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The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations

*Craig W. Dallon**

ABSTRACT

*Courts and scholars have considered the constitutional validity of 17 U.S.C. § 1101 (civil), and 18 U.S.C. § 2319A (criminal), known together as “the anti-bootlegging provisions.” These provisions prohibit unauthorized recording, copying, and distribution of live musical performances. The provisions have been challenged in three cases, resulting in five published opinions. Two district court opinions held the provisions unconstitutional, but subsequent opinions vacated those decisions. Notwithstanding a sharp division among copyright scholars, the courts have upheld these provisions. The discussion surrounding them is part of a continuing struggle to ascertain limits on congressional power to regulate copying and distribution of expression. The latest decision in this area, *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007), found that Congress had the power to enact § 2319A, but left two major issues unresolved. First, it only considered the constitutionality of the criminal provision, and its analysis cast doubt on the validity of the companion civil provision that was not before the court. Second, Martignon did not consider the free speech challenge to the statute and remanded the case for consideration of that issue.*

This Article argues that the Constitution firmly supports Congress’s power to enact the anti-bootlegging provisions as an exercise of the Commerce Clause, which does not conflict with the Copyright Clause, and does not violate the First Amendment.

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TABLE OF CONTENTS

I.	THE URUGUAY ROUND AGREEMENTS AND FEDERAL PROTECTION AGAINST BOOTLEGS	262
	<i>A. The Challenge of Bootleg Recordings</i>	262
	<i>B. Inadequacy of Prior Federal Law Against Bootlegs</i>	265
	<i>C. The International Response to Bootlegs: The Uruguay Round Agreements</i>	266
II.	CONSTITUTIONALITY OF THE ANTI-BOOTLEGGING PROVISIONS	268
	<i>A. United States v. Moghadam</i>	268
	<i>B. United States v. Martignon (Martignon I)</i>	270
	<i>C. KISS Catalog, Ltd. v. Passport International Productions (KISS I)</i>	271
	<i>D. KISS Catalog, Ltd. v. Passport International Productions, Inc. (KISS II)</i>	273
III.	ANTI-BOOTLEGGING PROVISIONS ARE A CONSTITUTIONAL EXERCISE OF POWER UNDER THE COMMERCE CLAUSE	273
	<i>A. Congress Must Have a Valid Power Source to Enact Legislation but Need Not Identify the Power Source</i>	273
	<i>B. The Courts Incorrectly Concluded that Congress Believed it was Acting Pursuant to the Copyright Clause</i>	276
	<i>C. The Copyright Clause is Not a Proper Power Source for the Anti-Bootlegging Provisions</i>	280
	1. Live Musical Performances are not "Writings"	280
	2. Anti-Bootlegging Protections Do Not Comport with the Limited Times Requirement	286
	<i>D. Anti-Bootlegging Provisions Satisfy the Commerce Clause</i>	288
	<i>E. Anti-Bootlegging Provisions Do Not Pose A Conflict With the Copyright Clause</i>	293
	1. Text and Purpose of the Copyright Clause: A Grant of Authority	293
	2. Supreme Court Precedent	295
	3. Application of Copyright Clause to Anti-Bootlegging Provisions	298
IV.	THE TREATY POWER AND THE NECESSARY AND PROPER CLAUSE ALLOW CONGRESS TO ENACT THE ANTI-BOOTLEGGING PROVISIONS	304
V.	THE ANTI-BOOTLEGGING PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT	308

A. First Amendment Problem with the Anti-Bootlegging Provisions.....	308
B. Portions of the Provisions Govern Conduct Rather Than Speech.....	310
C. Anti-Bootlegging Provisions Should Be Subject to Intermediate Scrutiny	312
D. The Anti-Bootlegging Provisions are Substantially Related to an Important Governmental Interest	316
VI. CONCLUSION	319

In recent years, courts and scholars have considered the constitutional validity of 17 U.S.C. § 1101¹ and 18 U.S.C. § 2319A,² known collectively as “the anti-bootlegging provisions,” which prohibit unauthorized recording, copying, and distribution of live musical performances.³ Three cases have challenged the validity of these provisions, resulting in five separate opinions.⁴ Notwithstanding a sharp division among copyright scholars, the decisions to date evince a growing consensus upholding these provisions.⁵ Although the law appears to be coalescing, the discussion surrounding the provisions demonstrates a continuing struggle to find—or perhaps create—limits on congressional power to regulate and limit copying and distribution of expression.⁶ This Article concludes that the Constitution firmly supports Congress’s power to enact the anti-bootlegging provisions.

In 1994, Congress enacted the Uruguay Round Agreements Act (URAA).⁷ The Act implemented the Uruguay Round Agreements

1. 17 U.S.C. § 1101 (2006).

2. 18 U.S.C. § 2319A (2006).

3. *Id.*; 17 U.S.C. § 1101.

4. *United States v. Martignon (Martignon II)*, 492 F.3d 140 (2d Cir. 2007); *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999); *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005); *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS I)*, 350 F. Supp. 2d 823 (C.D. Cal. 2004); *United States v. Martignon (Martignon I)*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

5. See sources cited *supra* note 4.

6. See *id.* (court decisions coalescing); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004) (acknowledging the “overwhelming view among commentators is that the Intellectual Property Clause’s limits apply to all of Congress’s powers” but maintaining that “[t]he prevailing wisdom is wrong”); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1119 (2000) (arguing that the Intellectual Property Clause absolutely constrains Congress’s legislative power).

7. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501—3624 (2010)).

(URA),⁸ which were multilateral trade agreements that the United States and approximately 110 other nations negotiated.⁹ The URA concluded over seven years of often-difficult trade negotiations conducted pursuant to the General Agreement on Tariffs and Trade (GATT).¹⁰ The URA comprised a collection of broad-ranging international trade agreements,¹¹ which replaced GATT with the World Trade Organization (WTO)¹² and included the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").¹³

According to its preamble, motivation for the TRIPS Agreement came from a desire "to reduce distortions and impediments to international trade" with consideration for "the need to promote effective and adequate protection of intellectual property rights."¹⁴ The TRIPS Agreement requires WTO members to afford various intellectual property protections to nationals of all member countries and involves copyright, trademark, patent, and related issues.¹⁵ In particular, Article 14 requires member nations to protect performers from unauthorized recording or broadcasting of their musical performances.¹⁶

Following the completion and signing of the URA, both houses of Congress held hearings and, after an expedited process, approved the URA and the TRIPS Agreement.¹⁷ Much of the URA was consistent with existing United States law, but some provisions required implementing legislation to bring the United States into compliance.¹⁸ Along with approval of the URA, Congress also enacted the necessary implementing legislation,¹⁹ which included the "anti-

8. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143 [hereinafter URA].

9. S. REP. NO. 103-412, at 5 (1994).

10. The negotiations began in September 1986. *Id.* at 2.

11. *Id.* at 3.

12. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

13. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C, Apr. 15, 1994, 33 I.L.M. 1143, 1197 [hereinafter TRIPS Agreement].

14. *Id.*

15. *Id.* at 1197—1211.

16. *Id.* at art. 14 ¶ 1.

17. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, §§ 101(a), 101(d)(15), 108 Stat. 4809, 4814 (1994).

18. S. REP. NO. 103-412, at 3 (1994) ("As U.S. law is already largely in compliance with the provisions of most of the Uruguay Round agreements, the implementing bill does not reflect all of the provisions of those agreements.").

19. URAA §§ 101-801, 108 Stat. at 4809—5053.

bootlegging provisions.”²⁰ These provisions create both civil remedies and criminal penalties against any person who, without consent of the performer or performers, records or transmits live musical performances, or traffics in such illicit recordings or music videos.²¹ These unauthorized, illicit recordings are known as “bootlegs.”²²

Soon after enactment of the provisions, trade groups and federal law enforcement agencies successfully began using the new provisions to crack down on those who created or trafficked in such unauthorized recordings (“bootleggers”). Following a sting operation in 1997,²³ Ali Moghadam was convicted under the criminal anti-bootlegging provision.²⁴ Moghadam challenged his conviction, alleging that his indictment should have been dismissed because Congress lacked the power to enact 18 U.S.C. § 2319A.²⁵ In *United States v. Moghadam*, the Court of Appeals for the Eleventh Circuit upheld the constitutionality of § 2319A and affirmed the conviction.²⁶ However, the court emphasized that the appellant had not appropriately raised the issue of whether the statute, which contains no express time limitation, violated the Constitution due to the “limited times” requirement of the Copyright Clause.²⁷ Therefore, the Court did not decide that issue.²⁸

In 2004, the United States District Court for the Southern District of New York, in *United States v. Martignon (Martignon I)*,²⁹ held § 2319A unconstitutional based in part on a “limited times” requirement theory.³⁰ The United States appealed the decision to the Court of Appeals for the Second Circuit,³¹ which, in *Martignon II*, vacated the district court’s dismissal of the indictment and remanded

20. *Id.* §§ 512–13, 108 Stat. at 4974–76.

21. 17 U.S.C. § 1101 (2006) (civil provision); 18 U.S.C. § 2319A (2006) (criminal provision).

22. The Recording Industry Association of America defines a “bootleg recording” as “the unauthorized recording of a performance that has been broadcast on radio or television, or of a live concert.” *Identifying Unauthorized Sound Recordings*, RECORDING INDUSTRY ASS’N OF AM., 76.74.24.142/D9972A64-2FAC-2698-E24A-FB5246807065.pdf [hereinafter RIAA] (last visited Dec. 12, 2010).

23. Bill Holland, *Record Bust May Curb Bootleg Biz Worldwide*, BILLBOARD, Apr. 12, 1997, at 6 (reporting on massive sting operation and indictment against *Moghadam*).

24. *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

25. *Id.*

26. *Id.*

27. U.S. CONST. art. I, § 8, cl. 8; *Moghadam*, 175 F.3d at 1274 n.9.

28. *Moghadam*, 175 F.3d at 1274 n.9, 1281 nn.14–15, 1282 n.17.

29. *Martignon I*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

30. *Id.* at 424.

31. *Martignon II*, 492 F.3d 140 (2d Cir. 2007).

the case for further consideration.³² The appellate court held that Congress had the authority under the Commerce Clause to enact § 2319A and that the enactment did not conflict with the Copyright Clause.³³ The court, however, remanded the case for consideration of whether § 2319A violated the First Amendment,³⁴ an issue raised in but not decided by the district court.³⁵ On remand, however, the First Amendment issue was not decided; following successful completion of a deferred prosecution agreement, the court, upon recommendation of the prosecution, terminated the case.³⁶

Shortly after *Martignon I*, the United States District Court for the Central District of California decided *KISS Catalog v. Passport International Products (KISS I)*.³⁷ *KISS I* closely followed *Martignon I*, holding § 1101, the civil anti-bootlegging provision, unconstitutional.³⁸ Following the district court's order in *KISS I* granting the defendant's motion to dismiss, the court granted the United States' motion to intervene in the case.³⁹ Thereafter, the judge who authored the opinion in *KISS I* died.⁴⁰ On the United States' motion to reconsider, the new judge issued *KISS II*, vacating in part the court's prior order and denying the defendant's motion to dismiss.⁴¹ The *KISS II* court upheld the civil anti-bootlegging provision as constitutional.⁴²

Opponents of the anti-bootlegging provisions argue that Congress may not extend perpetual exclusive rights to live musical performances, because doing so violates the Copyright Clause's writings and limited times requirements.⁴³ They assert that the Copyright Clause limits the power of the Commerce Clause;⁴⁴

32. *Id.* at 153.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Order of Nolle Prosequi, *United States v. Martignon*, No. 03 Cr. 1287(HB) (S.D.N.Y. Sept. 15, 2008).

37. *KISS I*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part on reconsideration*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

38. *Id.* at 836.

39. *KISS II*, 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005).

40. *Id.*

41. *Id.* at 1177.

42. *Id.* *KISS* settled. As part of the settlement, the Defendants agreed to entry of a permanent injunction. *See* Stipulated Permanent Injunction, *Kiss Catalog, Ltd, v. Passport Int'l Prods., Inc*, Case No. CV 03-8514 DSF (CWx) (C.D. Cal. 2007) (Feb. 28, 2007) (filed with clerk of the court); Stipulation for Dismissal of Entire Action With Prejudice and Order Thereon, *Kiss Catalog, Ltd, v. Passport Int'l Prods., Inc*, Case No. CV 03-8514 DSF (CWx) (C.D. Cal. 2007) (Feb. 28, 2007) (filed with clerk of the court).

43. *See, e.g., Martignon I*, 346 F. Supp. 2d 413, 428—429 (S.D.N.Y. 2004).

44. U.S. CONST. art. I, § 8, cl. 3.

Congress cannot do under the Commerce Clause what it is prevented from doing under the Copyright Clause.⁴⁵ Some opponents also urge application of First Amendment scrutiny to the anti-bootlegging provisions,⁴⁶ which, like many other intellectual property regulations, are restraints on speech and subject to either strict or at least heightened scrutiny. They argue that the provisions cannot withstand such scrutiny.⁴⁷

This Article argues that the anti-bootlegging provisions are constitutional as a valid exercise of power under both the Commerce Clause and the Necessary and Proper Clause.⁴⁸ The provisions directly address issues of international and interstate commerce.⁴⁹ Moreover, Congress passed them pursuant to obligations under the URA and the TRIPS Agreement.⁵⁰ The TRIPS Agreement is a congressional-executive agreement between the United States and other countries, for which implementing legislation is appropriate under the Necessary and Proper Clause and the Treaty Power.⁵¹ One conclusion of this Article is that federal protection of unfixed musical performances, regardless of the term of such protection, does not pose a conflict with the Copyright Clause.

Part I of this Article discusses the history of the URAA and the anti-bootlegging provisions and identifies the impact of the provisions. Part II discusses the cases challenging the anti-bootlegging provisions. Part III argues that the Commerce Clause provides adequate support

45. See, e.g., *Martignon I*, 346 F. Supp. 2d at 426 (“Congress may not . . . enact copyright or copyright-like legislation, which conflicts with the fixation or durational limitations of the Copyright Clause, even if another clause provides the basis for such power . . .”).

46. Brief of Amici Curiae Twenty-Nine Intellectual Property and Constitutional Law Professors in Support of Defendant-Appellee and Affirmance at 23–29, *U.S. v. Martignon*, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-CR), 2004 U.S. 2nd Cir. Briefs 965337 [hereinafter *Law Professors’ Brief*]; William McGinty, Comment, *First Amendment Rights to Protected Expression: What Are the Traditional Contours of Copyright Law?*, 23 BERKELEY TECH. L.J. 1099 (2008).

47. Law Professors’ Brief, *supra* note 46, at 25; see also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) (arguing that copyright laws are content-based restrictions that should be subject to strict scrutiny review).

48. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

49. See TRIPS Agreement, *supra* note 13, at 1144 (stating the purpose of the agreement as “[b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international relations....”); see *infra* notes 290–302 and accompanying text.

50. See WILLIAM F. PATRY, *COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT 3–6* (1995) (discussing URAA as a response to obligations under URA).

51. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .”).

for the anti-bootlegging provisions and that the provisions do not conflict with the Copyright Clause. Part IV contends that in addition to the Commerce Clause power, the Necessary and Proper Clause and the Treaty Power provide a second basis for Congress' authority to enact the anti-bootlegging provisions. Part V suggests that these provisions are consistent with the First Amendment, and Part VI concludes that they are constitutional.

I. THE URUGUAY ROUND AGREEMENTS AND FEDERAL PROTECTION AGAINST BOOTLEGS

A. *The Challenge of Bootleg Recordings*

A bootleg recording generally is an unauthorized recording of a live performance.⁵² Typically, a bootleg is a sound recording of a live music concert made surreptitiously by a concertgoer, but it could also be an unauthorized recording made of a live concert from a television or radio broadcast.⁵³ In some contexts the definition of a bootleg recording is even broader: a recording "which contains an unauthorized copy of a commercially unreleased performance."⁵⁴ This broad definition includes unauthorized duplication of authorized but unreleased studio or private recordings of musical performances.⁵⁵

Preventing bootleg recordings of live concerts is a continuing challenge. One commentator, discussing a bootleg recording of a summer 2009 Steely Dan concert, observed that "the time-honored tradition of bootlegging music" continues "as a raft of live recordings of recent concerts . . . find their way into the hands of fans."⁵⁶ Indeed, "[f]anatics have been recording concerts and finding ways to distribute

52. See RIAA, *supra* note 22 (defining "bootleg recording").

53. See *Dowling v. United States*, 473 U.S. 207, 211 n.2 (1985); Todd D. Patterson, Comment, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 374—75 (1997); David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 615 (1995).

54. *Dowling*, 473 U.S. at 211 n.2; see also Patterson, *supra* note 53, at 374 (recording of live music not intended for commercial production nor released to public).

55. *Dowling*, 473 U.S. at 211 n.2 (including copies of "outtakes" of studio recordings); Patterson, *supra* note 53, at 371, 374 (noting that "legendary first bootleg," the "Great White Wonder," was a collection of previously unreleased recordings by Bob Dylan "culled primarily from his home sessions"; bootlegs include copies made from unreleased studio recordings and recordings of private practices); Schwartz, *supra* note 53, at 615 (citing example of bootlegs of "The Lost Lennon Tapes" made from authorized broadcast of unreleased, private recordings of John Lennon).

56. Tim Cain, *Bootlegging Concerts Fills a Need*, HERALD & REVIEW, Apr. 1, 2010, http://www.herald-review.com/entertainment/local/article_9850745e-3dbc-11df-bded-001cc4c002e0.html.

them for decades.”⁵⁷ Inexpensive, easily accessible recording devices, including cell phones, and the ability to share files or post content on the Internet facilitate the quick distribution of bootleg recordings.⁵⁸ Unofficial bootleg recordings often appear on the Internet within hours after concerts.⁵⁹

The bootleg recordings at issue in the context of the URAA are limited to unauthorized recordings of *live* performances.⁶⁰ The URAA provisions do not cover bootlegs made from unreleased, authorized recordings.⁶¹ However, federal copyright law does protect unreleased, authorized recordings.⁶²

57. *Id.*

58. See, e.g., Kevin C. Johnson, *And Now Playing...in Concert: Legions of Fans with Cell Phones*, ST. LOUIS POST-DISPATCH, Mar. 19, 2010, at A1, available at 2010 WLNR 5779248 (noting widespread use of cell phones for photographs and recordings at concerts); Kevin Joy, *Bootleg Videotapes of Concerts Flourish*, COLUMBUS DISPATCH (OH), Feb. 23, 2008, http://www.dispatch.com/live/content/local_news/stories/2008/02/23/0_BADPHONES.ART_ART_02-23-08_A1_K19EHPN.html (“With high-tech, camera-equipped cell phones now standard gear, venues are increasingly finding their anti-video policies stretched to the limit.”); *id.* (noting that within hours of a Linkin Park concert “videos of the show started popping up on YouTube,” and noting that ultimately more than 50 clips were available); J. Scott Orr, *Bands Beating Bootleggers at Their Own Game*, SEATTLE TIMES, Mar. 28, 2007, http://seattletimes.nwsourc.com/html/musicnightlife/2003638511_official28.html (“The Internet vastly expanded the distribution potential for bootlegs, with hundreds of high-quality concert recordings of some acts...being offered for sale or trade at many Web sites.”); John Sinkevics, *Stealing the Show: Cell Phones Capture Concerts as Fans Share Experience*, THE GRAND RAPIDS PRESS, Dec. 4, 2006, at D1, available at 2006 WLNR 21082568 (discussing widespread cell phone recording at concerts).

59. Joy, *supra* note 58 (noting that bootlegs of 2008 Linkin Park performance were on YouTube within hours); Orr, *supra* note 58 (noting that bootlegs of Rolling Stones concerts were available on Internet the day after most shows).

60. 17 U.S.C. § 1101(a) (2006); 18 U.S.C. § 2319A(a) (2000).

61. 17 U.S.C. § 1101(a) (limited to those who fix the sounds or reproduce copies of “an unauthorized fixation”); 18 U.S.C. § 2319A(a) (same).

62. They are “original works of authorship fixed in [a] tangible medium of expression,” 17 U.S.C. § 102(a) (2006), and therefore within the scope of federal copyright protection. See *generally id.* (identifying subject matter of copyright). Bootleg recordings of live performances, where simultaneously transmitted and subject to an authorized recording, may be analyzed as either copyright infringement or a violation of the anti-bootlegging provisions. Although copyright law only extends to “fixed” works, § 101 of the Copyright Act defines “fixed” to include sounds that are transmitted simultaneous to an authorized recording. *Id.* § 101. For an interesting discussion of whether this conflicts with the writing requirement of the Copyright Clause, see Symposium, *PANEL III: United States v. Martignon—Case in Controversy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1223, 1258–59 (2006) [hereinafter Symposium]. Unauthorized recordings made from a live musical performance, whether directly in violation of federal copyright laws or not, fall within the scope of the anti-bootlegging provisions. The anti-bootlegging provisions apply to “[a]nyone who, without the consent of the performer . . . fixes the sounds . . . of a live musical performance in a copy or phonorecord . . .” 17 U.S.C. § 1101(a)(1) (2006); *accord* 18 U.S.C. § 2319A (2000).

The URAA only covers *musical* performances,⁶³ but not other live performances such as comedy acts, dramatic productions, or public speeches.⁶⁴ The URAA also does not apply to unauthorized recordings of motion pictures in movie theaters which are neither live nor musical performances.⁶⁵

The recording industry's trade group, the Recording Industry Association of America (RIAA), considers bootleg recordings to be one type of music "piracy."⁶⁶ By the early 1990s, the production and sale of bootleg recordings had become a thriving international industry.⁶⁷ Because the bootleg industry, even before the URAA, was either illegal or operating at the edges of the law, hard data about the production and sale of bootleg recordings is difficult to find. General Counsel to the Office of the U.S. Trade Representative in 1994 hearings on the URAA estimated that "trade in bootleg recordings amount[ed] to billions of dollars a year."⁶⁸ More recently, the RIAA estimated the combined worldwide cost of piracy, which it defines to

63. The term "musical performance" is not defined by the statute. "Perform" is defined in § 101, as "to recite, render, play, dance, or act . . ." 17 U.S.C. § 101.

64. See PATRY, *supra* note 50, at 14—15 (discussing music requirement and noting that it clearly excludes, for example, a poetry reading).

65. See 17 U.S.C. § 1101(a)(1) (apply to "live musical performance[s]"); 18 U.S.C. § 2319A (2000) (same); PATRY, *supra* note 50, at 73 & n.50 (provisions not applicable to audiovisual works). Over a decade after enactment of the URAA, Congress enacted a separate provision prohibiting unauthorized use of audiovisual recording devices to record motion pictures in a motion picture exhibition facility. 18 U.S.C. § 2319B(a) (2005). Section 2319B was modeled after § 2319A. See H.R. REP. NO. 109-33(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 220, 221. That provision is not addressed by this Article.

66. See RIAA, *supra* note 22. In the RIAA's lexicon, other types of pirated works are "pirated recordings" which are "the unauthorized duplication of sounds from one or more legitimate recordings," and "counterfeit recordings" which are "the unauthorized duplication of not only the sound and track listing, but also of the original artwork, label, trademark, and packaging of a legitimate recording." *Id.*; *accord* *KISS I*, 350 F. Supp. 2d 823, 834 n.7 (C.D. Cal. 2004) (citing RIAA, acknowledging that bootlegging is a type of piracy); *cf.* TRIPS Agreement, *supra* note 13, at 14(1), art. 51 n.36 (defining pirated copyright goods under the agreement). *But see* *Dowling v. United States*, 473 U.S. 207, 211 n.2 (1985) (distinguishing "bootleg" recordings from "pirated" recordings); *United States v. Moghadam*, 175 F.3d 1269, 1271 n.3 (11th Cir. 1999) (same); *Martignon I*, 346 F. Supp. 2d 413, 417 n.3 (S.D.N.Y. 2004) (same), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

67. See *General Agreement on Tariffs and Trade Copyright Act of 1994: Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. On the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the S. Judiciary Comm.*, 103rd Cong. 142 (1994) [hereinafter *Hearings*] (statement of Ira S. Shapiro, General Counsel Office of the United States Trade Representative); *see also id.* at 259 (statement of Jason S. Berman, Chairman & Chief Executive Officer, Recording Industry of America); Patterson, *supra* note 53, at 397—400 (identifying Italy and Germany as leading bootleg centers and identifying leading bootleg labels in Italy).

68. *Hearings*, *supra* note 67, at 142 (statement of Ira S. Shapiro, General Counsel Office of the United States Trade Representative); *see also id.* at 259 (statement of Jason S. Berman) (stating of bootlegs, "[t]his is a \$1 billion industry worldwide" and citing examples).

include bootlegs, counterfeits, and other piracy,⁶⁹ at 4.2 billion dollars.⁷⁰ The bootleg portion of that figure, however, almost certainly is the smallest of the three types of piracy, and some skeptics have accused the RIAA of exaggerating its estimates.⁷¹

B. Inadequacy of Prior Federal Law Against Bootlegs

In the United States, before 1972, sound recordings received no direct protection under federal copyright law.⁷² Therefore, sound recordings themselves, whether legitimate or bootlegged, could be copied without violating federal law.⁷³ There was, however, an important caveat. Then, as now, the musical compositions performed in the sound recordings often had their own copyright protection.⁷⁴ While the performers had no interest in those copyrights, the copyright owners of the compositions could make claims against those who copied the sound recordings without permission.⁷⁵ Thus, under the prior law, a copy of a sound recording, while not infringing a performer's copyright, could still infringe the rights of the copyright owners of the musical compositions.⁷⁶ Moreover, though federal copyright protection did not extend to sound recordings as such, state law often did protect them.⁷⁷

The legal landscape changed when Congress enacted the Sound Recording Act of 1971, extending copyright protection to sound

69. Copyright Law and Music Piracy, PIRACY NETWORK (Oct. 16, 2010), <http://www.piracynetwork.com/music-piracy/copyright-law-music-piracy.html> ("Music Piracy refers to the illegal duplication and distribution of sound recordings. It mainly comprises of four specific forms – (i) bootleg recordings, (ii) pirate recordings, (iii) online piracy and (iv) counterfeit recordings.").

70. *KISS I*, 350 F. Supp. 2d at 834 n.7 (citing RIAA figure).

71. See CLINTON HEYLIN, *BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY* 11 (1994) ("The figures provided by the Recording Industry Association of America (RIAA) and the British Phonographic Industry (BPI) seem deliberately distorted to imply a problem on a far greater scale than reality suggests.").

72. *Goldstein v. California*, 412 U.S. 546, 552 (1973); see Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391; ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 4.7 (2003).

73. SCHECHTER & THOMAS, *supra* note 82, at § 4.7.

74. *Id.* (discussing the two separate copyrights existing in sound recordings; one in underlying musical work, the other in the sound recording); *Dowling v. United States*, 473 U.S. 207, 211 n.4 (1985) (contrasting protection of pre-1972 sound recordings from protection for the musical compositions performed).

75. *Dowling*, 473 U.S. at 211 n.4 (copyright infringement of musical compositions was basis for criminal count against copiers of sound recordings).

76. SCHECHTER & THOMAS, *supra* note 82, at § 4.7.

77. *Goldstein*, 412 U.S. at 546 (finding California criminal statute protecting sound recordings constitutional); see also JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 21 (2006).

recordings fixed after February 15, 1972.⁷⁸ However, even after the Sound Recording Act,⁷⁹ U.S. copyright protection did not extend to unrecorded musical performances.⁸⁰

Prior to the URAA many jurisdictions had criminal and civil remedies against bootleg recordings either by statute⁸¹ or common law.⁸² However, Congress recognized the need for uniform, federal protections against bootleg copies,⁸³ particularly imported bootleg recordings.⁸⁴ The Statement of Administrative Action submitted to Congress in connection with the URAA emphasized that state protections “may not provide the necessary basis for border enforcement,” and the federal remedy would “aid efforts by the Customs Service to combat bootleg sound recordings.”⁸⁵ The URAA specifically addressed the border enforcement issue by authorizing seizure and forfeiture of bootleg recordings.⁸⁶

C. The International Response to Bootlegs: The Uruguay Round Agreements

Of particular concern to the United States in the URA negotiations was international trade in pirated, counterfeited, and bootlegged sound recordings.⁸⁷ At the time, European bootleggers, particularly in Italy and Germany, openly produced many of these

78. Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

79. *Id.*

80. See 17 U.S.C. § 102(a) (2006) (limiting copyright protection to “original works of authorship fixed in any tangible medium of expression” and listing categories of protected works).

81. See, e.g., FLA. STAT. ANN. § 540.11(2)(a)(3)—(4) (2007). William Patry reported that thirty states had criminal laws preventing unauthorized taping of live musical performances and some jurisdictions had civil remedies. PATRY, *supra* note 50, at 9.

82. See *Metro. Opera Ass’n, Inc. v. Wagner-Nichols Recording Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff’d* 107 N.Y.S.2d 795 (N.Y. App. Div. 1951) (enjoining recording and sales of recordings of live opera performances from radio broadcast); see also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8E.02 (Matthew Bender, ed., 2010) (stating that “protection for such performances has traditionally been the province of common law copyright and other creatures of state law.”).

83. See S. REP. NO. 103-412, at 225 (1994).

84. See *Hearings*, *supra* note 67, at 119 (statement of Bruce C. Lehman, Ass’t Sec. of Commerce); *id.* at 142 (statement of Ira S. Shapiro, General Counsel to the Office of the U.S. Trade Representative).

85. The Uruguay Round Agreements Act: Statement of Administrative Action, Pub. L. No. 103-465, at 992, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4288.

86. 18 U.S.C. § 2319A(c) (2000).

87. See PATRY, *supra* note 50, at 2—3. For a discussion of the distinction between pirated, counterfeited, and bootlegged works, see *supra* note 66 and accompanying text.

recordings and exported them to other European countries and the United States.⁸⁸

Under Article 14 of the TRIPS Agreement, the members of the WTO agreed that:

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

. . . .

5. The term of the protection available under this Agreement to performers . . . shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place⁸⁹

One hundred twenty-nine countries originally agreed to the TRIPS Agreement,⁹⁰ but the number of WTO members, all of whom are bound by the agreement, has grown to 153.⁹¹ Following the TRIPS Agreement, Italy and Germany changed their laws and effectively closed down many of the bootleg operations there.⁹²

The United States enacted the URAA to implement the TRIPS Agreement. Section 512 of the URAA, the civil anti-bootlegging provision, provides that:

Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), . . .

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.⁹³

Section 513 of the URAA imposed criminal penalties for the same conduct committed “knowingly and for purposes of commercial advantage or private financial gain.”⁹⁴

88. See Patterson, *supra* note 53, at 397–400.

89. TRIPS Agreement, *supra* note 13, at art. 14, ¶ 5.

90. DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS* 7 (2002) (citing 114 countries plus the 15 members of European Community).

91. As of 23 July 2008, there were 153 members of the World Trade Organization. See WORLD TRADE ORGANIZATION, www.wto.org (last visited Dec. 12, 2010).

92. Antonella De Robbio, *Collection of Laws on Copyright*, UNIVERSITA DEGLI STUDI DI PADOVA (Aug. 15, 1999), <http://www.math.unipd.it/~derobbio/dd/Legge747-94.htm>.

93. 17 U.S.C. § 1101(a) (2006).

II. CONSTITUTIONALITY OF THE ANTI-BOOTLEGGING PROVISIONS

A. United States v. Moghadam

Following the enactment of the URAA, the RIAA and the U.S. government immediately began to leverage the anti-bootlegging provisions to curb bootlegging and prosecute violators.⁹⁵ The recording industry and federal prosecutors attributed their success against bootleggers to the URAA.⁹⁶ Even several years after enactment of the anti-bootlegging provisions, they played an important role in the fight against bootlegging,⁹⁷ but more recently, use of the criminal provisions for bootlegging has waned.⁹⁸

In one 1997 sting operation, dubbed “Operation Goldmine,” the U.S. Customs Service seized over 800,000 bootleg CDs and arrested

94. 18 U.S.C. § 2319A(a) (2006).

95. See Bill Holland, *Bootleg Seizures Up Under Piracy Act*, BILLBOARD, Aug. 31, 1996, at 1 (“The music-industry-sponsored federal anti-bootleg statute, which became law in 1995, is beginning to pay off in a big way, as evidenced by new statistics showing a dramatic rise in the amount of illicit music product seized in the first six months of the this year.”).

96. See *id.* at 127 (quoting U.S. customs agent, “[w]ithout this new law, we would have no teeth at all, and it would be practically impossible to go after the bootleggers and those who sell [their product].”).

97. *Martignon I* involved a defendant who was arrested in 2003 for violation of § 2319A. 346 F.Supp.2d 413, 417 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007). *KTSS I* involved sales of product in 2003. 350 F. Supp. 2d 823, 825 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005). A Department of Justice Press Release in 2004 reports the sentencing of an individual for engaging in the business of selling bootleg recordings of KISS, Aerosmith, Bob Dylan, and Bruce Springsteen, dating back to 2002. Press Release, Dep’t of Justice, W.D. of Pa., Former Canonburg Resident Gets Prison Term for Selling Bootlegged Recordings (July 15, 2004), *available at* <http://www.cybercrime.gov/smittleSent.htm>. The Department of Justice reports 36 cases filed against 51 defendants for fiscal years 1997-2005, under § 2319A. U.S. DEP’T OF JUSTICE, FY 2005 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. C, C-3, *available at* <http://www.justice.gov/ag/annualreports/pr2005/TableofContents.htm>; U.S. DEP’T OF JUSTICE, FY 2004 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. C, C-3, *available at* <http://www.justice.gov/ag/annualreports/pr2004/TableofContents.htm>; U.S. DEP’T OF JUSTICE, 2003 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. C, *available at* <http://www.justice.gov/archive/ag/annualreports/ar2003/appendices.htm#cc>; U.S. DEP’T OF JUSTICE, FY 2002 PERFORMANCE REPORT, APP. C, *available at* <http://www.justice.gov/archive/ag/annualreports/pr2000/AppCIGTopTenMemo.htm>; U.S. DEP’T OF JUSTICE, 2000 PERFORMANCE REPORT, APP. F, *available at* <http://www.justice.gov/archive/ag/annualreports/pr2000/AppFIntellProperty.htm>; U.S. DEP’T OF JUSTICE, CRIMINAL CASELOAD STATISTICAL REPORTS B-4 (1998); U.S. DEP’T OF JUSTICE, CRIMINAL CASELOAD STATISTICAL REPORTS B-4 (1999); U.S. DEP’T OF JUSTICE, CRIMINAL CASELOAD STATISTICAL REPORTS 88 (1997).

98. No new cases were filed from 2006—2008. See U.S. DEP’T OF JUSTICE, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. F, <http://www.justice.gov/ag/annualreports/pr2008/appd/p254-285.pdf>; U.S. DEP’T OF JUSTICE, FY 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. F, *available at* <http://www.justice.gov/ag/annualreports/pr2007/appd/p17-46.pdf>; U.S. DEP’T OF JUSTICE, FY 2006 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. F, *available at* http://www.justice.gov/ag/annualreports/pr2006/Appd/appd_f.pdf. One new case was filed in 2009. See U.S. DEP’T OF JUSTICE, FY 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, APP. E, *available at* <http://www.justice.gov/ag/annualreports/pr2009/appd/app-e.pdf>.

several individuals, including Ali Moghadam.⁹⁹ In federal court, Moghadam pled guilty to knowingly distributing, selling, and trafficking in bootleg CDs featuring live musical performances by Tori Amos and the Beastie Boys in violation of § 2319A.¹⁰⁰ However, he reserved the right to appeal the constitutionality of § 2319A.¹⁰¹

In his appeal before the Eleventh Circuit, Moghadam argued that Congress lacked the power to enact § 2319A because it was not acting pursuant to any of the enumerated powers identified in Article I, Section 8 of the Constitution.¹⁰² Moghadam posited that the provision could not have been enacted pursuant to the Copyright Clause,¹⁰³ which authorized Congress to enact laws “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”¹⁰⁴ Moghadam reasoned that the live musical performances in questions were not “writings” within the meaning of the clause, because they were not fixed.¹⁰⁵ The court agreed that a serious question whether unfixed live performances could qualify for protection under the Copyright Clause existed but declined to decide the issue.¹⁰⁶ Instead, the court held that Congress was authorized to enact the URAA using a different power source—the Commerce Clause.¹⁰⁷

The *Moghadam* court applied a fundamental inconsistency test and held that the enactment of § 2319A under the Commerce Clause power was not fundamentally inconsistent with the writing or fixation requirement of the Copyright Clause.¹⁰⁸ The court, however, emphasized that it did not consider the issue whether the anti-bootlegging provisions violated the limited times restriction of the Copyright Clause and, if so, whether such a violation would amount to a fatal fundamental inconsistency, placing the enactment beyond the reach of even the Commerce Clause power.¹⁰⁹ Moghadam had not

99. See; Bill Holland, Record Bust May Curb Bootleg Biz Worldwide, *BILLBOARD*, Apr. 12, 1997 at 6; Press Release, Recording Industry Association of America, Thirteen Alleged Major Bootleggers Indicted (Mar. 31, 1997), available at http://www.riaa.com/newsitem.php?news_year_filter=1997&id=DB5F29B1-5122-0818-4A14-7BB50A53DCC5.

100. *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

101. *Id.* at 1271 n.1.

102. *Id.* at 1271.

103. U.S. CONST. art. I, § 8, cl. 8.

104. *Id.*

105. *Moghadam*, 175 F.3d at 1273.

106. *Id.* at 1274.

107. U.S. CONST. art. I, § 8, cl. 3; *Moghadam*, 175 F.3d at 1282.

108. *Moghadam*, 175 F.3d at 1280—82.

109. *Id.* at 1274 n.9, 1281—82 & nn. 14—15, 17.

appropriately raised that issue on appeal, and therefore the court deemed it waived.¹¹⁰

B. United States v. Martignon (Martignon I)

In *Martignon I*,¹¹¹ the United States District Court for the Southern District of New York revisited the issues raised in *Moghadam*, but came to a different conclusion. *Martignon I* involved a defendant, Martignon, indicted in 2003 for selling bootlegged recordings of live performances in violation of § 2319A.¹¹² Martignon moved to dismiss the indictment, claiming that the anti-bootlegging statute was unconstitutional.¹¹³ The district court agreed with Martignon and found § 2319A unconstitutional for two reasons.¹¹⁴ First, the court disagreed with *Moghadam* and held that Congress lacked the authority to enact “copyright-like” legislation under the Commerce Clause.¹¹⁵ Second, the court held that even if Congress had such power, the anti-bootlegging provisions were “fundamentally inconsistent” with both the fixation and durational limits imposed by the Copyright Clause and therefore impermissible.¹¹⁶ Thus, in addition to disagreeing with *Moghadam*, the *Martignon I* court also addressed the limited times issue not reached in *Moghadam* and found it determinative in favor of the defendant.¹¹⁷

In *Martignon II*,¹¹⁸ the Second Circuit vacated the dismissal of the indictment against Martignon and remanded for consideration of the First Amendment argument that the district court did not reach.¹¹⁹ The appellate court held that Congress validly enacted §§ 2319A(a)(1) and (3) under the Commerce Clause, which did not conflict with the Copyright Clause.¹²⁰ The court found that “Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause

110. *Id.* at 1282 n.17.

111. 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

112. *Id.* at 417.

113. *Id.* at 416.

114. *Id.* at 426–29.

115. *Id.* at 426–28.

116. *Id.* at 428–29.

117. *Id.* at 429 n.21.

118. *Martignon II*, 492 F.3d 140 (2d Cir. 2007).

119. *Id.* at 153.

120. *Id.* at 152.

and (2) the resulting law violates one or more specific limits of the Copyright Clause.”¹²¹

The Second Circuit concluded that applying either a textual or contextual approach, § 2319A was not a copyright law.¹²² Extrapolating from the constitutional language, to “secur[e] . . . Right[s],”¹²³ the court held that “allocation of property rights [in expression]” is a necessary requirement of a copyright law.¹²⁴ The court reasoned that § 2319A, as a purely criminal sanction, “did not create or bestow property rights upon authors or inventors, or allocate those rights among claimants to them.”¹²⁵ As a result, § 2319A was not a copyright law subject to limitations of the Copyright Clause.¹²⁶

Moreover, the Second Circuit concluded that Congress could enact § 2319A under its Commerce Clause power.¹²⁷ The court emphasized that the section was limited to fixing, selling, distributing, and copying *with a commercial motive*.¹²⁸ The Court expressly distinguished § 2319A from its civil counterpart, § 1101, which contains no commercial motive requirement.¹²⁹ The court expressed no opinion as to the constitutionality of that section.¹³⁰

C. KISS Catalog, Ltd. v. Passport International Productions (KISS I)¹³¹

Moghadam, *Martignon I*, and *Martignon II* all addressed the constitutionality of the criminal anti-bootlegging provisions.¹³² Shortly after *Martignon I*, a court for the first time considered the constitutionality of the civil anti-bootlegging provisions in 17 U.S.C. § 1101(a).¹³³ In *KISS Catalog, Ltd. v. Passport International Productions (KISS I)*,¹³⁴ the defendants packaged and sold DVDs

121. *Id.* at 149.

122. *Id.* at 150.

123. U.S. CONST. art. I, § 8, cl. 8.

124. *Martignon II*, 492 F.3d at 150.

125. *Id.* at 151.

126. *Id.*

127. *Id.* at 152.

128. *Id.*

129. *Id.* at 152 n.8.

130. *Id.* Section 1101 was not at issue in the case and naturally the Second Circuit would not have reason to decide its constitutionality.

131. 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

132. *Martignon II*, 492 F.3d at 140; *United States v. Moghadam*, 175 F.3d 1269, 1269 (11th Cir. 1999); *Martignon I*, 346 F. Supp. 2d at 413.

133. 17 U.S.C. § 1101 (2006).

134. *KISS I*, 350 F. Supp. at 823.

containing footage of a 1976 KISS rock concert.¹³⁵ The defendants moved to dismiss the anti-bootlegging claim, arguing the unconstitutionality of § 1101.¹³⁶ Initially, the court held § 1101 unconstitutional.¹³⁷

First, the court determined that § 1101 was a “copyright-related statute,”¹³⁸ because Congress believed it was acting pursuant to the Copyright Clause. As evidence of this, the court noted that Congress included § 1101 in the code’s copyright provisions, and the section offers “copyright-like protections.”¹³⁹ Second, the court considered whether Congress overstepped the authority granted by the Copyright Clause by enacting § 1101,¹⁴⁰ by considering two Copyright Clause limitations: the fixation and limited times requirements.¹⁴¹ The court acknowledged the fixation requirement, rooted in the term “writings,” but declined to resolve the issue of whether either an unfixed musical performance or a performance fixed in an unauthorized recording could qualify as a writing.¹⁴² Instead, the court held that § 1101 exceeded Congress’s authority because it unquestionably violated the limited times requirement.¹⁴³ Section 1101 has no durational limits; the protections it affords are, on their face, perpetual.¹⁴⁴

Third, the court considered whether Congress could have enacted § 1101 relying upon its Commerce Clause powers and concluded that it could not.¹⁴⁵ The court acknowledged that but for the Copyright Clause, § 1101 surely would have been within the Commerce Clause power.¹⁴⁶ However, the court accepted the *Moghadam* court’s view that Congress could not enact a copyright-like statute under the Commerce Clause if it were “fundamentally inconsistent” with the Copyright Clause.¹⁴⁷ Applying this fundamental inconsistency test, the court concluded that permitting § 1101 under the Commerce Clause would create a direct conflict with

135. *Id.* at 825.

136. *Id.* at 829.

137. *Id.* at 836.

138. *Id.* at 830.

139. *Id.*

140. *Id.* at 831.

141. *Id.* at 831—33.

142. *Id.* at 832.

143. *Id.* at 833.

144. See 17 U.S.C. § 1101 (2006).

145. *KISS I*, 350 F. Supp. 2d at 837.

146. *Id.* at 833—34 (“[T]hat copyright-like protection for live performances touches on commerce is a proposition that should be without serious dispute.”).

147. *Id.* at 834; see also *id.* at 836 (noting that limitations “in one clause of Art. I, § 8 cannot be subverted by the Commerce Clause”).

the limited times requirement: “Permitting the current scope of the Commerce Clause to overwhelm those limitations altogether would be akin to a ‘repeal’ of a provision of the Constitution.”¹⁴⁸ Accordingly, the court granted the defendant’s motion to dismiss the anti-bootlegging claim.¹⁴⁹

*D. KISS Catalog, Ltd. v. Passport International Productions, Inc.
(KISS II)*

The United States, after it became aware of the order in *KISS I*, intervened in *KISS* and asked the court to reconsider its ruling.¹⁵⁰ After granting the motion to intervene, the judge in *KISS I* died, and the case was transferred to a new judge.¹⁵¹ On reconsideration, the court vacated the order in *KISS I* and denied the motion to dismiss the anti-bootlegging claim.¹⁵² The court rejected the view that subject matter outside the scope of the Copyright Clause—unfixed musical performances—could nonetheless be subject to the limitations imposed by the clause.¹⁵³ Fundamentally, the court rejected the constitutional approach in *Martignon I* and *KISS I* that attempted to make the Commerce Clause power subservient to the Copyright Clause even where the subject matter was outside the purview of the Copyright Clause.¹⁵⁴ The court also held that even if the Copyright Clause did limit Congress’s ability to act under the Commerce Clause, the anti-bootlegging provision did not create the required fundamental conflict necessary to invalidate the provision.¹⁵⁵

III. ANTI-BOOTLEGGING PROVISIONS ARE A CONSTITUTIONAL EXERCISE
OF POWER UNDER THE COMMERCE CLAUSE

*A. Congress Must Have a Valid Power Source to Enact Legislation but
Need Not Identify the Power Source*

The central pillar of the anti-bootlegging cases stands upon the constitutional doctrine that the federal government has limited

148. *Id.* at 837.

149. *Id.*

150. 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005).

151. *Id.*

152. *Id.* at 1177.

153. *Id.* at 1174.

154. *See id.* (approach “reads the Copyright Clause too broadly” and other constitutional grants too narrowly); *id.* at 1175 (rejecting effort to import limits into the Commerce Clause that the clause does not have).

155. *Id.* at 1176.

powers.¹⁵⁶ As a government of enumerated powers,¹⁵⁷ the federal government can only exercise powers granted to it by the Constitution.¹⁵⁸ Congress may only enact legislation when it acts pursuant to a power afforded to it by the Constitution.¹⁵⁹ In *McCulloch v. Maryland*,¹⁶⁰ Chief Justice Marshall identified the venerable test for federal power: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁶¹ Under this analysis, a court must first determine whether a statute was enacted pursuant to a power vested in the federal government and second whether the statute conflicts with a specific limitation on federal power.¹⁶²

The test for constitutionality of a law does not require that Congress articulate or even know the power source under which it enacted the law.¹⁶³ In *Woods v. Cloyd W. Miller Co.*,¹⁶⁴ the Supreme Court held that constitutionality of congressional action “does not depend on recitals of the power which it undertakes to exercise.”¹⁶⁵ In

156. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“The Constitution created a Federal Government of limited powers.”); THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001) (“The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite.”). People could rightfully question whether this is true only in theory rather than in practice. The principle nonetheless is central to our constitutional structure and remains axiomatic.

157. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers.”).

158. *E.g.*, *id.* (“The principle, that it can exercise only the powers granted to it, would seem too apparent . . . That principle is now universally admitted.”).

159. *E.g.*, *United States v. Comstock*, 130 S. Ct. 1949, 1971 (2010) (“Every law enacted by Congress must be based on one or more of” the enumerated powers.” (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000))).

160. *McCulloch*, 17 U.S. at 316.

161. *Id.* at 407; *accord* *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (reaffirming and quoting Chief Justice Marshall’s “classic formulation”).

162. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.1, at 134 (6th ed. 2000).

163. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

164. *Id.*

165. *Id.* Other courts have followed *Woods*. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (quoting *Woods*); *United States v. Moghadam*, 175 F.3d 1269, 1275 n.10 (11th Cir. 1999) (quoting *Woods*); *see also* *Doe v. Univ. of Illinois*, 138 F.3d 653, 678 (7th Cir. 1998), *vacated*, 526 U.S. 1142 (1999) (Easterbrook, J., respecting denial of rehearing en banc) (“Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons.”); *Timmer v. Michigan Dep’t of Commerce*, 104 F.3d 833, 838–39 (6th Cir. 1997) (not necessary for Congress to state constitutional basis for legislation); *Mills v. Maine*, 118 F.3d 37, 43 (1st Cir. 1997) (quoting *Woods*, *Timmer*, and *Usery v. Charleston Cnty. Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977)); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 808–09 n.6 (3d ed. 2000) (“[T]he Supreme Court has generally held that an

the words of the Fourth Circuit, “[o]ur duty in passing on the constitutionality of legislation is to determine whether Congress had the authority to adopt the legislation, not whether it correctly guessed the source of that power.”¹⁶⁶ Therefore, the test of constitutionality is an objective test—either the power exists or it does not.

Another constitutional law principle relevant to analyzing the anti-bootlegging provisions is that constitutional law does not impose a “near-miss” doctrine.¹⁶⁷ Professor G. Michael Fenner has explained, “[t]here is no rule that says that if a statute narrowly misses being valid under one power source, it cannot be validated under any other. There is no rule that says that legislation must be judged under the power source that it most looks like.”¹⁶⁸ In short, an enactment that cannot claim to be based on a particular power source may nonetheless be based on a different power source.¹⁶⁹

The three possible constitutional power sources for the anti-bootlegging provisions of the URAA are the Copyright Clause,¹⁷⁰ the Commerce Clause,¹⁷¹ and the Necessary and Proper Clause.¹⁷² As discussed below, the authorities unanimously agree that the Copyright Clause does not provide a valid power source for the anti-bootlegging provisions.¹⁷³ Yet the courts have routinely considered the Copyright Clause central to their analysis in the anti-bootlegging cases.¹⁷⁴

otherwise valid exercise of congressional authority is not invalidated by Congress’ recital of an inappropriate clause in support of that authority—or even by Congress’ failure to cite any clause at all.”) *But see id.* (stating that *United States v. Lopez*, 514 U.S. 549 (1995) may call this practice into question).

166. *Usery v. Charleston Cnty. Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977).

167. G. Michael Fenner, *Constitutional Law Outline: 2006* 85 n.378 (2006) (unpublished manuscript) (on file with author).

168. *Id.*

169. *E.g., In re Trade-Mark Cases*, 100 U.S. 82 (1879) (considering both Copyright Clause and Commerce Clause as potential sources of support for federal trademark statute); *Authors League of Am., Inc. v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986) (upholding restriction on certain imported literary works under the Commerce Clause; holding “the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause.”).

170. U.S. CONST. art. I, § 8, cl. 8.

171. *Id.* cl. 3.

172. *Id.* cl. 18.

173. *See, e.g., Martignon II*, 492 F.3d 140, 144 (2d Cir. 2007) (noting that district court found and the government conceded that the provision could not have been enacted under the Copyright Clause); *PATRY, supra* note 50, at 10, 18 (noting that provisions were not enacted under Copyright Clause).

174. *E.g., Martignon I*, 346 F. Supp. 2d 413, 419–24 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007) (discussing Copyright Clause).

B. The Courts Incorrectly Concluded that Congress Believed it was Acting Pursuant to the Copyright Clause

All the decisions in the anti-bootlegging cases recognized the need to locate a valid source in the Constitution empowering Congress to enact the anti-bootlegging provisions.¹⁷⁵ While the court in *Moghadam* acknowledged an absence of evidence on the point, it assumed that Congress believed it was acting under the Copyright Clause power.¹⁷⁶ The *Martignon I* court went further, finding that “[i]t is pretty clear” that Congress “believed that it was acting pursuant to its Copyright Clause powers.”¹⁷⁷ The *KISS I* court cited and agreed with *Moghadam* and *Martignon I* on this point.¹⁷⁸ The *KISS II* court backed away gently from the three prior decisions and found only that “Congress *may have* believed that it was acting pursuant to the Copyright Clause. . . .”¹⁷⁹ The *Martignon II* court took no position on which power Congress thought it was invoking.¹⁸⁰ It implicitly recognized that whatever Congress thought was irrelevant.¹⁸¹

The *Moghadam* court, relying upon legislative history, incorrectly assumed that Congress believed it was legislating under its Copyright Clause authority.¹⁸² The only support cited by the court for this view was a statement of Representative William Hughes that the URAA included “a number of changes in copyright that will advance our interests in the area of bootlegging, which is going to basically protect our country.”¹⁸³ Representative Hughes was the Chairman of the Subcommittee on Intellectual Property and Judicial Administration, which held hearings on the intellectual property

175. *Martignon II*, 492 F.3d at 141; *United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999); *KISS II*, 405 F. Supp. 2d 1169, 1171 (C.D. Cal. 2005); *Martignon I*, 346 F. Supp. 2d at 419; *KISS I*, 350 F. Supp. 2d 823, 830 (C.D. Cal. 2004), *vacated in part on reconsideration*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

176. *Moghadam*, 175 F.3d at 1272; *see also* 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.6.1 (3d ed. 2005) (noting that the absence of an “in commerce” requirement “suggests an intention to rest the chapter on the copyright-patent clause alone.”).

177. *Martignon I*, 346 F. Supp. 2d at 419; *see also id.* at 420 (wording and legislative history demonstrate that statute was exercise of Copyright Clause authority).

178. *KISS I*, 350 F. Supp. 2d at 830.

179. *KISS II*, 405 F. Supp. 2d at 1171 (emphasis added).

180. *See generally Martignon II*, 492 F.3d at 144–152 (discussing basis of congressional authority to enact § 2319A).

181. *See generally id.* at 141 (discussing issue presented).

182. *United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999) (“[W]hat little legislative history exists tends to suggest that Congress viewed the anti-bootlegging provisions as enacted pursuant to its Copyright Clause authority.”).

183. *Id.* (quoting 140 CONG. REC. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes)).

portions of the URAA.¹⁸⁴ His comments appear to label the anti-bootlegging provisions as copyright laws,¹⁸⁵ which is natural given the inclusion of the civil provisions in Title 17 of the Copyright Act and the placement of the criminal provisions together with the criminal copyright infringement provisions in Title 18.¹⁸⁶

Despite the statement of Representative Hughes, the assumption that Congress thought it was acting under its Copyright Clause power is almost certainly wrong.¹⁸⁷ Congress viewed the URAA as an international free trade agreement and did not view the Act as arising from its Copyright Clause power.¹⁸⁸ Most members of Congress probably did not even consider the constitutional power source of the legislation,¹⁸⁹ because the legislation on its face so clearly dealt with domestic and foreign commerce and international agreements, areas in which Congress clearly may enact legislation.¹⁹⁰

Representative Hughes's statements and other legislative history provide more than ample support for the view that Congress believed it was enacting the provisions to further the United States' interstate and foreign commercial trade interests.¹⁹¹ Representative Hughes's concluding comments, cited by the *Moghadam* court, support this point:

Intellectual property rights produce products which are some of our strongest and most lucrative exports. We need to ensure that these rights are protected in the global

184. See 140 CONG. REC. E2263 (daily ed. Oct. 8, 1994).

185. *Id.*; see also S. REP. 103-412, at 224–26 (1994) (discussing bootlegging provisions under subtitle “Copyright Provisions”).

186. See 17 U.S.C. § 1101 (2006) (civil anti-bootlegging provisions); 18 U.S.C. § 2319 (2006) (criminal infringement of a copyright); 18 U.S.C. § 2319A (2006) (criminal anti-bootlegging provisions).

187. Admittedly, trying to ascribe intent on a particular point to any collective body is fraught with difficulty. See, e.g., *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1802 (2010) (Scalia, J., concurring in part) (“Congress’s collective intent (if such a thing even exists) cannot trump the text it enacts . . .”).

188. The congressional reports are replete with statements emphasizing that the URAA was a trade bill, arising out of international trade negotiations. E.g., S. REP. NO. 103-412, at 2–3 (1994) (noting bill was referred to committee “to approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations,” and discussing international negotiations resulting in TRIPS; noting that URAA resulted from “[t]he Uruguay Round of multilateral trade negotiations [that was] by far the most ambitious and comprehensive round of multilateral trade negotiations in the history of GATT”; and noting that “the Uruguay Round tackled new areas, such as services, intellectual property rights, and investment, reflecting the growing complexity of the world trading system.”).

189. Not surprisingly, there are no statements from Congress concerning which power it thought it was exercising in enacting the URAA. See PATRY, *supra* note 50, at 18 (“Congress is not, however, required to (and normally does not) specify which of its powers it is legislating under. . .”).

190. *Id.* at 18 n.63 (concerning § 1101, arguing that Congress knew it was legislating under the Commerce Clause rather the Copyright Clause).

191. See sources cited *supra* note 188.

market It would be foolish . . . to reject [the URAA] if we expect to compete fairly and effectively in the world market.¹⁹²

Legislative history concerning the anti-bootlegging provisions emphasized the need for uniform federal enforcement to stop bootlegging, and the need to aid the Customs Service in stopping imports of bootlegged recordings from abroad.¹⁹³ Members of Congress lauded the URAA generally for lowering trade barriers between nations, promoting job creation in this country, and protecting American economic interests.¹⁹⁴

The trade implications and international focus of the URAA are explicit in the URA.¹⁹⁵ The anti-bootlegging provisions implemented provisions of TRIPS, which resulted directly from international trade negotiations.¹⁹⁶ The Final Act memorializing the URA was entitled, "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations."¹⁹⁷ The preamble to TRIPS unambiguously identifies the agreement's provisions as first and foremost trade provisions; TRIPS resulted from "[m]embers, [d]esiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"¹⁹⁸

William F. Patry, counsel to the Subcommittee on Intellectual Property and Judicial Administration in 1994 and the primary drafter of the URAA intellectual property-related provisions,¹⁹⁹ maintains that Congress understood that the anti-bootlegging provisions were enacted under the Commerce Clause and not the Copyright Clause.²⁰⁰

192. 140 CONG. REC. H11441, H11458 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes).

193. Uruguay Round Agreements Act: Statement of Administrative Action, H.R. REP. NO. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4288.

194. See, e.g., 140 CONG. REC. H10957, H10963 (daily ed. Oct. 5, 1994) (statement of Rep. Dooley) (emphasizing exports, job creation, and improved market access benefits of URAA); *id.* at H10964 (statement of Rep. Clinger) (URAA will help exporters by opening markets overseas and stating "[t]his is an American jobs bill"); *id.* (statement of Rep. Fish) (praising URAA's intellectual property provisions protecting U.S. producers from losing billions of dollars in U.S. exports).

195. See URA, *supra* note 8, at 1143—44.

196. See *Martignon I*, 346 F. Supp. 2d 413, 418 (S.D.N.Y. 2004), vacated and remanded, 492 F.3d 140 (2d Cir. 2007) (discussing TRIPS and URAA).

197. URA, *supra* note 8, at 1143.

198. TRIPS Agreement, *supra* note 13, at 1197.

199. See PATRY, *supra* note 50 (unpaginated final page entitled "About the Author"); Symposium, *supra* note 68, at 1225 ("I was the one who drafted the bootleg statute . . .").

200. PATRY, *supra* note 50, at 10, 18 & n.63. Patry made this point shortly after enactment of the URAA as April 1995, when he wrote his book. This was long before the

The legislative drafters consciously made this decision because they doubted that an unfixed performance could qualify as a writing within the meaning of the Copyright Clause.²⁰¹

Patry notes that the language of § 1101 distinguishes between a copyright infringer and a bootlegger; it imposes liability upon a bootlegger “to the same extent as an infringer of copyright.”²⁰² This acknowledges that the drafters of § 1101 understood that violators of that section are not copyright infringers.²⁰³ Although not the focus of Patry’s argument, the placement of the anti-bootlegging criminal provisions in 18 U.S.C. § 2319A,²⁰⁴ separate from the provisions governing “Criminal Infringement of a Copyright” in 18 U.S.C. § 2319,²⁰⁵ might also suggest that the drafters of § 2319A understood that the anti-bootlegging provisions did not address copyright violations.

Patry also notes that the rights granted in § 1101 are in perpetuity rather than for limited times.²⁰⁶ The Copyright Clause limited times requirement necessarily prohibits the granting of perpetual rights.²⁰⁷ Failure to impose a time limit was not an oversight by experienced copyright experts.²⁰⁸ Instead, according to Patry, the drafters knew they were not drafting copyright legislation and had no constitutional obligation to impose a time limit.²⁰⁹ He rejects, on two grounds, the argument that placement of the provisions in Title 17 with other copyright provisions determines the power

Moghadam court found otherwise in 1999. See also Symposium, *supra* note 62, at 1231 (explaining “we viewed it as an exercise of commerce-clause power.”).

201. See Symposium, *supra* note 62, at 1232–33 (noting that drafters believed they could not legislate unfixed works under the Copyright Clause power); see also *infra* notes 218–273 (discussing whether live musical performances qualify as “writings” in the constitutional sense).

202. 17 U.S.C. § 1101(a) (2006).

203. PATRY, *supra* note 50, at 18–19 n.63.

204. 18 U.S.C. § 2319A (2006).

205. *Id.* § 2319.

206. PATRY, *supra* note 50, at 18.

207. U.S. CONST. art. I, § 8, cl. 8 (“[B]y securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”).

208. William F. Patry, counsel to the House Subcommittee on Intellectual Property and Judicial Administration at the time, drafted the anti-bootlegging provisions. PATRY, *supra* note 50, at 3 n.7; Symposium, *supra* note 62, at 1225 (“I was the one who drafted the bootleg statute . . .”); *id.* at 1233 (noting that Patry had thirteen years of full-time copyright law experience at the time he drafted the provisions). Mr. Patry is a well-known copyright scholar and author of a major copyright law treatise. See WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE (1994) (published in three volumes).

209. PATRY, *supra* note 50, at 18. Patry now agrees that as a policy matter, it was a mistake to create a perpetual right. Symposium, *supra* note 62, at 1234 (“In hindsight, I think that was a huge mistake. I do think that we had the power to do it.”).

source relied upon by Congress.²¹⁰ First, where Congress places legislation in the code is irrelevant; it has no legal significance.²¹¹ Second, Patry argues that congressional staffers initially proposed to include § 1101 in Title 15, with the trademark provisions (enacted under the commerce clause powers), but it was moved to Title 17 at the last moment to placate objections unrelated to the merits of the bill.²¹² He notes that placement in Title 17 was for “administrative convenience” and took advantage of definitions and remedies already included there.²¹³ Ultimately, however, the power Congress thought it was exercising is not determinative.²¹⁴

C. The Copyright Clause is Not a Proper Power Source for the Anti-Bootlegging Provisions

The Copyright Clause is not a proper power source for the anti-bootlegging provisions.²¹⁵ The provisions provide protection to performers for their unfixed, live musical performances in perpetuity.²¹⁶ This would pose two constitutional problems under the Copyright Clause. First, live musical performances are not “writings,” and second, the rights afforded by the anti-bootlegging provisions are not “for limited times.”²¹⁷

1. Live Musical Performances are not “Writings”

Many authorities consider live musical performances to lie outside the scope of even the most liberal interpretation of the word “writings”²¹⁸ contained in the Copyright Clause.²¹⁹ This was the

210. Symposium, *supra* note 62, at 1231–32.

211. *Id.* at 1231.

212. *Id.* at 1231–32.

213. PATRY, *supra* note 50, at 10–11, 18 n.63.

214. See *In re Trade-Mark Cases*, 100 U.S. 82, 93–94 (1879) (noting that advocates of trademark statute believed the Copyright Clause was authority of the statute; the Court, nevertheless, considered whether Commerce Clause could support the statute).

215. In *Martignon II*, the government conceded that Congress could not have enacted § 2319A under the Copyright Clause power. 492 F.3d 140, 144 (2d Cir. 2007).

216. PATRY, *supra* note 50, at 18 (noting no limitation on duration in civil anti-bootlegging provision).

217. See *infra* notes 218–287 and accompanying text.

218. The courts have applied a liberal interpretation to the term “writings” in the Copyright Clause. See *Goldstein v. California*, 412 U.S. 546, 561 (1973) (noting “writings” has not been construed in its narrow literal sense); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (holding photographs to be writings); *United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999) (noting broad interpretation of term “writings” “to include much more than writings in the literal sense, or the lay definition of the word”); see also Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307, 345–46 (2006) (noting copyright protection has been extended to photographs, computer programs,

considered view of the drafters of the provisions,²²⁰ as well as the position taken in *Nimmer on Copyright*²²¹ and *Martignon I*.²²² The *Moghadam* and *KISS I* courts raised doubts about whether live musical performances could qualify as writings, but they declined to decide the issue.²²³

Under this view, the word “writings,” although broad enough to include paintings,²²⁴ photographs,²²⁵ computer software on hard drives,²²⁶ sculptures²²⁷ and other three dimensional objects, at a minimum requires embodiment in a material form.²²⁸ In the language

fabric designs, belt buckles, and architectural structures; this implicitly recognizes these as “writings” in the constitutional sense).

219. See Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 196 n.98 (1956) (writing requires some material form).

220. See Symposium, *supra* note 62, at 1232 (noting Patry’s own view that writing must be fixed); *id.* at 1233 (noting that drafters consulted with administration, the Copyright Office, and constitutional law scholars and concluded that live performances were not writings).

221. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2] (Matthew Bender, ed., 2010) (stating “in order for a work to constitute a writing, it must be embodied in some tangible form” and noting that “the *performance* of a play, musical composition, or other work cannot in and of itself be regarded as a writing capable of copyright protection”); NIMMER & NIMMER, *supra* note 82, § 8E.05 (“Copyright Clause empowers Congress to extend copyright protection solely to works fixed in tangible form”; anti-bootlegging provisions could not have been enacted under the Copyright Clause); see also Nimmer, *supra* note 219, at 196 n.98 (writing requires some material form).

222. 346 F. Supp. 2d 413, 423–24 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007). The Second Circuit in *Martignon II* found it unnecessary to determine whether live musical performances could qualify as writings in the constitutional sense. 492 F.3d 140, 144–45 (2d Cir. 2007). It goes without saying that a lay person, if asked whether a live musical performance or a concert is a “writing,” would likely respond with a justifiably puzzled look and answer no. Admittedly, the same could be said of many things found to qualify as writings under the Constitution such as statues or even paintings.

223. *Moghadam*, 175 F.3d at 1274; *KISS I*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part on reconsideration*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005). *KISS I* raised the possibility that § 1101(a)(3) which prohibits distribution of bootlegged recordings might qualify as protection of a writing under the clause, because it regulates a fixed writing, albeit an unauthorized one. *Id.* at 832. This would not help save the subsections of § 1101 which apply to the fixation of the performance, 17 U.S.C. § 1101(a)(1) (2006), or transmission of the performance, 17 U.S.C. § 1101(a)(2). Section 1101(a)(3) would still be problematic because the Copyright Clause allows protection to authors for “their respective Writings”—not someone else’s unauthorized writings. See U.S. CONST. art. I, § 8, cl. 8.

224. See 17 U.S.C. § 102(a)(5) (2006).

225. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (finding photographs to be writings).

226. See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (holding that a computer program is a literary work subject to copyright protection and program embedded into electronic memory devices satisfy the fixation requirement).

227. See *Mazer v. Stein*, 347 U.S. 201, 208 (1954) (assuming statue qualifies as writing).

228. See 17 U.S.C. § 102(a); NIMMER & NIMMER, *supra* note 221, § 1.08[C][2] (“If the word ‘writings’ is to be given any meaning whatsoever, it must, at the very least, denote ‘some material form, capable of identification and having a more or less permanent endurance.’”) (quoting *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R., 382, 394)).

of the Copyright Act, the work must be “fixed in a tangible medium of expression.”²²⁹ The Supreme Court in *Goldstein v. California*,²³⁰ although confirming a broad interpretation of the word “writings” in the Copyright Clause, nonetheless required a “physical rendering.”²³¹

Goldstein on Copyright, however, takes a different position as to the meaning of “writings” in the Clause: “There is little doubt that the performances subject to protection are ‘writings’ in the constitutional sense for, beyond literalism, there is nothing in the mechanical act of fixation to distinguish writings from non-writings.”²³² Professor Jane Ginsburg also has suggested that live performances might qualify as writings.²³³ This very broad interpretation is also supported by the language of the Senate Report from the Committee on Patents in connection with the 1909 Copyright Act.²³⁴ The report noted the consistent, broad construction of “writings,” which had been interpreted to include “dramas, even if unwritten.”²³⁵ The report opined that in modern terms “writings” would be better expressed as “works.”²³⁶

The First Circuit, in *Columbia Broadcasting System, Inc. v. DeCosta*,²³⁷ supports Professor Goldstein’s view. *DeCosta* involved the copyrightability of a live character called “Paladin.”²³⁸ The court rejected Professor Nimmer’s view that a writing required “some identifiable, durable, material form,” instead concluding, without elaboration, that “we see no reason why Congress’s power is so limited.”²³⁹

229. 17 U.S.C. § 102(a).

230. 412 U.S. 546 (1973).

231. *Id.* at 561; *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (holding writings to mean literary productions of authors including “all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.”).

232. GOLDSTEIN, *supra* note 176; *accord* Brian Danitz, Comment, Martignon and KISS Catalog: *Can Live Performances Be Protected?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1190–91 (2005) (arguing that live musical performance may be a writing).

233. Symposium, *supra* note 62, at 1258 (“I am not sure, however, that the Constitution in fact requires tangibility.”).

234. S. REP. NO. 59-6187 at 4 (1907).

235. *Id.* at 4. *But cf. id.* (stating that writings include “all forms of record in which the thought of an author may be recorded and from which it may be read or reproduced”); *accord* Mazer v. Stein, 347 U.S. 201, 210 n.15 (1954) (quoting S. REP. NO. 59-6187 (1907)).

236. S. REP. NO. 59-6187, at 4 (1907).

237. 377 F.2d 315 (1st Cir. 1967).

238. *Id.* at 316. The character, “Paladin,” made live appearances at parades, rodeos, auctions and horse shows. *Id.*

239. *Id.* at 320. After expressly disagreeing with Professor Nimmer’s position, the court may have backtracked when it held that “the constitutional clause extends to any concrete, describable manifestation of intellectual creation” *Id.*

If the courts are to be guided by either the literal text of the Copyright Clause or what the Framers of the Constitution intended, then the narrower view of “writings” requiring embodiment in a material, physical form must be controlling. To the Framers, the word “writing” had three primary meanings as identified in the leading dictionary at the time: “1. A legal instrument; as, the *writings* of an estate. 2. A composure; a book 3. A written paper of any kind.”²⁴⁰ Each of these variants requires a written, tangible manifestation. The definition of “author” when coupled with “writings” reinforces this understanding that the Framers intended to allow protection of only tangible, fixed works. “Author” had several meanings, but the most appropriate when coupled with the word “writings” as used in the Copyright Clause are “[t]he first writer of any thing; distinct from the translator or compiler” and “[a] writer in general.”²⁴¹

The Constitutional Convention adopted the Copyright Clause in 1787 against a backdrop of several state copyright acts and a copyright resolution from the Continental Congress adopted in 1783.²⁴² The statutes varied in their specifics, but many protected authors of books and pamphlets²⁴³ and the Connecticut statute added protection for maps and charts.²⁴⁴ Other states provided protection to authors or copyright holders of “books, treatises, or other literary works.”²⁴⁵ Maryland provided protection to authors of “any book or books, writing or writings.”²⁴⁶ The congressional resolution spoke only

240. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (unpaginated). Johnson’s definition comports with Noah Webster’s definition of a “writing” as “2. Anything written or expressed in letters 3. A book; any written composition; a pamphlet 4. An inscription 5. *Writings*, plu. conveyances of lands; deeds; or any other official papers.” 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Johnson Reprint Corp. 1970) (1828). Note that Supreme Court Justices have cited both Johnson and Webster to ascertain the meaning of language of the Constitution. See *Kelo v. City of New London*, 545 U.S. 469, 508 (2005) (citing Johnson’s dictionary to define meaning of “use” in the Takings Clause); *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (quoting Johnson’s dictionary for meaning of word “limited” in the Copyright Clause); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346–47 (1999) (Scalia, J., concurring) (citing Webster and Johnson dictionaries for meaning of the word “enumeration” in the Constitution).

241. JOHNSON, *supra* note 240 (unpaginated) (emphasis omitted).

242. See Dallon, *supra* note 218, at 313–14 (discussing history of the Copyright Clause).

243. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 10 (Bulletin No. 3, Rev. 1973) [hereinafter COPYRIGHT ENACTMENTS] (Pennsylvania statute providing protection for author of any book or pamphlet); *id.* at 12 (South Carolina statute providing protection for authors of any book); *id.* at 14 (Virginia statute providing protection for author of any book or pamphlet).

244. *Id.* at 2 (Connecticut statute providing protection to author of any book, pamphlet, map, or chart).

245. *Id.* at 4, 8 (Massachusetts and New Hampshire statutes providing protection for authors of books, treatises, and other literary works).

246. *Id.* at 5 (Maryland statute).

of protection for authors or copyright owners of books.²⁴⁷ There is no indication that Congress intended the Copyright Clause to expand the scope of copyright protection already familiar at the time of the Constitution.

James Madison was a driving force behind the passage of the Continental Congress's resolution, Virginia's copyright statute, and ultimately the Copyright Clause itself.²⁴⁸ Madison, along with Charles Pinckney, first proposed the idea of including the Copyright Clause in the Constitution,²⁴⁹ and Madison belonged to the committee that drafted the final language of the Copyright Clause.²⁵⁰ The Framers intended that the Copyright Clause nationalize and simplify existing state copyright protections.²⁵¹ The First Congress, itself populated with many Framers, effected the Framers' intent when it enacted the Copyright Act of 1790.²⁵² That Act, similar to the various state acts, extended copyright protection to authors of "any map, chart, book or books."²⁵³ All of these items, of course, involve works fixed in a tangible form.

Copyright protection in later years extended beyond the works identified in the 1790 Act to include historical or other prints,²⁵⁴ musical compositions,²⁵⁵ dramatic compositions,²⁵⁶ photographs,²⁵⁷ paintings,²⁵⁸ three dimensional objects,²⁵⁹ motion pictures,²⁶⁰ sound recordings,²⁶¹ and architectural works,²⁶² which variously may or may

247. *Id.* at 1.

248. See Craig W. Dallan, *The Problem With Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 417–18, 420–21 (2004) (discussing and documenting Madison's role in enacting the resolution, the Virginia statute, and the Copyright Clause); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 325 (Max Farrand ed., Yale Univ. Press rev. ed., 1966) (1911) [hereinafter CONVENTION RECORDS] (recording Madison's proposed constitutional language), available at <http://oll.libertyfund.org/title/1786>.

249. CONVENTION RECORDS, *supra* note 248, at 325.

250. *Id.* at 473, 505, 508–09.

251. See THE FEDERALIST NO. 43, at 222 (James Madison) (George W. Carey & James McClellan eds., 2001) (stating that the Copyright Clause was necessary because the "states cannot separately make effectual provision" for copyright Protection); Dallan, *supra* note 248, at 420 & nn.349–50 (documenting proponents' comments concerning need for uniform copyright laws).

252. Act of May 31, 1790, ch. 15, 1 Stat. 124.

253. *Id.* § 1.

254. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

255. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

256. Act of Jul. 8, 1870, ch. 230, § 86, 16 Stat. 198.

257. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540.

258. Act of Jul. 8, 1870, ch. 230, § 86, 16 Stat. 198.

259. *Id.* (extending protection to statues, statuaries, and certain models and designs).

260. Act of Aug. 24, 1912, ch. 356, § 5, 37 Stat. 488.

261. Act of Oct. 15, 1971, § 3, 85 Stat. 391.

not have fit within the parameters of the Framers' intent. Copyright infringement of these works likely was not a problem in the early days of the United States as a result of practical barriers and difficulties of mass duplication of such works—if they existed at all.²⁶³ Likely, neither Congress nor the Framers had occasion to consider the reach of the Copyright Clause to most of those works. All are fixed in tangible mediums of expression and can be perceived, studied, and compared against purported copies. Unfixed live musical performances—as contrasted with recorded performances—however, can only be perceived at the moment of performance. Thereafter, they are only memories, which cannot be recalled on demand, replayed, or precisely re-experienced.

Congress has not always adhered to a consistent definition of the word “writings.”²⁶⁴ In defining the subject matter of copyright, an early draft of the Copyright Act of 1909 proposed protecting “all the works of an author.”²⁶⁵ The Senate Report explained, “Congress has always construed [writings] broadly It has, for instance, interpreted it as authorizing subject matter so remote from its popular significance as photographs, paintings, statuary, and dramas, even if unwritten.”²⁶⁶ The report concluded that “the word ‘writings’ would today in popular parlance be more nearly represented by the word ‘work.’”²⁶⁷ The final legislation, however, declined to substitute the word “work” and restored the word “writings” to the Copyright Act of 1909.²⁶⁸ In contrast, the Senate Committee on Foreign Relations' report in 1954 noted one objection to the Berne Convention was “that Berne's protection of ‘oral’ works, such as speeches, would have conflicted with Article I, Section 8 of the Constitution, which refers

262. Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, tit. VII, 104 Stat. 5089 (1990) (codified as amended in scattered sections of 17 U.S.C.).

263. See U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION, OTA-CIT-302 99 (1986) (discussing impact of changing technology on copyright law and noting that “technology changed through the 19th and early 20th centuries and provided new forms in which to fix expressions of information—photographs, lithographs, motion picture films”), available at <http://www.fas.org/ota/reports/8610.pdf>; see also Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989) (“Throughout its history, copyright law has had difficulty accommodating technological change The language of copyright statutes has been phrased in fact-specific language that has grown obsolete as new modes and mediums of copyrightable expression have developed.”).

264. See *infra* notes 265–270 and accompanying text.

265. S. REP. NO. 6187, at 4 (1907).

266. *Id.*

267. *Id.*

268. S. REP. NO. 1108, at 10 (1909); see also Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1978).

only to 'writings' as material to be protected."²⁶⁹ The Copyright Act of 1976 defines copyrightable subject matter as "works of authorship fixed in any tangible medium of expression."²⁷⁰

The seemingly unlimited view of the Copyright Clause that extends "writings" to include unfixed performances discounts the language of the Constitution and reads the word "writings" out of it.²⁷¹ This might be appropriate if there were evidence that in using the term "writings," the Framers meant something different than the term's ordinary meaning; however, no such evidence exists.²⁷² Rather, the understood meaning of the word, the state copyright acts, the impetus for the Copyright Clause, and the 1790 Copyright Act all suggest that the Framers did intend "writings" to mean fixed works.²⁷³

2. Anti-Bootlegging Protections Do Not Comport with the Limited Times Requirement

Even if live performances could be considered writings under the Copyright Clause, the anti-bootlegging provisions could not have been enacted under that power because they violate the "limited times" requirement.²⁷⁴ The provisions create protections in

269. S. EXEC. REP. NO. 5, 83d Cong., 2d Sess. 3, at 3 (1954) (Report of Committee on Foreign Relations concerning Universal Copyright Convention of 1952), available at <http://www.copyright.gov/history/studies/study4.pdf>.

270. 17 U.S.C. § 102 (2006).

271. Courts try to give meaning to the words of the Constitution and are reluctant to ignore them. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) ("When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, 'that no word was unnecessarily used, or needlessly added.'") (quoting *Wright v. United States*, 302 U.S. 583, 588 (1938)); *Wright v. United States*, 302 U.S. 583, 588 (1938) ("[E]very word must have its due force . . .") (quoting *Holmes v. Jennison*, 39 U.S. 540, 570—71 (1840)). If courts consciously deviate from the words of the Constitution, the judiciary jeopardizes its legitimacy as it assumes expansive, unbounded powers. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]he judiciary . . . will always be the least dangerous to the political rights of the Constitution . . . [I]ncontestably . . . the judiciary is beyond comparison the weakest of the three departments of power . . .").

272. See *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."); see also *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting *Sprague*).

273. See *Boumediene v. Bush*, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) ("The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people.").

274. U.S. CONST. art. I, § 8, cl. 8.

perpetuity.²⁷⁵ This contrasts copyright protections that necessarily expire after a prescribed period.²⁷⁶

There is an inherent time limitation on fixation of a live musical performance that would satisfy the constitutional requirement.²⁷⁷ A live musical performance cannot be fixed for the first time after the performance ends—it either happens when the performance is underway, or it never happens. No limited times problem would arise if the original unauthorized recording were the only subject of the anti-bootlegging provisions.²⁷⁸ However, in addition to the initial fixing of sounds or images, the anti-bootlegging provisions also address the reproduction, transmission, sale, and distribution of unauthorized recordings.²⁷⁹ All three anti-bootlegging cases concerned the unauthorized reproduction of previously recorded, unauthorized recordings of live musical performances or distribution and sale of such unauthorized reproductions.²⁸⁰ An unauthorized recording can be reproduced, transmitted, or distributed many years or even decades after the live musical performance.²⁸¹ In *KISS*, the recordings at issue were based on a 1976 *KISS* concert, and the reproduction and distribution of the allegedly unauthorized recording began in 2003.²⁸²

Some have suggested that the Copyright Act's time limitations in 17 U.S.C. § 302²⁸³ should be imported into the anti-bootlegging provisions to satisfy the limited times requirement.²⁸⁴ The language of the provisions does not support this approach, however, and the

275. See 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2006).

276. See 17 U.S.C. § 302 (2006) (copyright endures for life of author plus 70 years; for works made for hire, copyright endures for 95 years from publication or 120 years from creation).

277. See 2 HOWARD B. ABRAMS, LAW OF COPYRIGHT § 18:40 (2004) (noting that right to make a writing of a live musical performance is limited to the duration of the performance by its very definition).

278. See *id.* (noting that right to make a writing of a live musical performance is limited to the duration of the performance by its very definition).

279. 17 U.S.C. § 302(a); 18 U.S.C. § 2319A(a).

280. *Martignon II*, 492 F.3d 140, 143 (2d Cir. 2007) (reproducing, distributing, selling, offering to distribute and sell); *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999) (distributing, selling, and trafficking); *KISS I*, 350 F. Supp. 2d 83, 824–25, 828 (C.D. Cal. 2004) (sale and distribution of allegedly unauthorized copies).

281. See, e.g., *KISS I*, 350 F. Supp. 2d at 825.

282. *Id.*

283. 17 U.S.C. § 302.

284. See *KISS I*, 350 F. Supp. 2d at 832 (citing plaintiffs' brief); cf. Angela T. Howe, Note, *United States v. Martignon and KISS Catalog v. Passport International Products: The Anti-Bootlegging Statute and the Collision of International Intellectual Property Law and the United States Constitution*, 20 BERKLEY TECH. L.J. 829, 851 (2005) (suggesting amendment of the provisions to include limits of § 302).

provisions do not incorporate or reference § 302 or copyright terms.²⁸⁵ In short, the courts addressing the issue, leading authorities, and the drafters of the provisions²⁸⁶ all agree that the Copyright Clause does not empower Congress to enact the anti-bootlegging provisions.²⁸⁷

D. Anti-Bootlegging Provisions Satisfy the Commerce Clause

Under the Commerce Clause, Congress has the power “[t]o regulate Commerce with foreign nations, and among the several States.”²⁸⁸ In recent decades, the Supreme Court has construed the Commerce Clause power broadly. The Court has recognized three categories of permissible regulation under the Commerce Clause: “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.”²⁸⁹

Much of the conduct governed by the anti-bootlegging provisions falls directly within the parameters of the Commerce Clause. The provisions impose liability on one who “transmits” a live musical performance.²⁹⁰ To “transmit” a performance “is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”²⁹¹ A transmission frequently involves telephone communications, television or radio broadcasts, or Internet webcasts. These mechanisms are instrumentalities of interstate commerce,²⁹² and Congress may regulate the content transmitted by those

285. See *KISS I*, 350 F. Supp. 2d at 832–33 (refusing to rewrite the statute); *KISS II*, 405 F. Supp. 2d 1169, 1172 n.7 (C.D. Cal. 2005) (United States agreed the duration limits of § 302 are not incorporated, so Court assumes they are not).

286. See

287. See *NIMMER & NIMMER*, *supra* note 82, § 8E.05[A] (noting that, because “[t]he Copyright Clause empowers Congress to extend copyright protection solely to works fixed in tangible form,” anti-bootlegging provisions could not have been enacted under the Copyright Clause); see also *GOLDSTEIN*, *supra* note 176 (recognizing the limited times problem); *supra* notes 199–213 and accompanying text (discussing drafters’ views).

288. U.S. CONST. art. I, § 8, cl. 3.

289. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005); accord *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

290. 17 U.S.C. § 1101 (a)(2) (2006); 18 U.S.C. § 2319A(a)(2) (2006).

291. 17 U.S.C. § 101 (2006).

292. See, e.g., *United States v. Int’l Boxing Club of New York, Inc.*, 348 U.S. 236, 241 n.5 (1955) (noting that radio, television, and motion pictures are “engaged in interstate commerce”); *United States v. Corum*, 362 F.3d 489, 494–95 (8th Cir. 2004) (regulation of content of even intrastate telephone call within reach of commerce clause; telephones are instrumentalities of interstate commerce); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (Internet is an instrumentality of interstate commerce).

instrumentalities under the second category identified by *United States v. Lopez*²⁹³ and *Gonzales v. Raich*.²⁹⁴

The provisions also impose liability on anyone who sells or traffics in unauthorized copies of live musical performances.²⁹⁵ Often these transactions are squarely within foreign or interstate commerce.²⁹⁶ In many cases, bootleggers import copies into the United States.²⁹⁷ Many instances involve sales or shipments across state lines.²⁹⁸ Others involve recordings of performers who have traveled across state lines to perform.²⁹⁹ Other examples involve unauthorized recordings made in one state being transported and copied in a different state.³⁰⁰ Many involve sales made by means of instrumentalities or channels of interstate commerce such as the mail, telephone, or the Internet.³⁰¹ Congress has the power to regulate all this conduct, because it occurs “in,” or uses instrumentalities of, interstate commerce.³⁰²

Although many situations covered by the provisions will involve recordings in foreign or interstate commerce, the provisions are not specifically limited to cross-border commerce.³⁰³ The provisions do not contain a “jurisdictional hook” limiting their application to those activities or conduct in foreign or interstate commerce.³⁰⁴ For example, the provisions would cover a situation

293. 514 U.S. 549 (1995).

294. 545 U.S. 1 (2005).

295. 17 U.S.C. § 1101 (a)(3); 18 U.S.C. § 2319A(a)(3).

296. For example, the multiparty sting operation leading to the prosecution of Ali Moghadam involved seventeen individuals who conspired to manufacture, import, and distribute bootleg CDs. See Press Release, Recording Industry Association of America, Defendants in Largest Bootleg Case Sentenced to Prison, Fines and Community Service (Dec. 17, 1997), available at <http://www.riaa.com/newsitem.php?id=31268A2F-76EF-DDB7-B50F-0EA840994D BA>.

297. *Id.*

298. See, e.g., *Dowling v. United States*, 473 U.S. 207, 209 n.1 (1985) (noting shipments of unauthorized recordings of Elvis Presley performances from California to Maryland in interstate commerce); *id.* at 211 n.3 (noting some of the bootlegs at issue were recorded by a fan at a concert in Pittsburgh).

299. See, e.g., George Strait Calendar of Events, <http://www.georgestrait.com/calendar.asp> (last visited Dec. 1, 2010) (noting as of December 2010 that George Strait was scheduled to do concerts in Ohio, Illinois, Texas and New Mexico in March of 2011).

300. See *Kiss I*, 350 F. Supp. 2d 823, 825 (C.D. Cal. 2004) (involving California defendants allegedly distributing and selling copies of an unauthorized recording of New Jersey concert), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

301. See, e.g., *Martignon I*, 346 F. Supp. 2d 413, 417 (S.D.N.Y. 2004) (noting that defendant operated a store in Manhattan, a catalog service, and an Internet site), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

302. See *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (stating that Congress has the power to regulate channels and instrumentalities of interstate commerce).

303. See 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2006).

304. See 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

where electronic wires through a speaker system wholly limited to a single building or campus transmit a live performance or where bootleggers made or sold unauthorized copies of a local band performance only in the same locality.³⁰⁵ Although not a jurisdictional hook, the criminal provisions of § 2319A do contain a commerce element,³⁰⁶ requiring that an offender act “knowingly and for purposes of commercial advantage or private financial gain.”³⁰⁷

Neither the Commerce Clause nor the cases interpreting it require a jurisdictional hook.³⁰⁸ In situations where the regulated conduct is not directly “in” foreign or interstate commerce or does not use instrumentalities of interstate commerce, the conduct must qualify for legislative regulation under the third Commerce Clause category, under the “substantial effects test.”³⁰⁹ That category applies to even purely local activities that have a substantial effect on interstate commerce.³¹⁰

Under the substantial effects test, courts look to whether the regulated activity, viewed in the aggregate, substantially affects interstate commerce.³¹¹ Where individual instances have only a *de minimis* effect upon interstate commerce, Congress may still regulate them if, when considered as a class of activities, the impact would be substantial.³¹² The Supreme Court, in *Gonzales v. Raich*, stated that “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”³¹³ *Gonzales v. Raich*, building on *Wickard v. Filburn*, stands for the

305. See 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

306. See *United States v. Morrison*, 529 U.S. 598, 611 (2000) (stating that cases passing the substantial effects test have all involved some sort of economic endeavor).

307. 18 U.S.C. § 2319A(a).

308. *United States v. Peters*, 403 F.3d 1263, 1273 (11th Cir. 2005) (“[W]hen the challenged statute regulates activity that is plainly economic in nature, no jurisdictional hook or congressional findings may be needed to demonstrate that Congress properly exercised its commerce power.”); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (“[T]he absence of an express jurisdictional element is not fatal to a statute’s constitutionality under the Commerce Clause.”); see *Sabri v. United States*, 541 U.S. 600, 605 (2004) (stating in the context of the Spending Clause and the Necessary and Proper Clause that “[w]e simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook”); cf. *United States v. Lopez*, 514 U.S. 549, 559 (1995) (requiring analysis of whether intrastate activity substantially affects interstate commerce).

309. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 67 (2005) (Thomas, J., dissenting) (referring to the test applied by the majority as the “substantial effects” test); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (criticizing the “substantial effects” test); *United States v. Crenshaw*, 359 F.3d 977, 985 (8th Cir. 2004) (applying the “substantial effects” test); *United States v. Al-Zubaidy*, 283 F.3d 804, 811 (6th Cir. 2002) (discussing the “substantial effects” test).

310. *Raich*, 545 U.S. at 17; *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

311. *Lopez*, 514 U.S. at 561.

312. *Raich*, 545 U.S. at 17.

313. *Id.*

proposition that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”³¹⁴ Moreover, the test is not whether the activity in fact substantially affects interstate commerce, “but only whether a ‘rational basis’ exists for so concluding.”³¹⁵ According to the majority in *Raich*, “[t]hat the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”³¹⁶

Under these Commerce Clause standards, the anti-bootlegging provisions satisfy the substantial effects test. The URAA did not contain any legislative findings concerning the impact of bootlegging upon interstate commerce, but Congress need not make such findings.³¹⁷ The legislative history of the URAA and the anti-bootlegging provisions emphasized their commercial nature and, in particular, the relation to foreign commerce.³¹⁸ Congress understood that the URA were international trade agreements governing the United States’ commerce with, at the time, 110 other nations.³¹⁹ Anti-bootlegging protection was a part of those agreements, and the URAA implemented them.³²⁰ Representative Hughes, the chairman of House committee considering the intellectual property provisions of the URAA, stated that the anti-bootlegging provisions would “basically protect our country.”³²¹ He illustrated the benefits of the provisions by noting that reported bootlegged recordings of President Clinton’s “jam session” in Prague—being sold by mail order from New York—would fall within reach of the provisions.³²²

General Counsel to the United States Trade Representative, Ira S. Shapiro, emphasized in his testimony before Congress that international trade in bootleg sound recordings posed a significant problem not effectively addressed by existing state laws: “This trade has become more significant as bootleggers have become more

314. *Raich*, 545 U.S. at 18 (citing *Wickard*, 317 U.S. at 118—19).

315. *Id.* at 19.

316. *Id.* at 22.

317. *Id.*, at 21 (“[T]he absence of particularized findings does not call into question Congress’ authority to legislate.”); *Perez v. United States*, 402 U.S. 146, 156 (1971) (stating that Congress need not make “particularized findings in order to legislate.”).

318. See *infra* notes 319—326 and accompanying text.

319. See S. REP. NO. 103—412, at 5 (1994).

320. See H.R. REP. NO. 103—316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4288.

321. 140 CONG. REC. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of William J. Hughes, Chairman, Intellectual Property and Judicial Administration Subcommittee).

322. *Id.* at H11458.

sophisticated and also reflects the international character of performance tours. The sound recording industry estimates that trade in bootleg recordings amounts to billions of dollars a year.”³²³ Mr. Shapiro identified enforcement against imported bootleg products as the “key objective” of the anti-bootlegging provisions.³²⁴ Jason S. Berman, Chairman and CEO of the RIAA, further testified that bootlegs were a billion dollar industry worldwide, and he provided examples of American performers whose live music performances were recorded by bootleggers, copied abroad, and sold.³²⁵ Berman noted that bootlegging was an enormous commercial enterprise.³²⁶ Of course, the reach of the URAA extends beyond imported bootlegs and provides protections to bootlegs made in the United States whether for export or domestic use.³²⁷ By extending protection to foreign nationals performing in the United States, the United States could obtain reciprocal protection for American performers abroad.³²⁸

Even setting aside the international trade aspects of the URAA, protection for American performers in the United States easily satisfies the substantial effects test.³²⁹ Creating, transmitting, selling, or trafficking in unauthorized recordings, even if done on a local level, has the potential to impact authorized interstate sales of recordings and concert tickets.³³⁰ The public may choose to substitute the bootleg recording of a song for an authorized commercial recording.³³¹ The public also may choose to forego a performance with the thought of later obtaining a recording of it.³³² As the *Moghadam* court recognized, “[b]ootleggers depress the legitimate markets because demand is satisfied through unauthorized channels.”³³³ The markets

323. *Hearings, supra* note 67, at 142 (statement of Ira S. Shapiro, General Counsel, Office of the United States Trade Representative).

324. *Id.* at 143.

325. *Id.* at 259.

326. *Id.*

327. *See* 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2006).

328. *See* PATRY, *supra* note 50, at 1228—30 (discussing the need to convince treaty partners to take action against bootleggers).

329. *See* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (discussing the “substantial effects” test).

330. Jerry D. Brown, *U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy for Bootleggers*, 16 LOY. L.A. ENT. L.J. 1, 29 (1995) (noting lost royalties because “when a recording of a live performance is released contemporaneously with a concert tour, many fans will choose to buy the less expensive, longer-lasting recording over attending the concert.”).

331. *Id.* Some bootleggers contest this premise. *See* CLINTON HEYLIN, *BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY* 7 (1995) (“The notion that a bootleg exists in direct competition to the product peddled by legitimate record companies is absurd.”).

332. *See* Brown, *supra* note 330, at 29 (noting that some people will choose to get a bootleg recording rather than attend the actual concert).

333. *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999).

for popular music groups' songs and performances involve interstate commerce.³³⁴ Not surprisingly, the *Moghadam*, *KISS*, and *Martignon II* courts agreed that the anti-bootlegging provisions would lie within the Commerce Clause power unless something in the Copyright Clause limits that power.³³⁵

E. Anti-Bootlegging Provisions Do Not Pose A Conflict With the Copyright Clause

The fundamental question posed by the cases challenging the anti-bootlegging provisions is whether limitations exist in the Copyright Clause that also limit Congress's power under the Commerce Clause.³³⁶ Nothing in the text of the Clause, its purpose, or Supreme Court precedent suggests that it operates as a limitation on Congress's other powers.³³⁷

1. Text and Purpose of the Copyright Clause: A Grant of Authority

The text of the Copyright Clause on its face is a limited grant of power and not a limitation on other powers: "The Congress shall have Power . . . [8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." ³³⁸ This grant of authority does not purport to limit other rights.³³⁹ It does, however, imply that the Framers believed that the other powers given under the Constitution did not include the right for Congress to protect copyrights and patents.³⁴⁰

The original purpose and meaning of the Copyright Clause suggests that the Framers included it to expand Congress's power, not to impose limitations on other powers granted to Congress in the

334. See *id.*

335. See *Martignon II*, 492 F.3d 140, 152–53 (2d Cir. 2007) (holding § 2319A to be within Commerce Clause authority); *Moghadam*, 175 F.3d at 1276 ("Section 2319A clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations."); *KISS II*, 405 F. Supp. 2d 1169, 1173 (C.D. Cal. 2005) (agreeing with *Moghadam*, and holding that Commerce Clause grants power for civil anti-bootlegging provision); *KISS I*, 350 F. Supp. 2d 823, 833–34 (C.D. Cal. 2004) ("[T]hat copyright-like protection for live performances touches on commerce is a proposition that should be without serious dispute"), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

336. See, e.g., *Martignon II*, 492 F.3d at 144.

337. See *infra* Part III.E.1–3.

338. U.S. CONST. art. I, § 8, cl. 8.

339. See *id.*

340. See *infra* notes 341–350 and accompanying text.

Constitution.³⁴¹ According to James Madison, one criticism of the government under the Articles of Confederation prompting the Constitutional Convention was the “want of uniformity in the laws concerning naturalization & literary property.”³⁴²

During the ratification debates, supporters of the Constitution argued that the Copyright Clause was necessary because the individual states lacked the capacity to effectively protect literary property.³⁴³ In the only reference to the Copyright Clause in *The Federalist Papers*, Madison argued that “[t]he utility of this power will scarcely be questioned” and “[t]he states cannot separately make effectual provision for either [copyrights or patents].”³⁴⁴ Others echoed this theme during the ratification debates. In the debates before the Pennsylvania Convention, prominent founder and later Governor of Pennsylvania Thomas McKean argued, “the power of securing to authors and inventors the exclusive right to their writings and discoveries could only with effect be exercised by Congress.”³⁴⁵ Well-known founder, member of the Constitutional Convention, and proponent of the Constitution, Roger Sherman, wrote that the power “for promoting the progress of science” was necessary because it “could not be effectually provided for by the particular states.”³⁴⁶ Prominent

341. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1147 (photo. reprint 1968) (1833), available at http://www.utulsa.edu/law/classes/rice/Constitutional/Storey/00_story_voll_intro.html (follow “Power to Promote Science and Useful Arts” hyperlink) (discussing the Copyright Clause and stating that “[i]t was beneficial to all parties, that the national government should possess this power”).

342. James Madison, *Observations by J.M.*, 2 MADISON PAPERS 109 and 12 MADISON PAPERS 53 (1787), reprinted in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786—1870, at 128 (1905).

343. See *infra* notes 344—350 and accompanying text.

344. THE FEDERALIST NO. 43, at 222 (James Madison) (George W. Carey & James McClellan eds., 2001). The full quotation from *The Federalist* is:

The utility of this power will scarcely be questioned. The copy-right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most them have anticipated the decision of this point, by laws passed at the instance of congress.

Id.

345. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen ed., 1976). McKean went on to explain:

For, sir, the laws of the respective states could only operate within their respective boundaries, and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular, and to the cause of science in general.

Id.

346. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 525 (Merrill Jensen ed., 1978).

North Carolina lawyer and later Supreme Court Justice James Iredell wrote that the Copyright Clause did not pose a threat to liberty of the press³⁴⁷ and inferred that its purpose was to allow the federal government “to afford . . . encouragement to genius.”³⁴⁸ Iredell continued that “[i]f this provision had not been made in the new Constitution, no author could have enjoyed such an advantage in all the United States, unless a similar law constantly subsisted in each of the States separately.”³⁴⁹ There was no suggestion in the language of the Clause or by the Framers or Ratifiers of the Constitution that the clause was designed to limit other constitutional powers.³⁵⁰

2. Supreme Court Precedent

Courts and scholars have pointed to *Graham v. John Deere Co.*,³⁵¹ a patent case, for the proposition that the Copyright Clause imposes limitations upon Congress’s powers.³⁵² In *Graham*, a patent case, the Supreme Court stated that Article I, Section 8, Clause 8 “is both a grant of power and a limitation.”³⁵³ The Supreme Court reaffirmed this statement in *Eldred v. Ashcroft*, a copyright case.³⁵⁴ Building upon the statement in *Graham*, the defendants in *Martignon* and *KISS I* argued that the limitations imposed by the Copyright Clause apply not only to the power to legislate under the Copyright Clause, but also externally to other powers granted under Section 8, including the Commerce Clause.³⁵⁵

Although *Graham* and *Eldred* recognized limitations in the Patent and Copyright Clause, both cases considered the exercise of Congress’s power under Article I, Section 8, Clause 8 itself, not the

347. 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382 (John P. Kaminski & Gaspare J. Saladino, eds., 1986).

348. *Id.* at 380 & 386 n.a (stating that Mason’s objections could not have referred to this clause: “He is a gentleman of too much taste and knowledge himself to wish to have our government established upon such principles of barbarism as to be able to afford no encouragement to genius.”).

349. *Id.* at 382 & 386 n.c.

350. See U.S. CONST. art. I, § 8, cl. 8.

351. *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

352. See *Martignon II*, 492 F.3d at 145 (discussing *Graham*, 383 U.S. 1); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006) (arguing that Progress Clause of Intellectual Property Clause contains limitations on Congress’s power to legislate in the areas of copyrights and patents); Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Elder v. Ashcroft*, 44 IDEA 331 (2004) (arguing that to promote the progress of science clause serves to limit Congress’s power).

353. 383 U.S. at 5.

354. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham*, 383 U.S. at 5).

355. *Martignon II*, 492 F.3d 140, 145 (2d Cir. 2007); *KISS I*, 350 F. Supp. 2d 823, 831 (C.D. Cal 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

Commerce Clause or another constitutional power. *Graham* involved consolidated patent infringement actions.³⁵⁶ Those cases involved the validity of certain patents under the Patent Act.³⁵⁷ The Court exclusively focused on Congress's patent power under Article I, Section 8, Clause 8 and no other constitutional power.³⁵⁸ The Court referenced and discussed the "qualified authority" under the clause.³⁵⁹ Similarly, *Eldred* considered whether Congress acted within its constitutional authority when it enacted the Copyright Term Extension Act of 1998.³⁶⁰ The Court focused only on Congress's authority under the Copyright Clause and no other Article I, Section 8 constitutional power.³⁶¹ The Supreme Court has never held that the Copyright Clause restricts anything but the exercise of the Copyright Clause power itself.

The *Trade-Mark Cases*³⁶² and *Heart of Atlanta Motel, Inc. v. United States*³⁶³ both support the view that a statute not properly enacted under one power source in Article I, Section 8 could nonetheless be duly enacted under a different power source. The *Trade-Mark Cases* struck down a criminal trademark statute as not supported by the Copyright (or Patent) Clause or the Commerce Clause.³⁶⁴ The Court held that trademarks did not require originality and therefore did not necessarily qualify as writings of authors.³⁶⁵ The Court nonetheless evaluated whether Congress had power under the Commerce Clause to enact the legislation.³⁶⁶

Heart of Atlanta Motel centered on the constitutionality of Title II of the Civil Rights Act of 1964, which prohibited racial discrimination in public accommodations.³⁶⁷ Similar provisions had been found unconstitutional, as beyond the power of Congress, in the *Civil Rights Cases*.³⁶⁸ The holding in the *Civil Rights Cases* focused

356. 383 U.S. at 3—4.

357. *Id.* at 3.

358. *Id.* at 5.

359. *Graham*, 383 U.S. at 5.

360. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

361. *Id.* at 192—93. In a separate issue, the Court also considered whether the Copyright Term Extension Act violated the First Amendment. *See id.* at 218—21.

362. *In re Trade-Mark Cases*, 100 U.S. 82, 93—94 (1879).

363. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *In re Trade-Mark Cases*, 100 U.S. at 93—94.

364. 100 U.S. at 93—95.

365. *Id.* at 94.

366. *Id.* at 95—96. The Court concluded that under the then-prevailing view of the Commerce Clause, Congress did not have the authority to enact the trademark statute at issue. *Id.* at 97—98.

367. 379 U.S. at 22 (1964).

368. *The Civil Rights Cases*, 109 U.S. 3 (1883).

exclusively on Congress's power under the Thirteenth and Fourteenth Amendments; it did not consider the Commerce Clause power.³⁶⁹ In *Heart of Atlanta Motel*, however, the Court held that even though the provisions of Title II might not be enacted under either the Thirteenth or Fourteenth Amendments, as held in the *Civil Rights Cases*, they nonetheless were a valid exercise of the Commerce Clause power.³⁷⁰

Railway Labor Executives' Ass'n v. Gibbons supports the proposition that other Article I, Section 8 clauses do limit the Commerce Clause power.³⁷¹ In *Railway Labor*, the Court struck down legislation requiring a bankrupt railroad to pay large sums of money to its displaced employees, because it violated the uniformity requirement of the Bankruptcy Clause (Article I, Section 8, Clause 4).³⁷² The case turned on the constitutionality of the Rock Island Railroad Transition and Employee Assistance Act (RITA).³⁷³ The Court found that the Act was enacted by Congress under the authority of the Bankruptcy Clause and not the Commerce Clause.³⁷⁴ As a bankruptcy law, it fell within the scope of the Bankruptcy Clause, which empowers Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."³⁷⁵ The Court reasoned that if Congress could impose non-uniform bankruptcy laws under the Commerce Clause, it would render the Bankruptcy Clause limitations meaningless.³⁷⁶ Because RITA lacked the requisite uniformity, the Court deemed it unconstitutional.³⁷⁷ Congress could not enact non-uniform bankruptcy laws pursuant to the Commerce Clause, because to do so "would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."³⁷⁸ The Court read the history of the Bankruptcy Clause to indicate the Framers' intent that Congress should not have the power to enact private bankruptcy laws.³⁷⁹ Admittedly, then, *Railway Labor*

369. *Id.* at 25 ("[N]o countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void . . .").

370. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250—51, 261—62.

371. *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982).

372. *Id.* at 467—71.

373. 45 U.S.C.A. §§1001—1007. 1009—1012, 1014, 1016—1018 (2006).

374. *Ry. Labor Execs.' Ass'n*, 455 U.S. at 465—66 (concluding that "RITA is an exercise of Congress' power under the Bankruptcy Clause.").

375. U.S. CONST. art I, § 8, cl. 4.

376. *Ry. Labor Execs.' Ass'n*, 455 U.S. at 473.

377. *Id.*

378. *Id.* at 469.

379. *Id.* at 471—72.

demonstrates that the Commerce Clause power may, in some cases, be limited in the context of other constitutional grants and limitations.³⁸⁰

3. Application of Copyright Clause to Anti-Bootlegging Provisions

The *Moghadam* court considered whether the Copyright Clause might limit the Commerce Clause.³⁸¹ *Moghadam*, interpreting *Railway Labor*, adopted a test that focused on whether allowing the legislation under the Commerce Clause would be fundamentally inconsistent with a limitation imposed by a separate provision of the Constitution.³⁸² The court found that extending “copyright-like” protection to live musical performances was not fundamentally inconsistent with the Copyright Clause’s fixation requirement.³⁸³ The court declined to consider whether the provision might be fundamentally inconsistent with the limited times requirement, because that issue had not been properly raised on appeal.³⁸⁴

In contrast, the *Martignon I* court found that under *Railway Labor*, § 2319A was unconstitutional as a “copyright-like” law, addressing the purposes of the Copyright Clause, and therefore directly limited by the Copyright Clause.³⁸⁵ In the court’s view, Congress may not enact a “copyright-like” statute under any authority other than the Copyright Clause.³⁸⁶ Because the anti-bootlegging statute violated both the fixation and limited duration requirements, it was unconstitutional.³⁸⁷ Additionally, the court found that even if Congress could enact “copyright-like” legislation under the Commerce Clause, it could not enact the anti-bootlegging statute, as it was fundamentally inconsistent with the fixation and durational limitations imposed by the Copyright Clause.³⁸⁸ The *KISS I* court agreed that the anti-bootlegging statute (in that case, the civil

380. *Id.* at 473; see *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1138 (N.D. Cal. 2002) (“[A]s broad as Congress’ Commerce Power is, Congress may not use that power in such a way as to override or circumvent another constitutional restraint.”).

381. *United States v. Moghadam*, 175 F.3d 1269, 1281 (11th Cir. 1999).

382. *Id.* at 1280 & n.12; see also *Martignon I*, 346 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007) (applying fundamentally inconsistent test).

383. *Moghadam*, 175 F.3d at 1281.

384. *Id.* at 1281 & n.15.

385. *Martignon I*, 346 F. Supp. 2d at 426–27 (stating that “the anti-bootlegging statute falls squarely within the purview of the Copyright Clause, and therefore, Congress is limited by [its] restrictions”).

386. *Id.* at 424–25 (“Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when that separate grant provides proper authority.”).

387. *Id.* at 428.

388. *Id.*

provision, § 1101) was subject to—and violated—the limited times requirement of the Copyright Clause.³⁸⁹

Although *Railway Labor* did hold the Bankruptcy Clause imposed limits that could not be circumvented by the Commerce Clause, *Martignon I* read *Railway Labor* too broadly. Fundamental to the *Railway Labor* holding and analysis was the finding that RITA³⁹⁰ was an exercise of Congress's power under the Bankruptcy Clause.³⁹¹ The Court carefully documented that RITA was a bankruptcy law, because it governed the relationship between a bankrupt railroad and its creditors and altered the relationship among claimants to the bankrupt estate's remaining assets.³⁹² Only then did the Court hold the limitations of the Bankruptcy Clause applicable to RITA.³⁹³ As the Second Circuit recognized in *Martignon II*, applying *Railway Labor*, the courts first must determine whether the anti-bootlegging provisions are copyright laws.³⁹⁴ Only then do the limitations of the Copyright Clause apply.³⁹⁵

To fall within the purview of the Copyright Clause, a law must secure to authors exclusive rights to their writings.³⁹⁶ As noted above, live musical performances should not qualify as “writings” under the Constitution which would free them from the limitations of the Copyright Clause.³⁹⁷ A second line of analysis focuses on whether the provisions “secure” rights to authors.³⁹⁸ The Second Circuit, in *Martignon II*, held that the criminal provision, at least, did not.³⁹⁹ The court cited the seminal Supreme Court decision, *Wheaton v. Peters*,⁴⁰⁰ and held that “securing rights” in the context of the Clause means to create, bestow or allocate property rights in expression, not merely to add protection for preexisting rights.⁴⁰¹

389. *KISS I*, 350 F. Supp. 2d 823, 836–37 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

390. 45 U.S.C.A. §§1001–1007, 1009–1012, 1014, 1016–1018 (2006).

391. *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982).

392. *Id.* at 467.

393. *Id.* at 468–69.

394. *Martignon II*, 492 F.3d 140, 149 (2d Cir. 2007).

395. *Id.* at 149–50.

396. The focus of this Article is copyright protection or protection of expression, not patent protection, which is also within the scope of the clause. In the case of patents, a patent law secures to inventors the exclusive rights to their discoveries. U.S. CONST. art. I, § 8, cl. 8; *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

397. See *supra* notes 218–223 and accompanying text.

398. *Martignon II*, 492 F.3d at 150.

399. *Id.* at 150–51.

400. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 660–61 (1834).

401. *Martignon II*, 492 F.3d at 150. The meaning of the word “securing” in the clause is still debated. See Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of*

The *Martignon II* court's interpretation of "securing" finds support in the historical record.⁴⁰² At the Constitutional Convention, James Madison and Charles Pinckney each proposed their respective versions of what later became the Copyright Clause.⁴⁰³ Madison proposed that Congress have the power "[t]o secure to literary authors their copyrights for a limited time,"⁴⁰⁴ while Pinckney proposed the power "[t]o secure to Authors exclusive rights for a certain time."⁴⁰⁵ These proposals were referred to committee and ultimately became Article I, Section 8, Clause 8 of the Constitution.⁴⁰⁶ The construction, "to secure . . . to authors" their "rights," may suggest that "secure" was intended to mean "create," "bestow," or "allocate" rather than "protect."⁴⁰⁷

The 1790 Copyright Act, the first copyright law following ratification of the Constitution, used "securing" in the same sense as the Constitution: "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."⁴⁰⁸ This language was patterned after the famous English copyright statute, the Statute of Anne of 1710, entitled "An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."⁴⁰⁹ Although "vesting" appears in the title, "secured"

Common Law Copyright in America and the Modern Interpretation of the Copyright Power, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 324—40 (2005—06).

402. The leading English dictionary of the day had several meanings for the phrase "to secure" including: "To make certain; to put out of hazard; to ascertain;" "To protect; to make safe;" "To insure;" and "To make fast." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS, AND AUTHORIZED BY THE NAMES OF THE WRITERS IN WHOSE WORKS THEY ARE FOUND n589 (6th ed. 1785). These meanings are not helpful to resolving the issue. They could apply to preexisting rights or newly creating rights.

403. See Dallon, *supra* note 248 at 422.

404. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 325 (Max Farrand, ed., 1911).

405. *Id.*

406. See *id.* at 505, 508—09; Dallon, *supra* note 248, at 422.

407. If "to protect" were the meaning intended, we would expect, "to secure for authors their rights" or, to address directly the language of the Copyright Clause, "by securing for limited Times for Authors and Inventors the exclusive Right." See Dallon, *supra* note 248 at 424—25 (discussing Madison's view that copyright was a grant of a privilege).

408. Copyright Act of 1790, ch. 15, 1 Stat. 124, 124.

409. Statute of Anne, 8 Ann., 1710, c. 19 (Eng.). Interestingly, "securing" had been used in the title of the original bill that became the Statute of Anne, but the new language, including the word "vesting," was substituted. See Walterscheid, *supra* note 401, at 325; *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 218.

appears in the body of the statute.⁴¹⁰ While the 1790 Act, following the language of the Constitution, substituted the word “securing” for “vesting,” everything else suggests that the same meaning was intended as in the Statute of Anne.⁴¹¹ That the word “securing” was used synonymously with “vesting” finds support in the 1784 Pennsylvania Copyright Statute, which used “vesting” in the title of the act, and “to secure” in the body.⁴¹² “Vesting” in this context is more consistent with the meaning of creating, bestowing or allocating rights rather than protecting preexisting rights. In the leading dictionary of the period, “to vest” was defined as “[t]o make possessor of,” “to invest with,” or “[t]o place in possession.”⁴¹³

The Continental Congress and numerous state copyright laws, enacted between 1783 and 1786, used derivatives of the word “secure,” but their uses of the term were ambiguous or support different interpretations.⁴¹⁴ The 1785 Virginia Copyright Statute, which shares many elements with the Copyright Clause, supports the view of creation of a property right⁴¹⁵: “AN ACT securing to the authors of literary works an exclusive property therein for a limited time.”⁴¹⁶ The Connecticut statute, on the other hand, suggests a meaning of protecting existing rights or authors themselves. It stated “that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their works.”⁴¹⁷ The Massachusetts statute speaks strongly of preexisting rights: “As the principal encouragement such persons can have . . . must exist in the legal security of the fruits of their study and industry . . . and as such

410. It stated, “unless some Provision be made, whereby the Property in every such Book, as is intended by this Act to be secured to the Proprietor or Proprietors thereof . . .” Statute of Anne, 8 Ann., 1710, c. 19 (Eng.).

411. See 1 Stat. at 124.

412. In the title it states: “AN ACT for the encouragement and promotion of learning by vesting a right to the copies of printed books in the authors or purchasers of such copies . . .” It then recites, “Whereas the honorable the Congress . . . have recommended to the several States to secure to the authors or publishers of any new books . . .” COPYRIGHT ENACTMENTS, *supra* note 243, at 10.

413. JOHNSON, *supra* note 402, at n933.

414. See COPYRIGHT ENACTMENTS, *supra* note 243, at 1–21 (listing texts of various state copyright enactments).

415. Significantly, James Madison was integrally involved with the drafting and adoption of both the Virginia copyright statute and the Copyright Clause. See Dallon, *supra* note 248, at 421–23 (documenting Madison’s close involvement).

416. COPYRIGHT ENACTMENTS, *supra* note 243, at 14 (giving the text of Virginia statute). If authors already had exclusive property then why did they need the statute?

417. See *id.* at 1 (giving the text of Connecticut statute); *accord id.* at 17 (giving the similar language of the Georgia statute); *id.* at 19 (giving the similar language of the New York statute).

security is one of the natural rights of all men”⁴¹⁸ The 1783 resolution passed by the Continental Congress concerning copyright law sheds little light on the meaning of “secure.”⁴¹⁹ It “recommended to the several States, to secure to the authors or publishers of any new books . . . and to their executors, administrators and assigns, the copy right of such books” and “to secure to the said authors” if they survived the first copyright term another (second) copyright term.⁴²⁰

The true meaning of “by securing” is now a centuries’ old debate,⁴²¹ decided rightly or wrongly in 1834 by the Supreme Court in *Wheaton v. Peters*.⁴²² In *Wheaton*, the Supreme Court held that the word “secure” as used in the Copyright Clause “could not mean the protection of an acknowledged legal right,” but instead referenced a future right.⁴²³ Central to this finding was that the Copyright Clause also refers to patents—“by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries”—and no one claimed that patents were preexisting rights.⁴²⁴

The import of this understanding of “securing” is that § 2319A, because it does not create, bestow, or allocate any exclusive rights to authors in their expression, cannot qualify as a copyright law under the constitutional grant. As a criminal statute, it creates a right in the government to sanction offenders. Authors (in this context, performers) do not have rights under § 2319A that they can enforce against an offender. The conclusion then, and that which *Martignon II* drew, is that § 2319A is not a copyright law and therefore lies outside the reach of the copyright clause limitations.⁴²⁵

Martignon II also considered, by reference to the history and context, whether § 2319A should be deemed a copyright law and thus subject to the limitations of the Copyright Clause.⁴²⁶ The court looked

418. See *id.* at 4 (giving the text of Massachusetts statute); *accord id.* at 8 (giving the similar language of the New Hampshire statute); *id.* at 9 (giving the similar language of the Rhode Island statute).

419. See *id.* at 1 (giving the text of the 1783 resolution).

420. *Id.* at 1.

421. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1128 (1983) (arguing against the existence of common law copyright; “There is no historical justification whatsoever for the claim that copyright was recognized as a common law right of an author.”); Dallon, *supra* note 248, at 411—16 (discussing whether common law copyright preexisted the Statute of Anne); John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States—Part I*, 9 BULL. COPYRIGHT SOC’Y 102 (1962) (arguing in support of existence of common law copyright).

422. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

423. *Id.* at 661.

424. *Id.*

425. *Martignon II*, 492 F.3d 140, 151 (2d Cir. 2007).

426. *Id.* at 150.

to copyright laws not governed by the Copyright Clause, but which nonetheless are accepted as such.⁴²⁷ It identified pre-Constitution state copyright laws, colonial-era British copyright law, and modern state copyright laws and concluded that all of these allocated property rights in expression.⁴²⁸ Section 2319A, as a criminal law, does not.⁴²⁹

This analysis, however, is questionable because other early copyright laws created more than merely property rights for copyright holders.⁴³⁰ The Statute of Anne, the first English copyright law, created rights for copyright holders⁴³¹ but also imposed a fine payable to the Crown.⁴³² Similarly, the first American copyright law enacted under the authority of the Copyright Clause—the Copyright Act of 1790—in addition to allowing recovery for plaintiffs, imposed a fine payable to the United States.⁴³³ No one suggests that the 1790 Act, enacted by many of the Framers themselves, exceeded Congress's authority under the Copyright Clause by doing more than conferring a property right on the copyright holder.⁴³⁴ Perhaps the Second Circuit's view is that a copyright law, at a minimum, *must* create property rights in authors but *can* go further.

The Second Circuit's analysis would suggest that criminal copyright provisions, such as § 506 of the current Copyright Act,⁴³⁵ 18 U.S.C. § 2319,⁴³⁶ and § 28 of the Copyright Act of 1909,⁴³⁷ could not be enacted as an exercise of the Copyright Clause power.⁴³⁸ Congress would need to find a different power source to support these enactments.⁴³⁹ Finally, while *Martignon II* clears § 2319A of

427. *Id.*

428. *Id.*

429. *Id.* at 151.

430. See William McGinty, *Not a Copyright Law? United States v. Martignon and Why the Anti-Bootlegging Provisions Are Unconstitutional*, 23 BERKELEY TECH. L.J. 323, 343-44 (2008) (“[C]riminal enforcement of copyright is not an historical anomaly.”).

431. *Id.*

432. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (requiring offender to pay one penny for every sheet with one moiety to the Queen, the other moiety to person suing).

433. Copyright Act of 1790, ch. 15, § 2, 1 Stat. 124, 125 (ordering payment of fifty cents for every sheet with one moiety to person bringing suit, the other to the United States).

434. See Dallon, *supra* note 218, at 330 (noting that many of the Framers were members of the Congress enacting the 1790 Copyright Act).

435. 17 U.S.C. § 506 (2006).

436. 18 U.S.C. § 2319 (2006).

437. Copyright Act of 1909, Pub. L. No. 60-349, § 28, 35 Stat. 1075.

438. See *Martignon II*, 492 F.3d 140, 150 (2d Cir. 2007).

439. Of course there are other possible sources of congressional power authorizing Congress to enact various criminal laws, most significantly the Commerce Clause. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (affirming Congress's power to enact criminal statute under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down criminal statute for failing to fall within the Commerce Clause power),

constitutional infirmity, it leaves § 1101, the civil anti-bootlegging provision, open to constitutional attack,⁴⁴⁰ because it *does* create or bestow property rights in expression upon performers by subjecting offenders to the civil remedies of the Copyright Act.⁴⁴¹

In summary, the anti-bootlegging provisions are not copyright protections; they do not grant exclusive rights to authors for their writings. The Copyright Clause was not intended to govern unfixed, live performances, but to allow federal protection for copyrights in written works (and patents for inventions).⁴⁴² Recognizing that the anti-bootlegging protections are not genuine copyright protections, the courts have characterized the anti-bootlegging provisions as “copyright-like,”⁴⁴³ “copyright-related”⁴⁴⁴ or “quasi-copyright.”⁴⁴⁵ These designations only serve to emphasize that the anti-bootlegging provisions are not copyright provisions. Understanding that the anti-bootlegging provisions are not copyright laws, any limitations imposed by the Copyright Clause do not apply to these provisions.⁴⁴⁶ Allowing them under the Commerce Clause power, then, poses no threat to any limitations imposed by the Copyright Clause.⁴⁴⁷

IV. THE TREATY POWER AND THE NECESSARY AND PROPER CLAUSE ALLOW CONGRESS TO ENACT THE ANTI-BOOTLEGGING PROVISIONS

Although the Commerce Clause provides a clear basis for the anti-bootlegging provisions, the Necessary and Proper Clause alternatively empowers Congress to enact them.⁴⁴⁸ Under the Treaty Power, the President, with the advice and consent of the Senate, has the power to enter into treaties with other nations.⁴⁴⁹ Congress in

440. *Id.* at 152.

441. NIMMER & NIMMER, *supra* note 82, § 8E.05[C][6].

442. *See supra* notes 240–253 and accompanying text; Dallon, *supra* note 218, at 314–15 (discussing history and original intent of the Copyright Clause).

443. *Martignon I*, 346 F. Supp. 2d 413, 422 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

444. *KISS I*, 350 F. Supp. 2d 823, 830 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

445. *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999).

446. *Martignon II*, 492 F.3d 140, 152 (2d Cir. 2007) (noting that § 2319A was not enacted under the Copyright Clause and therefore there is no need to examine whether it violates the limits of the Copyright Clause).

447. *Id.*

448. *See* U.S. CONST. art. I, § 8, cl. 18.

449. *Id.* art. II, § 2, cl. 2.

turn, under the Necessary and Proper Clause,⁴⁵⁰ has the power to implement and enforce those treaties.⁴⁵¹

Missouri v. Holland, which concerned the Migratory Bird Treaty Act of 1918,⁴⁵² illustrates this constitutional power.⁴⁵³ In 1913, Congress had enacted legislation to protect migratory birds, but two district courts held that the Act exceeded the Commerce Clause power.⁴⁵⁴ The President then entered into a treaty with Great Britain assuring the protection of migratory birds and Congress passed the Migratory Bird Treaty Act of 1918 implementing the treaty.⁴⁵⁵ The State of Missouri challenged the act, claiming that it was invalid as a violation of the rights reserved to the states under the Tenth Amendment.⁴⁵⁶ Justice Holmes, writing for the Court, held that Congress had the power under the Necessary and Proper Clause to enact legislation implementing a valid treaty.⁴⁵⁷ After *Holland*, the Supreme Court, in *Reid v. Covert*, clarified that “no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution.”⁴⁵⁸ Thus the United States could not negotiate away in agreements with foreign nations a citizen’s constitutional right to a trial in civilian courts, nor could Congress deny that right by legislation.⁴⁵⁹

To fall within the Necessary and Proper Clause power, the congressional enactment must be rationally related to implementation of the treaty and not otherwise be prohibited by the Constitution.⁴⁶⁰ If

450. *Id.* art. I, § 8, cl. 18.

451. *E.g.*, *United States v. Lara*, 541 U.S. 193, 201 (2004) (“[T]reaties made pursuant to that power can authorize Congress to deal with ‘matters’ which otherwise ‘Congress could not deal.’”); *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008) (noting that the clause applies to executive’s treaty power); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. j (1987); *see also* *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (“[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation.”).

452. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–708, 709a, 710–711).

453. *Missouri v. Holland*, 252 U.S. 416 (1920).

454. *United States v. McCullagh*, 221 F. 288, 292 (D. Kan. 1915); *United States v. Shaver*, 214 F. 154, 160 (E.D. Ark. 1914).

455. *Holland*, 252 U.S. at 431–32.

456. *Id.* at 431.

457. *Id.* at 432 (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”).

458. *Reid v. Covert*, 354 U.S. 1, 16 (1957).

459. *Id.* at 16, 18.

460. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) (1987) (“No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.”).

the URA were considered a treaty, under *Holland* and *Reid*, Congress would have the power to enact the anti-bootlegging provisions under the Necessary and Proper Clause, because the provisions are rationally related to the obligations in the agreement, and the anti-bootlegging provisions are not inconsistent with another constitutional provision.⁴⁶¹ As noted above, the Copyright Clause limitations do not apply to the anti-bootlegging provisions.⁴⁶²

The URA, however, is not a treaty; it was neither submitted nor ratified as one. Rather, the URA is a congressional-executive agreement,⁴⁶³ negotiated and signed by the President, and passed by both houses of Congress.⁴⁶⁴ Some authority suggests that congressional-executive agreements are the legal equivalent of treaties⁴⁶⁵ and are authority for Congress to legislate, drawing from the Necessary and Proper Clause.⁴⁶⁶ Regardless how congressional-executive agreements are characterized, the broad language of the Necessary and Proper Clause supports congressional power to implement such agreements: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁴⁶⁷

Although not a basis for enactment of the provisions adopted in 1994, the subsequent WIPO Performances and Phonograms Treaty

461. See *Comstock*, 130 S. Ct. at 1956.

462. *Supra* notes 442—447 and accompanying text; see also Caroline T. Nguyen, Note, *Expansive Copyright Protection for all Time? Avoiding Article 1 Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079, 1108 (2006) (concluding that anti-bootlegging provisions were properly enacted under Treaty Power and that Treaty Power is not limited by Article I enumerated powers).

463. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 215—16 (2d ed. 1996) (discussing congressional-executive agreements).

464. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987).

465. See *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (holding that executive agreement, authorized by Congress, while lacking the dignity of a treaty requiring ratification, was nonetheless a treaty for purposes of a jurisdictional statute allowing direct appeals to the Supreme Court); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 303 cmt. e (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); Nguyen, *supra* note 462, at 1093 n.99 (applying treaty analysis to TRIPS and citing authority).

466. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. j (1987) ("An executive agreement made by the President under his own constitutional authority would afford a similar basis for Congressional legislation . . ."); *id.* Reporters' note 8 (stating that Congress has power to enact legislation necessary and proper to carry into execution executive agreement).

467. U.S. CONST. art. I, § 8, cl. 18.

("WPPT") of 1996,⁴⁶⁸ ratified by the Senate in 1998,⁴⁶⁹ would now provide a valid power source for enactment of the anti-bootlegging provisions. WPPT is a ratified treaty⁴⁷⁰ that requires parties to the treaty to provide, among other things, the rights afforded by the anti-bootlegging provisions.⁴⁷¹ Under the treaty, performers are entitled to the exclusive right to authorize broadcast and fixation of their unfixed performances,⁴⁷² and reproduction⁴⁷³ and public distribution⁴⁷⁴ of phonograms (sound recordings)⁴⁷⁵ of their performances. The rights encompassed by the treaty apply to "performances" by "performers" and are therefore much broader than the live musical performances governed by the anti-bootlegging provisions.⁴⁷⁶ Performers are defined as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, or play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."⁴⁷⁷ Although not a possible basis of authority at the time the anti-bootlegging provisions were passed, Congress today would have the power to enact the provisions under the Necessary and Proper Clause.⁴⁷⁸ This current basis of power does not suggest that a later enactment can somehow retroactively provide a valid power source to an earlier law, but it does suggest that the provisions have gained political and international support.

468. World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

469. The treaty was ratified on October 21, 1998; 144 CONG. REC. S12,972 (daily ed. Oct. 21, 1998).

470. *Id.*

471. See Ginsburg, *supra* note 62, at 1255–56 (noting the treaty imposes similar obligations to TRIPS).

472. Under article 6: "Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances." World Intellectual Property Organization Performances and Phonograms Treaty, *supra* note 468, at art. 6.

473. Under article 7: "Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form." *Id.* at art. 7.

474. Under article 8(1): "Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership." *Id.* at art. 8(1).

475. Under the treaty a "phonogram" is defined as "the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work." *Id.* at art. 2(b).

476. *Id.* at art. 2(a) (covers performances of literary and artistic works and expressions of folklore).

477. *Id.*

478. This current power does not suggest that a later enactment can somehow retroactively provide a valid power source to an earlier law.

V. THE ANTI-BOOTLEGGING PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT

A. First Amendment Problem with the Anti-Bootlegging Provisions

Several legal academics have questioned the constitutionality of the anti-bootlegging provisions on the ground that they violate First Amendment free speech protections.⁴⁷⁹ None of the courts considering the constitutionality of the anti-bootlegging provisions, however, reached the First Amendment issue.⁴⁸⁰ The First Amendment, subject to exceptions, prohibits government censorship or control over expression of private individuals.⁴⁸¹ The anti-bootlegging provisions arguably burden free speech, implicating the First Amendment, in two ways. First, they directly limit speech by prohibiting transmission and communication of live musical performances to the public.⁴⁸² Music, a traditional form of expression, enjoys protection under the First Amendment.⁴⁸³ Second, the provisions prohibit conduct—recording, reproducing, distribution, sale, and trafficking⁴⁸⁴—which, while not directly regulating speech, have the effect of burdening it by preventing its capture and dissemination.⁴⁸⁵ Applying First Amendment scrutiny, the statutes are arguably problematic because they do not contain an explicit fair use exception, and because they create a perpetual right.⁴⁸⁶

479. Law Professors' Brief, *supra* note 46, at 23—31; McGinty, *supra* note 46, at 1129—34.

480. The First Amendment issue was raised in *Martignon I*, but neither the district court nor the Second Circuit reached the issue. 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007). *Martignon II* remanded the case to the district court for consideration of the First Amendment free speech issue, 492 F.3d at 153, but on remand the case was discontinued following a deferred prosecution agreement, and the issue was never decided. Order of Nolle Prosequi, *supra* note 36.

481. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

482. Section 1101 makes liable “[a]nyone who, without the consent of the performer or performers involved . . . (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance.” 17 U.S.C. § 1101(a) (2006). Section 2319A imposes criminal liability upon those who “without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain . . . (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance.” 18 U.S.C. § 2319A (2006).

483. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (recognizing music as “one of the oldest forms of human expression” and stating that it is protected under the First Amendment).

484. See 17 U.S.C. § 1101(a)(1), (3); 18 U.S.C. § 2319A (a)(1), (3).

485. See *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (noting that delivery of tape, handbill, and pamphlet, while conduct, is speech protected by First Amendment).

486. See Law Professors' Brief, *supra* note 46, at 27.

Generally, courts have analyzed laws burdening speech by whether they are content-based or content-neutral restrictions.⁴⁸⁷ Content-based speech regulations are presumed unconstitutional and generally subject to strict judicial scrutiny,⁴⁸⁸ which requires the government to prove that the restriction furthers a compelling governmental interest, narrowly tailored to achieve that interest.⁴⁸⁹ Content-neutral speech regulations are subject to intermediate scrutiny.⁴⁹⁰ Under intermediate scrutiny a regulation must advance an important governmental interest unrelated to suppression of free speech and not burden substantially more speech than is necessary to achieve that interest.⁴⁹¹ Strict scrutiny requires the government to prove that the restriction furthers a compelling governmental interest that is narrowly tailored to achieve that interest.⁴⁹²

Courts have deemed certain categories of speech—such as obscenity, fighting words, and fraud—as beyond the reach of First Amendment protections and subject to neither strict nor intermediate scrutiny.⁴⁹³ Copyright law restrictions also generally escape First Amendment scrutiny.⁴⁹⁴ Previously, some courts maintained that copyright law was uniquely exempt from First Amendment

487. See e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) (“[I]ncreasingly in free speech law, the central inquiry is whether the government action is content based or content neutral.”); Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803–04 (2004) (discussing practice of analyzing law based on classification as content-based or content-neutral).

488. See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (finding content-based restrictions presumptively invalid); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (finding content-based restrictions presumptively beyond the power of government).

489. *Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

490. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

491. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

492. *Citizens United*, 130 S. Ct. at 898–99 (2010) (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 464).

493. See *Stevens*, 130 S. Ct. at 1584 (obscenity, fraud, incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (obscenity, fighting words); see also Wilson R. Huhn, *supra* note 487, at 804–05 (noting that certain types of content-based laws escape strict scrutiny, including commercial speech, obscenity and fighting words).

494. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (noting in the domain of copyright law that “First Amendment concerns are protected by and coextensive with the fair use doctrine”); cf. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (discussing conflict between copyright and free speech).

scrutiny.⁴⁹⁵ The Supreme Court rejected this categorical position but nonetheless found that when “the traditional contours of copyright protection” apply, First Amendment scrutiny is unnecessary.⁴⁹⁶ Commercial speech also receives lesser protection and is subject to intermediate scrutiny.⁴⁹⁷ The first question is what level of First Amendment scrutiny, if any, should apply to the anti-bootlegging provisions?

B. Portions of the Provisions Govern Conduct Rather Than Speech

The anti-bootlegging provisions address different types of conduct, and the First Amendment analysis necessarily must consider each type of prohibited conduct separately.⁴⁹⁸ First, the provisions prohibit recording live musical performances without permission.⁴⁹⁹ Second, they forbid making reproductions of such prohibited recordings.⁵⁰⁰ Third, they prohibit unauthorized communication to the public of the sounds or images of live musical performances.⁵⁰¹ Fourth, they prohibit distribution, sale, or trafficking in such unauthorized copies.⁵⁰²

The prohibitions against recording and against reproducing recordings regulate conduct, not speech. Some conduct is expressive, “symbolic speech” and falls squarely within First Amendment protections.⁵⁰³ Courts analyze conduct as speech if it is “intended to be communicative” and “would reasonably be understood by the viewer to be communicative.”⁵⁰⁴ The act of recording live musical performances

495. See *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *New Era Publ'ns., Int'l, ApS, v. Henry Holt & Co., Inc.*, 873 F.2d 576, 584 (2d Cir. 1989) (“[F]air use doctrine encompasses all claims of first amendment in the copyright field . . .”).

496. *Eldred*, 537 U.S. at 221.

497. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–65 (1980).

498. See 17 U.S.C. § 1101(a) (2006) (identifying different types of conduct at issue); 18 U.S.C. § 2319A(a) (2006) (identifying different types of conduct at issue).

499. 17 U.S.C. § 1101(a)(1).

500. *Id.*

501. *Id.* § 1101(a)(2).

502. *Id.* § 1101(a)(3).

503. See, e.g., *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2818 (2010) (noting that petition signing is protected expressive conduct subject to First Amendment scrutiny); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006) (stating that inherently expressive speech is within First Amendment protection).

504. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); see *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (noting analysis to determine whether conduct qualifies for First Amendment protection); *Spence v. State of Washington*, 418 U.S. 405, 410–11 (1974) (noting importance of intent to communicate and great likelihood that message would be understood by those who viewed it in determining whether conduct qualifies for First

is often done secretly and in contravention of venue policies or contract rights.⁵⁰⁵ Generally, there is little or no expression in the act of recording another's speech; it does not communicate information.⁵⁰⁶ Also, the prohibited act of reproducing recordings (normally not viewed by others) does not communicate information.⁵⁰⁷ Instead, these actions typically occur for the gratification and, in some cases, economic benefit of the actor, who seeks to capture and reproduce the performance.⁵⁰⁸ These aspects of the law, as non-expressive conduct, lie beyond First Amendment scrutiny.⁵⁰⁹

The wiretapping laws and cases interpreting them illustrate the concept that regulation of conduct should be viewed differently than regulation of communication.⁵¹⁰ The federal Wiretapping Act prohibits the intentional interception of "any wire, oral, or electronic

Amendment Protection); see also *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (finding that delivery of tape, handbill, pamphlet, while conduct, are speech protected by First Amendment); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (recognizing parades as expression); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (recognizing wearing armband as expression); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (recognizing saluting the flag as expression).

505. Venues and performers typically prohibit recording of performances. See Kevin Joy, *Bootleg Videotapes of Concerts Flourish*, COLUMBUS DISPATCH, Feb. 23, 2008, available at 2008 WLNR 3588787 ("Most concert venues and performers have long prohibited videotaping of events"); *Theater Policies*, HOLLYWOOD BOWL, <http://www.hollywoodbowl.com/tickets/theatre-pol.cfm> (prohibiting operation of recording devices in the theater) (last visited Dec. 2, 2010).

506. If the recording is done secretly, the action cannot communicate to those who are unaware of it. If the recording is done openly, it may communicate intent to record or objection to the prohibition. In *United States v. O'Brien*, the Court acknowledged that not all conduct intended to express an idea would qualify as protected speech. 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.>").

507. See *Clark*, 468 U.S. at 294 (stating that conduct is communicative if reasonably understood by the viewer to be communicative).

508. See *United States v. Moghadam*, 175 F.3d 1269, 1276 n.11 (11th Cir. 1999) ("The trafficking in bootleg sound recordings results in unjust enrichment of person who unfairly appropriate the intellectual property and potential profits of sound recording companies and artists.>").

509. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307, 310 (2000) (Scalia, J., concurring) ("When conduct other than speech itself is regulated . . . the First Amendment is violated only 'where the government prohibits conduct precisely because of its communicative attributes.'" (citing *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 577 (1991))); *Barnes*, 501 U.S. at 572, 576 (Scalia, J., concurring) ("[A] general law regulating conduct and not specifically directed at expression, is not subject to First Amendment scrutiny at all."); *O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.>").

510. See *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Many jurisdictions have such laws. See, e.g., CAL. PENAL CODE §§ 631–637.5 (West 2010); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2010); NEB. REV. STAT. § 86-290 (2008).

communication”; intentional disclosure of the contents of such intercepted communication; and the use of such intercepted communications.⁵¹¹ In *Bartnicki v. Vopper*, the Supreme Court considered the constitutionality of prohibiting the disclosure of illegally intercepted communications under the Wiretapping Act.⁵¹² The Court distinguished the subsection prohibiting *disclosure* of the communications, which regulated speech and was subject to First Amendment scrutiny, from the provision that prohibited *use* of such communications, which regulated conduct.⁵¹³ Although not an issue in the case, one premise in *Bartnicki* was that the provision prohibiting interception of the communications was permissible.⁵¹⁴ This supports the view that the portions of the anti-bootlegging provisions that prohibit the acts of unauthorized recording or duplication of unauthorized recordings do not violate the First Amendment.⁵¹⁵

C. Anti-Bootlegging Provisions Should Be Subject to Intermediate Scrutiny

In contrast to the recording and reproduction provisions, the prohibitions against unauthorized communication or distribution of unauthorized copies directly restrict speech.⁵¹⁶ These provisions should be treated as content-neutral regulations, subject to intermediate scrutiny⁵¹⁷ because (1) they do not target a particular message, (2) their overarching objective is to encourage speech by

511. 18 U.S.C. § 2511 (2008).

512. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

513. *Id.* at 526–27.

514. *Id.* at 525–26 (noting that the provision in 18 U.S.C. § 2511(1)(a) prohibiting the interception of the electronic communications was not at issue in the case because the telephone call at issue was intercepted by an unknown person, not a party to the action). However, the Court considered whether prohibiting distribution could be justified as a means to enforce the prohibition against intercepting communications and even went so far as to suggest that direct sanctions against interception might need to be more severe. *Id.* at 528–29. Ultimately, the Court held that the prohibition against disclosure where the disclosing entity did not itself illegally intercept the information and where the information was of public interest, could not be prohibited. *Id.* at 535. *Cf. Quigley v. Rosenthal*, 327 F.3d 1044, 1067–68 (10th Cir. 2003) (holding prohibition against use of intercepted telephone conversations did not violate First Amendment where communications were not of purely private matter).

515. *See also Virginia v. Hicks*, 539 U.S. 113, 123 (2003) (upholding trespass policy where policy regulated “nonexpressive conduct” and finding that entry violated the ban and was not speech).

516. *See Bartnicki*, 532 U.S. at 527 (finding that delivery of tape, handbill, pamphlet, while conduct, is speech protected by First Amendment).

517. One scholar has noted that intermediate scrutiny, “in actual operation . . . has been fairly deferential to government interests.” Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1370 (2006).

protecting the interests of performers, and (3) they neither compel, nor prohibit, the speaker's own speech.

Content-based laws regulate speech based upon the message conveyed or substantive content of the speech.⁵¹⁸ These include laws "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."⁵¹⁹ The Supreme Court has held that "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."⁵²⁰ More broadly, "laws that . . . impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."⁵²¹

Although the anti-bootlegging provisions only apply to live musical performances, they do not target music with a particular content; music conveying particular ideas, opinions, or viewpoints; or music of a particular genre (which might be subterfuge for regulating particular content).⁵²² The anti-bootlegging provisions apply to all live musical performances regardless of any message communicated by them.⁵²³ The restrictions apply to purely instrumental performances, vocal performances, and mixed vocal and instrumental performances.⁵²⁴ They apply regardless of the genre of music performed.⁵²⁵ That the provisions are limited to music conveyed in a particular context (a live setting) should not render them content based and therefore subject to strict scrutiny.

Significantly, the objective of the restrictions is not to restrict dissemination of performers' speech, but to *encourage* speech of the performers themselves.⁵²⁶ This places the anti-bootlegging provisions

518. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991) (recognizing that a statute burdening speakers based on content of their speech is presumptively inconsistent with First Amendment).

519. *Bartnicki*, 532 U.S. at 526 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994)).

520. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward*, 491 U.S. at 791); *id.* at 737 (Souter, J., concurring) (quoting *Ward*, 491 U.S. at 791).

521. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994).

522. *See* 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2006).

523. *See* 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

524. *See* 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

525. *See* 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

526. *See* Brian Danitz, *supra* note 232, at 1192–93 ("Such protections provide incentives to performing artists to produce live works that disseminate the ideas and facts embodied within to their audience."); *cf.* *Eldred v. Ashcroft*, 537 U.S. 186, 221(2003) (discussing copyright law incentives to authors).

outside the suspect purposes of and typical concerns surrounding content-based regulation.⁵²⁷ The anti-bootlegging provisions, like copyright law, protect performers' "expression from unrestricted exploitation" and therefore "do[] not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas."⁵²⁸ The civil provision encourages speech by creating what amounts to a property right for performers.⁵²⁹ The criminal provision provides additional protection in support of this right.⁵³⁰ Affording performers control over their performances enhances the value of those performances and benefits the performers much the same way that copyright law provides incentives for creators of works.⁵³¹ In the analogous context of copyright law, the Supreme Court, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, recognized that the exclusive rights afforded copyright holders were actually "an engine of free expression" rather than speech restrictions.⁵³² The Court explained, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."⁵³³ Although as noted above, the anti-bootlegging provisions are not copyright laws, they share the same purpose of incentivizing speech.⁵³⁴

The potential economic incentives of preventing bootlegs are apparent. Members of the public wishing to hear live performances will need to pay admission and attend the concerts. The increased demand makes the performance more profitable and encourages performers to offer more performances.⁵³⁵ Alternatively, in the absence of bootlegs, members of the public might listen to authorized live transmissions of the concerts, increasing the audience for those transmitting the concerts (which in turn benefits the performers). Without bootlegs, members of the public might purchase authorized copies of the performance.⁵³⁶ Finally, bootlegs might replace

527. See *Eldred*, 537 U.S. at 221 (discussing how inherent limitations of copyright law adequately protect First Amendment interests).

528. *Id.* (discussing copyright law).

529. See 17 U.S.C. § 1101.

530. See 18 U.S.C. § 2319A.

531. See, e.g., *Eldred*, 537 U.S. at 212 & n.18 (discussing copyright law incentives to authors as means of promoting public good).

532. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

533. *Id.*; *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558).

534. See *Eldred*, 537 U.S. at 212 & n. 18 (discussing copyright law incentives to authors as means of promoting public good).

535. See generally *Brown*, *supra* note 330, at 29 (discussing potential harm bootleg recordings pose to performers); *Danitz*, *supra* note 232, at 1192–93 (noting that anti-bootlegging provisions provide incentives to performers to produce live works).

536. *Brown*, *supra* note 330, at 11 (bootlegs replace sales of authorized recordings).

purchases of authorized copies of studio-produced individual songs or albums produced and sold by the group.⁵³⁷ By providing economic incentives for performers, the anti-bootlegging provisions encourage the performers to continue to perform or expand their performances in hopes of greater economic returns.⁵³⁸ In this way, the provisions, by limiting unauthorized speech, encourage the speech of performers, with corresponding benefit to the public.

The nature of the regulated speech also influences the First Amendment analysis.⁵³⁹ Under the anti-bootlegging provisions, the regulated speech is the repeated speech of others, and in many cases, it also qualifies as “unpublished speech.”⁵⁴⁰ Although live musical performances are not writings, and federal copyright law does not govern them, performances do involve expression. Analogizing to Supreme Court copyright law precedent, unpublished works are entitled to greater protection than published works, even in the face of First Amendment challenges.⁵⁴¹ In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court considered whether a defendant violated copyright law by publishing a story quoting portions of the soon-to-be-published memoirs of President Ford.⁵⁴² The defendant argued both “fair use” and that First Amendment values permitted it to publish the story without consent of the copyright holder.⁵⁴³ In discussing fair use, the Court, relying upon roots in common law copyright, recognized that an author has the “right to decide when and whether [the author’s expression] will be

537. *Id.* at 11, 29.

538. *See supra* note 534 and accompanying text.

539. *See Eldred*, 537 U.S. at 221.

540. Under copyright law, “publication” is the distribution of copies or recordings of a work to the public. 17 U.S.C. § 101 (2006). Significantly, public performance of a work does not constitute publication. *Id.*; *see also* *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1211 (11th Cir. 1999) (holding that oral delivery of speech to broadcast by media to millions of people did not constitute a general publication). If authorized recordings of a performance are not distributed to the public, or otherwise broadcast to the public, then the performance should be considered unpublished. *See* 17 U.S.C. § 101. The performers have not given unlimited access to the public and evince their intent to retain control over the performance. *See id.* General publication occurs if either “tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work” or “the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public.” *Estate of Martin Luther King, Jr.*, 194 F.3d at 1215. Although unfixed live performances are not governed by copyright law, the copyright law is analogous. *See supra* note 441 and accompanying text.

541. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

542. *Id.*

543. *Id.* at 544, 555.

made public.”⁵⁴⁴ Directly addressing the First Amendment challenge, the Court recognized a right to refrain from speaking.⁵⁴⁵

The Court in *Eldred v. Ashcroft* reaffirmed and expanded this principle when it held, “[t]he First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”⁵⁴⁶ Thus, not only does a right not to speak exist, but the First Amendment also is limited when it comes to attempts to repeat other people’s speech.⁵⁴⁷ The anti-bootlegging provisions do not compel any speech, nor do they prohibit a speaker’s own original speech.⁵⁴⁸ The speech impacted by the anti-bootlegging provisions is the repeated speech of the performers—thus entitled to deferential First Amendment review.⁵⁴⁹

D. The Anti-Bootlegging Provisions are Substantially Related to an Important Governmental Interest

The anti-bootlegging provisions satisfy the intermediate scrutiny analysis of the First Amendment because they serve an important governmental interest, and they do not burden substantially more speech than necessary to achieve that interest.⁵⁵⁰ The provisions serve the important government purpose of creating or protecting a property right for performers,⁵⁵¹ encouraging them to perform, and thus creating speech in the same way that copyright protection does.⁵⁵² Performers enjoy an intellectual property interest

544. *Id.* at 551 (“Publication of an author’s expression before he has authorized its dissemination seriously infringes the author’s right to decide when and whether it will be made public . . .”).

545. *Id.* at 559; *see also* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting “right to refrain from speaking at all”); *Estate of Hemmingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968) (“There is necessarily . . . a concomitant freedom *not* to speak publicly . . .”).

546. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

547. *Id.*

548. *See* 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2006).

549. *See supra* notes 538–547 and accompanying text.

550. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (holding that intermediate scrutiny test, which applies to content-neutral regulations, requires that a regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests”); *accord Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010) (quoting *Turner*, 520 U.S. at 189).

551. *See Eldred*, 537 U.S. at 221 (approving government protection of “authors’ original expression from unrestricted exploitation” as valid First Amendment purpose).

552. *Id.* at 219. The Constitution itself specifically recognizes the important objective of promoting “the Progress of Science and useful Arts,” which includes expression of authors. U.S. CONST. art. I, § 8, cl. 8. Expression of performers is analogous.

in their musical performances under the anti-bootlegging provisions⁵⁵³ and exploit that interest by participating in the concerts. The anti-bootlegging provisions protect the intellectual property rights of performers both domestically and abroad.⁵⁵⁴ By entering into these international agreements, U.S. performers receive protection abroad from other nation members of the WTO.⁵⁵⁵ The United States advocated strongly for the intellectual property provisions of TRIPS, and Congress found that the URA would “dramatically improve protection and enforcement of U.S. intellectual property rights abroad.”⁵⁵⁶ In enacting the URAA, Congress wanted “foreign countries to be aware of the seriousness with which it view[ed] bootlegs.”⁵⁵⁷

The anti-bootlegging provisions also are narrowly tailored. The statutes are limited in scope and allow for alternative means to communicate the message of live musical performances.⁵⁵⁸ In *Harper & Row*, the Supreme Court held that copyright law’s limited scope and fair use defense adequately accommodate the First Amendment concerns.⁵⁵⁹ These principles apply with equal force to unfixed, musical performances.

Significantly, the anti-bootlegging provisions allow for some recordings, reproductions, or distribution.⁵⁶⁰ First, both the civil and criminal provisions permit recordings and related activities authorized by the performers—only unauthorized recordings are prohibited.⁵⁶¹ Second, under the criminal provision, § 2319A, the offense for fixing,

553. See also *Metro. Opera Ass’n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 492–93 (N.Y. Sup. Ct. 1950) (holding that live opera performances give rise to protected property rights), *aff’d*, 107 N.Y.S.2d 795 (N.Y. App. Div. 1951); *cf.* *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (recognizing common-law copyright as a property interest).

554. There are no nationality or citizenship limitations in the provisions; they protect all “performers.” See 17 U.S.C. § 1101 (civil provision); 18 U.S.C. § 2319A (criminal provision). Indeed, the provisions were enacted to discharge a treaty obligation requiring that “[e]ach Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property” (subject to certain exceptions not relevant here). TRIPS Agreement, *supra* note 13, at art. 3(1).

555. See *supra* Part I.B.; *Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010) (noting one important governmental purpose of § 514 of URAA, a different section of the URAA than the anti-bootlegging provisions, was securing foreign copyrights for American works).

556. See H.R. REP. NO. 103-826, pt. 1, at 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773; PATRY, *supra* note 50, at 2 (discussing U.S. desire to have intellectual property provisions included in URA).

557. PATRY, *supra* note 50 at 9.

558. See 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

559. *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 560 (1985).

560. See 17 U.S.C. § 1101(a) (limiting scope of civil liability to unauthorized acts); 18 U.S.C. § 2319A(a) (limiting scope of criminal liability to fixation and trafficking without consent and to acts done for commercial advantage or private financial gain).

561. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

reproducing, transmitting, distributing, selling, or trafficking is limited to those activities done "knowingly and for purposes of commercial advantage or private financial gain."⁵⁶² Activities done for personal or noncommercial uses are permitted.⁵⁶³ Third, the fair use defense should apply to both the civil and criminal anti-bootlegging provisions.⁵⁶⁴ Although not explicit in the language of the provisions, the Administrative Action Statement for the provisions stated Congress's intent "that neither civil nor criminal liability will arise in cases where First Amendment principles are implicated, such as where small portions of an unauthorized fixation are used without permission in a news broadcast or for other purposes of comment or criticism."⁵⁶⁵

Section 1101 provides that violators "shall be subject to the remedies provided in §§ 502 through 505, to the same extent as an infringer of copyright."⁵⁶⁶ Both § 502 (injunctions) and § 503 (impounding and disposition of infringing articles) are limited to "such terms as [the court] may deem reasonable."⁵⁶⁷ On that basis, a court, in the face of a fair use or meritorious First Amendment argument, would be expected to limit or deny relief.⁵⁶⁸ Section 504 (damages and profits) provides for actual damages or statutory damages.⁵⁶⁹ In the case of fair use under § 1101, a court is unlikely to find any actual damages against a defendant.⁵⁷⁰ Admittedly, nothing in the language of the statutory damage provisions would relieve a fair use defendant of all liability, though a court has broad discretion concerning the amount of damages.⁵⁷¹ In the copyright context, for which § 504 was originally enacted, the language of that section would not have expressly referenced fair use because a separate section explicitly sets forth that defense, and the remedy sections do not apply when fair use is found.⁵⁷²

562. 18 U.S.C. § 2319A(a).

563. *Id.*

564. ADMINISTRATIVE ACTION STATEMENT, *supra* note 193, at 274.

565. *Id.*

566. 17 U.S.C. § 1101(a).

567. *Id.* §§ 502—03.

568. *See infra* notes 569—572 and accompanying text.

569. 17 U.S.C. § 504.

570. Under copyright law, fair use takes into consideration whether a defendant's use was a commercial use, 17 U.S.C. § 107(1), and what effect the use had upon the market for or value of the protected work. 17 U.S.C. § 107(4).

571. *Id.* § 504(c); *see also* Fitzgerald Publ'g Co. v. Baylor Publ'g. Co., 807 F.2d 1110, 1116—17 (2d Cir. 1986) (discussing factors to be considered in exercising discretion in setting statutory damages).

572. *See* 17 U.S.C. § 107.

Strong historical precedent supports a fair use defense.⁵⁷³ Fair use under copyright law was a common law doctrine, recognized by the courts for over a century, before Congress finally codified it in the Copyright Act of 1976.⁵⁷⁴ Similarly, fair use has long been a fundamental part of trademark law.⁵⁷⁵ The courts, likewise, should find a fair use defense for the anti-bootlegging provisions.

Finally, the anti-bootlegging provisions do not prevent anyone from reviewing, discussing, criticizing, or reporting facts concerning those performances.⁵⁷⁶ The anti-bootlegging provisions do not prohibit anyone from repeating words spoken or songs sung at those performances.⁵⁷⁷ Someone (with an adequate memory) could literally repeat every word spoken or sung at the concert without violating the anti-bootlegging provisions. Moreover, the anti-bootlegging provisions do not prevent anyone from personally performing the same songs or from imitating the performances.⁵⁷⁸

VI. CONCLUSION

The anti-bootlegging provisions serve an important purpose—preventing unauthorized commercial exploitation of live musical performances.⁵⁷⁹ This provides incentive for performers to host live performances and creates a market for performers' own authorized recordings.⁵⁸⁰ Congress enacted the provisions to implement the United States' treaty obligations under TRIPS, as part of its effort to protect intellectual property interests of U.S. citizens by stopping domestic and foreign bootleg recordings.⁵⁸¹

The *Moghadam*, *KISS II*, and *Martignon II* courts correctly concluded that the provisions were a proper exercise of congressional

573. Even before it was codified, fair use was an important doctrine in copyright law. See *Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841) (No. 4901). Trademark law also has a long history of a fair use defense. See 15 U.S.C. § 1115(b)(4) (2006) (codifying trademark fair use defense); Margreth Barrett, *Reconciling Fair Use and Trademark Use*, 28 CARDOZO ARTS & ENT. L.J. 1, 7—37 (2010) (discussing history of fair use in connection with trademark law).

574. The fair use doctrine traces its pedigree back to *Folsom v. Marsh*, decided in 1841, authored by Justice Story, sitting as a district judge. 9 F. Cas. 342. It was not codified until the enactment of the Copyright Act of 1976. See Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (codified at 17 U.S.C. § 107). For the history and rationale of the fair use doctrine, see SCHECHTER & THOMAS, *supra* note 72, at § 10.1.

575. See 15 U.S.C. § 1115(b)(4) (codifying trademark fair use defense); Barrett, *supra* note 573, at 7—37 (discussing history of fair use in connection with trademark law).

576. See 17 U.S.C. § 1101; 18 U.S.C. § 2319A (2006).

577. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

578. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

579. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

580. See *supra* notes 526—538 and accompanying text.

581. See *supra* notes 8—16 and accompanying text.

power under the Constitution.⁵⁸² Congress had authority under the Commerce Clause to enact the provisions, because they directly impact both interstate and international commerce.⁵⁸³ Congress recognized that bootlegged recordings harmed performers and recognized that these provisions were necessary pursuant to an international trade agreement.⁵⁸⁴

Although the provisions do not comply with the limitations of the Copyright Clause, as a result of their regulation of unfixed performances (not writings) and unlimited duration, they need not comply with the Copyright Clause.⁵⁸⁵ They do not grant authors rights to writings and therefore are not within the purview of copyright law.⁵⁸⁶ The Framers and Ratifiers of the Constitution intended the Copyright Clause as an affirmative grant of power to Congress permitting it to legislate in the areas of copyright and patent.⁵⁸⁷ The Framers did not intend the Clause to impose a limitation on other constitutional grants of power.⁵⁸⁸

In addition to the Commerce Clause, the Necessary and Proper Clause (in conjunction with the Treaty Power), also provides Congress with the authority to enact the provisions.⁵⁸⁹ The President had the authority to enter into the URA, as a congressional-executive agreement, and Congress was empowered to pass legislation to carry out the United States' obligations under the agreement where those obligations did not violate prohibitions in, or affirmative rights afforded by, the Constitution.⁵⁹⁰

Finally, the anti-bootlegging provisions do not violate the First Amendment. Portions of the provisions regulate non-expressive conduct—not speech—and should not be subjected to First Amendment scrutiny.⁵⁹¹ The other portions of the provisions should only warrant intermediate scrutiny because they do not pose the inherent threat to free speech that many other laws governing speech do.⁵⁹² The provisions do not target a particular message or viewpoint.⁵⁹³ They

582. *United States v. Moghadam*, 175 F.3d 1269, 1269 (11th Cir. 1999); *KISS II*, 405 F. Supp. 2d 1169, 1177 (C.D. Cal. 2005); *Martignon II*, 492 F.3d 140, 153 (2d Cir. 2007).

583. *See supra* notes 288—335 and accompanying text.

584. *See supra* notes 318—326 and accompanying text.

585. *See supra* notes 381—447 and accompanying text.

586. *See supra* notes 218—273 and accompanying text.

587. *See supra* notes 338-350 and accompanying text.

588. *Id.*

589. *See supra* notes 448—478 and accompanying text.

590. *Id.*

591. *See supra* notes 498—515 and accompanying text.

592. *See supra* notes 516—549 and accompanying text.

593. *See supra* notes 518—525 and accompanying text.

encourage speech by protecting the interests of performers, creating an incentive for them to continue their performances.⁵⁹⁴ They protect the right of performers to govern their own speech, and the right of repeated speech receives lesser First Amendment protection.⁵⁹⁵ Significantly, the provisions do not compel speech.

The provisions survive intermediate scrutiny because they serve the important governmental interest of promoting rights of performers to control their own speech in order to incentivize and encourage performers to perform.⁵⁹⁶ Also the provisions serve the important governmental interest of satisfying obligations under international trade agreements.⁵⁹⁷ The provisions are narrowly tailored to these important interests. They are limited to live musical performances.⁵⁹⁸ They also are limited to unauthorized acts, thus allowing for recordings, reproductions, transmissions, distributions, and sales authorized by the performers.⁵⁹⁹ Finally, they do not limit communication of ideas, lyrics, or fair uses of the content of live musical performances, nor do they prevent imitation of those performances or compositions.⁶⁰⁰ Therefore, the anti-bootlegging provisions are a valid exercise of congressional power under the Constitution.

594. See *supra* notes 526—538 and accompanying text.

595. See *supra* notes 539—549 and accompanying text.

596. See *supra* notes 550—557 and accompanying text.

597. See *supra* notes 554—557 and accompanying text.

598. See *supra* note 558 and accompanying text.

599. See *supra* notes 560—561 and accompanying text.

600. See *supra* notes 562—578 and accompanying text.

