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Robart v. State of Alaska: A New Interpretation for Copyrightable Subject Matter?

By Jessica Miedema*

I. Introduction

Every year millions of people buy commemorative and souvenir items depicting state seals. However, after the decision handed down in *Robart v. Alaska*, such items may no longer be as readily available.¹ In the wake of the *Robart* decision, manufacturers of souvenir items could be held criminally liable for using a state seal on their products, depending on where the items are produced or sold.² There is little legal precedent which addresses whether a state can prohibit the use of its state seal. A number of earlier cases that challenged a state's right to regulate the use of its seal—brought under trademark law—upheld state protectionist statutes; however a more recent case decided under copyright law held that the state statutes were preempted.³

In *Robart*, the court held that the Alaska state seal was not copyrightable subject matter, and was not protected by the federal copyright laws.⁴ The court stated that the Copyright Act of 1976 did not preempt Alaska's state statute, which prohibited use of the state seal for commercial purposes without permission from the state's

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¹ *Robart v. Alaska*, 82 P.3d 787 (Alaska 2004).

² *Id.*

³ *See Commw. v. R.I. Sherman Mfg. Co.*, 75 N.E. 71 (Mass. 1905) and *In Re Cahn, Belt & Co.*, 27 App. D.C. 173 (D.C. 1906) (stating that under trademark law a state can prohibit the use of the state seal); *See also Bicentennial Comm'n v. Olde Bradford Co.*, 365 A.2d 172 (Pa. 1976) (holding that under copyright law a state cannot prohibit the use of a state seal that is in the public domain).

⁴ *Robart*, 82 P.3d at 791.

Lieutenant Governor.⁵ As a result of the *Robart* case, state courts are now in disagreement as to whether a state seal is copyrightable subject matter.⁶ Moreover, the Copyright Act of 1976 was revised by Congress to achieve uniformity and predictability of copyright rights, and the *Robart* holding conflicts with that purpose.⁷ In essence, the *Robart* court has given the State of Alaska an exclusive property right in its state seal. In addition, this right goes against the fundamental principles of copyright law, as one cannot receive a copyright for material that was already in the public domain, much less an exclusive property right.⁸

This article will first discuss the sections of federal copyright law that address copyrightable subject matter and other pertinent provisions of the Copyright Act. Part II discusses three pre-*Robart* cases⁹ that illustrate how courts have treated state seals in the past. Part III discusses the holding in *Robart* and the denial of certiorari from the United States Supreme Court in this case. Part IV analyzes the court's decision in *Robart* and its inconsistency with copyright law. This part also addresses any alternative solutions to the state seal issue, such as trademark law or an intervention by Congress. Part V discusses the impact of this holding on copyright law, and both individuals and private entities who wish to use the state seal for commercial purposes. Finally, this article concludes by discussing the concerns surrounding the *Robart* decision.

II. The History of State Seals as Copyrightable Subject Matter

A. The Copyright Act of 1976

To understand whether or not a state seal is copyrightable subject matter, one must look to the foundation of the Copyright Act. The Constitution granted Congress the right to "promote the progress

⁵ *Robart*, 82 P.3d at 793.

⁶ Brief for Appellant at 19, *Robart v. Alaska*, 82 P.3d 787 (Alaska 2004) (No. 04-215).

⁷ H.R. Rep. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

⁸ Copyright Act of 1976, 17 U.S.C. §§ 101-103 (2000).

⁹ *R.I. Sherman Mfg. Co.*, 75 N.E. at 71; *Cahn, Belt & Co.*, 27 App. D.C. at 173; *Olde Bradford Co.*, 365 A.2d at 172.

of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁰ The first Copyright Act was enacted in 1790 and was revised every forty years until 1909.¹¹ The most recent Copyright Act was wholly amended in 1976, although it remains fundamentally the same as the 1909 version.¹²

The gateway to copyright protection begins with Section 102 of the Copyright Act. This section defines copyrightable subject matter as an “original work of authorship fixed in any tangible medium of expression.”¹³ This definition can be broken down into three areas: originality, works of authorship, and works being fixed in any tangible medium of expression.¹⁴ First, for a work to be original it must be independently created and have at least a minimal level of creativity.¹⁵ To fulfill the minimal level of creativity requirement a work must not be so mechanical or routine that it lacks any trace of ingenuity.¹⁶ Second, Section 102 provides a non-exhaustive list of categories that would be considered works of authorship.¹⁷ These categories include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.¹⁸ The use of the word “include” makes clear that the listing is illustrative and inclusive in nature.¹⁹ Moreover, categories do not necessarily exhaust the scope of original works of authorship that the bill is intended to protect.²⁰ Third, a work is fixed in a tangible medium of expression when it is sufficiently permanent or stable to permit it to be perceived,

¹⁰ U.S. CONST. art. I, § 8 cl. 8.

¹¹ H.R. Rep. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

¹² *Id.*

¹³ 17 U.S.C. § 102(a).

¹⁴ *Id.*

¹⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁶ *Id.*

¹⁷ 17 U.S.C. § 102.

¹⁸ *Id.*

¹⁹ H.R. Rep. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

²⁰ *Id.*

reproduced, or otherwise communicated for a period of more than transitory duration.²¹

One main category provided by the statute is one of pictorial, graphic, and sculptural works,²² which is broadly defined as: "two dimensional and three dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."²³

Section 105 places all federal government works in the public domain and therefore not available for copyright protection.²⁴ A work of the United States government is a work prepared by an officer or employee of the United States government as part of that person's official duties.²⁵ Consequently, materials created by government employees cannot secure a copyright.²⁶ In addition, the use of federal government works does not mean that a work falling within this definition is the property of the United States government.²⁷ However, in 1966 Congress passed a statute that protects such federal symbols as the great seal of the United States and the seals of the executive and legislative branches from being used without express permission.²⁸ While the legislative history is silent as to why this statute was enacted, one could infer Congress' action as an indication that it felt the federal symbols were left unprotected by copyright law and needed specific protection.²⁹ With no legislative comment regarding state seals and symbols, one could find that Congress did not intend to prohibit states from protecting seals that represent state sovereignty.³⁰ However, the statute could also be interpreted as prohibiting protection because Congress did not expressly mention

²¹ Copyright Act of 1976, 17 U.S.C. § 101 (2000).

²² *Id.* at § 102.

²³ *Id.* at § 101.

²⁴ *Id.* at § 105.

²⁵ *Id.* at § 101.

²⁶ H.R. Rep. 94-1476, at 59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5673.

²⁷ *Id.* at 59.

²⁸ 18 U.S.C. § 713(a) (1997).

²⁹ *Robart*, 82 P.3d at 793.

³⁰ *Id.*

state seals and symbols.³¹ Once a work is deemed copyrightable subject matter and is, therefore, protected under the Copyright Act, Section 106 gives the copyright owner a bundle of rights that can be used as the owner wishes.³² Among these rights are the rights of reproduction, derivation, distribution, and display.³³ Therefore, the owner of a valid copyright has the right to decide who gets this bundle of rights by licensing out each right to either the same or separate parties.³⁴

Finally, Section 301 of the Copyright Act states that any rights granted by Section 106 that “are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.”³⁵ Moreover, Section 301(b)(1) states that

nothing in this title annuls or limits any rights or remedies under the common law or statutes of any state with respect to subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression.³⁶

If a work is not copyrightable subject matter, or is not fixed in a medium of expression, the Copyright Act does not preempt any state statute which would govern.³⁷

B. History of State Seal Cases in the State Courts

Only three cases—two from the early 1900’s and one from 1976—have addressed the issue of whether a state can prohibit the use of its seal.³⁸ In the two earlier cases, the state courts relied on trademark law to solve the problem of allowing states to prohibit

³¹ Brief for Appellant at 28, *Robart* (No. 04-215).

³² Copyright Act of 1976, 17 U.S.C. § 106 (2000).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* § 301.

³⁶ *Id.*

³⁷ Copyright Act of 1976, 17 U.S.C. § 301 (2000).

³⁸ *R.I. Sherman Mfg. Co.*, 75 N.E. at 71 and *Cahn, Belt & Co.*, 27 App. D.C. at 173 (decided in 1905 and 1906 respectively); *Olde Bradford Co.*, 365 A.2d at 172.

individuals and private entities alike from using the state seal—the sovereign symbol of the state—for commercial purposes.³⁹

Trademark law is governed by the Lanham Act, which describes a registered trademark as “any word, name, symbol, or device, or any combination thereof, which is used by a person or which a person has a bona fide intention to use in commerce.”⁴⁰ A trademark must also identify and distinguish this product from other goods.⁴¹ This includes a unique product from those manufactured or sold by others and indicates the source of the goods, even if that source is unknown.⁴² While trademarks do not give one an exclusive right to use a certain word or symbol, the rationale behind trademarks is one of reducing consumer confusion and protecting companies’ goodwill.⁴³

In *Commonwealth v. R. I. Sherman Manufacturing Co.*, the defendant used the Massachusetts’ seal and arms on his labels after the Massachusetts’ statute’s grace period expired.⁴⁴ The statute read as follows: “No person or private corporation shall use the arms or the great seal of the commonwealth, nor any representation thereof, for any advertising or commercial purpose whatever.”⁴⁵ The court relied on trademark law as a basis for Massachusetts’ claim.⁴⁶ The court stated that a trademark can be a name, or any arrangement of words, lines, figures that designate goods of a particular kind manufactured by the trademark holder as long as no other person has an equal right to use.⁴⁷ The court found that the state of Massachusetts designed the state seal and the defendant copied it onto his labels to use for his business.⁴⁸ This gave both parties an equal right to use the mark and neither party could claim a trademark

³⁹ See *R.I. Sherman Mfg. Co.*, 75 N.E. at 72; See *Cahn, Belt & Co.*, 27 App. D.C. at 173.

⁴⁰ The Trademark Act of 1946 (“*Lanham Act*”), 15 U.S.C. § 1127 (2000).

⁴¹ *Id.*

⁴² *Id.*

⁴³ 15 U.S.C. § 1125(a).

⁴⁴ *R.I. Sherman Mfg. Co.*, 75 N.E. at 71.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 72.

to it.⁴⁹ The court noted that since the act in question was within the power of the Massachusetts' state legislature and it did not come into conflict with the U.S. Constitution, the state could forbid the use of the seal for any advertising or commercial purposes.⁵⁰ Therefore, the defendant had no rights to a trademark and was guilty of violating the Massachusetts' state statute.⁵¹

Moreover, in the *In Re Cahn, Belt, & Company* case, the Court of Appeals of the District of Columbia held that a mark simulating the arms or seal of a state, even with "certain additions or variations" to the state seal when used for commercial purposes, is not entitled to registration under the Trademark Act.⁵² In this action, Cahn, Belt, & Company applied for a trademark for the mark used upon its whiskey.⁵³ This mark was described as "a pictorial representation of the arms and seal of the State of Maryland, with certain additions or variations."⁵⁴ The court stated that Section 5 of the Trademark Act clearly prohibited trademark use for any mark that consisted of the coat of arms, other insignia of the United States or of any state, provided that the applicant did not have actual and exclusive use of the trademark for ten years prior to the enactment of Section 5.⁵⁵ The court also held that registering a public insignia of a state was contrary to public policy.⁵⁶

Because the mark in this case consisted of the coat of arms of Maryland, it fell within the public insignia description.⁵⁷ Although the company had actual use of the trademark, it never possessed exclusive use of the mark, and therefore, the company could not have

⁴⁹ *R.I. Sherman Mfg. Co.*, 75 N.E. at 72.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See generally Cahn, Belt & Co.*, 27 App. D.C. at 173 (holding that acquiring an exclusive property right in the state's coat of arms is not allowed by a person or entity).

⁵³ *Cahn, Belt & Co.*, 27 App. D.C. at 173.

⁵⁴ *Id.*

⁵⁵ *Id.* at 172; *See also*, 15 U.S.C. § 1052 (taking the earlier Section 5 of the Trademark Act in its entirety and converting it to Section 1052 of the current Trademark Act).

⁵⁶ *Cahn, Belt & Co.*, 27 App. D.C. at 173.

⁵⁷ *Id.*

acquired the property right in the mark required by Section 5.⁵⁸ The *Cahn, Belt & Co.* case clearly illustrates that a private entity or individual cannot invoke trademark law as a means by which to use a state seal for commercial purposes against a state's wishes because it is unlikely that the private entity or individual ever had exclusive use of the state's seal or coat of arms.⁵⁹

C. The Pennsylvania Decision: State Seals Protected

While the two cases discussed in Part II.B, *supra*, were decided only under trademark law, the more recent legal precedent of *Bicentennial Commission v. Olde Bradford Co.* analyzes state seal rights in the context of both trademark and copyright laws.⁶⁰ Until recently, *Olde Bradford Co.* was the only reported case that directly addressed whether the Copyright Act preempted a state seal protectionist statute.⁶¹ While trademark law seemed to be a dead-end for individuals and private entities that wished to use state seals for commercial purposes, the court in *Olde Bradford Co.* established that copyright law was a viable solution to this problem.⁶² The *Olde Bradford Company* had, both before and after the state of Pennsylvania registered its seal as a service mark, manufactured items bearing a similarity to the state's seal.⁶³ These products were similar or nearly identical to the items manufactured by Wilton, a competitor, who had paid Pennsylvania for permission to use the state's seal.⁶⁴ The Commission alleged that the *Olde Bradford Company* had violated Pennsylvania's Bicentennial Act of 1975, which states:

No person, partnership, corporation or other entity, except as authorized by the commission, shall use, manufacture, sell, reproduce, counterfeit, copy, colorably imitate or

⁵⁸ *Cahn, Belt & Co.*, 27 App. D.C. at 173.

⁵⁹ *See generally id.* (showing that trademark law does not protect state seals for commercial purposes).

⁶⁰ *Olde Bradford Co.*, 365 A.2d at 174-75.

⁶¹ Brief for Appellant at 19, *Robart* (No. 04-215).

⁶² *See generally Olde Bradford Co.*, 365 A.2d at 174-75 (putting state seals in the public domain and making the state seal copyrightable subject matter under the Copyright Act).

⁶³ *Olde Bradford Co.*, 365 A.2d at 175.

⁶⁴ *Id.* at 174-75.

otherwise use in a manner likely to cause confusion, to cause mistake or to deceive, any mark adopted by the commission, or any item bearing such mark, or apply any such mark to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon, or in connection with, the manufacture, sale, offering for sale, distribution, or advertising of goods or services.⁶⁵

The court determined that Section (b) of the Bicentennial Act included elements of both copyright law and trademark law.⁶⁶ The Act prohibited any unauthorized reproduction, which references copyright law and also banned use in a manner likely to cause confusion, which references trademark law.⁶⁷ However, the court found that the dominant intent of the Act was to prohibit the mere unauthorized production of the state of Pennsylvania's marks.⁶⁸ Although the Act's language tracked trademark laws, it did not specify the parties to be protected or the type of confusion to be avoided.⁶⁹ Federal copyright law, which also prohibited the mere unauthorized production of works, preempted the state statute, and therefore the company could copy any work already in the public domain.⁷⁰

III. *Robart*: The Divergence from Prior Case Law

In *Robart v. Alaska*, the state of Alaska brought charges against Scott Robart for his attempt to sell a medallion featuring the state seal in a state sponsored show.⁷¹ In 1996, Robart, a businessman, was invited by an employee of the State Department of Commerce and Economic Development to participate in a show on the QVC home shopping network.⁷² This show was to feature consumer-made products from Alaska and would be televised

⁶⁵ *Id.* at 177.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Olde Bradford Co.*, 365 A.2d at 177.

⁶⁹ *Id.*

⁷⁰ *Id.* at 177-78.

⁷¹ *Robart*, 82 P.3d at 790.

⁷² *Id.* at 789.

nationally.⁷³ He wanted to use the state seal on a medallion commemorating 100th anniversary of the 1897 Alaska gold rush.⁷⁴ The state seal of Alaska consists of an arrangement of pictures that includes forests, fish, seals, railroads and other symbols that represent the state.⁷⁵ Before producing the medallion, Robart investigated the state's requirements for using the seal and discovered that Alaska law allowed an individual to use the state seal if he obtained the permission of the Office of the Lieutenant Governor.⁷⁶ Robart then faxed his written request for permission to use the state seal to the Office of the Alaska Lieutenant Governor.⁷⁷ Despite repeated attempts to obtain permission, Robart never received a response to his requests.⁷⁸ Robart also faxed two requests to the Alaska Office of the Governor, but the Governor's office also failed to reply to him.⁷⁹

Although he never obtained the Lieutenant Governor's permission to use the seal, Robart decided to use the state seal based on a state employee's encouragement to showcase his product on the QVC special.⁸⁰ Moreover, because Robart had not received a response from any government office, he reasoned that the statute would not be an obstacle to showcasing his product on the show.⁸¹ Once the design of the product was submitted to the Department of Commerce and Economic Development, the state department did not contact Robart to inquire whether he had permission to use the state seal.⁸² In fact, the Governor of Alaska sent a letter to Robart congratulating him for his product's appearance on the upcoming QVC broadcast.⁸³

When the medallion appeared on the show, the Lieutenant Governor's chief of staff saw the state seal on the product and

⁷³ *Robart*, 82 P.3d at 789.

⁷⁴ *Id.*

⁷⁵ Brief for Appellant at 25, *Robart* (No. 04-215).

⁷⁶ *Robart*, 82 P.3d at 789; *See also*, ALASKA STAT. § 44.09.015 (2004) (prohibiting use of state seal without permission and outlining punishments).

⁷⁷ *Robart*, 82 P.3d at 789.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Robart*, 82 P.3d at 789.

⁸³ *Id.*

wondered whether Robart had permission to use the symbol.⁸⁴ When it was revealed that Robart did not have permission, the Governor sent Robart a cease and desist letter and enclosed a copy of the statute.⁸⁵ On August 6, 1997, two months after Robart had received the Governor's letter, an Alaskan state trooper posed as a buyer and purchased two medallions from Robart.⁸⁶ The state then charged Robart with using the state seal for commercial purposes without the written permission of the lieutenant governor in violation of Alaska statute 44.09.015.⁸⁷

Robart made a motion to dismiss the charged based on the grounds that the statute violated his first amendment right to free speech.⁸⁸ The district court agreed with Robart and dismissed the case.⁸⁹ The State of Alaska appealed.⁹⁰ The Alaska Supreme Court concluded that commercial use of the state seal was not protected speech and reversed the district court's ruling.⁹¹ Robart petitioned the court for a hearing and it was granted with the request to brief whether federal copyright law preempted the statute.⁹² However, after arguments had been heard, the court dismissed the petition as improvidently granted.⁹³ The case returned to the district court and Robart again made a motion to dismiss the charged based on federal copyright preemption grounds.⁹⁴ The district court denied Robart's motion and he appealed to the Alaska Supreme Court, who decided to hear his case.⁹⁵

Robart argued before the Alaska Supreme Court that federal copyright laws preempted the state statute because under Section 102

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 790.

⁸⁷ *Robart*, 82 P.3d at 790; *See also* ALASKA STAT § 44.09.015(a) (Michie 2004) (prohibiting the use of the state seal without written permission from the lieutenant governor).

⁸⁸ *Robart*, 82 P.3d at 790.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Robart*, 82 P.3d at 790.

⁹⁴ *Id.*

⁹⁵ *Id.*

of the Copyright Act, the state seal was copyrightable subject matter.⁹⁶ He also argued that the state seal was in the public domain and could be freely used by the public.⁹⁷ Robart stated in his brief that Alaska could not pass its own statute to provide the same protections given under the federal Copyright Act because the federal law preempts all other state laws.⁹⁸ The state of Alaska's position was that the Copyright Act does not preempt the statute, because it falls within the preemption exceptions listed in Section 301(b) of the Act.⁹⁹ Under this section copyright law does not preempt state law that addresses rights or remedies that do not come within copyrightable subject matter as set out in Section 102.¹⁰⁰ The state argues that a state seal, because it is the symbol of a sovereign, is not a type of work that comes within copyrightable subject matter and as a result falls within one the preemption exception of Section 301(b).¹⁰¹

The Alaska Supreme Court held that federal copyright law does not preempt the Alaska statute limiting the commercial use of the state seal because states have the power to protect symbols of their sovereignty as evidenced by earliest trademark cases on this issue.¹⁰² The court favorably weighed the state's argument as more accurate and held that a state seal is the symbol of a sovereign entity.¹⁰³ Thus, it is not the type of work that comes within the subject matter of the copyright laws.¹⁰⁴ The court reasoned that the federal copyright laws do not expressly include state seals as copyrightable subject matter, and the state seal would fall within the preemption exceptions listed in Section 301(b) of the Copyright Act.¹⁰⁵ Therefore, federal copyright law could not preempt the

⁹⁶ *Robart*, 82 P.3d at 790; *See also* 17 U.S.C. § 102 (2000) (listing an inclusive and non exhaustive list of copyrightable subject matter).

⁹⁷ *Robart*, 82 P.3d at 791.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*; 17 U.S.C. § 301(b) (2000).

¹⁰¹ *Robart*, 82 P.3d at 791.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Robart*, 82 P.3d at 791.

¹⁰⁵ *Id.*

statute.¹⁰⁶

Robart appealed the decision by the Alaska Supreme Court to the United States Supreme Court.¹⁰⁷ Even though a state conflict exists on the issue of whether a state seal protectionist statute is preempted by federal copyright law, on October 14, 2004, the Supreme Court denied Robart's *writ of certiorari*.¹⁰⁸ Therefore, a divergence in state case law exists: the Alaska decision upholding state seal protectionist statutes, or the Pennsylvanian decision which prohibits those very same statutes.

IV. Why the *Robart* Case was Wrongly Decided

A. *Robart* is Irreconcilable With *Olde Bradford*

Olde Bradford and *Robart* are the only two reported cases that address whether the Copyright Act preempts a state seal protectionist statute.¹⁰⁹ As discussed in Part II.C, *Olde Bradford* takes the position that a state seal is copyrightable subject matter and is protected under the federal copyright laws.¹¹⁰ Consequently, those laws preempted the state statute, which prohibited the commercial use of the state seal.¹¹¹ However, the high court of Alaska did not acknowledge *Olde Bradford's* relevance in the *Robart* decision. The only mention of *Olde Bradford* was in a footnote that stated: "Although the laws governing copyrights and trademarks may overlap as applied to a single item, they are intended to grant quite different forms of protection to their holders."¹¹² This quote does not convey the relevant holding of *Olde Bradford*, which is that copyright law did preempt the state seal statute because the dominant intent of the Bicentennial Act was to prohibit, as does the federal copyright law, the mere unauthorized production of the Pennsylvania commission's

¹⁰⁶ *Id.*

¹⁰⁷ *Robart*, 82 P.3d 787, *petition for cert. filed*, 2004 WL 1835374 (U.S. Aug. 12, 2004) (No. 04-215).

¹⁰⁸ *Robart v. Alaska*, 125 S. Ct. 310, 310 (2004).

¹⁰⁹ *See generally Olde Bradford Co.*, 365 A.2d at 178 (stating the Bicentennial Act was preempted by federal copyright law).

¹¹⁰ *Id.* at 178.

¹¹¹ *Id.*

¹¹² *Robart*, 82 P.3d at 792 n.30.

marks.¹¹³

In fact, the court also stated “we cannot find a single federal or state case discussing the application of federal copyright law on laws protecting state seals.”¹¹⁴ This is a blatant disregard of the Pennsylvania court and its ruling in *Olde Bradford Co.* The Alaska court instead decided to look at earlier legal precedent, which focused on trademark law.¹¹⁵

State courts faced with the issue of whether a state seal statute is preempted have two entirely different positions to consider.¹¹⁶ This is contrary to Congress’ objectives of a single uniform federal system and promotion of works of authorship for the 1976 Copyright Act.¹¹⁷ One of the fundamental purposes behind the copyright clause of the Constitution was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author’s rights under differing laws of the various states.¹¹⁸ National uniformity in the copyright arena avoids the practical difficulties of determining and enforcing an author’s rights under the differing state laws and in the separate courts of the various states.¹¹⁹ A single uniform federal system for copyright protection is more essential now than ever as different areas and technology are becoming apparent in the copyright field.¹²⁰ With the development of communications through technology, the concept of publication has become artificial and obscure.¹²¹ Since the courts have given various interpretations of “publication,” some of them radically different, Congress enacted the

¹¹³ *Olde Bradford Co.*, 365 A.2d at 177.

¹¹⁴ *Id.* at 792.

¹¹⁵ *Id.* at 791-92.

¹¹⁶ *See Robart*, 82 P.3d at 793 (holding the Copyright Act does not preempt the Alaska state seal statute); *See also Olde Bradford Co.*, 365 A.2d at 177 (holding the Copyright Act does preempt the Pennsylvania state statute).

¹¹⁷ *See* H.R. REP. NO. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745 (stating Congress’ goals of national uniformity and protecting consumer confusion).

¹¹⁸ Brief for Appellant at 21, *Robart* (No. 04-215); H.R. Rep. 94-1476 at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.

¹¹⁹ *See* H.R. REP. NO. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745 (discussing how important national uniformity was in enacting the Copyright Act).

¹²⁰ *See id.*

¹²¹ *See id.* at 130.

1976 Copyright Act to help clear up this chaotic situation.¹²²

Moreover, this ruling completely affects the implementation of similar state statutes. Twenty-five states have a statute that prohibits unauthorized commercial use of their state seal by: (1) expressly prohibiting unauthorized use for commercial purposes; (2) prohibiting all non-governmental uses; (3) allowing educational or commemorative uses only with prior approval; or (4) imposing restrictions on private party use of reproductions of the state seal.¹²³ These states do not know which decision their courts will look to follow or how to advise individuals and private entities on how to read the state seal statutes. This example shows precisely the kind of confusion Congress wanted to avoid when it drafted the Copyright Act.¹²⁴

B. State Seals As Copyrightable Subject Matter?

In order to qualify as “subject matter” under Section 102 of the Copyright Act, a state seal must be an original work of authorship fixed in a tangible medium of expression.¹²⁵ There is a very low threshold of creativity required to satisfy the originality requirement, “as even a slight amount will suffice.”¹²⁶ The state seal of Alaska is sufficiently creative to satisfy the originality requirement because it has united pictures of forests, fish, seals, railroads and other symbols

¹²² *See id.*

¹²³ *See* Brief for Appellant at 20, *Robart* (No. 04-215); ALA. CODE § 13A-10-13(a) (2004); ALASKA STAT. § 44.09.015 (Michie 2004); ARIZ. REV. STAT. § 41.130 (2004); CAL. GOV'T CODE § 402(a) (2004); CONN. GEN. STAT. § 3-106a (2003); DEL. CODE ANN. tit. 29, § 2306(b) (2004); FLA. STAT. ANN. § 15.03(3) (West 2004); GA. CODE ANN. §§ 50-3-31, 50-3-8 (2002); HAW. REV. STAT. § 5-6 (2003); 5 ILL. COMP. STAT. 460/5 and 720 ILL. COMP. STAT. 620/1 (2004); ME. REV. STAT. ANN. tit. 1, §204 (2003); MICH. COM. LAWS § 750.245 (2004); NEV. REV. STAT. § 235.010(4) (2004); N.H. REV. STAT. ANN. § 3:9-a (2003); N.J. STAT. ANN. § 52:2-9 (2004); N.Y. STATE LAW § 74 (McKinney 2004); N.D. CENT. CODE § 54-02-01(2)(d) (2003); OHIO REV. CODE ANN. § 5.10 (West 2004); OR. REV. STAT. § 186.023 (2003); R.I. GEN LAWS § 11-15-4 (2004); S.C. CODE ANN. § 38-57-45 (LAW. CO-OP. 2003); S.D. CODIFIED LAWS §§1-6-3.1, 1-6-3.2 (Michie 2003); TEX. BUS. & COM. CODE ANN. § 17.08(b) (2004); VA. CODE ANN. § 7.1-31.1 (Michie 2004); WASH. REV. CODE §§43.04.030, 43.04.040 (2004).

¹²⁴ *See* H.R. Rep. No. 94-1476 at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745 (discussing apparent need for limiting confusion between state statutes).

¹²⁵ 17 U.S.C. § 102 (2000).

¹²⁶ *Feist Publ'ns, Inc.*, 499 U.S. at 345.

that are part of Alaska's proud state history.¹²⁷ In addition, the seal is also a work of authorship as it falls squarely within the pictorial, graphic, and sculptural works category listed in Section 102.¹²⁸ The state seal can be either a two or three-dimensional work of fine, graphic or applied art, and therefore fits into this overall sculptural category.¹²⁹ Even if the state seal did not fit into this category, the list in Section 102 is not exhaustive and many other objects not listed might be considered copyrightable subject matter as long as it meets the other requirements set forth under Sections 101, 102 and 103.¹³⁰ Last, the state seal is fixed in a tangible form of expression as it is in the form of a medallion in this case.¹³¹

C. An Incorrect Interpretation of the Copyright Act Lead to the *Robart* Decision

The *Robart* court concluded that because Congress did not mention state seals in Section 102 when defining copyrightable subject matter, it did not intend to preempt state seal protectionist statutes.¹³² This interpretation is not only inconsistent, but conflicts with the statutory definition of copyrightable subject matter.¹³³ In Section 102, Congress set forth a list of categories that fell within copyright protection.¹³⁴ The only obstacle to overcome for state seals to be copyrightable subject matter is for the seal to fall into one of the listed categories,¹³⁵ and Alaska's state seal falls within the pictorial, graphic and sculptural works category.

The court's reasoning in *Robart*, however, works against its analysis.¹³⁶ In Section 105 of the Copyright Act, Congress expressly

¹²⁷ Appellant's Brief at 25, *Robart* (No. 04-215).

¹²⁸ 17 U.S.C. § 102.

¹²⁹ *Id.* at § 101.

¹³⁰ H.R. Rep. 94-1476 at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

¹³¹ *See Robart*, 82 P.3d at 789 (stating that Robart attached the state seal on a medallion for the QVC show).

¹³² *See id.* (stating that Congress cannot be said to have preempted an area traditionally occupied by states when it remains silent on the issue at debate).

¹³³ Appellant's Brief at 27-8, *Robart* (No. 04-215).

¹³⁴ 17 U.S.C. § 102.

¹³⁵ *Id.*

¹³⁶ *See* Appellant's Brief at 28, *Robart* (No. 04-215) (stating that the court's

excludes “any work of the United States Government” from copyrightable subject matter.¹³⁷ Nowhere does it mention state seals or works of state governments; analyzing the Act by express inclusion or exclusion leads to a conclusion that only the works of the United States of America are protected under this specific statute.¹³⁸ In addition, this would be the most appropriate place to mention whether state seals and symbols fall under copyright protection, as it is a specific prohibition section. Section 102 would be the least suitable place to discuss state seals because it is a general section of all includable copyrightable subject matter which are set forth in a non-exhaustive list.¹³⁹

The *Robart* court also explains that before a state area can be preempted by federal law, “congressional intent to supersede state laws must be clear and manifest.”¹⁴⁰ The court notes that because federal copyright law is silent on the issue of state seals, Congress has not firmly rooted itself into this area of copyright law.¹⁴¹ This interpretation is lacking as Congress has imminently placed itself in every area of copyright law, as demonstrated by the broad regulation of the Copyright Act itself.¹⁴² In fact, the congressional notes for Section 301 of the Copyright Act explain that:

The intent is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas

reasoning of state seals not expressly being mentioned as copyrightable subject matter and therefore the Copyright Act did not apply was faulty and incorrect).

¹³⁷ 17 U.S.C. § 105.

¹³⁸ Appellant’s Brief at 28, *Robart* (No. 04-215).

¹³⁹ 17 U.S.C. § 102 (2000).

¹⁴⁰ *Robart*, 82 P.3d at 792.

¹⁴¹ *Id.*

¹⁴² H.R. Rep. 94-1476 at 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746.

between state and federal protection.¹⁴³

Therefore, the question the *Robart* court should have asked is not whether Congress specifically mentioned state seals, but whether a state seal fits within one of the categories listed in Section 102.¹⁴⁴

D. Referring to State Seals as Trademarks is Improper

The function of trademark laws is to prevent confusion of the source of goods and services.¹⁴⁵ The relevant Alaska statute does not sanction deceptive or confusing uses of the seal that falsely imply official action.¹⁴⁶ If Alaska modified its statute to prohibit deceptive or confusing uses of the state seal, the statute may be more analogous to trademark protection.¹⁴⁷ Moreover, the court in *Robart* stated that “Alaska statute 44.09.015 does not provide the equivalent of copyright protection; rather, it provides protection analogous to trademark protection.”¹⁴⁸ Under trademark law, however, state flags and seals are excluded from protection.¹⁴⁹ Moreover, because there is no protection for a state seal in trademark law and copyright law protects a state seal, the statute would therefore be more analogous to copyright protection.¹⁵⁰ As a result of this, neither Alaska nor a private individual would be allowed to register the state seal as a trademark and therefore neither would be afforded protection.¹⁵¹

E. Possible Solutions For The *Robart*—*Olde Bradford* Dilemma

The *Robart* court had a legitimate concern in desiring the

¹⁴³ H.R. Rep. 94-1476 at 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746.

¹⁴⁴ Brief for Appellant at 28, *Robart* (No. 04-215).

¹⁴⁵ *Id.* at 29.

¹⁴⁶ ALASKA STAT. § 44.09.015 (Michie 2004); *See also Robart* 82 P.3d at 791 (prohibiting the use of state seal without permission and outlining the resulting punishments).

¹⁴⁷ Brief for Appellant at 29, *Robart* (No. 04-215).

¹⁴⁸ *Robart*, 82 P.3d at 793.

¹⁴⁹ *See* Brief for Appellant at 29, *Robart* (No. 04-215); *See also* 15 U.S.C. § 1052(b) (2000) (stating that state flags, seals and symbols are excluded from trademark protection).

¹⁵⁰ Appellant’s Brief at 29, *Robart* (No. 04-215).

¹⁵¹ *Robart*, 82 P.3d at 792.

prohibition of commercial use of a symbol of the sovereign state.¹⁵² A product that bears the state seal gives the impression that the item was approved by the state, whether or not actual permission was granted.¹⁵³ Protectionist statutes, such as Alaska statute 44.09.015, are the states' way of approving the product, and assuring that there is no misuse of state seals in the commercial arena.¹⁵⁴

On the other hand, there is no remedy to this problem readily available to the court. Because state seals are copyrightable subject matter under Section 102, they are protected under federal copyright laws.¹⁵⁵ Any state seal protectionist statute is therefore preempted and would be invalid.¹⁵⁶ Securing the state seal as a trademark is also not an option because trademark protection does not extend to state flags and seals.¹⁵⁷ The only available solution is for Congress to amend the Copyright Act to include state seals as protected items. Currently, with no guidance from Congress, indeterminable outcomes for these statutes will emerge.

V. The Impact of *Robart* on the Commemorative Souvenir Industry

A. Adverse Affects of the *Robart* Ruling

People buy commemorative products as a remembrance of their vacation or of a historical occasion. After *Robart*, the availability of these products might be severely limited as different states decide to follow either the *Robart* or *Olde Bradford* rulings. The state of Alaska, and other states following *Robart*, could now have a controlled monopoly on commemorative products. The state will now be able to choose who will sell products featuring the state seal, what kind of product the state seal will be placed on, and how many products the manufacturer may make that bear the state seal. All regulation is essentially achieved through royalty agreements or,

¹⁵² *R.I. Sherman Mfg. Co.*, 75 N.E. at 72.

¹⁵³ *Id.*

¹⁵⁴ See ALASKA STAT. § 44.09.015 (2004) (prohibiting use of state seal without permission and outlining punishments).

¹⁵⁵ 17 U.S.C. § 102.

¹⁵⁶ *Id.*

¹⁵⁷ 15 U.S.C. § 1052(b) (2000).

as in the state of Alaska, by obtaining special permission from a government office.¹⁵⁸ The state of Alaska could assign the right to reproduce the state seal on products to only one private entity or individual if it chooses. This gives that chosen private entity or individual an exclusive market to commemorative products in Alaska, which is unjust and unreasonable given that the state seal has been in the public domain since its creation.

Moreover, not only will the availability and quantity of commemorative products be limited, but also the quality and uniqueness of these products could suffer. There is no guarantee that the state will grant permission to use the state seal on the highest quality or most unique product. The state of Alaska now has the power to promote and exploit this national commerce by authorizing certain vendors, who make a certain style and quality of product, to sell their commemorative and souvenir items bearing the state seal.¹⁵⁹

On the other hand, states realize the importance of this vibrant market and will not forfeit the substantial revenue that it generates. Therefore, the states will most likely give permission to every company that asks for it, as long as the use of the state seal is not mishandled or misused in anyway. Furthermore, the quality of the commemorative medallions and other products, such as mugs, shirts, bells or spoons is not always the essence of the market. Many people buy low quality commemorative products because it is just that—an inexpensive souvenir by which to remember the event or occasion. Nevertheless, some people want to buy special commemorative products of the very finest and highest quality, and those products may no longer be available depending on what the state policy is towards giving permission.

B. Souvenir Business Owners Beware

Vendors of commemorative medallions and other products enjoyed a certain freedom prior to the *Robart* decision.¹⁶⁰ Given the decision in *Olde Bradford*, the commentary notes and the case law construing Section 301 of the Copyright Act, vendors did not have to worry about any risk of criminal penalties for selling commemorative

¹⁵⁸ See ALASKA STAT. § 44.09.015 (2004) (prohibiting use of state seal without permission of the lieutenant governor of Alaska).

¹⁵⁹ Appellant's Brief at 21, *Robart* (No. 04-215).

¹⁶⁰ *Id.* at 22.

medallions bearing state seals.¹⁶¹ Today a vendor needs to proceed with caution, or he or she could be assessed with a fine and some minimal prison time.¹⁶² For example, a vendor can sell Pennsylvania seal medallions in Pennsylvania but cannot sell Alaska seal medallions in Alaska.¹⁶³ However, Alaska seal medallions can be sold in Pennsylvania because Pennsylvania cannot enforce Alaska's criminal laws.¹⁶⁴

Vendors must therefore analyze the statutes of each and every state to determine if there is a statute requiring permission to sell a medallion or other product bearing the state seal.¹⁶⁵ Even then, a vendor has no idea whether the courts in each state will follow the Pennsylvania court or the Alaska court. This unpredictability will chill interstate commerce and lead to less production of commemorative medallions and other products because guessing wrongly leads to criminal penalties.¹⁶⁶

C. Statutes Ripe For Discrimination and Misuse

Trademark protection does not afford the state of Alaska with an exclusive property right in its state seal and neither does copyright protection as the state seal has been in the public domain for many years.¹⁶⁷ However, because of the *Robart* decision, Alaska now has an exclusive property right in its state seal when it should not.¹⁶⁸ Moreover, the state can now license this exclusive property right to any person or company.¹⁶⁹ There are no guidelines or requirements that the state of Alaska must follow to issue a license for the state

¹⁶¹ *Id.*

¹⁶² See ALASKA STAT. § 44.09.015 (stating that a violation of this section is a misdemeanor, and upon conviction is punishable by a fine of not more than \$500, or by imprisonment for not more than six months, or by both).

¹⁶³ Appellant's Brief at 22, *Robert* (No. 04-215).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 17 U.S.C. §§ 106, 301; 15 U.S.C. § 1127.

¹⁶⁸ See generally *Robart*, 82 P.3d at 793 (holding that state seals could be prohibited from commercial use without the permission of the Lieutenant Governor's office).

¹⁶⁹ See ALASKA STAT. § 44.09.015 (2004) (prohibiting use of state seal without permission of the lieutenant governor of Alaska).

seal.¹⁷⁰ Two competing companies could ask the state for permission to use the state seal, and the state could give the rights to the favored company only. Discrimination and favoritism could become a large potential problem when dealing with a statute that gives the Lieutenant Governor the power to say who does or does not receive that right to produce. Moreover, it does not give any instructions or requirements to license the state seal.¹⁷¹ However, this could be remedied by amending the statute to give guidelines on how to distribute these exclusive property rights.

Another inherent problem with this statute is that under the guise of being a state symbol the state could limit other objects associated with the state from public and commercial use, even though these object are already in the public domain and are free for everyone to use. The question would then become where does the court draw the line for state symbol protection? This could be handled by limiting the statute to exact objects such as the state seal, flag, or coat of arms. However, most statutes are not as specific as the Alaska statute, which limits it to only the state seal.¹⁷² Some statutes include state emblems, which can be a hard area to define. Should the courts make the decision as to what is included as protected state symbols or defer to the lieutenant governor's office to make the right decision? These are only some of the questions that are presented when dealing with a statute that gives unlimited power to a state to distribute an exclusive property right as it sees fit.

VI. Conclusion

Ultimately, the court's decision in *Robart* is inconsistent with existing case law and thwarts the goals of federal copyright laws.¹⁷³ Given the fundamentally flawed interpretation of copyright law and a distinct lack of acknowledgement for a prior case deciding the exact same area of law, *Robart v. Alaska* was wrongly decided. This ruling could be potentially harmful to interstate commerce and the public at large. Since the United States Supreme Court has denied certiorari¹⁷⁴,

¹⁷⁰ See ALASKA STAT. § 44.09.015 (2004) (prohibiting use of state seal without permission of the lieutenant governor of Alaska).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See generally *Robart*, 82 P.3d at 793 (holding that state seals are not copyrightable subject matter and not protected by the Copyright Act).

¹⁷⁴ *Robart*, 125 S. Ct. at 310.

both the Alaska state court decision and the Pennsylvania state court decision stand as good law.¹⁷⁵ Now only time will tell if other state courts will follow the Alaska state court decision in *Robart* or the Pennsylvania state court decision in *Olde Bradford*.¹⁷⁶ Whatever the decision, Congress' copyright objectives of uniformity and predictability will be long lost in these decisions.

¹⁷⁵ See *Robart*, 82 P.3d at 793 (holding there was no copyright preemption of the Alaska state seal statute); See also *Olde Bradford Co.*, 365 A.2d at 177 (holding there was copyright preemption of the Pennsylvania Bicentennial Act).

¹⁷⁶ See generally *Robart*, 82 P.3d at 793 (holding there was no copyright preemption of the Alaska state seal statute); See also *Olde Bradford Co.*, 365 A.2d at 177 (holding there was copyright preemption of the Pennsylvania Bicentennial Act).
