

WHAT IF THE ANTI-BOOTLEGGING STATUTES ARE UPHELD UNDER THE COMMERCE CLAUSE?

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2008 MICH. ST. L. REV. 153

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INTRODUCTION

The Commerce Clause¹ and the Copyright Clause² are in conflict again. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,³ the U.S. Supreme Court held that “[o]riginality is a constitutional requirement,”⁴ and that non-original compilations could not be protected under

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1. U.S. CONST. art. I, § 3, cl. 8.

2. *Id.* § 8, cl. 8.

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

4. *Id.* at 346; see also Sarah Duran, “A Species of Mutant Copyright Law”: An Argument Against Using the Commerce Clause to Protect Databases, 8 TUL. J. TECH. & INTELL. PROP. 87, 94 (2006) (“[i]t is . . . the ‘essence of copyright’ and a constitutional requirement.” (quoting *Feist*, 499 U.S. at 349)).

copyright law.⁵ After *Feist*, it was thought that protection for databases could be provided under the Commerce Clause,⁶ even though the Copyright Clause would forbid it.⁷ Following years of debate and many introductions of legislation,⁸ the idea was dropped.⁹ It was believed that the purposes of the Commerce Clause and the Copyright Clause¹⁰ were so incompatible as to prevent any database protection if such protection were allowed under the Commerce Clause.¹¹ After a decade of dormancy, the debate is hot once again. This time, it is backed by the courts, holding that the anti-bootlegging statutes¹² are a legitimate exercise of constitutional authority under the “Commerce Clause”—despite the fact that the anti-bootlegging statutes were legislated under the Copyright Clause without any mention of the Commerce Clause.

5. See Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997); Dennis S. Karjala, *Copyright in Electronic Maps*, 35 JURIMETRICS J. 395, 408-11 (1995); Kathleen Janssen & Jos Dumortier, *The Protection of Maps and Spatial Databases in Europe and the United States by Copyright and the Sui Generis Right*, 24 J. MARSHALL J. COMPUTER & INFO. L. 195, 207-08 (2006) (discussing *Feist*); Duran, *supra* note 4, at 94 (“Noting that originality is a ‘bedrock principle of copyright,’ the Court held that facts cannot be subject to copyright because the person who finds and reports a fact has not created the fact, ‘he or she has merely discovered its existence.’” (quoting *Feist*, 499 U.S. at 345, 347)).

6. U.S. CONST. art. I, § 3, cl. 8.

7. *Feist*, 499 U.S. at 364; Janssen & Dumortier, *supra* note 5, at 207-09; June M. Besek, *Legal Protection for Databases: Recent Developments*, 574 PLI/PAT 439, 445 (1999).

8. Janssen & Dumortier, *supra* note 5, at 223-24 (“Since the introduction of the European database directive in 1996, a number of bills have been introduced The first attempt was introduced in 1996 as the Database Investment and Intellectual Property Antipiracy Act. . . . The next year, a new bill was introduced for the Collection of Information Antipiracy Act The bill reappeared under the same name and in much the same form in 1998 The next attempt was made in 1999 under an alternative approach. The Consumer and Investor Access to Information Act provided protection to owners of compilations from commercial misappropriation by competitors.” (footnotes omitted)); Duran, *supra* note 4, at 88-92 (“Since *Feist*, members of Congress have sought to pass bills that would provide protection against copying and other unauthorized uses of databases that consist of a collection of facts and other information. In a recent session of Congress, lawmakers proposed two bills that would have created a cause of action for ‘misappropriation’ of databases. The first proposal, H.R. 3261, introduced in October 2003, would allow parties that create or maintain information in databases to file civil suits in federal court against a party that misappropriates a substantial part of the database’s information. The second proposal, H.R. 3872, introduced in March 2004, would make misappropriation of a database an unfair method of competition and an unfair or deceptive act or practice in commerce under section 5(a)(1) of the Federal Trade Commission Act (‘FTCA’).” (footnotes omitted)).

9. Janssen & Dumortier, *supra* note 5, at 223-24.

10. U.S. CONST. art. I, § 3, cl. 8; *id.* § 8, cl. 8.

11. Some authors argue that more databases would be created if there were legal protection for them. See J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2511-12 (1994); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

12. 17 U.S.C. § 1101 (2000); 18 U.S.C. § 2319A (2000).

This Article will take a look at the anti-bootlegging cases, and take them to their logical—or illogical—conclusion.¹³ What if the anti-bootlegging statutes are upheld under the Commerce Clause? What effect will that have?

I. STATUTORY BACKGROUND

As part of the Uruguay Round Agreements Act (URAA)¹⁴ that brought the United States into the World Trade Organization (WTO), Congress enacted civil¹⁵ and criminal¹⁶ statutes to protect against the unauthorized re-

13. Although the anti-bootlegging statutes have been on the books since 1994, there have only been three cases litigated thereunder. *See* *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999); *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007); *KISS Catalog v. Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated on reh'g*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

14. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); *see also* WILLIAM F. PATRY, *COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND TABLE AGREEMENTS ACT* (1995); Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 380-81 (1997).

15. 17 U.S.C. § 1101 provides in relevant part:

(a) UNAUTHORIZED ACTS.—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), regardless of whether the fixations occurred in the United States,

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

17 U.S.C. § 1101(a) (2000).

16. 18 U.S.C.A. § 2319A provides:

(a) OFFENSE.—Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—

(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), regardless of whether the fixations occurred in the United States;

shall be imprisoned for not more than 5 years or fined in the amount set forth in this title, or both, or if the offense is a second or subsequent offense, shall be im-

recording of live musical performances, and the unauthorized sale and distribution of recordings of live performances. Prior to that time, there was no federal protection for live performances, although several states had laws that prevented the unauthorized recording and sale of live musical recordings.¹⁷

The legislative history indicates that the “anti-bootlegging” statutes were passed as one piece of a number of significant changes to the Copyright Act of 1976 in response to our obligations under international law.¹⁸ This history appears to indicate that Congress thought it was acting in accordance with its Copyright and Patent Clause authority when it enacted the new legislation, for there is no mention of the Commerce Clause at all.

Since the anti-bootlegging statutes became law in late 1994, there have been very few cases brought under them. Despite the paucity of cases, however, the same primary challenges have been raised: namely, that the anti-bootlegging statutes are unconstitutional either because they do not contain a “fixation” requirement, or because they violate the “limited Times” language in Article I, Section 8, Clause 8 of the Constitution, since they appear to provide perpetual protection.¹⁹ There is not a time limit that is tied to either the date of creation of the work, the date of the concert, the life of the author of the composition, or the life of the performance in question contained in the statutes. The question then boils down to whether the legislation was promulgated solely under the Copyright and Patent Clause, and is therefore unconstitutional, or whether the legislation was enacted pursuant to Commerce Clause authority, making it a constitutional exercise of congressional power—even though Congress thought that it was acting pursuant to the Copyright Clause.

II. UNITED STATES V. MOGHADAM

The first case that was brought under the anti-bootlegging statutes was *United States v. Moghadam*,²⁰ but the copyright community largely over-

prisoned for not more than 10 years or fined in the amount set forth in this title, or both.

18 U.S.C. § 2319A(a).

17. States have laws that protect against unauthorized duplication of pre-1972 sound recordings. For example, it was a New York State common law that was held to prevent the unauthorized duplication of sound recordings in *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005). See generally Michael B. Landau, “Publication,” *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29 (2000).

18. Patterson, *supra* note 14, at 380-81.

19. U.S. CONST. art. I, § 8, cl. 8 provides: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

20. 175 F.3d 1269 (11th Cir. 1999).

looked it. In *Moghadam*, the defendant was convicted of knowingly distributing, selling, and trafficking in bootleg compact disks of live recordings of musical performances, “including Tori Amos and the Beastie Boys,”²¹ under § 2319A of Title 18.²² The defendant appealed his conviction to the U.S. Court of Appeals for the Eleventh Circuit, challenging the constitutionality of the statute.²³ On appeal, the Eleventh Circuit noted that the constitutional challenge appeared to be a question of first impression in the country.²⁴

Interestingly, the challenge to the Copyright Clause was based “only on the concept of ‘fixation,’ which is said to be embedded in the term ‘Writings.’”²⁵ Moghadam argued that a live performance, by definition, had not been reduced to a fixed form as of the time of the performance.²⁶ The court avoided the fixation issue because it determined that the conviction could be upheld “on the basis of an alternative source of Congressional power,” the Commerce Clause.²⁷

The government took the position that the anti-bootlegging statutes were permissible legislation under Congress’s Commerce Clause authority. The Commerce Clause empowers Congress to pass legislation regarding “(i) the use of channels of interstate commerce; (ii) instrumentalities and persons or things in interstate commerce; and (iii) intrastate activities that substantially affect interstate commerce.”²⁸ The government contended that

21. *Id.* at 1271.

22. *Id.*; see 18 U.S.C. § 2319A (2000).

23. *Moghadam*, 175 F.3d at 1271. The district court proceeding in *Moghadam* is not contained in a Federal Reporter. The case can be found at *United States v. Moghadam*, No. 97-53-CR-ORL-18 (M.D. Fla. May 19, 1999).

24. *Moghadam*, 175 F.3d at 1271.

25. *Id.* at 1273. It is interesting to note that “fixation” is related to “Writings,” given how widely copyrightable subject matter has expanded in the years since the first copyright act of 1790. It has expanded to encompass much more than “Writings.” In 1790, “maps, charts, and books” were protected—and that’s it. Today, maps, charts, books, sound recordings, choreography, pantomime, motion pictures and audiovisual works, architecture, computer software, paintings, sculpture, and prints are protected. 17 U.S.C. § 102(a) (2000). That’s a far cry from the “Writings of an Author.”

26. *Id.* at 1274 (“[N]o respectable interpretation of the word ‘writings’ embraces an untaped performance of someone singing at Carnegie Hall.” (quoting David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1409 (1995))).

27. *Id.* A sports event can be fixed if it is broadcast and recorded simultaneously. See, e.g., *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979); *Gen. Elec. Prop. Mgmt. of Colo. v. Broad. Info. Servs., Inc.*, No. 88-A-325, 1988 WL 106018 (D. Colo. Oct. 12, 1988); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2] (Release No. 74, 2007) (“It is as if one who was dictating live into a tape recorder were overheard and copied at the moment of dictation. At that moment, the material has become a ‘writing,’ even if copied simultaneously, rather than a moment later.”); see also 17 U.S.C. § 411(b) (2000).

28. *Moghadam*, 175 F.3d at 1275 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

Moghadam's activity satisfied the third prong, and the court agreed.²⁹ Despite the lack of any findings in the legislative history, the court noted that "[t]he link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident."³⁰

The court then turned to the issue of whether Congress could use the Commerce Clause to avoid limitations that would prevent it from passing the same legislation under the Copyright Clause:

In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another.³¹

The only time that one provision may not be used as legislative authority is if it were *fundamentally inconsistent* with another.³² Because the "fixation" requirement in the Copyright Clause could be easily met by the performer simultaneously taping herself, the court found that prohibiting sales of unauthorized recordings of live concerts was not so seriously at odds with the goals of the Copyright Clause as to be "fundamentally inconsistent."³³ The conviction was, therefore, upheld.³⁴

At the end of its opinion, the Eleventh Circuit did note that there might be a "Limited Times" problem with the statute that could have been raised by defendant's counsel.³⁵ The court indicated that extending unlimited copyright-like protection under the Commerce Clause might be "fundamentally inconsistent," but "reserve[d] those issues for another day."³⁶ In 2004,

29. *Id.* at 1282.

30. *Id.* at 1276. "Because Congress thought it was acting under the Copyright Clause, predictably there are no legislative findings in the record regarding the effect of bootlegging of live musical performances on interstate or foreign commerce." *Id.* at 1275.

31. *Id.* at 1277 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)) (noting that while the provisions of the Civil Rights Act of 1875 were held to be beyond the scope of the legislative authority of Section 5 of the Fourteenth Amendment, the Civil Rights Act of 1964 was upheld under the Commerce Clause).

32. *Id.* at 1282.

33. *Id.* at 1281.

34. *Id.* The court knew that there was a "Limited Times" problem with the statute, although the defendant did not raise it. The fact that a performer *could* tape herself does not take it out of being "fundamentally inconsistent" because the "Limited Times" infirmity was not raised. *Id.* ("On its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore phonorecords of live musical performances would presumably never fall into the public domain."). *See also* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1411 (1995).

35. *Moghadam*, 175 F.3d at 1281-82.

36. *Id.* at 1281. This might have sufficed for a civil case, but not for a criminal case. If a judge has knowledge of a legal theory that exculpates the accused, then the judge should follow it, instead of telling the defendant's counsel that this would have been a good case in which to raise "Limited Times." *See id.* at 1281 n.15.

there were two more anti-bootlegging cases decided, one criminal case³⁷ and one civil case.³⁸

III. *UNITED STATES V. MARTIGNON*

In *United States v. Martignon*,³⁹ the owner of Midnight Records, comprising a store in Manhattan, a catalog service, and an Internet site, was arrested and subsequently indicted by a federal grand jury for violating 18 U.S.C. § 2319A for selling unauthorized recordings of live performances through his business.⁴⁰ Martignon moved to dismiss the indictment on the grounds that the anti-bootlegging statute under which he was charged was unconstitutional.⁴¹

His lawyers had the advantage of having access to the Eleventh Circuit's 1999 *Moghadam* opinion. In addition to asserting that § 2319A violated the "Writings" requirement for lack of a "fixation" standard, they followed the Eleventh Circuit's advice and argued that by providing perpetual copyright-like protection, the anti-bootlegging statute violated the "Limited Times" portion of the Copyright Clause as well.⁴²

In evaluating the claim, Judge Baer of the U.S. District Court for the Southern District of New York⁴³ distinguished *Moghadam* as being a narrow holding because the defendant in that case did not challenge the statute on perpetual protection grounds:

[N]ot only was this issue not present in *Moghadam*, but the *Moghadam* court all but stated, on several different occasions, that had the defendant challenged the statute's violation of the "Limited Times" provision in the Copyright Clause, the Court may well have come to a different conclusion about the statute's viability.⁴⁴

37. *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

38. *KISS Catalog v. Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated on reh'g*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

39. *Martignon*, 346 F. Supp. 2d at 413.

40. *Id.* at 417. Martignon was indicted on October 27, 2003. *Id.*

41. *Id.*

42. *Id.* at 423-24.

43. Author's note: I heartily commend Judge Baer for giving credit to the law clerks who worked on the opinion. Footnote 1 in the opinion states:

Sonia Wadhwa Nath, a summer 2004 intern in my Chambers and second-year law student at The George Washington University Law School and Graham O'Donoghue, also a summer 2004 intern in my Chambers and a second-year law student at Columbia Law School, provided substantial assistance in the research and drafting of this Opinion.

Id. at 416 n.1.

44. *Id.* at 419 (citing *United States v. Moghadam*, 175 F.3d 1269, 1274, 1281 n.14, 1281, 1282 (11th Cir. 1999)).

Judge Baer *did* come to a different conclusion. The judge first addressed the “fixation” issue that was avoided by the Eleventh Circuit and held that “by virtue of the fact that [the statute] regulates unfixed live performances, the anti-bootlegging statute is not within the purview of Congress’ Copyright Clause power.”⁴⁵ Section 2319A also was found to “run afoul” of the “Limited Times” provision by “grant[ing] seemingly perpetual protection to live musical performances.”⁴⁶ Finally, the court held that endless protection was “fundamentally inconsistent” with Copyright Clause limitations, and as a result, could not have been enacted pursuant to any valid Commerce Clause authority.⁴⁷ Section 2319A was thus found to be unconstitutional, and the defendant’s motion to dismiss the indictment was granted.⁴⁸

On appeal,⁴⁹ the Second Circuit, in a carefully written and narrow opinion, vacated Judge Baer’s dismissal of the indictment and remanded the case for consideration on First Amendment grounds.⁵⁰ Judge Pooler, on remand, first held that the Second Circuit’s opinion was limited to the criminal provisions, 18 U.S.C. §§ 2319A(a)(1) and (3).⁵¹ “Our conclusion is limited to those provisions alone and does not reach other anti-bootlegging provisions of the Uruguay Round Agreements Act (‘URAA’), Pub. L. No. 103-465, 108 Stat. 4809 (1994), from which Section 2319A is drawn.”⁵² In doing so, the court left open the issue of the constitutionality of the civil anti-bootlegging statutes.⁵³

45. *Id.* at 424.

46. *Id.*

47. *Id.* at 428-29.

48. *Id.* at 429-30.

49. *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007).

50. *Id.* at 153 (“Martignon argued below and amici Twenty-Nine Intellectual Property and Constitutional Law Professors argue here that Section 2319A violates the First Amendment because it is unconstitutionally overbroad, containing no fair use exception or durational limitation. The district court did not reach this argument because it found a violation of the Copyright Clause. We therefore remand to allow the district court to consider the First Amendment argument.”).

51. *Id.* at 142.

52. *Id.*

53. *See KISS Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (holding, on rehearing, that the civil anti-bootlegging statutes were not within the scope of congressional copyright authority because the performances were not “fixed” and, therefore, were legitimate under the Commerce Clause). If live performances are not fixed and are therefore not copyrightable subject matter for purposes of the anti-bootlegging acts, are the rights of performance of dramatic works and musical works, currently protected under § 106(4), in jeopardy? Some argue that the right of performance applies to performances of works that had previously been fixed in a tangible medium of expression. If that is the case, a strong argument could be made that if the civil anti-bootlegging statutes are outside of the authority granted by the Copyright Clause, it should only be with respect to performances of musical compositions that had not previously been fixed. It makes no logical sense to say that a copyright holder has the right to control all live performances of his musi-

By concentrating on only the criminal statutes contained in § 2319A, the court was able to engage in a very different type of analysis of the nature and applicability of the Copyright Clause than it could have done with respect to the civil statutes. The criminal statutes, as opposed to the civil statutes, do not provide any “exclusive Right[s]” “for limited Times to Authors.”⁵⁴ Nor do they provide any incentive to create. The criminal statutes provide rights to the government and law enforcement to prevent and punish certain behavior, namely, the making of and trafficking in unauthorized recordings of live musical performances.⁵⁵ The criminal statutes also do nothing to “promote the Progress of Science and useful Arts.”⁵⁶ Although Congress clearly thought that it was acting pursuant to the Copyright Clause, at least in the collective eyes of the Second Circuit, Congress was not doing anything in accordance with either the goals or the mandates of the Copyright Clause.⁵⁷ The issue of authority under that clause was removed from the equation.⁵⁸ There was no clash between the Copyright Clause and the Commerce Clause because the legislation was not actually copyright legislation.

The holding that the legislation was not enacted pursuant to the Copyright Clause was central to the court’s finding that the Copyright Clause did not present any obstacle to upholding the statutes.⁵⁹ The court instead held that the legislation was promulgated by Congress, albeit not consciously, pursuant to the Commerce Clause.⁶⁰ The Second Circuit looked at other Commerce Clause/“Other Clause” cases to determine whether there was a “fundamental inconsistency” based upon the ultimate nature of the statutes in question.⁶¹

In *Heart of Atlanta Motel, Inc. v. United States*,⁶² one of the cases considered by the *Martignon* court, there was a question regarding whether federal civil rights laws could be enforced against private actors who en-

cal composition because the composition had initially been fixed, but cannot prevent the unauthorized reproduction, transmission, or distribution of copies of that same performance because of a lack of “fixation.”

54. U.S. CONST. art. I, § 8, cl. 8.

55. *Martignon*, 492 F.3d at 142-43.

56. U.S. CONST. art. I, § 8, cl. 8.

57. *Martignon*, 492 F.3d at 151.

58. *Id.* at 151-52. Because the legislation was not passed pursuant to the Copyright Clause, the Copyright Clause/Commerce Clause balancing test did not have to be done. The legislation was not Copyright Clause legislation. *Id.*

59. *Id.* at 152.

60. *Id.* at 152-53.

61. See, e.g., *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Trade-mark Cases*, 100 U.S. 82 (1879).

62. 379 U.S. 241 (1964).

gaged in racial discrimination.⁶³ The private actor issue raised a big Fourteenth Amendment problem.⁶⁴ The U.S. Supreme Court held that anti-discrimination laws were constitutional under the Commerce Clause because of “the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.”⁶⁵

In contrast, in another case considered by the *Martignon* court, *Railway Labor Executives’ Ass’n v. Gibbons*,⁶⁶ a 1979 strike caused the Rock Island Railroad Line to stop operations, causing the railroad to file for protection under the Bankruptcy Act.⁶⁷ In accordance with the Bankruptcy Act, the U.S. Bankruptcy Court directed Rock Island’s trustee to prepare a liquidation plan.⁶⁸ In June 1980, the Bankruptcy Court concluded that employee-labor-protection claims could not be paid out of Rock Island’s assets.⁶⁹

Congress subsequently enacted the Rock Island Railroad Transition and Employee Assistance Act (RITA).⁷⁰ RITA provided that the trustee must pay up to \$75 million to Rock Island employees who were not hired by other carriers.⁷¹ These payments were to be made as administrative expenses, which would give them priority over other creditors’ claims.⁷² Because RITA altered the priorities and regulations under the Bankruptcy Act, it was viewed as being primarily bankruptcy type legislation, not legislation that regulated “commerce.”⁷³ Thus, the Supreme Court held that the legislation was unconstitutional.

As discussed above, given that the criminal anti-bootlegging statutes do nothing to “promote the Progress of Science and useful Arts,”⁷⁴ confer no rights or benefits upon authors, and were meant to limit or altogether stop the commercial market in the making and trafficking of bootleg recordings of performances, the Second Circuit had no problem considering § 2319A to be a statute more related to commerce than to copyright.⁷⁵ As a consequence, the “fundamental inconsistency” found by Judge Baer in the district

63. *Id.* at 146-47.

64. *Id.* at 147.

65. *Id.* at 257.

66. *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982).

67. *Id.* at 148.

68. *Id.*

69. *Ry. Labor Executives’ Ass’n*, 455 U.S. at 460.

70. *Id.* at 461.

71. *United States v. Martignon*, 492 F.3d 140, 148 (2d Cir. 2007) (citing *Gibbons*, 455 U.S. at 461-62).

72. *Id.* at 149-50 (citing *Gibbons*, 455 U.S. at 461-62).

73. *Id.* (citing *Gibbons*, 455 U.S. at 467-68).

74. U.S. CONST. art. I, § 8, cl.8.

75. *Martignon*, 492 F.3d at 152.

court was not found by the appellate court.⁷⁶ The Second Circuit upheld § 2319A as a valid exercise of Commerce Clause power by Congress.⁷⁷

The case did not end there, however. Though the court did vacate the district court's dismissal of the injunction, it also remanded the case to the district court for a determination of whether § 2319A violated the First Amendment on vagueness or overbreadth grounds:

Martignon argued below and amici Twenty-Nine Intellectual Property and Constitutional Law Professors argue here that Section 2319A violates the First Amendment because it is unconstitutionally overbroad, containing no fair use exception or durational limitation. The district court did not reach this argument because it found a violation of the Copyright Clause. We therefore remand to allow the district court to consider the First Amendment argument.⁷⁸

IV. *KISS CATALOG INC. V. PASSPORT INTERNATIONAL PRODUCTIONS, INC.*

In *KISS Catalog Inc. v. Passport International Productions, Inc.*,⁷⁹ the dispute involved films of a KISS concert made more than thirty years ago. On July 10, 1976, KISS performed at Roosevelt Stadium in New Jersey as part of their "Spirit of '76" concert tour.⁸⁰ The concert promoter for the Roosevelt Stadium was Metropolitan Talent, Inc. (Metropolitan).⁸¹ Metropolitan filmed the Roosevelt Stadium performance so that it could project images of the band onscreen while the band was performing. After the concert, Metropolitan retained its live recording of the show—"for the next thirty years."⁸² In 2003, Metropolitan entered into a "Stock Footage License Agreement" with Passport International Productions, Inc. (Passport) that purportedly gave Passport rights to distribute copies of the filmed 1976 Roosevelt Stadium concert to the public.⁸³ Passport released a DVD of the concert entitled "KISS: The Lost Concert" and began selling copies in late 2003.⁸⁴ In November 2003, KISS filed suit against Passport, asserting a variety of trademark and state law claims.⁸⁵

76. *Id.* at 153.

77. *Id.*

78. *Id.* at 153. For purposes of full disclosure, the author, Michael Landau, was one of the professors who joined the Brief of the Amici, Twenty-Nine Intellectual Property and Constitutional Law Professors, filed by the Samuelson Law, Technology & Public Policy Clinic, University of California School of Law.

79. 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated on reh'g*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

80. *Id.* at 825 (citing Third Am. Compl. (TAC) at ¶ 19).

81. *Id.* (citing TAC at ¶ 20).

82. *Id.* at 825.

83. *Id.*

84. *Id.*

85. *Id.*

In August 2004, KISS filed an amended complaint in order to assert an anti-bootlegging claim under § 1101(a)(3).⁸⁶ In October 2004, it filed a second amended complaint to include claims for copyright infringement.⁸⁷ On November 8, 2004, Passport filed motions to dismiss both the copyright and bootlegging claims.⁸⁸ The court held that the plaintiffs had sufficiently set forth a claim for copyright infringement and had registered the work.⁸⁹ The defendants' motion regarding copyright dismissal was therefore denied.⁹⁰

The court then turned to the anti-bootlegging claims. After briefly discussing the statutes' background, Judge Rea commented, "Despite the existence of the anti-bootlegging law for ten years, this Court has been unable to find any reported cases addressing this statute. Thus, many of the issues discussed below are matters of first impression."⁹¹

The defendants first argued that the anti-bootlegging claims had to fail because they were inconsistent with the copyright infringement claims.⁹² The court rejected this argument, holding that because Rule 8(e)(2) of the Federal Rules of Civil Procedure permits a plaintiff to plead alternative or inconsistent claims, despite the copyright infringement claim, the anti-bootlegging claim was perfectly acceptable.⁹³

The defendants then argued that § 1101, which took effect in late 1994, was prospective in nature, and could not be applied to prevent the sale of a film that was made twenty years prior to its enactment.⁹⁴ The court rejected this argument as well, noting that each subsection could be applied independently.⁹⁵

It is possible that Congress could have intended to limit the scope of § 1101(a)(3) to instances where the live performance being protected took place after 1994. However, the plain text of the statute does not support that reading. Statutory interpretation "begins with the language of the statute." Further, "[w]hen interpreting a statute we must give words their 'ordinary or natural' meaning". No lan-

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 828. While it is true that, at that time, there had not been reported cases involving the civil statute, 17 U.S.C. § 1101, the court discusses both *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) and *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999). The criminal and civil statutes, and challenges to them, are so related that it is somewhat surprising that the judge says that the issues are "matters of first impression." *Kiss Catalog, Inc.*, 350 F. Supp. 2d at 828.

92. *Kiss Catalog, Inc.*, 350 F. Supp. 2d at 827.

93. *Id.* at 826.

94. *Id.* at 828.

95. *Id.* at 828.

guage in § 1101(a)(3) restricts the distribution prohibition to bootleg recordings made after 1994.⁹⁶

Section 1101(a)(1) applies to making an unauthorized recording, § 1101(a)(2) applies to making unauthorized transmissions of a live performance, and § 1101(a)(3) applies to distributing, selling, or offering to sell any unauthorized recording. The court rejected the argument that Section 1101(a)(3) inherently included § 1101(a)(1), so that only the distribution of unauthorized recordings made after the effective date could trigger liability.⁹⁷ The court noted that Congress easily could have included language tying the two together, but that it did not do so.⁹⁸ The statute was interpreted as applying to separate violations, not only to post-1994 acts.⁹⁹ Therefore, the unauthorized sale after the effective date of a recorded concert that was made prior to the effective date would violate § 1101(a)(3).¹⁰⁰ To further illustrate, the court pointed out that if one were to make an unauthorized recording after the effective date, and then distribute the recording, both §§ 1101(a)(1) and 1101(a)(3) would have been violated.¹⁰¹

Finally, the Second Circuit addressed the issue of the constitutionality of the statutes. As a threshold matter, it had to be determined whether § 1101 was “copyright-like” legislation.¹⁰² Based upon the statute’s “language, history, and placement,” as well as the language in *Moghadam*¹⁰³ and *Martignon*,¹⁰⁴ the court concluded that “it was ‘pretty clear that when Congress enacted the anti-bootlegging statute, it believed it was acting pursuant to its Copyright Clause powers.’”¹⁰⁵ The court then turned to the “Fixation” or lack of a “Writing” issue:

At first glance, it would seem that a live performance protected by § 1101 is not a fixed work. A live performance is intangible and does not endure. If “writings” continues to exist as a constitutional limit, live performances cannot be within the scope of that term. Thus, one would be inclined to think that . . . live performances could not be regulated via the Copyright Clause. “While the category of ‘writings’ has expanded over time, it has never moved into the realm of unfixed works.” . . . However, Plaintiffs have brought a claim under § 1101(a)(3) which prohibits the unauthorized distribution of an unauthorized recording . . . [T]his Court will not

96. *Id.* at 828-29 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004)).

97. *Id.*

98. *Id.* at 829.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 830-31.

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

104. *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

105. *KISS Catalog, Inc.*, 350 F. Supp. 2d at 830 (quoting *Martignon*, 346 F. Supp. 2d at 419); *see also Moghadam*, 175 F.3d at 1275 (“Congress thought it was acting under the Copyright Clause.”).

attempt to reach a conclusion on this question. As the further discussion will indicate, the Court finds other unconstitutional defects with § 1101.¹⁰⁶

As the Eleventh Circuit did in *United States v. Moghadam*, the U.S. District Court for the Central District of California also declined to address the “fixation” or “Writings” issue, based upon “other unconstitutional defects with § 1101.”¹⁰⁷

Section 1101, as written, also contains no time limit for its protections. The Copyright Clause is a “constitutional command” directing Congress to design a system that promotes “the Progress of Science and useful Arts.”¹⁰⁸ As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to Authors and Inventors.¹⁰⁹ The court thus held that the current version of the statute created “perpetual copyright-like protection in violation of the ‘for limited Times’ restriction of the Copyright Clause.”¹¹⁰

Finally, the issue of whether Congress could have been acting under its Commerce Clause authority when it enacted the statute was addressed. While conceding that in some cases a piece of legislation may be enacted pursuant to one of several different constitutional grants, the court held that the limitation in the Copyright Clause was so strong that allowing Congress to invoke the Commerce Clause in a situation where the Copyright Clause would otherwise be violated would “‘eradicate from the Constitution a limitation on the power of Congress.’ . . . 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.”¹¹¹ The court held § 1101, therefore, to be unconstitutional.¹¹²

Now it becomes interesting!

After Judge William J. Rea entered the trial order holding § 1101 unconstitutional, the U.S. Attorney General’s Office became aware of the decision. The Attorney General’s Office sought leave to intervene and moved for a rehearing pursuant to 28 U.S.C. § 2403(a),¹¹³ which provides,

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the

106. *Id.* at 831-32 (footnotes omitted) (quoting *Martignon*, 346 F. Supp. 2d at 424; Nimmer, *supra* note 34, at 1409).

107. *Id.* at 832.

108. U.S. CONST. art. I, § 8, cl. 8.

109. *KISS Catalog, Inc.*, 350 F. Supp. 2d at 823.

110. *Id.* at 833.

111. *Id.* (quoting *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 469 (1982)).

112. *Id.* at 837.

113. 28 U.S.C. § 2403(a) (2000).

United States to intervene . . . for the argument on the question of constitutionality.¹¹⁴

Failure to allow counsel from the U.S. Government to defend the constitutionality of a challenged statute is reversible error.¹¹⁵ While the first case was pending, the court had not notified the Government. Thus, the court granted the motion. Judge Rea died while the case was pending, transferring the action to Judge Fischer.¹¹⁶

The court now heard the U.S. Government's arguments regarding the legislative authority of Congress under both the Copyright and Commerce clauses, as well as the issue of whether there was a "fundamentally inconsistent" clash between the two clauses on the issue of perpetual protection for unfixed performances.¹¹⁷ On rehearing, the court viewed the "fixation" issue in a totally different manner, and by so doing, was able to hold that the legislation was permissible under the Commerce Clause.¹¹⁸ Instead of following all of the references in the legislative history to "copyright," and concentrating on the fact that the statute, indeed, was placed in Title 17 to be part of the Copyright Act, Judge Fisher did not hold that the legislation was promulgated pursuant to Copyright Clause authority.¹¹⁹ Instead, he concentrated on the unfixed nature of a live performance.¹²⁰ Because live performances are not "fixed," they are not "Writings" in the constitutional sense of the word.¹²¹ Live performances cannot, therefore, by definition, fall within the scope of the congressional power to provide "exclusive Rights" for "limited Times" to "authors . . . and their Writings."¹²² Because the unfixed live performances were outside of the scope of the Copyright Clause, for the purposes of the analysis, and especially for the purpose of any potential fundamentally inconsistent conflict between grants of congressional authority, the Copyright Clause was not relevant.¹²³

By acting wholly outside of the scope of the Copyright Clause, the judge reasoned that Congress must have promulgated the statutes in question under some other authority granted by a different empowering clause of Article I, even though there was no question at the time that Congress thought it was acting under its Copyright Clause authority.¹²⁴ The court

114. *KISS Catalog, Inc.*, 405 F. Supp. 2d at 1170 n.2.

115. *Id.* at 1170 ("Failure fully to consider the position of the United States would be an abuse of discretion." (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995))).

116. *Id.*

117. *Id.* at 1171.

118. *Id.* at 1776.

119. *Id.* at 1175-76.

120. *Id.*

121. *Id.* at 1176.

122. *Id.*

123. *Id.*

124. *Id.* at 1172-73.

noted that Congress had very broad authority under the Commerce Clause to regulate almost anything that can have a “substantial effect” on commerce.¹²⁵ It was assumed that an illegal market in bootleg concert recording would have an obvious “substantial effect” on commerce.¹²⁶ Given this effect, the legislation was found to be a proper exercise of congressional legislative authority.¹²⁷

Moreover, because the “unfixed performances” were completely outside of the scope of the Copyright Clause and could not be regulated under the Copyright Clause, there was no issue of conflict between provisions. The anti-bootlegging provisions of § 1101 were, therefore, wholly constitutional and justified in the court’s opinion.¹²⁸

There are now opinions in which both the civil anti-bootlegging statute and the criminal anti-bootlegging statute have been held to be unconstitutional.¹²⁹ While one can never accurately predict what other appellate courts will do, all of the judges who have contemplated the “Limited Times” problem are in agreement, even when the issue was not even raised by parties to the case. Thus, it would probably be wise for Congress to amend the statute in the near future.

V. WHAT IF THE COURTS UPHOLD THE ANTI-BOOTLEGGING STATUTES?

The Second Circuit was very careful to uphold only the criminal anti-bootlegging statutes. The court deliberately did not decide the constitutionality of the civil statutes. The author feels that this was done to avoid the right “to perform . . . publicly” found in Section 106(4) of the Copyright Act.¹³⁰ As discussed below, the rationale for protecting the right “to perform . . . publicly” is based upon the fixation of the underlying song, dramatic work, or musical composition.¹³¹ But there was no “fixation requirement” with respect to the performances saying that it is illegal to record, transmit, or sell a recording without authorization. The “public performance” right and the anti-bootlegging right should coexist. It makes no sense to say performances for bootlegging purposes are unconstitutional, while at

125. *Id.* at 1173.

126. *Id.*

127. *Id.* at 1173.

128. *Id.* at 1176-77.

129. *See id.* at 1169; *United States v. Martignon*, 492 F.3d 140, 140 (2d Cir. 2007); *United States v. Moghadam*, 175 F.3d 1269, 1269 (11th Cir. 1999).

130. 17 U.S.C. § 106(4) (2000).

131. Section 102(a) of the Copyright Act provides: “Copyright protection subsists, in accordance with this title, in original works of authorship *fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2000) (emphasis added).

the same time saying that the right of performance is constitutional. It might make sense if the court had held that both the right of performance and the anti-bootlegging statutes were unconstitutional. That is not what the court said, however. By failing to do so, in the Second Circuit at least, the constitutionality of the civil statutes is up in the air.¹³²

There are two cases dealing with the constitutionality of the criminal statutes: *Moghadam* and *Martignon*. *Moghadam* held that the statute was constitutional under the Commerce Clause, but did not answer the question of whether it was enacted under the Copyright Clause.¹³³ *Martignon* held that the statute was constitutional under the Commerce Clause, but not even passed under the Copyright Clause.¹³⁴ The *KISS Catalog* court initially held that the civil statute was unconstitutional under both clauses, and then, upon rehearing, decided that the Copyright Clause was irrelevant, and that the civil statute was constitutional under the Commerce Clause.¹³⁵ In sum, courts have had an incredibly difficult time dealing with this issue.

If the criminal anti-bootlegging statutes are upheld, several other things naturally follow. By stating that any exchange between the copyright owner and Congress is null, the Second Circuit has challenged the underlying assumption that any and all criminal copyright statutes are passed under the Copyright Clause. They have not been. They were passed under the Commerce Clause.¹³⁶ What will that mean with respect to other statutes?

Under *Martignon*, should Congress want to impose limits related to time and scope in excess of those articulated by the Copyright Clause, it is free to do so. This could create a bizarre disconnect between criminal and civil liability. Civil liability would end at life-of-the-author plus seventy or

132. Actually, it is up in the air in all circuits but the Eleventh. The Second Circuit deliberately avoided the issue. *Martignon*, 492 F.3d at 152 n.7. The *KISS Catalog* case is only a district court case. *KISS Catalog, Inc.*, 405 F. Supp. 2d at 1169. Only the Eleventh Circuit has ruled on it. *Moghadam*, 175 F.3d at 1269.

133. *Moghadam*, 175 F.3d at 1274.

In sum, Section 2319A does not create, bestow, or allocate property rights in expression, it does not share the defining characteristics of other laws that are concededly “copyright laws,” and it differs significantly from the Copyright Act that was passed pursuant to the Copyright Clause (and that is valid under it). We therefore conclude that it was not enacted under the Copyright Clause. We have no need to examine whether it violates limits of the Copyright Clause and proceed instead to an examination of its sustainability under the Commerce Clause.

Id.

134. *Martignon*, 492 F.3d at 140.

135. *KISS Catalog, Inc.*, 405 F. Supp. 2d at 1172-74.

136. This is an interesting distinction between the criminal copyright statutes and the civil ones. The court reasoned that because the criminal statutes did not provide the “Author” with a remedy, they were not providing the necessary incentive and, thus, were outside of the Copyright Clause. *Martignon*, 492 F.3d at 140. The court deliberately failed to rule on the civil statutes. *Id.*

ninety-five years, depending upon when the work was created, yet criminal liability could continue for years thereafter.¹³⁷

The copyright status of other performances—musical, dramatic, motion picture, and audiovisual—would be up in the air as well. The rationale used for protecting other performances is that they have been previously “fixed.”¹³⁸ The anti-bootlegging cases, however, did not use that as a criterion for protecting the performance. They held that all performances were outside the scope of the Copyright Clause.¹³⁹ What does this do to the right “of public . . . performance” contained in § 106(4)?¹⁴⁰

Does this take the right of performance out of the copyright arena and into the “Commerce Clause” arena? Maybe so. If “performances” do not involve the Copyright Clause at all for purposes of the anti-bootlegging statutes, then how can “performances” be within the scope of the Copyright Clause for a § 106(4) right?¹⁴¹ That would put all “performances,” whether for anti-bootlegging or “performance right”¹⁴² purposes, within the scope of the Commerce Clause, and would render the Copyright Clause superfluous.

A live athletic event, such as a basketball or a football game, for example, is fixed if it is simultaneously recorded at the time that it is transmitted or broadcast.¹⁴³ Suppose the performer tape records or digitally records his performance and webcasts it. In such a case, the Copyright Clause would be implicated because the performance has been “fixed” in a medium. Because there is no “Limited Times” requirement, however, the stat-

137. This is not the first time that the U.S. Supreme Court has split hairs. In *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*, 529 U.S. 205 (2000), the Court held that trade dress could be divided into three categories: product design, product packaging, and “some *tertium quid*.” *Id.* at 212-13, 215. The Court held that its earlier case of *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 1244 (1992), was inapposite because, despite its expressly stating so in the *Two Pesos* case years earlier, this time it held that in order to protect product design, one had to show secondary meaning, or “acquired distinctiveness.” *Wal-Mart Stores, Inc.*, 529 U.S. at 211, 214-15. Assume the following facts: a product and its box have the exact same design. The product’s box would be protected immediately upon use, but the product would be protected only upon a showing of secondary meaning. In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), the Court held that § 43(a) of the Lanham Act could not be used to prevent unaccredited copying of another project. In reaching that decision, the Court ignored (1) the purposes of the Lanham Act and the Copyright Act; (2) the legislative history of the Visual Artists’ Rights Act; and (3) the definition of “Services.”

138. See *KISS Catalog, Inc.*, 405 F. Supp. 2d at 1172.

139. *United States v. Moghadam*, 175 F.3d 1269, 1269 (11th Cir. 1999); *Martignon*, 492 F.3d at 140; *KISS Catalog, Inc.*, 405 F. Supp. 2d at 1690.

140. 17 U.S.C. § 106(4) (2000).

141. *Id.*

142. *Id.*

143. See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997); *Gen. Elec. Prop. Mgmt. Co. of Colo. v. Broad. Info. Servs., Inc.*, No. 88-A-325, 1988 WL 106018, at *2-3 (D. Colo. Oct. 12, 1988); *Prod. Contractors, Inc. v. WGN Cont’l Broad. Co.*, 622 F. Supp. 1500, 1503 (N.D. Ill. 1985).

utes would be unconstitutional under the Copyright Clause. They could not be upheld under the Commerce Clause either, since there would be a “fundamental inconsistency” between the Copyright Clause and the Commerce Clause.

As a result, the live performances right under § 106(4)¹⁴⁴ should be valid. The rationale for protecting a live performance of a song, motion picture, etc., is that the original has been fixed prior to its being played on-stage. Without a time limit in the statutes—criminal or civil—the anti-bootlegging statutes would be unconstitutional. If the anti-bootlegging statutes are held to be unconstitutional, then all performances, not just those for anti-bootlegging purposes, are unconstitutional as well.

VI. DATABASES—AGAIN

Upholding the anti-bootlegging statutes under the Commerce Clause opens the door to uncopyrightable database protection again. The Commerce Clause cannot be used to take an end-run around the Copyright Clause. On the other hand, the Commerce Clause can be used to protect subject matter that is wholly outside of the scope of the Copyright Clause. Such protection might not extend to expired databases—although this is debatable—but it could be used to protect ideas and facts,¹⁴⁵ since they do not implicate the Copyright Clause. Again, this leads to a very bizarre result. Protection for life-of-the-author plus seventy years¹⁴⁶ would exist under copyright law for copyrightable subject matter, but perpetual protection would be available for uncopyrightable material.

CONCLUSION

Congress should go back to the drawing board and amend the anti-bootlegging statutes, since they contain no time limits. From *Eldred v. Ashcroft*,¹⁴⁷ it is clear that a time limit of up to life-of-the-author plus seventy years is constitutional.¹⁴⁸ Congress should insert a time period of life of the last surviving author, or the copyright of the song, or the date of the performance, into § 1101 and § 2319(A) in order to rectify this situation. Similarly, with respect to fixation, at present there is no requirement in the anti-bootlegging statutes. If fixation of a sports event—one that involves

144. 17 U.S.C. § 106(4) (2000).

145. *Id.* § 102(b).

146. *Id.* § 203.

147. 537 U.S. 186, 205-06 (2003).

148. In the case of “works made for hire,” “anonymous works,” and “pseudonymous works,” protection lasts from 95 years from publication or 120 years from creation. 17 U.S.C. § 302(c) (2000). Pre-1909 works are protected for 28 years + 67 years (automatic renewal). *Id.* § 304(a).

less originality than a musical performance—is satisfied when the program is simultaneously taped with the broadcast, then simultaneous, or previous taping, should be sufficient. Congress should solve this inconsistency by expressly stating what satisfies the fixation standard for live performances. Since the courts are “all over the place,” Congress should immediately re-draft the anti-bootlegging statutes, both criminal and civil, to rectify the situation.