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NOTE

To Bootleg or Not to Bootleg? Confusion Surrounding the Constitutionality of the Anti-Bootlegging Act Continues

I. Introduction

Music is everywhere. From the background music in the shopping mall to the instrumental renditions of pop songs played in elevators, music permeates the world. Within this multi-billion dollar industry,¹ rights protection is a constant battle. In 1994, Congress passed the Anti-Bootlegging Act² (the Act) to protect one niche of the music industry by prohibiting the unauthorized recording and distribution of live performances. While the Act withstood constitutional challenges for nearly a decade, recent court decisions have exposed the Act's fatal flaws. These recent decisions have created a jurisdictional split with one jurisdiction upholding the Act's constitutionality and two declaring the Act unconstitutional. This note explores the fatal flaws of the Act and the confusion surrounding the Act's constitutionality.

The U.S. Constitution expressly grants power to Congress to enact copyright legislation under the Copyright Clause.³ The Copyright Clause serves two purposes that are constantly in precarious balance with one another. On one side of the scale, the Copyright Clause attempts to protect a creator's artistic works against unauthorized use. This protection maximizes artists' opportunities to profit and gives them greater incentive

1. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SOUND RECORDING INDUSTRIES: 2002, at 1 tbl.1 (2004) (showing gross receipts for sound recording industries in excess of \$15 billion), available at <http://www.census.gov/prod/ec02/ec0251i08t.pdf>.

2. The Anti-Bootlegging Act consists of 17 U.S.C. § 1101(a) (2000), which contains civil remedies, and 18 U.S.C. § 2319A (2000), which contains criminal penalties. Bootlegging is the unauthorized duplication of a commercially unreleased live performance for distribution; it is distinct from piracy, which is the duplication of a sound recording that has already been commercially released. *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985). For example, if people were to attend the next variety band concert at the local music café, record the show, and then make it available to others when the artist chooses not to do so, they would be engaging in bootlegging. If, however, they were to make copies of the albums the variety band sold and then give the albums to friends and family for Christmas, they would be engaging in pirating.

3. U.S. CONST. art. I, § 8, cls. 1, 8 ("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.").

to create works.⁴ On the other side of the scale, the Copyright Clause limits authors' monopolies over their works.⁵ This limitation provides greater public access to works, thereby serving the public interest in using these works for the benefit of society.⁶ To maintain this balance, courts have relied on constitutional provisions that limit the kinds of materials afforded copyright protection and the duration of that protection.⁷

In 1994, Congress tested the limitations the Copyright Clause imposes by passing the Anti-Bootlegging Act.⁸ Nearly a decade later in *United States v. Martignon*,⁹ a district court in New York determined that the Act was unconstitutional even though a prior case from another jurisdiction previously upheld the Act's constitutionality. This note focuses on the Act through the lens of the *Martignon* challenge, which exposed the Act's failure to satisfy the fixation and duration limitations that the Copyright Clause imposes. This note argues that the Act fails constitutional review because (1) the Act protects works that are outside the realm of "fixed" works; (2) the Act omits the required duration restrictions the Copyright Clause imposes; and (3) Congress cannot simply circumvent Copyright Clause limitations through use of the Commerce Clause.

The fixation requirement is based on the express protection of "writings" under the Copyright Clause.¹⁰ Fixation requires that protected works are to be recorded in some permanent form.¹¹ "[L]iterary works, musical works, dramatic works . . . pictures, sculptures, motion pictures, sound recordings, [and] architectural drawings" all fulfill the fixation requirement.¹² While the fixation category has expanded over time, it has always protected only those

4. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (superseded by statute on other grounds by 17 U.S.C. § 110 (1976)).

5. *Id.*; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

6. *Aiken*, 422 U.S. at 156.

7. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08 (2004) [hereinafter NIMMER ON COPYRIGHT] (citing *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966)) (recognizing that the same constitutional clause grants congressional power for both patent and copyright protections).

8. *See supra* note 2.

9. 346 F. Supp. 2d 413, 425 n.1 (S.D.N.Y. 2004).

10. *See supra* note 3.

11. 1 NIMMER ON COPYRIGHT, *supra* note 7, § 1.08 (listing scripts, motion pictures, and written materials as well as pictorial, graphic, and sculptural art as being included within the notion of fixation).

12. *KISS Catalog v. Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823, 831 (C.D. Cal. 2004), *vacated in part*, *KISS Catalog, Ltd. v. Passport Int'l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

creations that at least have “some material form, capable of identification and having a more or less permanent endurance.”¹³

The duration requirement is based on Constitutional text that limits copyright protection to a discrete time period.¹⁴ The duration restriction allows authors to capitalize on their product for a reasonable period of time before permitting public access to the works.¹⁵ While Congress has extended the duration of protection through the years, courts have not upheld limitless protection.¹⁶

In 1994, Congress passed the Act¹⁷ as part of an extensive agreement formed under the Uruguay Round Agreements Act.¹⁸ The Act protects live performances from unauthorized copying and distributing.¹⁹ Critics, however, attacked the Act for failing to fulfill the basic tenets of copyright law by expanding protection to “unfixed” works and by seemingly extending indefinite protection to these works.²⁰ After three jurisdictions scrutinizing the Act failed to apply cohesive reasoning regarding the constitutionality of the Act, confusion still exists among the jurisdictions.

Five years after the Act’s passage, the first case to challenge the Act’s constitutionality, *United States v. Moghadam*,²¹ reached the U.S. Court of Appeals for the Eleventh Circuit. The constitutional challenge in *Moghadam* failed, but subsequent cases exposed the Act’s constitutional deficiencies. This note explores those cases that have challenged the Act’s constitutionality and why the Act, in its current form, fails to withstand constitutional attacks.

Part II of the note discusses the inception of the Act and the Act’s survival of constitutional review in *United States v. Moghadam*. Part III introduces *United States v. Martignon*, which is the solitary case that has declared the Act unconstitutional. Part III continues with a brief discussion of *KISS Catalog v. Passport International Products*,²² which initially sided with

13. 1 NIMMER ON COPYRIGHT, *supra* note 7, § 1.08(C)(2) (citing Canadian Admiral Corp. v. Rediffusion Inc., [1954] Ex. C.R. 382, 383).

14. U.S. CONST. art. 1, § 8, cl. 8 (“securing for *limited Times* . . . exclusive Right to . . . Writings and Discoveries”) (emphasis added).

15. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994).

16. *See Eldred v. Ashcroft*, 537 U.S. 186, 209 (2003).

17. *See supra* note 2.

18. Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 512-513, 108 Stat. 4809, 4974-76 (1994).

19. *See infra* notes 28-29 and accompanying text.

20. *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1411-12 (1995).

21. 175 F.3d 1269, 1271 (11th Cir. 1999).

22. 350 F. Supp. 2d 823, 824 (C.D. Cal. 2004), *vacated in part*, *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

Martignon, declaring the Act unconstitutional. On rehearing, however, a different judge followed the reasoning expounded in *Moghadam* and upheld the Act as constitutional. After the legislative and case history outlined in Parts II and III, Part IV addresses the fixation and duration requirements of copyright law and explains why the Act fails to satisfy both of these requirements. Drawing on Part IV's conclusion that the Act fails to meet the requirements of the Copyright Clause, Part V demonstrates that the Copyright Clause serves as a grant of power as well as a limitation, and as a limitation, Congress cannot simply evade copyright requirements through use of the Commerce Clause. As a result, the Act cannot rely on the Commerce Clause to withstand a constitutional challenge. Finally, despite the Act's unconstitutionality, Part VI explores why courts may nevertheless find compelling justifications to uphold the Act and have done so in both *Moghadam* and more recently in *KISS Catalog*.

II. Historical Background

A. Enactment and Scope of the Anti-Bootlegging Act

During much of U.S. copyright history, copyright law did not protect audio recordings.²³ While early copyright law protected the reproduction of musical notations, it did not protect aural musical reproduction.²⁴ In 1971, Congress extended copyright protection for the music industry by passing the Sound Recording Act of 1971,²⁵ which was intended to protect the music industry against the increase in piracy that had arisen as a result of the invention of the audio tape recorder.²⁶ In 1994, Congress again expanded the sphere of protection afforded to the music industry by passing the Uruguay Round Agreements Act (Uruguay Act),²⁷ which served as the basis for the later enacted Anti-Bootlegging Act.²⁸ The Act extends copyright protection to live performances for an unspecified time, imposes both civil and criminal penalties on those who infringe on its protections,²⁹ and applies

23. Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Recording Companies*, 15 WIS. INT'L L.J. 371, 380-83 (1997).

24. *Id.* For example, written sheet music was protected but a sound recording on tape or other medium was not protected. *Id.* at 381.

25. Sound Recordings, Limited Copyright, Pub. L. No. 92-140, 85 Stat. 391 (codified at 17 U.S.C. § 102(a)(7)(2000)) (adding sound recordings to the list of protected works).

26. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 n.11 (1984).

27. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994).

28. Section 512, 108 Stat. 4974 of the URAA was codified at 17 U.S.C. § 1101(a)(2000). Section 513, 108 Stat. 4975 of the URAA was codified at 18 U.S.C. § 2319A (2000).

29. Civil liability is encompassed in 17 U.S.C. § 1101(a):

(a) Unauthorized Acts.—Anyone who, without the consent of the performer

to those who copy or distribute the musical performance without the artist's permission.³⁰

Academics criticize the Act on the basis of two constitutional deficiencies. First, the material the Act protects fails to fulfill the fixation requirement. Second, by omitting a time limitation provision, the Act fails to meet the duration requirement.³¹ The first legal challenge to the Act arose in *United States v. Moghadam*³² where the Eleventh Circuit upheld the constitutionality of the Act's criminal provisions.³³

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.

(b) Definition.—As used in this section, the term "traffic in" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer, or dispose of.

(c) Applicability.—This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

(d) State Law Not Preempted.—Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

Id. Criminal liability is embodied in 18 U.S.C. § 2319A:

(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

Id.

30. 17 U.S.C. § 1101(a)(3) (2000).

31. See Nimmer, *supra* note 20, at 1399-1400, 1409-10.

32. 175 F.3d 1269 (11th Cir. 1999).

33. *Id.* at 1271.

B. The First Challenge to the Act's Constitutionality Failed

1. Background of Moghadam

On March 27, 1997, Ali Moghadam was indicted under the Act for participating in the sale and distribution of bootlegged recordings.³⁴ Moghadam ultimately pled guilty to the charges against him.³⁵ Moghadam, however, expressly reserved the right to appeal his conviction on the ground that the Act under which he was charged was unconstitutional.³⁶ The Florida district court held that the statute was constitutional.³⁷ Moghadam subsequently appealed to the U.S. Court of Appeals for the Eleventh Circuit.³⁸

2. The Moghadam Court Determined That the Commerce Clause Was a Sufficient Basis for the Act's Passage

After extensive discussion, the Eleventh Circuit determined that the Act was constitutional and upheld Moghadam's conviction.³⁹ In its analysis, the appellate court declined to decide whether live performances fell within the copyright fixation requirement, but instead concluded that an alternative source of congressional power justified the Act.⁴⁰ Rather than address the Copyright Clause, the court determined that the Anti-Bootlegging Act was a valid exercise of legislative power under the Commerce Clause.⁴¹

Commerce Clause legislation requires only that a rational basis exist to justify the legislation.⁴² In *Moghadam*, the court found that such a rational basis existed to protect the creative works of musicians against unauthorized use.⁴³ Furthermore, the court found that the connection between the objective of the Act and interstate commerce was evident because bootlegged recordings were sold for financial gain across state boundaries.⁴⁴ The court also stated that the Act's legislative history did not discuss its enactment under the Commerce Clause because the events surrounding the

34. *Id.*

35. *Id.* at 1271 n.1.

36. *Id.*

37. *Id.* at 1271.

38. *Id.*

39. *Id.*

40. *Id.* at 1274.

41. *Id.*

42. *Id.*

43. *Id.* at 1275.

44. *Id.* at 1276.

Act's passage were sufficient to infer that it was passed as commercial legislation.⁴⁵

After concluding that the Act's passage was justifiable under the Commerce Clause, the court determined that the Copyright Clause did not prevent Congress from passing the Act using its Commerce Clause powers.⁴⁶ The court stated, "each of the powers of Congress is alternative to all of the other powers, and what cannot be done under the powers of one . . . may very well be doable under another."⁴⁷ Thus, the court upheld Moghadam's conviction, concluding that the Act was valid under the Commerce Clause and that Congress's powers were independent rather than mutually exclusive.⁴⁸ The Eleventh Circuit subsequently denied Moghadam a rehearing en banc,⁴⁹ and the U.S. Supreme Court denied certiorari,⁵⁰ leaving open the possibility for a subsequent challenge to the Act's constitutionality in another circuit. Shortly thereafter, such a challenge arose in the Southern District of New York in *United States v. Martignon*.⁵¹

III. Martignon Declares the Act Unconstitutional, but KISS Follows the Moghadam Reasoning and Upholds the Act's Constitutionality

A. Background to the Martignon Dispute

In September 2003, federal and state law enforcement, working with Recording Industry Association of America officials, arrested Jean Martignon for selling approximately one thousand bootlegged concert sessions from his Midnight Records store in violation of 18 U.S.C. § 2319A, the criminal provision of the Act.⁵² This criminal provision prohibits the sale of unauthorized musical recordings and establishes criminal penalties for its violation.⁵³ In his defense, Martignon claimed that the Act was unconstitutional.⁵⁴

The district court considered the same two issues that the *Moghadam* court previously addressed. The first issue was whether the Act complied

45. *Id.* at 1275-76 (stating that the specific context under which the Act was passed was in the midst of world treaties attempting to protect intellectual property in international commerce).

46. *Id.* at 1277.

47. *Id.*

48. *Id.* at 1282.

49. *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999), *reh'g denied*, 193 F.3d 525 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

50. *Id.*

51. *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004).

52. *Judge Tosses Bootleg Law*, DAILY PRESS (Newport News, Va.), Sept. 25, 2004, at A14.

53. 18 U.S.C. § 2319A(a) (2000); *Martignon*, 346 F. Supp. 2d at 417.

54. *Martignon*, 346 F. Supp. 2d at 417.

with the requirements of the Copyright Clause.⁵⁵ The second issue was whether Congress could circumvent the limitations of the Copyright Clause by using its Commerce Clause powers.⁵⁶

In contrast to the Eleventh Circuit, the *Martignon* court determined that the Act failed to satisfy the requirements of the Copyright Clause and that Congress could not accomplish indirectly through the Commerce Clause what it could not do directly under the Copyright Clause.⁵⁷ Consequently, the court declared the Act unconstitutional.⁵⁸

B. Reasoning for the Martignon Decision

The *Martignon* court determined that the Act violated both the fixation and duration requirements of the Copyright Clause.⁵⁹ The court concluded that the historical context surrounding the passage of the Act indicated that Congress enacted the legislation pursuant to its Copyright Clause powers.⁶⁰ The court relied, in part, on the wording of the Act to determine that its purpose was “synonymous with that of the Copyright Clause.”⁶¹ The court then discussed why the Act failed to satisfy both the fixation and duration requirements of the Copyright Clause.⁶²

The court determined that the Act failed to satisfy the Copyright Clause fixation requirement because the Act protected live performances which are not “writings” that receive Constitutional protection under the Copyright Clause.⁶³ The court stated that “[w]hile the category of ‘writings’ has expanded over time, it has never moved into the realm of unfixed works.”⁶⁴ The court noted that Congress arguably intended to expand the term “writings” under the Constitution to include live performances that are not recorded.⁶⁵ To do so, however, the court found that Congress should have manifested such legislative intent in some express manner.⁶⁶ Because no such discussion existed in the Act’s legislative history, the court concluded that Congress did not intend to expand the writings definition in such a

55. *Id.* at 422.

56. *Id.* at 424.

57. *Id.* at 425.

58. *Id.*

59. *Id.* at 424.

60. *Id.* at 420-22.

61. *Id.* at 420.

62. *Id.* at 423-25.

63. *Id.*

64. *Id.* at 423.

65. *Id.* at 424 n.13.

66. *Id.*

dramatic way.⁶⁷ Because Congress failed to explicitly express the intent to expand the meaning of the “writings” requirement and because live performances had never been categorized as a “writing,” the court concluded that the Act failed to meet the fixation requirement of the Copyright Clause.⁶⁸

Furthermore, the court held that the Act failed to meet the Copyright Clause’s duration restriction.⁶⁹ Specifically, the Act contained no provision regarding the length of time for which unfixed live performances were protected.⁷⁰ The Constitution specifically states that protection shall be granted for a “limited” time.⁷¹ Therefore, the Act did not fall within the constitutional limitations of the Copyright Clause.⁷²

Once the court determined that the Act was not valid within the scope of the Copyright Clause, the court then addressed the Commerce Clause and concluded that Congress “[m]ay [n]ot [d]o [i]ndirectly [w]hat [i]t [i]s [f]orbidden [t]o [d]o [d]irectly.”⁷³ In other words, Congress could not circumvent the Copyright Clause’s limitations by relying on the Commerce Clause as its legislative basis for passing the Act. Because the court determined that Congress could not avoid the limitations on its power under the Copyright Clause through reliance on another congressional power, the court did not analyze whether the Act was permissible under Congress’s commerce power.⁷⁴ Ultimately, the court declared the Act unconstitutional and dismissed the charges against Martignon.⁷⁵

C. The Act Fails, Then Survives, Constitutionality Review in California

Following *Moghadam* and *Martignon*, a district court in California determined that the civil section of the Act, 17 U.S.C. § 1101, was unconstitutional because it did not limit the duration of protection.⁷⁶ In *KISS Catalog*, the owners of the intellectual property rights of the rock band KISS sued the distributor of DVDs that featured KISS performances.⁷⁷ The

67. *Id.* at 424.

68. *Id.* at 422-24.

69. *Id.* at 424 (citing U.S. CONST. art. I, § 8, cl. 8).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 425 n.14.

75. *Id.* at 429-30.

76. *KISS Catalog v. Passport Int’l Prods., Inc.*, 350 F. Supp. 2d 823, 824 (C.D. Cal. 2004), *vacated in part*, *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

77. *Id.* at 824-25.

Central District of California indicated that the Act might not fail the fixation requirement,⁷⁸ but, similarly to *Martignon*, the *KISS Catalog* court held that the Act was unconstitutional because it failed to limit the duration of protection.⁷⁹ In a subsequent reconsideration, however, the district court overturned its previous ruling and determined that the Commerce Clause justified the constitutionality of the Act.⁸⁰

In June 2005, Judge Rea of the Central District granted the request of the United States to intervene in the *KISS Catalog* action. After Judge Rea's untimely death, the matter was transferred to Judge Fischer⁸¹ who determined in *KISS II* that the previous *KISS Catalog* ruling failed "fully to consider the position of the United States"; therefore, an abuse of discretion occurred.⁸² Judge Fischer determined that the *Moghadam* court correctly determined that the Act could be passed under Commerce Clause powers.⁸³ Furthermore, Judge Fischer concluded that the Act is not "[f]undamentally [i]nconsistent' [w]ith the Copyright Clause."⁸⁴

The conflict among the *Moghadam*, *KISS II*, and *Martignon* decisions demonstrates the confusion surrounding the validity of the Act. Moreover, the inconsistent rulings of Judge Rea and Judge Fischer from the same district court further highlight the need for clarification of the Act itself and the Act's constitutionality.

IV. The Act Fails to Fulfill the Constitutional Requirements of the Copyright Clause

A. The Act Fails to Satisfy the Fixation Requirement by Granting Copyright Protection to Performances That Fail to Meet Traditional Copyright Requirements

As illustrated in *Martignon*, the Act cannot be justified under the Copyright Clause because live performances protected by the Act fail to fulfill the fixation requirement that the Copyright Clause imposes. For a work to receive statutory copyright protection, it must be "fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either

78. *Id.* at 831-32.

79. *Id.* at 833.

80. *KISS II*, 405 F. Supp. at 1170.

81. *Id.*

82. *Id.*

83. *Id.* at 1171.

84. *Id.* at 1173.

directly or with the aid of a machine or device.”⁸⁵ The concept of fixation arises from the constitutional requirement that Congress may protect only “writings.”⁸⁶ Courts have defined the term “writings” to mean that works must at least have “some material form, capable of identification and having a more or less permanent endurance.”⁸⁷ Live television broadcasts, performances of plays, and musical compositions do not fall within this definition of a “writing” and therefore do not fulfill the fixation requirement.⁸⁸ Although Congress has progressively expanded the notion of “writings” to include additional areas, such as grooves on a phonograph record,⁸⁹ protected areas have always existed in some fixed, tangible, or durable form.⁹⁰

Copyright protection is reserved under the Constitution for those works that fulfill the fixation requirement.⁹¹ Live performances, by their very nature, are not fixed in form but rather are ephemeral musical expressions that disappear as soon as they are performed. No extension of the fixation requirement to date possibly encompasses a live performance within the fixation definition.⁹² While some legal scholars have argued that current copyright law may not adequately protect modern digital recordings and creations,⁹³ arguments for extending fixation to the digital realm are inapplicable to the protection of live performances under the Act. The Act’s protections do not extend to new technological forms of expression but

85. 1 NIMMER ON COPYRIGHT, *supra* note 7, § 2.03(B) (quoting 17 U.S.C. § 102(a) (2000)).

86. *See supra* note 3.

87. 1 NIMMER ON COPYRIGHT, *supra* note 7, § 1.08(C)(2) (citing *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, 383).

88. *Id.*

89. The term “writings” was expanded to include grooves on a phonograph record even though these grooves could not literally be read with the naked eye, as was required under early interpretations of the term. *Id.* § 2.05(A) (distinguishing protection afforded to phonorecords and other similar devices from an earlier case in which piano rolls were held to be non-infringing because they did not constitute “intelligible notation” for the purposes of a writing).

90. *Goldstein v. California*, 412 U.S. 546, 561 (1973) (referring to original copyright statutes that protected only maps, charts, and books under the writings requirement and the gradual expansion of the term “writings” to include additional works).

91. U.S. CONST. art. I, § 8, cls. 1, 8.

92. *KISS Catalog v. Passport Int’l Prods., Inc.*, 350 F. Supp. 2d 823, 832 (C.D. Cal. 2004) (quoting *Goldstein*, 412 U.S. at 561, for the proposition that “any physical rendering of the fruits of creative intellectual or aesthetic labor” may constitute a “writing”), *vacated in part*, *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005); *Dunham v. Gen. Mills, Inc.*, 116 F. Supp. 152, 153 (D. Mass. 1953) (“It is fundamental in copyright law that to obtain protection an author’s ideas must be reduced to concrete form.”).

93. *See, e.g.*, Brian F. Fitzgerald, *Digital Property: The Ultimate Boundary?*, 7 ROGER WILLIAMS U. L. REV. 47 (2001).

rather attempt to protect a form of expression that has existed since the drafting of the Constitution. Live musical performances existed at the time the Framers drafted the Copyright Clause “writings” requirement; thus, if the Framers so desired, they could have included such performances within the realm of protection.⁹⁴ Instead, the Framers chose to limit copyright protection only to those works that qualified as a “writing.”⁹⁵

Legislative history surrounding the passage of the general copyright statute embodied, in part, in 17 U.S.C. § 102⁹⁶ further supports the argument that live performances alone do not fulfill the fixation requirement.⁹⁷ In the 1976 Copyrights Act House Report accompanying the previously mentioned general copyright statute, the Committee on the Judiciary discussed how the fixation requirement applied to the broadcasting of live events.⁹⁸ The Committee understood that it needed to clarify how live events fulfilled the fixation requirement and thereby received protection.⁹⁹ Regarding sporting events, the report stated that if an event were first recorded and subsequently broadcasted, it would qualify as a motion picture and thereby receive copyright protection.¹⁰⁰ Furthermore, the report stated that if an event were simultaneously broadcasted and recorded, it should receive the same protection that would be afforded if there were some slight delay in the broadcast.¹⁰¹ The report further indicated, however, that unfixed works, such as unrecorded choreographic works, performances, or broadcasts, would not receive federal protection, but could be protected under state common law or statutes.¹⁰² The legislative history indicates that live performances were, at least in 1976, included in the category of unfixed works rather than that of fixed works and were specifically excluded from federal copyright protection.

94. Joseph C. Merschman, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress's Copyright Power*, 34 CONN. L. REV. 661, 682 (2002).

95. U.S. CONST. art. I, § 8, cls. 1, 8.

96. 17 U.S.C. § 102 (2000) (containing general provisions for copyright protection).

97. H.R. REP. NO. 94-1476, at 51-58 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664-71.

98. *Id.*

99. *Id.* at 52-56, reprinted in 1976 U.S.C.C.A.N. 5665-70.

100. *Id.* at 52, reprinted in 1976 U.S.C.C.A.N. 5665.

101. *Id.* at 52-53, reprinted in 1976 U.S.C.C.A.N. 5665-66.

102. *Id.* at 52, reprinted in 1976 U.S.C.C.A.N. 5665.

B. The Act Fails to Fulfill the Duration Requirement

In addition to not fulfilling the fixation requirement, the Act also fails to limit the duration of copyright protection.¹⁰³ The duration requirement for copyright legislation strikes a balance between two desirable, yet conflicting, social values.¹⁰⁴ Authors of copyrighted works need protection to profit from their works.¹⁰⁵ The public as a whole, however, is interested in benefiting from these works.¹⁰⁶ Congress and the courts have relied on copyright limitations to establish a balance between these two competing interests by allowing authors to have a monopoly over their works for a limited period of time before allowing the public free access to the works after the monopoly expires.¹⁰⁷

The difficult nature of maintaining this balance between protecting private rights and allowing public access received national media attention following the Supreme Court decision in *Eldred v. Ashcroft*.¹⁰⁸ The petitioners in *Eldred* argued that the Sonny Bono Copyright Term Extension Act (the CTEA),¹⁰⁹ which extended copyright protections for already existing works to seventy years, was unconstitutional.¹¹⁰ The *Eldred* petitioners claimed that the CTEA violated the constitutional duration requirement and the First Amendment.¹¹¹ The petitioners argued that the constitutional duration limitations affix to a work when the work is created, and because the limitation is constitutional in nature, Congress may not thereafter modify or expand the duration of protection afforded to the work.¹¹² The Supreme Court rejected the petitioners' arguments.¹¹³ In doing so, the Court emphasized that the CTEA did not create perpetual copyright

103. See 17 U.S.C. § 1101(a) (2000); 18 U.S.C. § 2319A (2000) (absence of any discussion related to specified period for protection).

104. 1 NIMMER ON COPYRIGHT, *supra* note 7, § 1.05(D).

105. *Id.*

106. *Id.*

107. *Id.*

108. 537 U.S. 186 (2003).

109. 17 U.S.C. § 302(a) (2000).

110. *Eldred*, 537 U.S. at 193. The petitioners did not challenge extension with respect to newly created works, only with respect to already existing ones.

111. *Id.* (discussing petitioners' argument that the CTEA could be applied to works created in the future and that the CTEA was only unconstitutional when applied to previously created works).

112. *Id.*

113. *Id.* at 204.

protection but rather simply extended the time of protection, which Congress had done on several prior occasions.¹¹⁴

The *Eldred* Court noted that while the Copyright Clause empowers Congress to afford copyright protection to works for limited times, the Copyright Clause does not set limitations on the exact duration of protection.¹¹⁵ Although Congress has increased the allotted time of protection on four different occasions, it has not extended the duration requirement to an unlimited time period.¹¹⁶ Opponents of the CTEA feared that Congress's ability to continuously extend the term of copyright protection essentially equated to unlimited protection.¹¹⁷ The Court, however, noted that the CTEA was not an attempt to extend unbounded protection to copyrighted materials but rather was a necessary step to align U.S. copyright protections with intellectual property protections in foreign countries.¹¹⁸

Although, like the CTEA, Congress passed the Act to more closely align U.S. copyright protections with those afforded in other countries,¹¹⁹ the drafters of the Act completely omitted a duration restriction, thereby making the Act incompatible with existing U.S. copyright law.¹²⁰ By failing to limit the duration of protection, Congress created a realm of indefinite protection for performances that arguably do not even qualify as "written" works entitled to protection under the Copyright Clause.¹²¹ Omitting the duration requirement alone nullifies the Act as an improper use of the powers granted to Congress under the Copyright Clause, according to language in *Eldred*.¹²²

Moghadam, *KISS Catalog*, and *Martignon* all recognized the durational deficiencies of the Act,¹²³ but the *Moghadam* court sidestepped the durational deficiency issue because the defendant failed to raise that issue on appeal and the court declined to do so sua sponte.¹²⁴ The *Moghadam*

114. *Id.* at 202-03.

115. *Id.* at 199.

116. *Id.* at 195-96.

117. *Id.* at 197.

118. *Id.* at 198 (citing *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)).

119. Nimmer, *supra* note 20, at 1391-92.

120. *See* 17 U.S.C. § 1101(a) (2000).

121. *See supra* Part IV.A.

122. *See Eldred*, 537 U.S. at 210 (accepting the proposition of extension to copyright protection within prescribed limits but acknowledging that perpetual protection is not allowed).

123. *United States v. Moghadam*, 175 F.3d 1269, 1274 n.9 (11th Cir. 1999); *KISS Catalog v. Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823, 833 (C.D. Cal. 2004), *vacated in part*, *KISS Catalog, Ltd. v. Passport Int'l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005); *United States v. Martignon*, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004).

124. *Moghadam*, 175 F.3d at 1281 & n.15.

court and the *KISS II* court both relied on the alternate power of the Commerce Clause to justify the Act's passage.¹²⁵ The *Moghadam* and *KISS II* reasoning is flawed, however, because Congress may not simply use another power, such as the Commerce Clause power, to circumvent Copyright Clause limitations.¹²⁶

*V. The Commerce Clause Cannot Be Used to Bypass Restrictions
Contained in Other Constitutional Clauses*

At the beginning of the Nineteenth Century, the U.S. Supreme Court determined that congressional acts are constitutional only if one of the enumerated powers in the Constitution supports the act.¹²⁷ The "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."¹²⁸ Courts must afford due respect, however, to congressional actions and only invalidate legislation "upon a plain showing that Congress has exceeded its constitutional bounds."¹²⁹ Congressional attempts to regulate areas not sufficiently related to interstate commerce pursuant to Congress's Commerce Clause power have led to judicial limitations.¹³⁰ The Act, however, does not fail as being insufficiently related to interstate commerce but fails because the Copyright Clause serves as "both a grant of power and a limitation."¹³¹ Therefore, limitations contained within the Copyright Clause may not be overborne simply through use of another constitutionally granted power.

*A. If No Limitations Existed, the Commerce Clause Could Support
Passage of the Act*

The Commerce Clause gives broad power to Congress to regulate commerce "among the several States."¹³² Under the Commerce Clause, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the

125. *Id.* at 1274; *KISS II*, 405 F. Supp. 2d at 1171-73.

126. *See infra* Part VI.

127. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see also* *United States v. Morrison*, 529 U.S. 598, 607 (2000).

128. *Morrison*, 529 U.S. at 607 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

129. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 568, 577-78 (1995)).

130. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 101 (1937); *McCulloch*, 17 U.S. at 421.

131. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (internal quotation marks omitted).

132. U.S. CONST. art. I, § 8, cl. 3.

threat may come only from intrastate activities.”¹³³ For Congress to pass legislation under the Commerce Clause, the regulated activity must substantially affect interstate commerce, a determination that only the courts can make.¹³⁴ To determine whether a particular activity substantially affects interstate commerce, courts may look to legislative findings surrounding the passing of an act.¹³⁵ Such legislative findings, however, are instructive but not binding on a court’s final determination.¹³⁶

Bootlegged recordings, undoubtedly, substantially affect interstate commerce; therefore, the Commerce Clause could theoretically justify the Act’s passage, but for other limitations. The Act targets the unauthorized recording, transmission, and distribution of live performances.¹³⁷ While the simple act of recording arguably does not extend beyond state lines, nor affect commerce, the distribution of such recordings has generated millions of dollars in sales outside legitimate distribution chains.¹³⁸ The *Moghadam* court recognized the Act’s substantial connection to interstate commerce and indicated that the relationship between the Act and the Commerce Clause was self-evident. The court based its reasoning, in part, on the fact that the Act regulates sales.¹³⁹ Therefore, the Act fell easily within regulated interstate commerce activities.¹⁴⁰

B. Commerce Clause Jurisprudence Demonstrates That the Act Cannot Overcome Copyright Clause Restrictions Through Reliance on the Commerce Clause

*Railway Labor Executives’ Ass’n v. Gibbons*¹⁴¹ best exemplifies the argument that the Commerce Clause is limited by other constitutional provisions. In *Gibbons*, the Supreme Court struck down the Rock Island Railroad Transition and Employee Assistance Act (the RITA) because it

133. *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003) (quoting *Lopez*, 514 U.S. at 558).

134. *Morrison*, 529 U.S. at 614 (citing *Lopez*, 514 U.S. at 557 n.2).

135. *See id.*

136. *Id.*

137. *See* 17 U.S.C. § 1101(a) (2000); 18 U.S.C. § 2319A (2000).

138. *See* Richard Burgess, *Music Pirate Pleads Guilty*, *ADVOCATE* (Baton Rouge, La.), July 26, 2005, at 1B. A Florida business has been accused of making more than \$1.5 million through four years of sales of bootleg recordings, including such bands and performers as the Grateful Dead, Tori Amos, Matchbox Twenty, Korn, and Stevie Ray Vaughn. *Id.*

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

140. *Morrison*, 529 U.S. at 608-09.

141. 455 U.S. 457 (1982). Another example of limitations imposed on the Commerce Clause is found in the Eleventh Amendment’s prohibition of lawsuits against states and state actors for patent and copyright infringement claims. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635-36 (1999).

violated the limitations that the Bankruptcy Clause¹⁴² of the Constitution imposes on Congress.¹⁴³ The Bankruptcy Clause grants Congress the power to “establish . . . *uniform Laws* on the subject of Bankruptcies throughout the United States.”¹⁴⁴

In its decision, the *Gibbons* Court first determined that Congress passed RITA which applied only to bankrupt regional railroads, pursuant to its power under the Bankruptcy Clause.¹⁴⁵ The Court then examined whether RITA violated the “uniform Laws” provision of the Bankruptcy Clause.¹⁴⁶ The Court reasoned that an act focused solely on regional bankruptcies could hardly claim to fall within the “uniform Laws” provision under the Bankruptcy Clause because regional regulation did not rise to the level of a uniform, national standard.¹⁴⁷ The Court also concluded that the Bankruptcy Clause served not only as an affirmative grant of power to Congress but also as a limitation on that power.¹⁴⁸ Under the limitation, Congress could only enact uniform bankruptcy laws.¹⁴⁹ After the Court determined that the Bankruptcy Clause limited Congress, the Court explained that the Commerce Clause could not justify a law that failed under the Bankruptcy Clause’s restrictions.¹⁵⁰ The Court stated: “[i]f [it] were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, [it] would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”¹⁵¹

The Court’s reasoning in *Gibbons* provides a suitable comparison for analysis of the Act. The language of the Copyright Clause is very similar to that of the Bankruptcy Clause because both clauses grant Congress the power to pass laws within the context of a few expressed limitations.¹⁵² The Bankruptcy Clause contains the limitation that Congress may establish only “uniform Laws,”¹⁵³ while the limitations contained in the Copyright Clause require that copyright protections be subject to the fixation and duration requirements.¹⁵⁴ The U.S. Supreme Court determined in *Gibbons* that

142. U.S. CONST. art. I, § 8, cl. 4.

143. *Gibbons*, 455 U.S. at 465.

144. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

145. *Gibbons*, 455 U.S. at 467-68.

146. *Id.* at 470-71.

147. *Id.* at 471.

148. *Id.* at 468.

149. *Id.*

150. *Id.* at 468-69.

151. *Id.*

152. U.S. CONST. art. I, § 8, cl. 8.

153. *Id.* art. I, § 8, cl. 4.

154. *Id.* art. I, § 8, cl. 8.

Congress may not avoid limitations on its power by simply resorting to another listed power for passage of an act.¹⁵⁵ Therefore, a similar application of this principle would render the Act unconstitutional because the Act fails to satisfy the requirements of the Copyright Clause, and the Commerce Clause may not be used to overcome these deficiencies.

In *KISS II* Judge Fischer erroneously distinguished *Gibbons* to determine that the reasoning applied therein was inapplicable to the Act.¹⁵⁶ Judge Fischer differentiated the case on the basis that, in *Gibbons*, Congress had attempted to pass a bankruptcy statute instead of a bankruptcy-like statute.¹⁵⁷ This distinction rests, however, on the determination that the Act is copyright-like legislation and not intended to be copyright legislation. As noted previously, the legislative history surrounding the Act fails to provide any guidance regarding whether the Act was simply meant to be copyright-like or was an extension of copyright protections to previously unprotected performances. The language of the Act itself supports a conclusion that the Act is copyright legislation rather than copyright-like legislation. According to the Act, violators “shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.”¹⁵⁸

Reliance on other Commerce Clause jurisprudence to justify the constitutionality of the Act is misplaced. The government in *Martignon*, and again in *KISS II*, claimed that the *Trade-Mark Cases*¹⁵⁹ supported the proposition that Congress may in fact use its commerce power to sidestep the limitations of the Copyright Clause.¹⁶⁰ In the *Trade-Mark Cases*, the Supreme Court struck down a series of trademark laws, holding that these laws neither satisfied the requirements of the Copyright Clause nor fell under the appropriate scope of the Commerce Clause, as the clause had been interpreted at that time.¹⁶¹ In *Martignon*, the government contended that because the Court in the *Trade-Mark Cases* considered the passage of the Trademark Acts as potentially within the scope of the Commerce Clause

155. *Gibbons*, 455 U.S. at 468-69.

156. *KISS Catalog, Ltd. v. Passport Int’l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005), *vacating in part* *KISS Catalog v. Passport Int’l Prods., Inc.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004).

157. *Id.*

158. 17 U.S.C. § 1101(a) (2000). *Contra* Adam Giuliano, Essay, *Steal This Concert? The Federal Anti-Bootlegging Statute Gets Struck Down, but Not Out*, 7 VAND. J. ENT. L. & PRAC. 373 (2005) (setting forth an argument that the Act is copyright-like legislation and, as such, complements rather than confronts copyright law).

159. *In re Trade-Mark Cases*, 100 U.S. 82 (1879).

160. *KISS II*, 405 F. Supp. 2d at 1174-75; *United States v. Martignon*, 346 F. Supp. 2d 413, 427 (S.D.N.Y. 2004).

161. *Trade-Mark Cases*, 100 U.S. at 99; *see also Martignon*, 346 F. Supp. 2d at 427.

power,¹⁶² the *Martignon* court should have similarly looked to the Commerce Clause for the congressional right to pass the Act.¹⁶³

The government's argument, however, failed to recognize the inherent differences between copyright protection and trademark protection. "Copyright law . . . protects the fruits of intellectual labor."¹⁶⁴ Trademark protection, on the other hand, arises only from use of a word or mark attached to goods or services in commerce and protects the consumer against product confusion and unfair competition.¹⁶⁵ Trademark laws were overtly passed under the Commerce Clause and are inherently legislation governing commerce.¹⁶⁶ Because trademark law is derived from a separate constitutional power than is copyright law, the limitations that exist for copyright law would not apply to trademark law. While trademark law recognizes the right to exclusive use of a word or mark in order to prevent public confusion, the Act attempts to expand an already existing right, that of copyrights, to other previously unprotected works, which fall outside the Copyright Clause's fixation and duration requirements.¹⁶⁷ Thus, the government's reliance on the *Trade-Mark Cases* is misplaced to the extent that it is used to justify passage of the Act under the Commerce Clause.

In *Moghadam*,¹⁶⁸ the government again contended that the Commerce Clause was suitable for passing the Act but instead relied on *Authors League of America, Inc. v. Oman*.¹⁶⁹ In *Authors League*, the Second Circuit scrutinized the constitutionality of 17 U.S.C. § 601 (the Manufacturing Act).¹⁷⁰ The Manufacturing Act, now expired, once protected the domestic book publishing industry "by restricting the importation of copyrighted, nondramatic literary works which were published abroad."¹⁷¹ The plaintiff in *Authors League* argued that the Manufacturing Act failed to satisfy the

162. *Martignon*, 346 F. Supp. 2d at 427. The Commerce Clause argument was ultimately unsuccessful in the *Trade-Mark Cases* because the then-accepted scope of the Commerce Clause did not encompass the actions regulated. *Trade-Mark Cases*, 100 U.S. at 98-99.

163. *Martignon*, 346 F. Supp. 2d at 427.

164. *Id.*

165. *Id.*

166. *See, e.g.*, 15 U.S.C. § 1051(d) (2000) (specifically requiring that the protected mark be used in commerce).

167. 17 U.S.C. § 1101(a) (2000). The Act is contained within a statute containing other copyright protections and purports to extend these same protections to a different type of work, which is completely different from recognizing a new set of rights on any works.

168. *See United States v. Moghadam*, 175 F.3d 1269, 1279 (11th Cir. 1999).

169. 790 F.2d 220 (2d Cir. 1986).

170. 17 U.S.C. § 601 (2000).

171. *Moghadam*, 175 F.3d at 1279.

Copyright Clause because the legislation was merely protectionist economic legislation and did not serve the purpose of protecting the useful arts.¹⁷²

The *Authors League* court determined that it was inconsequential whether the Manufacturing Act failed under the Copyright Clause because Congress could pass legislation under many different powers listed in the Constitution.¹⁷³ The Court addressed the plaintiff's argument by stating:

[w]hat plaintiff's argument fails to acknowledge, however, is that the copyright clause is not the only constitutional source of congressional power that could justify [the Manufacturing Act]. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations.¹⁷⁴

Although the *Authors League* reasoning supports the use of the Commerce Clause to pass copyright legislation, such reasoning is not appropriately suited to justify the passage of the Act when the Act openly conflicts with requirements of the Copyright Clause. First, the *Authors League* court did not definitively state that the Manufacturing Act failed to satisfy the requirements of the Copyright Clause.¹⁷⁵ Furthermore, the plaintiff's argument was not premised on one of the traditionally accepted limitations of the Copyright Clause, such as the duration and fixation requirements.¹⁷⁶ Instead, the plaintiffs in *Authors League* claimed that the Manufacturing Act failed to promote the progress of the useful arts, arguing that "protection of the domestic printing industry [was] only tenuously related to the goal sought to be furthered by the granting of a copyright."¹⁷⁷ This argument did not contend that the Manufacturing Act failed to meet the requirements of the Copyright Clause but rather that the Manufacturing Act did not fall directly within the definition the plaintiffs set forth regarding progress of the arts. Therefore, the court rightly decided that it could look to other congressional powers to support passage of the Manufacturing Act.¹⁷⁸

The reasoning relied on in *Authors League* and the *Trade-Mark Cases* fails to support use of the Commerce Clause for the Act's passage.

172. *Authors League*, 790 F.2d at 224.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

Furthermore, compelling policy reasons also exist to prohibit a Commerce Clause justification of the Act.

C. Ramifications of Allowing Congress to Pass Copyright Legislation Under the Commerce Clause

By allowing Congress to circumvent the Copyright Clause limitations through use of the Commerce Clause, courts have ignored the fundamental premise that exists in copyright law. Copyrights serve not only to protect authors but also to benefit the public by increasing creative materials available to the public.¹⁷⁹ By protecting live performances for an unspecified period of time, Congress granted live performers all of the benefits of copyright but deprived the public of any rights it would normally possess under existing copyright law. While copyright protections have been greatly increased throughout the last decade,¹⁸⁰ such unchecked expansion defeats the justification for monopoly-like control when it fails to balance the public's right to use and benefit from the works.

Congress's use of the Commerce Clause to bypass Copyright Clause restrictions is not only unconstitutional for failing to satisfy the fixation and duration requirements of the Copyright Clause, but also threatens U.S. copyright law as interpreted since the Constitution was enacted. The U.S. Supreme Court determined that Congress may enact legislation under the Commerce Clause when a rational basis exists for concluding that the activity being governed substantially affects interstate commerce.¹⁸¹ Under the Act, Congress regulates the purchase and sale of music recordings that undoubtedly pass through channels of interstate commerce during distribution.¹⁸² Therefore, regulating the purchase and sale of these recordings falls within the province of the Commerce Clause. This initial conclusion, however, fails to address the broader concern of using the Commerce Clause to enact legislation forbidden by other constitutional limitations. The Eleventh Circuit, in *Moghadam*, sidestepped this conundrum by stating "as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on

179. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

180. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (2005) (finding copyright infringement of software developers for peer-to-peer network where developers maintained no control over network); *Eldred v. Ashcroft*, 537 U.S. 186, 209 (2003) (expanding term of copyright protection); *Mai Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-19 (9th Cir. 1993) (extending the definition of fixation to include temporary copies of software in computer RAM).

181. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

whether it can be sustained under another.”¹⁸³ If this line of reasoning were applied as a blanket rule, the Commerce Clause would render useless many provisions of the Constitution.¹⁸⁴ Ultimately, allowing Congress to sidestep express constitutional limitations by simply resorting to a different enumerated power nullifies the Framers’ intent in drafting the Copyright Clause.

Justice Thomas noted the danger of relying on a broad “substantial effects” test for applying the use of the Commerce Clause power in his *United States v. Lopez*¹⁸⁵ concurrence: “[p]ut simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce.”¹⁸⁶ Justice Thomas also stated: “This [substantial effects] test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”¹⁸⁷ Upholding the Act as a constitutional exercise of congressional power would reinforce Justice Thomas’s belief that the Commerce Clause and the substantial effects test have nullified other Article I provisions of the Constitution such as the Copyright Clause. Declaring the Act unconstitutional, however, could produce the negative effects associated with violating international agreements.

VI. Higher Courts May Find Compelling Reasons for Upholding the Act and Expanding Notions of Copyright Law

A. Ramifications of Nullifying the Act

As previously discussed,¹⁸⁸ the Act was passed pursuant to the Uruguay Round Agreements.¹⁸⁹ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) embodies the international measures agreed to in the Uruguay Rounds.¹⁹⁰ Unlike many international treaties,

183. *Id.* at 1277 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)).

184. *United States v. Martignon*, 346 F. Supp. 2d 413, 426-27 (S.D.N.Y. 2004).

185. 514 U.S. 549 (1995).

186. *Id.* at 589 (Thomas, J., concurring).

187. *Id.* at 584. Justice Thomas specifically noted the potential consequences of the substantial effects test on the Bankruptcy Clause, regulation of the Army and Navy, and regulation of the District of Columbia and the United States territories as examples of the dangers of a broad Commerce Clause interpretation. *Id.* at 588.

188. *See supra* Part II.A.

189. Nimmer, *supra* note 20, at 1385.

190. *Id.* at 1391.

TRIPS extends far beyond simply incorporating a treaty into a governmental scheme because it contains its own enforcement provisions.¹⁹¹

Because of failing conventional intellectual property protection, the TRIPS committee incorporated enforcement mechanisms that immediately penalize those countries that fail to appropriately regulate intellectual property rights within their borders.¹⁹² In the past, individuals were forced to seek retribution in the countries where infringement was occurring, which was often a difficult and costly endeavor for foreigners.¹⁹³ Under TRIPS, however, governments may now impose importation tariffs as a result of infringement complaints.¹⁹⁴

Should the Act be declared unconstitutional, the United States may violate the TRIPS agreement and be subject to sanctions from other parties to TRIPS. Whether sanctions would in fact be imposed is unclear because enforcement of these provisions has yet to occur. Appellate courts may consider these potential sanctions as they consider *Martignon* and determine whether the Act is void as an unconstitutional use of power by Congress, or whether the Act should survive through a circuitous analysis like that applied in *Moghadam*.¹⁹⁵ To avoid international repercussions, reviewing courts may, whether justifiably or not, extend the scope of U.S. copyright law beyond traditionally accepted parameters.

B. The Supreme Court, As It Has Done Historically, May Decide to Expand the Fixation Requirement

Although the Supreme Court has not yet decided to review the constitutionality of the Act, the increasing split among jurisdictions may motivate the Court to review the Act. While current interpretations of the fixation requirement exclude live performances from the constitutional “writings” standard, the U.S. Supreme Court may, as it has done in the past expand the realm of fixed works, and include live performances therein. In the early copyright case of *Reiss v. National Quotation Bureau*,¹⁹⁶ Judge Learned Hand stated that the Constitution’s

grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise thereafter. Of course, the new subject-matter must have some relation to the

191. *Id.* at 1392.

192. *Id.* at 1392-93.

193. *Id.* at 1393.

194. *Id.* at 1392.

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

196. 276 F. 717 (S.D.N.Y. 1921).

grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.¹⁹⁷

If the Supreme Court construes the fixation requirement in light of the Act, the Court could find that Judge Hand's statement provides a strong basis for extending fixation to include those works protected under the Act. At the time of the drafting of the Constitution, it was possibly inconceivable that live performances could be easily and instantaneously recorded in the manner possible today. Technological changes resulting in the ease of recording live performance may also influence the Court to extend protection to live performance. Furthermore, recent criticism focuses on the rigidity of the fixation requirement, which results in the exclusion of certain ethnic works from copyright protection.¹⁹⁸ Traditional views of the fixation requirement prohibit certain cultures from protecting works that have been passed down orally for generations but are not embodied in written form.¹⁹⁹ Courts, as well as Congress, may view the need to provide equal protection for creative works of all cultures as further impetus for extending the fixation requirement to include works that have not traditionally fulfilled the fixation requirement such as aural presentations and the extensively discussed live performances.

VII. Conclusion

While the Act stood for nearly a decade before it was declared unconstitutional in *Martignon*, the passage of time did not absolve the Act of its original constitutional deficiencies. Even though the *Moghadam* challenge was severely weakened by *Moghadam*'s failure to preserve for appeal the issue of the Act's noncompliance with the duration requirement, the subsequent *Martignon* decision aptly exposed the Act's flaws. Notwithstanding the *Martignon* reasoning, the confusion surrounding the Act's constitutionality is evident in the contradicting decisions of *Moghadam* and *Martignon* and in the changing *KISS Catalog* decisions, in which one judge determined that the Act was unconstitutional, but another judge, on rehearing, determined that the Act was constitutional.

Amid the confusion, the Act continues to fail to meet the Copyright Clause fixation requirement by extending protection to unrecorded live performances that do not fit within the currently accepted realm of fixed

197. *Id.* at 719.

198. Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1639 (2004).

199. *Id.*

works. And even if the Act were to overcome its fixation failure, the Act fails to meet the Copyright Clause's duration requirement. While Congress could easily overcome the duration deficiency by adding a short clause limiting the time of protection, Congress has not yet chosen to do so. Until a limitation is imposed, the Act blatantly fails constitutional review for its lack of a duration limitation.

Furthermore, the Act cannot simply escape the Copyright Clause limitations through reliance on the Commerce Clause. Allowing Congress to sidestep limitations set forth under one clause through use of power found under another clause would completely undermine the checks the Constitution provides.

Notwithstanding the Act's constitutional failure as recognized in *Martignon* and discussed above, the Supreme Court, along with other reviewing courts, may be highly motivated to uphold the Act as constitutional to support the United States's attempts to conform to international intellectual property agreements. Until the Act is amended to comply with Copyright Clause restrictions or until the Supreme Court rules on the Act's constitutionality, confusion like that demonstrated by the differing opinions in *Maghadam*, *Martignon*, and the two divergent *KISS Catalog* decisions will continue to surround scrutiny of the Act.

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