE § 987(a); ME. REV. STAT. ANN. tit. 27, § 303(2); MASS. GEN. LAWS ANN. ch. 231, § 85S(a); N.Y. ARTS & CULT. AFF. LAW § 14.03(1); Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1987).

¹² All of the statutes provide for a minimum of both injunctive and legal relief. See, e.g., N.Y. ARTS & CULT. AFF. LAW, § 14.03(4)(a); ME. REV. STAT. ANN. tit. 27 § 303(5). Massachusetts also awards attorneys fees, expert witness fees and court costs as well

even abroad, to purchase works of art. Both New York and California are well known for their galleries and auction houses and attract not only local buyers but many out-of-state collectors as well.¹³ A potential problem of significant importance concerning these statutes is the lack of clarity with regard to their interstate scope. For example, if a Californian buys a work of art in California, mutilates it, and then displays it, he would be guilty of violating the statute and be subject to its penalties.¹⁴ However, if a Texan buys a work of art in California, brings it to Texas and damages it, the result is less clear.¹⁵ The issue then becomes whether the California court may assert jurisdiction over the Texan and afford the artist relief under the California statute. Similarly, it is uncertain whether a New York artist who sells his work in New Jersey to a New Jersey resident, can still avail himself of the New York protectionist statute.

Part II of this Note will examine the protectionist statutes in each of the five states in which legislation has been enacted. Part III will provide background on the fundamentals of long arm jurisdiction. Part IV of this Note will analyze the personal jurisdiction statutes in each of the five states to determine whether the protectionist statutes of the five states may be extended to other jurisdictions. Finally, this Note will conclude that of the five states, California provides the most promising basis for relief, but national legislation is needed to fully protect works of art.

II. THE STATUTES

With the enactment of protectionist statutes, the United

as "any other relief which the court deems proper." MASS. GEN. LAWS ANN. ch. 231 § 85S(e)(3)(iv).

California and Pennsylvania have the broadest remedies provision of the statutes. They grant the same relief as the others, as well as providing for punitive damages. In California, the proceeds of this award would go to "an organization or organizations engaged in charitable or educational activities involving fine arts." CAL. CIV. CODE § 987(e)(3). Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, § 2101, 2105, 2103.

¹³ Approximately 39% of the works of art sold in the past five years at Sotheby's, a well known New York auction house, have been to purchasers from outside the greater New York region, including parts of New Jersey and Connecticut. This percentage includes private sales as well as sales made to dealers. The actual number of works of art that leave New York State is probably much higher because many New York dealers also sell the artwork to out-of-state purchasers. Telephone interview with Karen Davidson, Assistant Vice President of Marketing, Sotheby's North America (Feb. 26, 1987).

¹⁴ CAL. CIV. CODE § 987(c).

¹⁵ This problem was alluded to in an article by a Massachusetts attorney which stated that "the question naturally arises whether the rights granted to artists by these [statutes] can be defeated by the simple expedient of the owner's removing the artwork from the state." Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101, 104 (1986).

States joins many European countries in protecting what the French, at the Berne Convention, have termed *droit moral* or moral rights.¹⁶ Moral rights are intangible rights which the artist has in his creation. These rights survive even the sale of the work.¹⁷ They are the "legal expression of an umbilical cord that attaches the artist to his or her work."¹⁸ However, the concept of moral rights has not been well received in this country¹⁹ and courts have had to strain to find alternative methods for protecting artists.²⁰

The California statute was the first of the five to be passed.²¹ This statute prohibits the intentional mutilation, physical defacement, alteration, or destruction of a work of fine art.²² If a viola-

¹⁶ The European countries which recognize moral rights are members of the Berne Convention. See The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis (Paris text), reprinted in 4 NIMMER, *supra* note 6, at app. 27-5 to 27-6 [hereinafter The Berne Convention].

The Berne Convention is a multinational convention that seeks, through its provisions on moral rights, to protect artists of those nations participating in the convention from having their work either displayed improperly, or damaged in any way and publicly displayed. The Berne Convention, *supra*, at app. 27-5 to-6. The Berne Convention was originally signed in 1886, and later revised several times before reaching its current state. The Berne Convention, *supra*, at app. 27-1. For a list of the nationalities that are parties to the Berne Convention, see 4 NIMMER, *supra* note 6, at app. 22. The United States is not a party to the Berne Convention. NIMMER, *supra* note 6, at app. 22.

For a more thorough discussion of the Berne Convention, see Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202 (1979); Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983); Duboff, Winter, Flacks, Keplinger, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?*, 4 CARDOZO ARTS & ENT. L.J. 203 (1985); Note, *Giving the Devil its Due: Actors' and Performers' Rights to Receive Attribution for Cinematic Roles*, 4 CARDOZO ARTS & ENT. L.J. 299, 309 (1985).

¹⁷ See Rosen, *supra* note 16, at 156.

¹⁸ Sandison, *California Enacts Droit Moral and Droit de Suite*, ART & LAW, Jan. 1977, at 1.

¹⁹ See *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."); *Miller v. Commissioner*, 299 F.2d 706, 709 n.5 (2d Cir. 1962) ("the moral right, as such, is not recognized in this country").

²⁰ *Granz v. Harris*, 198 F.2d 585, 588 (2d Cir. 1952) (court relied on contract theories to hold that substantial cutting of an original musical work constituted misrepresentation if the changes render the credit line a false attribution of authorship). In *Gilliam*, the court upheld, under both federal copyright law and § 43(a) of the Lanham Act, plaintiffs' claims that their work, three programs from the series *Monty Python's Flying Circus*, had been mutilated by extensive editing. *Gilliam*, 538 F.2d at 24. The *Gilliam* court notes that the Lanham Act would not protect the copyrighted work itself, but only a misdescription or mislabelling. A legend which indicated that the plaintiffs had not approved the editing of the ABC version, would have made the altered work comply with the Lanham Act. *Id.*

²¹ For an in depth critique of California's protection statute, see Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873 (1981).

²² CAL. CIV. CODE § 987(c) (West Supp. 1987).

tion occurs, the statute authorizes injunctive relief,²³ actual damages,²⁴ punitive damages,²⁵ attorney and expert witness fees,²⁶ and any other relief that the court deems proper.²⁷

The Massachusetts²⁸ and Pennsylvania statutes²⁹ are similar to the California statute. Massachusetts, however, is more restrictive in the remedies it grants to artists. While it allows for damages and injunctive relief, it does not permit punitive damages to be awarded.³⁰ Pennsylvania allows for the same remedies as California.³¹

New York and Maine take a somewhat different approach. The New York statute prohibits the display, in places accessible to the public, of altered, defaced, mutilated, or modified works of fine art under circumstances where it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is likely to result therefrom.³² The Maine statute is almost identical to New York's statute.³³ Both statutes seem to place more emphasis on the artist's rights and less emphasis on the public interest in protecting works of art.

The New York and Maine statutes are intended to protect valid rights which vest in the artist by virtue of his creative role. When the artist's work is admired, the public appreciates his genius and talent for translating observations into form. Prior to the enactment of these statutes, it was legally possible to purchase a work of art, alter it, and display it with the artist's insignia.³⁴ Anyone who saw the piece might reasonably assume that the artist had also done the alterations. Hence, an altered work which might not bear any resemblance to the original, results not only in a disservice to that artist, but moreover may severely damage his reputation. For example, when the city of

²³ *Id.* § 987(e)(1).

²⁴ *Id.* § 987(e)(2).

²⁵ *Id.* § 987(e)(3). The statute mandates that if punitive damages are awarded, the court, in its discretion, shall select a California organization involved in the fine arts to receive such damages.

²⁶ *Id.* § 987(e)(4).

²⁷ *Id.* § 987(e)(5).

²⁸ MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West Supp. 1987).

²⁹ PENNSYLVANIA FINE ARTS PRESERVATION ACT, PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1987).

³⁰ MASS. GEN. LAWS ANN. ch. 231 § 85S(e).

³¹ See PENNSYLVANIA FINE ARTS PRESERVATION ACT, PA. STAT. ANN. tit. 73, § 2101, 2105 (Purdon Supp. 1987).

³² N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 1987). For a deeper analysis of the New York statute, see Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique* 84 COLUM. L. REV. 1733 (1984).

³³ ME. REV. STAT. ANN. tit. 27, § 303(2) (West Supp. 1986).

³⁴ See *infra* note 35 and accompanying text.

Pittsburgh placed an Alexander Calder mobile in its airport in an altered state,³⁵ Calder had no legal recourse to preserve the legal integrity of his creation.³⁶ If this had occurred today, Calder³⁷ could have sued under Pennsylvania's artist protection statute for injunctive relief as well as damages.³⁸ Since there are only five states that have adopted protective statutes, many situations could arise where artists do not have protection from purchasers in nonprotective states. Therefore, the long arm statutes play a significant role for these artists.

III. LONG ARM JURISDICTION

The concept of "long arm jurisdiction" evolved from a series of cases in which plaintiffs tried to sue out-of-state defendants in plaintiffs' state courts. Defendants naturally opposed this assertion of power claiming that the plaintiffs' home states had no jurisdiction over them.³⁹

In 1877, in *Pennoyer v. Neff*,⁴⁰ the Supreme Court held that defendants could only be sued if they were physically present within the state and were personally served with notice of process.⁴¹ If defendants owned property located within the state's borders, it could be attached at the commencement of the proceedings, thus establishing *quasi in rem* jurisdiction.⁴² Long arm jurisdiction was needed to allow plaintiffs to sue defendants who did not own land within that particular state.⁴³

For over sixty years, the simplistic requirement of physical presence was a workable jurisdictional basis.⁴⁴ As the country

³⁵ The city had repositioned the mobile and painted it green and yellow instead of its original black and white. Rose, *Calder's Pittsburgh: A Violated and Immobile Mobile*, ART NEWS, Jan. 1978, at 39; See also Gantz, *supra* note 21, at 873-74.

³⁶ *Id.*

³⁷ Under California law, Calder's estate could have brought the action within 50 years of the artist's death. CAL. CIV. CODE § 987(g)(1).

³⁸ Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, § 2101(5) (Purdon Supp. 1987).

³⁹ For a thorough discussion of the historical premise for the assertion of personal jurisdiction, see Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1965); Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915 (1960).

⁴⁰ 95 U.S. 714 (1877).

⁴¹ *Id.* at 723.

⁴² Such jurisdiction could result in defendant being liable for any judgments, but only up to the value of the property attached. *Id.* at 726.

⁴³ State sovereignty was the dominant theme. Out-of-state plaintiffs suing in-state defendants was viewed as an encroachment on the authority of the sovereignty of the state. *Id.* at 722.

⁴⁴ See, e.g., *Broderick v. Rosner*, 294 U.S. 629, 639 (1935); *Freeman v. Alderson*, 119 U.S. 185, 188 (1886).

became more mobile, however, other guidelines were needed.⁴⁵ In 1945, the landmark case, *International Shoe Co. v. State of Washington*,⁴⁶ was decided. *International Shoe* allowed the assertion of jurisdiction over non-resident defendants provided they met certain criteria.⁴⁷ The test set out in *International Shoe*, and later modified by other cases,⁴⁸ was a test of reasonableness. This test focused on the due process element of subjecting defendants to courts of other jurisdictions.⁴⁹

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁵⁰

In *International Shoe*, the Court concluded that it was fair to subject a nonresident to the jurisdiction of courts in other states when the nonresident had enjoyed the privileges of conducting business in that state.⁵¹ Such privileges, the Court reasoned, carry with them

⁴⁵ For example, courts found it difficult to decide if a corporation was physically present within a state for purposes of jurisdiction. For a more complete discussion, see J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE, § 3.4, at 103-04 (1985) [hereinafter CIVIL PROCEDURE].

⁴⁶ 326 U.S. 310 (1945).

International Shoe was incorporated in the state of Delaware, and had its principal place of business in Missouri. *Id.* at 313. It employed sales agents to solicit business around the country. Several of its salesmen worked in Washington state. *Id.* *International Shoe* had no office in Washington; the authority of its salesmen was limited to exhibiting samples and soliciting orders at prices and on terms fixed by the Missouri office. *Id.* at 314. The salesmen did not even have the authority to enter into contracts on behalf of the company. *Id.* Washington tried to assess unemployment compensation taxes against the company based on the \$31,000 in annual commissions it paid to its Washington sales force. *Id.* at 313. The state issued an order and notice of assessment and served it personally upon one of the company's local sales agents, along with mailing a registered copy to the company's Missouri headquarters. *Id.* at 312.

International Shoe challenged both Washington's right to tax the commissions and the propriety of service. *Id.* at 313. It argued that the salesmen were not agents of the company, and that the statute permitting service by mail was unconstitutional because it violated the due process clause. However, the United States Supreme Court, held that the service of process was valid.

⁴⁷ See *infra* notes 53-62 and accompanying text.

⁴⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Ketton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

⁴⁹ Chief Justice Stone in his opinion stated that, "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 319.

⁵⁰ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)).

⁵¹ *Id.* at 319.

the obligation to respond to suits in that state.⁵²

International Shoe did not provide a set of rules for determining jurisdiction. Instead, it provided a guide by which each case must be decided. Subsequent decisions have formulated a two-prong test out of the *International Shoe* decision.⁵³ Initially, courts examine whether the defendant has had minimum contacts with the forum state. In *Hanson v. Denckla*,⁵⁴ the Court denied the jurisdiction of a Florida court, saying that the defendant did not meet the minimum contacts requirement.⁵⁵ The Court ruled that it was necessary that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁵⁶

Once minimum contacts are established, the court will determine if the assertion of jurisdiction in this particular case complies with "traditional notions of fair play and substantial justice."⁵⁷ *International Shoe* never adequately defined minimum contacts. More recent cases have tried to interpret the meaning.⁵⁸

In order for the defendant to be subject to a state's jurisdiction, the plaintiff has the burden of establishing that the defendant falls into one of four categories: (1) defendant's activities in the forum have been continuous and systematic, and the cause of action being sued upon arose from those activities; (2) defendant's activities in the forum have been continuous and systematic, but the cause of action being sued upon did not arise from those activities; (3) defendant's activities in the forum have been sporadic and casual, but the cause of action arose from those activities; and (4) defendant's

⁵² *Id.* See also *Hanson*, 357 U.S. at 251 (explicitly requiring an availing of the rights of conducting activities within the state as a prerequisite for the Court's assertion of jurisdiction).

⁵³ See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

⁵⁴ 357 U.S. 235 (1958). In *Hanson*, a Pennsylvania domiciliary had executed a trust agreement in Delaware, naming a Delaware bank as trustee. *Id.* at 238. The trustor subsequently moved to Florida, where she died. *Id.* at 239. The Florida court tried to assert jurisdiction over the trust, and served the Delaware trustees by mail and publication. *Id.* at 241. Several defendants challenged the Florida court's jurisdiction, and the Supreme Court upheld the challenge. *Id.* at 255.

⁵⁵ *Id.* at 253.

⁵⁶ *Id.* The position taken by the Court in *Hanson* was affirmed by *World-Wide Volkswagen*, 444 U.S. at 286. In *World-Wide Volkswagen*, the Court refused to assert jurisdiction over two New York salesmen who were being sued in an Oklahoma court because a car they had sold to a New Yorker was involved in an accident in Oklahoma. *Id.* at 287. The defendants had no other contact with Oklahoma. The Court stressed the inherent unfairness of requiring defendants to travel to Oklahoma to defend the suit, even though it was foreseeable that a car they sold to plaintiffs found its way to Oklahoma. *Id.* at 295-99. Defendants had never purposefully availed themselves of Oklahoma's benefits and protections, and thus should not have been subjected to suit in Oklahoma. *Id.* at 297-99.

⁵⁷ See *supra* note 50.

⁵⁸ See *supra* note 48.

activities in the forum have been sporadic and casual and the cause of action being sued on did not arise from those activities.⁵⁹

The jurisdictional analysis does not end once minimum contacts are established. Due process also requires that the assertion of jurisdiction comply with "traditional notions of fair play and substantial justice."⁶⁰ In *Travelers Health Association v. Virginia*,⁶¹ the Supreme Court articulated three factors it will consider in deciding whether to allow the assertion of jurisdiction: (1) the interest of the state in controlling the type of activity being operated within its borders; (2) the inconvenience of making in-state plaintiffs go elsewhere to solve their disputes; and (3) the state's interest in providing a local forum for litigation.⁶² *Travelers Health* upheld the assertion of jurisdiction by Virginia over an insurance company which solicited business by mail within Virginia. The court reasoned that if companies expended time and effort in an attempt to solicit business, the benefits of obtaining new business carried with it the burden of defending themselves in court there.⁶³ The contacts were less substantial than in *International Shoe* but nevertheless, the court found it "fair" to allow Virginia to assert jurisdiction over the defendants.

IV. APPLYING LONG ARM PRINCIPLES TO THE ARTIST PROTECTION STATUTES

Whereas *International Shoe* only analyzes a defendant's con-

⁵⁹ These categories were enumerated in *International Shoe*, 326 U.S. at 317-18. The long arm statutes of most states are split into categories that conform to these groupings. In asserting jurisdiction, the plaintiff has the burden of showing that due process has been met. In the situations described in categories one and four, it is relatively easy to determine jurisdiction. Situation number one is the exact fact pattern of *International Shoe*, and courts would have no problem asserting jurisdiction. See e.g., *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966). In category four, the courts would have to assess the nature of defendant's contacts, but in most cases, if the defendant has little contact with the forum, it would be unreasonable to require him to appear before a foreign court. See *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966). The second and third groupings are a gray area of the law. It is most likely that the out-of-state purchaser of artwork will fall into one of these categories. Therefore, analysis of long arm statutes will focus on the type of behavior that falls under these headings. See also *Parke Bernet Galleries v. Franklin*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970). For a discussion of the *Parke Bernet* case, see Case Note, *Jurisdiction—Long-Arm Statute—Participation in New York Auction via Interstate Telephone Call by Non-domiciliary Held to Constitute "Transaction of Business" Within Meaning of CPLR Section 302(a)*, 99 FORDHAM L. REV. 325 (1970).

⁶⁰ See *supra* note 50.

⁶¹ 339 U.S. 643 (1950). See also *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

⁶² 339 U.S. at 647-49.

⁶³ *Id.*

tacts with the forum state, more recent Supreme Court,⁶⁴ lower federal court,⁶⁵ and state court⁶⁶ decisions have applied a balancing approach toward establishing jurisdiction. This makes it easier for the plaintiff-artist to assert jurisdiction. It is likely that a defendant purchaser will have few contacts with the forum state, and a significant possibility that the purchase will be the only contact that the defendant has with the state. Using a strict *International Shoe* defendant oriented analysis, it will be unlikely that a plaintiff will meet the burden of showing that a defendant has the requisite contacts to establish jurisdiction.⁶⁷ However, using the more liberal balancing test approach that courts have been willing to apply to the jurisdictional analysis,⁶⁸ a plaintiff has a good chance of requiring the defendant to defend this action in plaintiff's forum state.

The assertion of personal jurisdiction over out-of-state purchasers of artwork must comply with both constitutional requirements of due process and the individual state's long arm statute.⁶⁹ California,⁷⁰ Maine,⁷¹ Massachusetts,⁷² New York,⁷³ and Pennsylvania,⁷⁴ as well as virtually every other state in the union, have long arm statutes. Maine, Massachusetts, New York and Pennsylvania have similar statutes.⁷⁵ They are detailed and spell out exactly what is needed to enable the state to assert jurisdiction. California, however, has an extremely broad long arm

⁶⁴ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁶⁵ See *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 193 (1st Cir. 1980).

⁶⁶ See *Circus Circus Hotels, Inc. v. Superior Court of Orange County*, 120 Cal. App. 3d 546, 174 Cal. Rptr. 885 (1981); *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 389 N.E.2d 76 (1979); *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

⁶⁷ *International Shoe*, 326 U.S. 310 (1945), discussed only defendant's contacts with the forum state. There was no mention of plaintiffs' concerns because the Court found sufficient minimum contacts.

⁶⁸ The *Burger King* Court mentioned four nondefendant related factors that might affect jurisdiction: (1) "the forum State's interest in adjudicating the dispute[;]" (2) "the plaintiff's interest in obtaining convenient and effective relief[;]" (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies[;]" and (4) "the shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

⁶⁹ See CIVIL PROCEDURE, *supra* note 45, § 3.12, at 142.

⁷⁰ CAL. CIV. PROC. CODE § 410.10 (West 1973).

⁷¹ ME. REV. STAT. ANN. tit. 14, § 704A (1976).

⁷² MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1985).

⁷³ N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1972).

⁷⁴ 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981).

⁷⁵ Compare N.Y. CIV. PRAC. L. & R. § 302 with ME. REV. STAT. ANN. tit. 14, § 704A and 42 PA. CONS. STAT. ANN. § 5322 and MASS. GEN. LAWS ANN. ch. 223A, § 3. For a detailed analysis of the statutes, see *infra* notes 128-36 and accompanying text.

statute.⁷⁶

The California statute states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."⁷⁷ California courts have interpreted the statute broadly,⁷⁸ but plaintiffs must still prove that the assertion of jurisdiction over out-of-state defendants is reasonable.⁷⁹

In order to subject out-of-state purchasers who have no other contacts with the forum state to jurisdiction within that state, the artist must demonstrate that the purchase itself constitutes the necessary minimum contacts. This situation falls in the third *International Shoe* category: defendant's activities within the state were sporadic and casual, but the cause of action being sued on arose from those dealings.⁸⁰ Assuming defendant had no other dealings with the state, the artist must prove that the purchase alone is enough to subject the defendant to jurisdiction. If the purchaser has other contacts with the forum state, it will be much easier to establish the requisite contacts.

In California, cases have held that when the defendant only has sporadic contacts with California, the cause of action must arise out of those dealings in order to assert jurisdiction.⁸¹ If the purchaser entered the forum state to purchase the work of art, then he might be subject to jurisdiction if he removes the work and alters it in another state.⁸²

If a Texan purchases a Californian's artwork in Los Angeles,

⁷⁶ CAL. CIV. PROC. CODE § 410.10.

⁷⁷ *Id.* The California statute is identical to the Rhode Island statute which also allows jurisdiction to the fullest constitutional limits. See R.I. GEN. LAWS § 9-5-33 (1985).

⁷⁸ See *Bergan v. Bergan*, 114 Cal. App. 3d 567, 170 Cal. Rptr. 751 (1981).

⁷⁹ *Ruger v. Superior Court of Sacramento County*, 118 Cal. App. 3d 427, 430, 173 Cal. Rptr. 302, 304 (1981) (court had no jurisdiction over an officer and shareholder of a corporation which delivered a revolver into the stream of commerce in an action arising out of the alleged defects of that revolver); *Lundgren v. Superior Court of Los Angeles County*, 111 Cal. App. 3d 477, 483, 168 Cal. Rptr. 717, 719 (1980) (court had no jurisdiction over shareholder who had no ties to California except that he owned shares in a corporation that merged with a California corporation).

⁸⁰ See, e.g., *Elkart Engineering Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965) (service of process was valid even though defendant had isolated contacts with the forum state).

⁸¹ See *Kramer Motors, Inc. v. British Leyland Ltd.*, 628 F.2d 1175 (9th Cir. 1980); *E.I.C., Inc. v. Bank of Virginia*, 108 Cal. App. 3d 148, 153, 166 Cal. Rptr. 317, 320 (1980).

⁸² Indeed, in *St. Joe Paper Co. v. Superior Court of San Francisco*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 455 U.S. 982 (1982), the court found it reasonable to assert jurisdiction where the defendant intentionally caused effects in California even though the actions were committed outside the State. 120 Cal. App. 3d at 1000, 175 Cal. Rptr. at 99. Defendant knew that his actions would have repercussions in California. The court, in addition, reasoned that since California subjected that area of the law to special regulation (just as we have in the artist's case) minimum contacts

and brings it back to Texas, jurisdiction could be premised on the Texan availing himself of California's laws and benefits while he was in California,⁸³ and thus it is reasonable to assert jurisdiction.⁸⁴ If the artist asserted that the cause of action arose out of dealings in California, the purchaser would most likely argue that it would be unfair to assert jurisdiction over him merely because he purchased something. The purchaser did not purposefully avail himself of the protection and benefits of California law.⁸⁵ A case of this nature has not yet arisen, but analogous cases have arisen in California and the courts have granted jurisdiction. In *Rocklin De Mexico S.A. v. Superior Court of Placer County*,⁸⁶ substantial sales of goods in California to an out-of-state purchaser provided

would be established by the activities and not only by physical presence. 120 Cal. App. 3d at 996, 175 Cal. Rptr. at 97.

⁸³ For example, if the artwork turned out to be a forgery, the buyer would most likely seek redress under California's consumer fraud laws. See Consumer Legal Remedies Act, CAL. CIV. CODE § 1770(a) (West 1985).

⁸⁴ In *St. Joe Paper*, 120 Cal. App. 3d at 995-96, 175 Cal. Rptr. at 94, the court stressed the importance of due process in a balancing test. *Id.* Where there is a sufficient nexus between defendant's in-state activities and plaintiff's cause of action, jurisdiction can be exercised provided it does not offend traditional notions of due process. *Id.* California's interest in protecting its artists, as evidenced by the fact that it is one of only five states to enact such legislation, will weigh heavily in plaintiff's favor. The lack of an alternative forum may make the assertion of jurisdiction reasonable despite the inconvenience to defendant.

⁸⁵ This raises issues of notice. It may not be fair to subject purchasers of artwork to foreign tribunals if they are unaware when purchasing the piece, that they are implicitly consenting to jurisdiction. Most likely, plaintiff-artists would have to post some sort of sign or otherwise alert purchasers to the penalties involved if they alter or somehow deface the artwork. In other contexts, however, states have been willing to subject out-of-state residents to their courts without providing them with explicit notice. All states have nonresident motorist statutes that allow the state to assert jurisdiction over nonresidents who are involved in traffic accidents on that state's roadways. The California Nonresident statute is typical. It states:

The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any operation by himself or agent of a motor vehicle anywhere within this state, . . . is equivalent to an appointment by the nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against the nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle anywhere within this state by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator.

CAL. VEH. CODE § 17451 (West 1971).

New York, Massachusetts, Maine and Pennsylvania all have similar statutes. See N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986); MASS. GEN. LAWS ANN. ch. 90 § 3A (West 1969); 29 ME. REV. STAT. ANN. § 1911 (West 1978); and PA. CONS. STAT. ANN. § 6701 (Purdon 1977).

No notice is given to drivers that upon entering the state they are consenting to the jurisdiction of that particular state's court. The driver is presumed to have consented. The same rationale can be applied to the artist's argument. If a collector purchases artwork, he should be deemed to have constructive notice of the protectionist statutes, and if he defaces the work, he can be brought back to the original state to face the consequences.

⁸⁶ 157 Cal. App. 3d 91, 203 Cal. Rptr. 547 (1984).

sufficient minimum contacts for a California court to assert jurisdiction over a breach of contract suit brought by the seller.⁸⁷

In *McGee v. International Life Insurance Co.*,⁸⁸ a Texas insurance company reinsured the life of a California resident.⁸⁹ The company did no other business in California and did not maintain an office there.⁹⁰ When the company refused to pay the proceeds due on the policy, the California beneficiary brought suit in California.⁹¹ The Supreme Court upheld jurisdiction by stating that due process had been satisfied.⁹² The Court relied heavily on the fact that insurance was an industry regulated by the states and that California had an interest in providing a forum for disputes involving their citizens.⁹³ This point weighs heavily in the plaintiff-artist's favor. California is one of only five states to enact protectionist legislation and thus has clearly indicated its interest in regulating this type of practice. The state has demonstrated an interest in preserving works of art and would most likely uphold the assertion of jurisdiction, even if based only on minimum contacts.

The lack of a special state interest proved fatal for the assertion of jurisdiction in *Kulko v. Superior Court*.⁹⁴ In *Kulko*, the plaintiff, a Californian, brought suit against her out of state ex-husband to amend a child support and custody decree.⁹⁵ The defendant had no contacts with California except that he allowed his child to live with its mother in California nine months out of the year and bought the child's airline tickets to and from California.⁹⁶ The lower courts reasoned that the defendant gained economic benefit from California by not having to pay for the upkeep of the child while the child was in California.⁹⁷ The lower courts premised the assertion of jurisdiction on those contacts.⁹⁸ In reviewing the California Supreme Court's assertion of jurisdiction, the United States Supreme Court rejected the assertion.⁹⁹ The Court stated that California had evinced no special concern

⁸⁷ 157 Cal. App. 3d at 99, 203 Cal. Rptr. at 551.

⁸⁸ 355 U.S. 220 (1957).

⁸⁹ *Id.* at 221.

⁹⁰ *Id.* at 222.

⁹¹ *Id.* at 221.

⁹² *Id.* at 223.

⁹³ *Id.*

⁹⁴ 436 U.S. 84 (1978).

⁹⁵ *Id.* at 88.

⁹⁶ *Id.* at 87-90.

⁹⁷ *Id.* at 89.

⁹⁸ *Id.*

⁹⁹ *Id.* at 101-02.

for situations such as this,¹⁰⁰ and that the defendant's actions alone did not meet the minimum contacts prong of the due process analysis.¹⁰¹ The Court, however, insinuated that if California had enacted legislation in this area, the result would have been different.¹⁰²

In the case of out-of-state purchasers of artwork, the result should be more consistent with *McGee* than with *Kulko*. California has enacted legislation in this area, and even if the defendant's contacts are slight, the lawsuit could be sustained based on those contacts.

However, it seems unlikely that a Californian who sells artwork in Texas and later finds out that the purchaser altered the piece, would have any recourse in California. In this case, the connection with California is so slight that the courts would most likely rule that no minimum contacts existed.¹⁰³

In another recent Supreme Court case, *World-Wide Volkswagen Corp. v. Woodson*,¹⁰⁴ foreseeability was included as an additional factor to be considered when balancing the interests of the parties.¹⁰⁵ In *World-Wide Volkswagen*, a New York State car dealer was sued in Oklahoma when a car he had sold was involved in an accident in Oklahoma.¹⁰⁶ The injury from the accident occurred in Oklahoma and the dealer was asked to defend the suit there.¹⁰⁷ The Court ruled that the defendant had no contact whatsoever with Oklahoma and should not have expected to defend suit there.¹⁰⁸ While it was conceivable that a car which the defendant sold could be driven to Oklahoma, the plaintiff could not drive the car there and thereby haul the defendant into an Oklahoma court. The Court ruled that it was not reasonable for the defendant to be forced to defend himself there because it was not fore-

¹⁰⁰ Special state interest was a key factor in the Court's decision in *McGee*, 355 U.S. 220 (1957).

¹⁰¹ *Kulko*, 436 U.S. at 92.

¹⁰² *Id.* at 98.

¹⁰³ In *Ruger v. Superior Court of Sacramento County*, 118 Cal. App. 3d 427, 173 Cal. Rptr. 302 (1981), the court denied jurisdiction where the nonresident defendant's only contacts with California were his position as an officer and shareholder of a company which did business in California. 118 Cal. App. 3d at 434, 173 Cal. Rptr. at 306. The company manufactured revolvers which injured plaintiff. The defendant did not directly engage in business in California nor did he own any property there. 118 Cal. App. 3d at 432, 173 Cal. Rptr. at 304-05. The court held that defendant's contacts were too insubstantial to warrant the assertion of jurisdiction over him. 118 Cal. App. 3d at 434, 173 Cal. Rptr. at 306.

¹⁰⁴ 444 U.S. 286 (1980).

¹⁰⁵ *Id.* at 297.

¹⁰⁶ *Id.* at 288.

¹⁰⁷ *Id.* at 289-91.

¹⁰⁸ *Id.* at 295.

seeable to the defendant when he sold the car that he would have to travel to Oklahoma to defend a lawsuit.¹⁰⁹

This due process balancing test lies at the heart of the purpose for requiring out-of-state purchasers of artwork to return to the state where they purchased the piece to defend themselves if they are accused of violating an art protectionist statute. If the purchaser does not know at the time of purchase that by buying the work of art, he is in essence consenting to jurisdiction, it may not be "reasonable" to expect the purchaser to be subject to the jurisdiction of the state. Some form of notice should be given to purchasers regarding the potential ramifications of defacing a piece of artwork. If galleries or auction houses are required to post notice, or give purchasers a written warning, it might protect the plaintiff artist from the lack of foreseeability defense likely to be raised by defendant-purchasers. To protect themselves, prudent artists should insert choice of law clauses into all contracts for sales of works of art specifying which state law should govern.¹¹⁰ Thus, the artist has recourse against purchasers who alter their work even if there is no personal jurisdiction over the purchaser.¹¹¹

In Maine, New York, Pennsylvania, and Massachusetts, plaintiffs have an additional burden. Not only must they comply with due process, they must also demonstrate that the defend-

¹⁰⁹ *Id.* The Court stressed that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *Id.* at 297 (citations omitted).

¹¹⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971) states: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Since the parties could have expressly contracted for the preservation of the work of art, a choice of law clause would most likely be upheld. See *M/S Bremen & Unterweser Reederei v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (court upheld a choice of law provision in a contract between a German corporation and an American corporation specifically stating that all disputes would be resolved in London). However, this argument is circular in nature for if the artist has the bargaining leverage to demand a choice of law clause, he also has the ability to specifically contract for the preservation of the piece. See generally, NIMMER, *supra* note 6, § 8.21[C], at 249-50. The concern is then for the lesser known artist who lacks the ability to negotiate the provisions of the contract.

A possible solution to this dilemma is to amend the protectionist legislation to require that all contracts for the sale of art have a choice of law clause in the contract. For example, all contracts for the sale of artwork in New York have a mandatory clause in the contract that permits the artist to choose New York law to govern all future litigation that arises from the artwork. Thus, the lesser known artist is protected by New York law without having to expressly bargain for its coverage.

¹¹¹ Parties may consent to jurisdiction even if they are not physically present within the forum. See CIVIL PROCEDURE, *supra* note 45, § 3.5 (1985).

ant's actions fall into one of the categories set out in the long arm statutes of those states.

The Maine¹¹² statute is a hybrid of the detailed New York and Massachusetts statutes and the very general California statute. It has a very broad legislative purpose, allowing jurisdiction to the fullest extent permitted by notions of due process.¹¹³ The statute also details the specific instances where jurisdiction will be permitted.¹¹⁴

The New York,¹¹⁵ Pennsylvania,¹¹⁶ and Massachusetts¹¹⁷ statutes are very specific and set forth exactly when jurisdiction will be granted. Analyzing the long arm statutes of these four states, it is clear that a plaintiff will bear the burden of proving that a defendant falls within either the provision for transacting business within the state or for committing a tortious act outside of the state which has an injurious impact within the state.¹¹⁸

The Massachusetts statute is typical of this type of statute. It states that "[a] court may exercise personal jurisdiction over a person . . . as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth.¹¹⁹ This provision has been held to allow jurisdiction in cases not strictly limited to business.¹²⁰ Courts will look to any purposeful

¹¹² ME. REV. STAT. ANN. tit. 14, § 704A (1980).

¹¹³ *Id.* § 1.

¹¹⁴ *Id.* § 2.

¹¹⁵ N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1972). See *McGowan v. Smith*, 72 A.D.2d 75, 423 N.Y.S.2d 90 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 268, 419 N.E.2d 321, 437 N.Y.S.2d 643 (1981) (Court of Appeals ruled that personal jurisdiction was lacking where nonresident company attended housewares shows in New York only sporadically, and where there was no showing that those same visits gave rise to plaintiff's cause of action). See also *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757 (2d Cir. 1983) (federal court applied New York statutes and found personal jurisdiction lacking where defendant had mail order sales in New York, but there was no connection between the goods and plaintiff's action).

¹¹⁶ 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981). See, e.g., *Webb Research Corp. v. Rockland Industries, Inc.*, 580 F. Supp. 990 (E.D. Pa. 1983) (personal jurisdiction was granted over out-of-state defendant in breach of contract action where defendant had initiated the sale, was involved in the production of the item, and negotiated the terms of the contract in Pennsylvania).

¹¹⁷ MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1985). See *Good Hope Industries, Inc. v. Ryder Scott Co.*, 378 Mass. 1, 389 N.E.2d 76 (1979) (court ruled that defendant's in-state actions were deliberate and not fortuitous, and so personal jurisdiction was established pursuant to Massachusetts's long arm statute).

¹¹⁸ N.Y. CIV. PRAC. L. & R. § 302(a)(1), (3); ME. REV. STAT. ANN. tit. 14, § 704A(2)A, B; MASS. GEN. LAWS ANN. ch. 223A, § 3(a), (d); 42 PA. CONS. STAT. ANN. § 5322(1), (4).

¹¹⁹ MASS. GEN. LAWS ANN. ch. 223A, § 3(a).

¹²⁰ See *Ross v. Ross*, 371 Mass. 439, 358 N.E.2d 437 (1976). In *Ross*, Massachusetts asserted jurisdiction over a nonresident who had previously used the Massachusetts court system to modify support agreements between herself and her former husband. The court stressed that "transacting business" was not to be read literally, but could include any purposeful act of the defendant, whether personal, private or commercial. 371 Mass. at 441, 358 N.E.2d at 439 (citations omitted). This type of analysis might be

act to establish jurisdiction, whether "personal, private, or commercial."¹²¹

The New York long arm statute, like that of Massachusetts, enumerates the instances where jurisdiction may be obtained.¹²² "As to a cause of action . . . a court may exercise personal jurisdiction over any nondomiciliary . . . who . . . transacts any business within the state. . . ." ¹²³

The Maine statute has identical language and it specifies clearly that the legislative intent of the statute is to grant jurisdiction to the fullest extent allowed by the Constitution.¹²⁴ However, the courts in Maine have not given such a broad construction to the statute. The Maine Supreme Judicial Court has denied jurisdiction in cases where a single contract plus various telephone calls were all that the plaintiff could show to establish minimum contacts.¹²⁵

In Pennsylvania, the opposite seems to be the case. The statute is specific in its language,¹²⁶ but cases have construed the statute to grant jurisdiction to the fullest extent allowed under the Constitution.¹²⁷

In order to gain jurisdiction over a defendant-buyer in Maine, Massachusetts, New York, or Pennsylvania, the artist must show that the sale of a piece of artwork falls within the statute's

read to include purchasing works of art, especially if the defendant traveled to the state purposely to obtain it.

¹²¹ *Id.*

¹²² N.Y. CIV. PRAC. L. & R. § 302.

¹²³ *Id.* § 302(a)(1).

¹²⁴ Subsection 1 of Maine's long arm statute states in part that "[t]his section, to insure maximum protection to citizens of this State, shall be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution." ME. REV. STAT. ANN. tit. 14, § 704A(1).

¹²⁵ *Architectural Woodcraft Co. v. Read*, 464 A.2d 210 (Me. 1983). In *Architectural Woodcraft*, plaintiff was a manufacturer-seller of spiral staircases. Defendant purchased the staircase by mail and communicated with plaintiff only by telephone. *Id.* at 211. Defendant never physically entered Maine. The court ruled that the single purchase contract coupled with the use of interstate communications were insufficient contacts to confer jurisdiction over the defendant. *Id.* at 212. The assertion of jurisdiction would not have comported with due process. *Id.* Had the defendant entered Maine, the result might have been different. Given the broad legislative intent of the statute, it seems likely that if the defendant had even slightly more significant contacts with the forum, the court would have allowed the assertion of jurisdiction.

¹²⁶ See 42 PA. CONS. STAT. ANN. § 5322.

¹²⁷ See *Commodore Business Machines, Inc. v. JST Distributing Co., Inc.*, 596 F. Supp. 409, 411 (E.D. Pa. 1984) (reach of Pennsylvania long arm statute which allows jurisdiction "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States" is permissible). See also *Omni Exploration, Inc. v. Graham Engineering Corp.*, 562 F. Supp. 449 (E.D. Pa. 1983); *Crompton v. Park Ward Motors, Inc.*, 299 Pa. Super. 40, 445 A.2d 137 (Super. Ct. 1982).

"transacting business" provision.¹²⁸ It seems unlikely that if a purchaser buys a piece of artwork purely for pleasure and alters it for his personal, private viewing that he would be subject to jurisdiction under the transacting business provision. In this type of situation, a plaintiff would have to argue that the contract for the sale of the piece constituted the necessary business arrangement.

Pennsylvania, however, has qualifying clauses in its long arm statute. These specify that in order to fall within the transacting business provision, the transaction must be "for the purpose of thereby realizing pecuniary benefit."¹²⁹ Cases in Pennsylvania have held that merely entering into contractual obligations with a resident of Pennsylvania does not subject a non-resident to personal jurisdiction in the forum state.¹³⁰ Pennsylvania does have a provision enabling the courts to assert jurisdiction over the defendant buyer if he ships the artwork through the Commonwealth¹³¹ which may provide a permissible method of obtaining jurisdiction over out-of-state purchasers.

New York courts have determined that causes of action do not only have to be limited to contracts in the strict sense.¹³² Perhaps under this reasoning, a plaintiff-artist can assert jurisdiction over the defendant by arguing that the contract for the sale of the artwork was the minimum contact necessary in a cause of action arising out of the damage to that artwork.

Maine, Massachusetts, Pennsylvania, and New York all have provisions in their long arm statutes which subject tortfeasors who commit torts outside the forums to their respective jurisdictions.¹³³ Under the protectionist statutes, damaging a work of art is considered tortious behavior. Artists might be able to obtain

¹²⁸ Since the statutes specify the instances where jurisdiction can be asserted, an artist will have to fit his cause of action into one of the provisions enumerated. The transacting business provision seems to be the most appropriate, given that this is a sale of a business product. The product in such instances is a piece of artwork.

¹²⁹ 42 PA. CONS. STAT. ANN. § 5322(a)(1)(i), (ii) (Purdon 1981).

¹³⁰ See *Group Two Advertising, Inc. v. First Inv. Properties, Inc.*, 27 Pa. D. & C.3d 687 (1983).

¹³¹ 42 PA. CONS. STAT. ANN. § 5322(a)(1)(iii) ("[w]ithout excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph. . . (iii) The shipping of merchandise directly or indirectly into or through this Commonwealth").

¹³² See, e.g., *Xedit Corp. v. Harvel Industries Corp.*, 456 F. Supp. 725 (S.D.N.Y. 1978).

¹³³ MASS. GEN. LAWS ANN. ch. 223A, § 3(d) (West Supp. 1985) states that:

[a] court may exercise personal jurisdiction over a person . . . as to a cause of action in law or equity arising from the person's . . .

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth.

jurisdiction by claiming that a tort, the alteration of their artwork, committed outside the state, caused them harm in the state. For example, damage to their reputation occurred within the state and therefore they are entitled to sue the defendants in the forum state.¹³⁴ This method of obtaining jurisdiction does not seem as promising as it sounds because those statutes contain qualifying provisions that also require the defendant to engage in some forum related activity. This activity may take the form of engaging in business or deriving substantial revenue from interstate commerce.¹³⁵ Under these statutes, jurisdiction might be proper because a purchaser of artwork should reasonably expect that if he alters the piece and displays it in an altered state, the artist might suffer the consequences of such an action.¹³⁶ The second part of all of these provisions makes the usefulness of obtaining jurisdiction on this provision questionable. Only if the defendant has additional contacts with the forum state, perhaps through other business dealings, will this method work. This has yet to be tested.

Not only must minimum contacts be established, but the exercise of jurisdiction must also be "fair".¹³⁷ From the artist's

The New York counterpart to this statute states that:

[A] court may exercise personal jurisdiction over any nondomiciliary . . . who . . . commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business . . . or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . .

N.Y. CIV. PRAC. L. & R. § 302(a)(3) (McKinney 1972).

The Maine long arm statute states that:

Any person, whether or not a citizen or resident of this State, who . . . does any of the acts hereinafter enumerated in this section, thereby submits . . . to the jurisdiction of the courts of this state . . . (A) The transaction of any business within this State; (B) Doing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State . . .

ME. REV. STAT. ANN. tit. 14, § 704A(2) (1976).

The Pennsylvania statute states that:

A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly . . . as to a cause of action or other matter arising from such person . . . (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

42 PA. CONS. STAT. ANN. § 5322(a)(4).

¹³⁴ The notice issue comes up here as well. See *supra* note 85 and accompanying text.

¹³⁵ See *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 402 N.E.2d 122, 425 N.Y.S.2d 783 (1980) (court lacked jurisdiction because all the necessary elements were not complied with). "[Jurisdiction] must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there." 49 N.Y.2d at 326. (citations omitted).

¹³⁶ In *Fantis Foods*, the court held that defendant could not reasonably have foreseen the consequences of his actions, and so the assertion of jurisdiction was denied. *Id.*

¹³⁷ See *supra* notes 61-63 and accompanying text.

viewpoint, it is arguably fair to allow jurisdiction because he has no other alternative. If he cannot sue in one of the five states that has legislation protecting works of art, he loses the right to defend his creation from alterations.¹³⁸ Historically, due process has been concerned with fairness to defendants, not plaintiffs.¹³⁹ Using a more modern balancing approach, the courts will have to weigh the merits of each side and decide whether or not to allow the artist to bring a cause of action in the forum state.

V. CONCLUSION

Fair play and substantial justice require a balancing test between the interests of both buyer and seller and their respective states.¹⁴⁰ It may unduly burden the purchaser to require him to defend a lawsuit in a foreign court, especially if he is unaware at the time of purchasing the work that he is consenting to suit in the state where he bought the work. The plaintiff-artist's interests, however, must also be protected. If the long arm statutes are narrowly construed, then the effect is to deny relief even where the states have specifically manifested their intent to grant relief.¹⁴¹ At present, only five states have enacted artist protection statutes. If there is no alternative forum, the artist does not have the ability to bring moral rights suits at all.¹⁴² Of the five long arm statutes analyzed, it seems most likely that a plaintiff-artist will obtain jurisdiction over an out-of-state purchaser most easily in California.¹⁴³ There, artists must only comply with due process to fulfill all of the requirements of the statute.¹⁴⁴ In Maine, Massachusetts, New York, and Pennsylvania, artists must not only comply with due process, they must also demonstrate to the court that their cause of action falls within one of the subsections of the long arm statute.¹⁴⁵ This may be difficult to do. Recently, Senator Edward Kennedy of Massachusetts has proposed

¹³⁸ As of this writing, there is no national legislation protecting moral rights. Senator Edward Kennedy of Massachusetts, however, has sponsored a bill in Congress "[t]o amend the copyright law to secure the rights of artists of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works." S. 2796, 99th Cong., 2d Sess. (1986) (Preamble).

¹³⁹ See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁴⁰ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

¹⁴¹ See *supra* notes 88-93 and accompanying text.

¹⁴² See *supra* note 136 and *infra* note 146 and accompanying texts.

¹⁴³ California has the broadest statute which states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

¹⁴⁴ *Id.*

¹⁴⁵ ME. REV. STAT. ANN. tit. 14, § 704A (1976); MASS. GEN. LAWS ANN. ch. 223A, § 3

national legislation that would protect artists from the unauthorized alteration of their works.¹⁴⁶ However, until such legislation is passed, and works of art are nationally protected, artists will have to rely on the long arm statutes of California, Maine, Massachusetts, New York, and Pennsylvania to obtain relief.

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(West 1985); N.Y. CIV. PROC. L. & R. § 302 (McKinney 1972); 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981).

¹⁴⁶ S. 2796, 99th Cong., 2d Sess. (1986). Senator Kennedy proposes to amend the current copyright law, 17 U.S.C. § 106 (1982) by adding the following:

(b)(1) Independently of the artist's economic right in copyright in a pictorial, graphic, or sculptural work of fine art, the artist shall have the right during his life to claim authorship of his works which are publicly displayed or to disclaim authorship of such works because of any distortion, mutilation, or other alteration thereof. This right shall not apply to works made pursuant to contract for trade or advertising use.

(c) Subject to the limitation in section 113(d), the destruction or significant or substantial distortion, mutilation, or other alteration to the critical embodiment or totality of a pictorial, graphic, or sculptural work caused by an intentional act or by gross negligence is a violation of the exclusive rights of the copyright owner where the creator of the work is the copyright owner. Where the artist is not the copyright owner, he shall nonetheless have the exclusive right during his lifetime . . . to assert infringement of the copyright by distortion, mutilation, or other alteration.