

# NOT A COPYRIGHT LAW? *UNITED STATES V. MARTIGNON* AND WHY THE ANTI-BOOTLEGGING PROVISIONS ARE UNCONSTITUTIONAL

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## I. INTRODUCTION

When is a law granting exclusive rights to the content of a videotape or a phonorecord not a copyright law? According to the Second Circuit, whenever jail time is a possibility.

In 1994, Congress enacted the Uruguay Round Agreements Act which established civil and criminal penalties for “bootlegging,” the unauthorized recording of a live musical performance (such as a rock concert).<sup>1</sup> Because the Copyright Clause of the Constitution only empowers Congress to give exclusive rights to “authors” for their “writings,” and because artists do not write down their live performances, these statutes arguably exceed Congress’ constitutional authority. Furthermore, the statutes grant perpetual protection against bootlegging, contrary to the duration requirement of the Copyright Clause.<sup>2</sup> Despite this, courts have so far upheld the statutes against constitutional attacks.

In 2003, Jean Martignon, proprietor of Midnight Records in New York, was prosecuted under the criminal prohibition against bootlegging and challenged the statute’s constitutionality.<sup>3</sup> The U.S. Court of Appeals for the Second Circuit upheld the statute, finding that Congress had the power under the Commerce Clause to enact perpetual criminal protection against bootlegging because criminal laws give the right to exclude to the government, not to the author, and therefore criminal laws cannot be con-

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1. Uruguay Round Agreements Act Pub. L. No. 103-465, §§512-13, 108 Stat. 4809, 4974 (1994) (codified at 17 U.S.C. § 1101 (2000); 18 U.S.C. § 2319A (2000)).

2. U.S. CONST. art. 1, § 8, cl. 8 reads “The Congress shall have power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Article 1, section 8, clause 8 has been variously called the “Progress Clause,” the “Intellectual Property Clause,” The “Copyright Clause” and the “Patent Clause.” This Note will use the term “Copyright Clause” because the most recent decision by the United States Supreme Court interpreting this clause in the context of copyright law used this term. *Eldred v. Ashcroft*, 537 U.S. 186 (2002).

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

sidered as copyright laws.<sup>4</sup> The court held that the Copyright Clause had no relevance whatsoever to the constitutionality of the criminal prohibition on bootlegging, basically, because Martignon faced the possibility of jail time.<sup>5</sup>

The Second Circuit's analysis was incorrect because both the criminal and civil bootlegging statutes *are* copyright laws, or at least "copyright-like" enough for the Copyright Clause to have relevance. When that relevance is properly taken into account through application of the Eleventh Circuit's "fundamental inconsistency" test, which invalidates a law if it breaks some important restraint on Congress's power,<sup>6</sup> it becomes apparent that the Constitution does grant Congress the power to protect live performances from unauthorized recording, but only for limited times.

Part II of this Note gives background information about the anti-bootlegging provisions, the Copyright Clause, and the Commerce Clause. Part III summarizes the law relating to congressional power conflicts, or where one congressional power seems to limit the scope of another. Part IV details the holdings of the *Martignon* court and argues that its conclusion was flawed. Part V suggests alternatives to the *Martignon* rationale, and argues that the Eleventh Circuit's "fundamental inconsistency" test should be applied to the anti-bootlegging provisions to find that Congress has the power to enact the anti-bootlegging laws, but can only protect live performances for "limited times."

## II. BACKGROUND INFORMATION AND LAW

The legal background to this question encompasses both statutory law (the anti-bootlegging provisions) and constitutional law (the scope of the Copyright and Commerce Clauses). The Note will first summarize the anti-bootlegging provisions of the Uruguay Round Agreements Act, then it will discuss the scope of the Copyright Clause, and finally of the Commerce Clause.

Congress enacted two anti-bootlegging provisions in 1994 when it passed the Uruguay Round Agreements Act ("URAA"), a civil provision and a criminal provision. The URAA codified the agreements reached in the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT").<sup>7</sup> 17 U.S.C. § 1101<sup>8</sup> is the civil provision granting performers

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

5. *Id.*

6. *See infra* Section III.C.

7. Uruguay Round Agreements Act § 101, 19 U.S.C. § 3511 (2000).

the remedies of the copyright act<sup>9</sup> to recover against any person who fixed their performances without authorization (e.g., with a camcorder or audio recorder), or who distributed such unauthorized fixations.<sup>10</sup> 18 U.S.C. § 2319A allows for the criminal prosecution of any person who knowingly fixed a live performance without authorization, or who distributed such unauthorized fixations, for “purposes of commercial advantage or private financial gain.”<sup>11</sup> This intent requirement is not present in the civil provision.<sup>12</sup>

The powers delegated to Congress relevant to § 1101 and § 2319A are the Copyright Clause and the Commerce Clause.<sup>13</sup> The Copyright Clause reads, “The Congress shall have power to . . . promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”<sup>14</sup>

### A. The Copyright Clause

While the Copyright Clause grants power to Congress, it also limits that power. This section will briefly go over the preamble, the limited times provision, and the authors and writings requirement to explain how they limit congressional power to enact copyright laws. Further, the First Amendment also restricts Congress’s ability to act under the Copyright Clause, and this limitation will be covered last. Because the anti-bootlegging provisions protect works in perpetuity, and the Copyright Clause forbids perpetual protection, the anti-bootlegging provisions would certainly be unconstitutional if the Copyright Clause were the sole source of their congressional power.

#### 1. *The Promotion of Progress*

Copyrights are usually thought of as a bargain between the public and an individual author: the author agrees to let the public see her work in

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8. 17 U.S.C. § 1101 (2000).

9. *See* 17 U.S.C. §§ 502-505 (2000).

10. *See* 17 U.S.C. § 1101 (2000).

11. *See* 18 U.S.C. § 2319A (2000).

12. 17 U.S.C. § 1101 (2000).

13. The Treaty Clause, U.S. CONST. art. 2, § 2, gives independent legislative authority to the federal government. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920). The Treaty Clause, however, is not applicable to the anti-bootlegging provisions because President Clinton never presented the GATT treaty to Congress for ratification. David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1398 (1995).

14. U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause also grants Congress the power to confer exclusive rights to “Inventors” for their “Discoveries” thus authorizing federal patent law.

exchange for protection against copycats.<sup>15</sup> “The Preamble indicates that the granting of [exclusive] rights [in works of original authorship] is driven by the goal of enhancing public welfare.”<sup>16</sup> In a patent case, *Graham v. John Deere Co.*,<sup>17</sup> the Court held that, “The [Copyright] [C]lause is both a grant of power and a limitation. This qualified authority . . . is limited to the promotion of advances in the useful arts.”<sup>18</sup> However, in *Eldred v. Ashcroft*, the Court held that the judiciary should show substantial deference to Congress regarding what kinds of copyright laws promote progress.<sup>19</sup> It noted “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”<sup>20</sup> As long as a copyright law rationally relates to the promotion of progress, the Court held, the law does not violate the constitutional objective of copyright.<sup>21</sup> Furthermore, the *Eldred* Court distinguished between copyright and patent law on the ground that “[a] reader of an author’s writing may make full use of any fact or idea she acquires from her reading” whereas patents grant a full monopoly on the use of the knowledge contained in the patent.<sup>22</sup> Finally, the Court held that even though the promotion of progress is a substantive limit on congressional power in patent law, that law does not imply a similar restriction on Congress’s power to pass copyright laws.<sup>23</sup> Interpreting the Court’s decision, the Tenth Circuit has held that “the clear import of *Eldred* is that Congress has expansive powers when it legislates under the Copyright Clause.”<sup>24</sup>

## 2. “For Limited Times”

In addition to the requirement that copyrights promote progress, the Constitution only allows copyrights to be granted for “limited times.” The purpose of this provision is that once the copyright term has ended, works will fall into the public domain and give the public free access to them.<sup>25</sup> While the Supreme Court has been deferential to Congress regarding the

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15. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1154 (2000).

16. Heald & Sherry, *supra* note 15, at 1154.

17. 383 U.S. 1 (1966).

18. *Id.* at 5 (internal quotation marks omitted).

19. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

20. *Id.*

21. *Id.* at 204-05.

22. *Id.* at 217.

23. *Id.*

24. *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007).

25. Heald & Sherry, *supra* note, 15 at 1165.

exact duration of copyright, the Court has acknowledged that a perpetual copyright would be unconstitutional.<sup>26</sup> Congress is free, however, to set virtually any finite duration on copyright protection as long as the duration rationally relates to the purposes of copyright.<sup>27</sup> The Copyright Term Extension Act (“CTEA”) added twenty years to the term of protection for works still covered by copyright and for works created after the date of enactment.<sup>28</sup> When the law was challenged on Copyright Clause grounds in *Eldred v. Ashcroft*, the Court found that the Act did not violate the Copyright Clause’s “limited times” provision.<sup>29</sup> The Court held that it was within the purview of Congress to decide the proper scope of copyright protection, consistent with historical practice.<sup>30</sup> The CTEA was consistent with historical practice both because the Copyright Clause grants to Congress the power to decide how long copyrighted works should be protected and because copyright terms had been lengthened numerous times in the past.<sup>31</sup> Therefore, while the limited times requirement mandates that no copyright law be perpetual, Congress has broad authority up to that limit.<sup>32</sup>

3. “*To . . . Authors . . . For Their . . . Writings*”

Similar to the requirement that copyrights only last for limited times, Congress can only grant exclusive rights to “authors” for “writings” under the Copyright Clause. Courts have interpreted these requirements in two ways. First, in order to qualify as a “writing,” and in order for the originator of the writing to qualify as an “author,” the work must be original.<sup>33</sup> Second, the authors and writings requirement may mandate that copy-

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26. See *Eldred*, 537 U.S. at 209 (holding that the CTEA’s extension of the copyright term did not create a perpetual copyright, and did not represent a congressional attempt to evade the “limited times” constraint).

27. See *id.* at 213.

28. Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. § 304 (2000)). Copyright terms vary depending on the kind of author (personal or institutional, individual or joint) and also depending on when the work was created. However, for works created on or after January 1, 1978 by an individual author, the term is now measured by the life of the author plus seventy years. 17 U.S.C. § 302 (2000).

29. *Eldred*, 537 U.S. at 209-210.

30. *Id.* at 212-14.

31. *Id.*

32. The Supreme Court did imply that very long durations could be practically perpetual, especially if that was the intent of Congress. *Cf. id.* at 210 n.16 (examining legislative history to prove that Congress had no intent to act unconstitutionally in passing the CTEA); *Cf. id.* at 210 n.17 (noting that the rule against perpetuities could produce property interests as long in duration as those produced by the CTEA).

33. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-48 (1991).

rightable works be fixed in some tangible medium,<sup>34</sup> although no court has so held explicitly.

Even though “originality remains the sine qua non of copyright,”<sup>35</sup> the originality requirement is very weak, requiring only a “modicum of originality” to render a work copyrightable.<sup>36</sup> The originality requirement in the Copyright Clause does, however, mandate that facts are not copyrightable, even though the particular expression of a fact can be copyrighted.<sup>37</sup>

However, originality is not the only requirement: works of authorship might still be constitutionally ineligible for copyright protection due to a tangibility requirement within the word “writings.” Because Congress has placed a tangibility requirement in every copyright law passed so far,<sup>38</sup> no court has ever ruled on whether or not the Constitution requires tangibility for copyrightable works.<sup>39</sup> What counts as “tangible,” furthermore, has broadened as media has evolved beyond pen and paper. As the Court in the *Trade-Mark Cases* noted, the word “writings” has progressively widened in order to encompass things that in no sense are words.<sup>40</sup> “Fixation” may refer to software that only exists for a brief moment in the random access memory of a computer.<sup>41</sup> Arguably, in light of the needs of a tech-

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34. *Cf.* *Goldstein v. California*, 412 U.S. 546, 561 (1973) (“[A]lthough the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”); *United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999) (assuming *arguendo* that the Copyright Clause did require a copyrightable work to be tangible).

35. *Feist Publications, Inc.*, 499 U.S. at 348.

36. *Id.* at 346.

37. *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

38. The first U.S. copyright act protected only “maps, charts, and books.” Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790). The Copyright Act of 1909 specified classes of works that were eligible for copyright protection including “books,” “drawings,” and “lectures, sermons, addresses” that were “prepared for oral delivery.” Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909). The list of eligible classes remained substantially in place until 1976 when Congress replaced it with the general proscription that “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.” Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended 17 U.S.C. § 102 (2000)). This language persists in the copyright laws today. 17 U.S.C. § 102 (2000).

39. *See* 1-1 NIMMER ON COPYRIGHT § 1.08(C)(2).

40. *See* *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (holding that a federal trademark law was unconstitutional because it was outside of the scope of Congress’s power).

41. *See* *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that software loaded into the random access memory of a computer is “fixed” for purposes of 17 U.S.C. § 101).

nologically advancing society, the word “writings,” if it embodies a tangibility requirement at all, should not be construed to deny protection to works of authorship that meet the originality and promotion of progress requirements. According to David Nimmer, however, “[N]o respectable interpretation of the word ‘Writings’ embraces an un-taped performance of someone singing at Carnegie Hall.”<sup>42</sup> Furthermore, intangible works cannot be archived. The entire point of the “limited times” requirement is to benefit the public by putting valuable works in the public domain once the copyright on them has expired.<sup>43</sup> Yet if the work is not fixed, there is no guarantee that the work will last for extended periods. Copyright’s current duration is a bit longer than one human lifetime.<sup>44</sup> Therefore, an unfixed work might persist in the memory of the current generation and could fade once that generation had forgotten. If copyright protected unfixed works that faded into obscurity, those works would have copyright protection for their entire existence. The copyright owner would get the copyright, but the public would not get the benefit of the public domain work after the copyright had expired. A copyright on unfixed works would cheat society, in a sense, because those works could not be archived and preserved for posterity.<sup>45</sup>

Protecting intangible works, however, like the singer’s performance at Carnegie Hall, “creates a minimal but discernible incentive.”<sup>46</sup> Because live performers are guaranteed some degree of protection by the anti-bootlegging provisions, they are likely to perform more.<sup>47</sup> Anti-bootlegging provisions, therefore, promote progress in the way that copyright laws should—by giving authors legal protection in exchange for the creation of more works. Furthermore, an eighteenth century reading of the word “writings” is not necessary in interpreting the Constitution. In the same way that “speech” in the First Amendment includes more than oral expression in order to protect First Amendment values,<sup>48</sup> a court could in-

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42. Nimmer, *supra* note 13, at 1409.

43. See Heald & Sherry, *supra* note 15, at 1165.

44. See Copyright Term Extension Act § 102, 17 U.S.C. § 304 (2000).

45. See Joseph Merschman, Note, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce End Run Around Limits on Congress’s Copyright Power*, 34 CONN. L. REV. 661, 681 (2002).

46. Heald & Sherry, *supra* note 15, at 1192.

47. *Id.*

48. The Supreme Court has construed “speech” to include the wearing of armbands, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969), the defacement of license plates, *Wooley v. Maynard*, 430 U.S. 705, 716 (1977), and dancing in the nude, see *Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000).

terpret “writings” in the Copyright Clause to include more than tangible expression in order to uphold the anti-bootlegging provisions, thereby protecting live performers from exploitation.<sup>49</sup>

#### 4. *The First Amendment*

In addition to the restraints on congressional action in the Copyright Clause itself, the First Amendment imposes independent restrictions on Congress’s ability to act under the Copyright Clause. In *Harper & Row v. Nation Enterprises*,<sup>50</sup> the Supreme Court held that the First Amendment requires that copyright protection be limited by the fair use exemption to copyright infringement as well as by the idea/expression dichotomy.<sup>51</sup> The doctrine of fair use protects from a copyright infringement claim certain uses of copyrighted material that are beneficial to the public and do little to no economic harm to the copyright owner.<sup>52</sup> The “idea/expression” dichotomy exempts from copyright sufficiently abstract ideas, such as general plot outlines.<sup>53</sup> The Court of Appeals for the Tenth Circuit recently held that a law implicates First Amendment rights when it alters the “traditional contours” of copyright law.<sup>54</sup> The court was concerned with a provision of the URAA that took works from the public domain and put them under copyright protection.<sup>55</sup> It held that the fair use doctrine and the idea/expression dichotomy did not sufficiently guarantee the First Amendment interests at issue because the “traditional contours” of copyright protection required that works in the public domain stay in the public domain.<sup>56</sup> Despite this holding, the court remanded the case to the district court for a further consideration of the First Amendment question.<sup>57</sup>

Absent powers granted to Congress by the Commerce Clause, the Copyright Clause would almost certainly invalidate the anti-bootlegging provisions because they have no duration limitation and protect unfixed

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49. Heald & Sherry, *supra* note 15, at 1192 n.515.

50. 471 U.S. 539 (1985).

51. *Id.* at 560.

52. *See* 17 U.S.C. § 107 (2000).

53. *See* *Baker v. Seldon*, 101 U.S. 99, 104 (1880); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121-22 (2d Cir. 1930).

54. *Golan v. Gonzales*, 501 F.3d 1197 (10th Cir. 2007).

55. *Id.* at 1182-83; *see also* Uruguay Round Agreements Act § 514, 17 U.S.C. § 104A (2000). The copyright restoration provisions “restored” to copyright protection certain foreign works that had lapsed into the public domain through operation of formalities in the United States copyright law. *Id.*

56. *Golan*, 501 F.3d at 1189.

57. *Id.* at 1197.

works.<sup>58</sup> This position is alluded to by the *Martignon* district court, where the government conceded that § 2319A was invalid under the Copyright Clause because of their lack of conformity with the limited times and fixation requirements.<sup>59</sup>

## B. The Commerce Clause

Instead of relying on the Copyright Clause for congressional authority to enact the anti-bootlegging provisions, the government in *Martignon* argued that the Commerce Clause gave Congress the requisite authority.<sup>60</sup> The Commerce Clause provides Congress with broad powers to “regulate commerce among the several states.”<sup>61</sup> Under the Commerce Clause, Congress can regulate 1) “the channels of interstate commerce” 2) “the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities” and 3) “those activities having a substantial relation to interstate commerce.”<sup>62</sup> Furthermore, “substantial effect” has a very broad and permissive definition. For example, in *Wickard v. Filburn*, the Court found that Congress could prohibit one farmer from producing wheat for consumption on his own farm because the additional wheat introduced into the market affected interstate prices.<sup>63</sup>

Review of the constitutionality of statutes passed under the Commerce Clause is very deferential to Congress; the Court will only strike down a law if there is no rational basis for believing that the regulated activity falls under the above named categories.<sup>64</sup> Thus the fact that bootleg copies of live performances are easily sold nation-wide via the Internet<sup>65</sup> is sufficient interstate commerce to find that § 2319A is constitutional under even a narrow interpretation of the Commerce Clause.<sup>66</sup> Even if the sale of the bootlegs were purely or predominantly local, the law would only be unconstitutional if there were “no rational basis” for the conclusion that the sale of bootlegs could “affect[] interstate commerce” or if there were “no

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58. *United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999).

59. *United States v. Martignon*, 346 F. Supp. 2d 413, 422 (S.D.N.Y. 2004).

60. *Id.*

61. The Commerce Clause reads, “The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

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

63. 317 U.S. 111, 130-31 (1942).

64. *See Lopez*, 514 U.S. at 557.

65. As was Mr. Martignon’s business model. *United States v. Martignon*, 346 F. Supp. 2d 413, 417 (S.D.N.Y. 2004).

66. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824) (holding that the federal government has the power to regulate interstate shipping routes).

reasonable connection between the regulatory means selected and the asserted ends.”<sup>67</sup> Section 2319A was enacted in the context of an international agreement and “[t]he context reveals that the focus of Congress was on interstate and international commerce.”<sup>68</sup> Therefore, there is no serious suggestion that the Commerce Clause, if the limitations in the Copyright Clause do not apply, is insufficient to enact the anti-bootlegging laws.

### III. CONFLICTS BETWEEN CONGRESSIONAL POWERS

There is a tension between what the Copyright Clause forbids and what the Commerce Clause authorizes. The anti-bootlegging provisions are right in the middle—not clearly authorized, yet not clearly forbidden. To determine if Congress was authorized to enact the anti-bootlegging provisions, the courts require a framework to evaluate conflicts in Congress’s constitutional powers. When Congress passes a law that is authorized by one clause of the Constitution but that seems to conflict with another congressional power, courts have used three methods to determine the constitutionality of the questioned law.<sup>69</sup> The first method, the solitary analysis approach, is to uphold the statute if any constitutional authority can be found, regardless of limitations in other grants of power.<sup>70</sup> The second method, the categorization approach, is to categorize the law under the most appropriate congressional power and then apply any limitations found in that power while disregarding the limitations in any others.<sup>71</sup> The

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67. Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 754 (1982).

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

69. Dotan Oliar finds five methods, but also counts scholarly approaches unendorsed by any court. Dotan Oliar, *Resolving Conflicts Among Congress’s Powers Regarding Statutes’ Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467 (2007).

70. Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250-52 (1964) (holding that the Civil Rights Act of 1964 was a valid exercise of the Commerce power, despite previous holding in the *Civil Rights Cases*, 109 U.S. 3, 25 (1883), that Congress had no power under the Thirteenth and Fourteenth Amendments to enact similar provisions); Author’s League of Am., Inc. v. Oman, 790 F.2d 220, 224 (2d Cir. 1986) (“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.”).

71. Cf. Ry. Labor Executives Ass’n v. Gibbons, 455 U.S. 457, 468 (1982) (holding that a special congressional act disposing of the assets of a railroad company was not an exercise of the commerce power, but of the bankruptcy power and so was invalid); Edey v. Robertson (*The Head Money Cases*), 112 U.S. 580, 595 (1884) (holding that a fee imposed on ship-owners for transporting immigrants was not a tax under the tax power of art. I, § 8, cl. 1 but an exercise of the commerce power).

third method, the fundamental inconsistency approach, is to decide if there is any “fundamental inconsistency” between the law and any relevant congressional power.<sup>72</sup> This Part will discuss each of the three methods in turn.

#### A. Solitary Analysis

Under the solitary analysis approach, the statute is constitutionally valid so long as one of the powers standing alone is sufficient to uphold it. The Supreme Court in *Heart of Atlanta Motel, Inc. v. United States* held that the Commerce Clause granted Congress the authority to enact the Civil Rights Act of 1964, which banned racial discrimination in places of public accommodation, even though the Court denied that power to Congress under the Thirteenth and Fourteenth Amendments in the *Civil Rights Cases*.<sup>73</sup> The Court first found that the *Civil Rights Cases* did not rule on the Commerce Clause question with authority because the discussion was cursory and the Court in the *Civil Rights Cases* did not consider the Commerce Clause question properly before it.<sup>74</sup> The Court in *Heart of Atlanta* then found that the *Civil Rights Cases* decision and the congressional powers conferred by the Thirteenth and Fourteenth Amendments had no relevance to whether the Commerce Clause authorized Congress to pass the Act.<sup>75</sup> It ultimately held that the Commerce Clause stood alone in the evaluation of constitutional authority.<sup>76</sup>

The Second Circuit applied a similar analysis to the manufacturing clause<sup>77</sup> of the Copyright Act in *Authors League of America, Inc. v. Oman*.<sup>78</sup> The manufacturing clause required, with multiple exceptions, that “nondramatic literary material” in the “English Language” must either have been “manufactured in the United States or Canada” or forego copyright protection.<sup>79</sup> The court first found that, “the Copyright Clause is not

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72. *Cf. Moghadam*, 175 F.3d at 1281 (finding the Copyright Clause was not “fundamentally inconsistent” with section 2319A).

73. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-52 (1964); *see also The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

74. *Heart of Atlanta*, 379 U.S. at 251. *Cf. The Civil Rights Cases*, 109 U.S. at 19 (“[W]hether Congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.”)

75. *Heart of Atlanta*, 379 U.S. at 251.

76. *See id.*

77. *See* 17 U.S.C. §§ 601-603 (2000).

78. 790 F.2d 220 (2d Cir. 1986).

79. *See* 17 U.S.C. §§ 601-603 (2000).

the only constitutional source of congressional power that could justify the manufacturing clause.”<sup>80</sup> Finding authority under the Commerce Clause for the manufacturing clause of the Copyright Act, the court’s analysis ended.<sup>81</sup> Once again, the Commerce Clause stood alone and any limitations to Congress’s power in other parts of the Constitution were irrelevant.<sup>82</sup>

## B. Categorization

In contrast to the solitary analysis approach, the categorization approach categorizes a law under its proper congressional power and requires investigation into all relevant constitutional powers in order to apply the correct limitations.<sup>83</sup> A court first must decide which power is most appropriate for the law and then apply the limitations found in that power.<sup>84</sup>

In the most recent Supreme Court decision about Article I, section 8 conflicts, *Railway Labor Executives Association v. Gibbons*, the Court found that the Rock Island Transition and Employee Assistance Act of 1980 (“RITA”)<sup>85</sup> violated the uniformity limitation in the Bankruptcy Clause of the Constitution,<sup>86</sup> and so was void.<sup>87</sup> RITA affected interstate commerce by distributing assets from the liquidated Rock Island and Pacific Railroad Company, and could have been upheld on Commerce Clause grounds had there been no limitation in the Bankruptcy Clause.<sup>88</sup> The Court first held that RITA was a bankruptcy law because RITA distributed the assets of an insolvent organization and because Congress thought it was exercising its Bankruptcy Clause powers.<sup>89</sup> Because RITA

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80. *Author’s League*, 790 F.2d at 224.

81. *Id.*

82. *See id.*

83. *See Ry. Labor Executives Ass’n v. Gibbons*, 455 U.S. 457, 468-69 (1982) (“[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy as pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”).

84. *See id.*

85. Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified as amended at 45 U.S.C. §§ 1001 et seq. (2000)).

86. The Bankruptcy Clause reads, “Congress shall have the power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4.

87. *Gibbons*, 455 U.S. at 471.

88. In *Gibbons*, the challenged provisions of RITA distributed money to former Rock Island employees. *Id.* at 461-62.

89. *Id.* at 467-68.

was a law governing bankruptcies, the Court held, the limitations in the Bankruptcy Clause had to apply in order to ensure that bankruptcy laws would be uniform as the Constitution required.<sup>90</sup>

The Supreme Court employed a similar analysis, albeit to find a constitutional limitation on congressional power not applicable, in the *Head Money Cases*, where it categorized a law under the Commerce Clause.<sup>91</sup> There the Court held that a fee on ship owners imposed for each immigrant they brought to the United States was an exercise of the Commerce Power and not the Tax Power.<sup>92</sup> The law had been challenged because the fee was not imposed uniformly and Congress did not collect the fee for the “common defense” or “general welfare” of the United States.<sup>93</sup> The “true answer to all these objections,” the Court held, was that the tax was levied to “mitigate the evils inherent in the business of bringing foreigners to this country.”<sup>94</sup> Because Congress enacted the statute to regulate immigration, that purpose, the regulation of traffic, placed the statute within the Commerce Clause.<sup>95</sup> Therefore, the limitation that a tax had to be uniform and for the general welfare had no force.<sup>96</sup>

In both *Gibbons* and *The Head Money Cases*, the Court engaged in a two-step inquiry to analyze the statute at issue. First, it found the constitutional power most appropriate to the statute by determining the statute’s area of law (e.g. bankruptcy law). Then the Court applied any limitations to congressional power contained in the most appropriate clause of the Constitution while disregarding limitations contained in other, even related, clauses. In *Gibbons*, the Court found that the more restrictive power was most appropriate, and so there were no limitations to disregard.<sup>97</sup> In the *Head Money Cases*, the Court found that the Commerce Power better fit the purpose of the law.<sup>98</sup> As a result, the limitations in the Tax Power

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90. *Id.* at 469.

91. *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 595 (1884).

92. *Id.* The Tax Power of the Constitution provides that, “the Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1.

93. *The Head Money Cases*, 112 U.S. at 594-95.

94. *Id.*

95. *Id.*

96. *Id.* at 596.

97. *Ry. Labor Executives Ass’n v. Gibbons*, 455 U.S. 457, 467-68 (1982).

98. *The Head Money Cases*, 112 U.S. at 594-95.

were wholly irrelevant.<sup>99</sup> According to the Court, Congress could levee a fee that was both non-uniform and collected for a specific constituency (as opposed to the general welfare), so long as that fee regulated the traffic of goods and people internationally.<sup>100</sup>

### C. Fundamental Inconsistency

The “fundamental inconsistency” approach, unlike either the solitary analysis or the categorization approaches, applies all relevant constitutional powers and their limitations.<sup>101</sup> The statute at issue is struck down if it breaches some fundamental limitation on congressional action found in one of the relevant constitutional powers.<sup>102</sup> This method was first used by the Eleventh Circuit in *United States v. Moghadam* to reconcile the tension between the solitary analysis and categorization approaches.<sup>103</sup> The court in *Moghadam* found that the criminal prohibition on bootlegging in § 2319A passed constitutional muster by applying this test.<sup>104</sup> However, it noted that “there are some circumstances, as illustrated by [*Gibbons*], in which the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power.”<sup>105</sup> The court found that such circumstances occurred where Congress used the Commerce Clause in a way fundamentally inconsistent with the other power.<sup>106</sup>

In analyzing the bootlegging statute, § 2319A, the *Moghadam* court began by noting that because it regulates “conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations,” it was therefore consistent with the Commerce Clause.<sup>107</sup> The court next assumed, while expressly reserving the question, that because § 2319A protected unfixed works, it violated the “writings” requirement of the Copyright Clause.<sup>108</sup> The court further held that the stat-

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99. The Court gave dicta that the fee met the requirements of the Tax Power, but held that it did not have to meet constitutional muster. *Id.*

100. *See id.*

101. *See, e.g.,* *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (holding that § 2319A was not “fundamentally inconsistent” with the fixation requirement of the Copyright Clause).

102. *Id.*

103. *See* *United States v. Elcom*, 203 F. Supp. 2d 1111, 1139 (N.D. Cal. 2002) (noting that the *Moghadam* court resolved the tension between the stand alone and categorization approaches).

104. *See Moghadam*, 175 U.S. 1269.

105. *Id.* at 1280.

106. *Id.*

107. *Id.* at 1276.

108. *Id.* at 1277.

ute was “copyright-like” and was therefore related to the Copyright Clause and the limitations in the Copyright Clause could not be completely ignored.<sup>109</sup> The court further found, however, that Congress’s focus in passing the law was on international and interstate commerce, and the anti-bootlegging provisions were therefore related to the Commerce Clause.<sup>110</sup> Finally, the court held that § 2319A was not “fundamentally inconsistent” with the fixation requirement of the Copyright Clause because a live performance can gain fixation, and copyright protection, during its performance via simultaneous broadcast.<sup>111</sup> However, it was careful to note that the perpetuity of the protection offered by § 2319A was not at issue.<sup>112</sup> In dicta, it reasoned that this aspect of the statute might be fundamentally inconsistent with the “limited times” provision of the Copyright Clause.<sup>113</sup>

The “fundamental inconsistency” method strikes a balance between the categorization approach and the solitary analysis approach. In order to preserve “a limitation on the power of Congress,”<sup>114</sup> the *Moghadam* court looked to the limitations in the Copyright Clause. Further, in order to give full effect to the broader power, the Commerce Clause, the court found the anti-bootlegging provisions constitutional despite the fact that they technically violated the writings requirement.

While lower courts considering similar issues have adopted the *Moghadam* fundamental inconsistency test, they have not applied it consistently. In *Kiss Catalog, Ltd. v. Passport International Productions*, the district court upheld the civil prohibition on bootlegging, § 1101, purporting to use the fundamental inconsistency approach.<sup>115</sup> The court first held that the Commerce Clause provided ample authority to uphold the act absent any Copyright Clause violation.<sup>116</sup> The court then held that the statute was not “fundamentally inconsistent” with the Copyright Clause, and

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109. *Id.* at 1280-81.

110. *Id.*

111. *Id.* at 1280. 17 U.S.C. § 101 (2000) contains a definition of “fixed work” that includes a live performance that is simultaneously transmitted and recorded. The *Moghadam* court noted that this provision remains untested against a possible Copyright Clause challenge. *Moghadam*, 175 F.3d at 1281.

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

113. *Id.*

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

115. *Kiss Catalog, Ltd. v. Passport Int’l Prods. (Kiss II)*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005), *rev’g on reh’g*, *Kiss Catalog, Ltd. v. Passport Int’l Prods. (Kiss I)*, 350 F. Supp. 2d 823 (C.D. Cal. 2004).

116. *Kiss II*, 405 F. Supp. 2d at 1171-72.

characterized § 1101 as complementary to the purposes of copyright.<sup>117</sup> The court held that because both copyright and the anti-bootlegging provisions protect original works of authorship from unauthorized copying, the anti-bootlegging provisions were consistent with the Copyright Clause.<sup>118</sup> However, the court also applied elements of the *Gibbons* categorization approach, holding that the Copyright Clause was irrelevant to the outcome of the case because the Copyright Clause only regulated congressional action pursuant to fixed works.<sup>119</sup> Because live performances are unfixed works, the court held, the Copyright Clause had no relevance to their regulation.<sup>120</sup>

Another district court, in *United States v. Elcom*, applied *Moghadam*'s "fundamental inconsistency" test in upholding provisions of the Digital Millennium Copyright Act ("DMCA"), which were challenged on Copyright Clause grounds.<sup>121</sup> The statute at issue prohibited trafficking in devices that could bypass technological protection measures that prevented unauthorized copying of copyrighted works.<sup>122</sup> The prohibition on trafficking such devices prohibited the sale of bypassing mechanisms even to bypass a technological protection measure over an uncopyrighted or uncopyrightable work (such as a phonebook).<sup>123</sup> Therefore, the DMCA extended copyright-like protection to works that would be ineligible for copyright for constitutional reasons (such as lack of originality). Like the *Kiss II* court, the *Elcom* court first found that Congress had the authority under the Commerce Clause to enact the anti-trafficking provisions.<sup>124</sup> In order to determine if the trafficking ban was inconsistent with the Copyright Clause, the court found that the purpose of the Copyright Clause was to "promote the useful arts and sciences" and that granting exclusive rights

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117. *Id.* at 1173, 1176.

118. *See id.* at 1176.

119. *Id.* at 1175 ("[O]nce the Court concludes that the Statute does not fall within the purview of the Copyright Clause, it need no longer consider whether it complies with the limitations of the Copyright Clause. To do so imports into the Commerce Clause limits that clause does not have. That the Statute might provide 'copyright-like' or 'copyright-related' protection to matters clearly not covered by the Copyright Clause is not important. One need only find an alternative source of constitutional authority. This Court finds such authority in the Commerce Clause.").

120. *Id.* at 1174-1176.

121. 203 F. Supp. 2d at 1141.

122. *Id.* at 1128, 1141. *See* 17 U.S.C. § 1201 (2000).

123. *See* 17 U.S.C. § 1201 (2000); *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

124. *Elcom*, 203 F. Supp. 2d at 1138.

is the constitutionally sanctioned method of getting that result.<sup>125</sup> Because the anti-trafficking measures of the DMCA made it more difficult for pirates to make unauthorized copies of copyrighted works, these provisions strengthened the exclusive rights sanctioned by the Copyright Clause.<sup>126</sup> Thus, because the law was consistent with the purposes of copyright, the court upheld its constitutionality.<sup>127</sup>

The solitary analysis, categorization, and fundamental inconsistency methods each determine how much of the Constitution is relevant to a statute's constitutionality. The solitary analysis approach only looks at the one power that can uphold the law; the categorization approach looks at the entire Constitution in its first step, but narrows to only one clause once it determines the area of law relevant to the statute; and the fundamental inconsistency approach keeps the whole Constitution in view at all stages. When considering the constitutionality of the anti-bootlegging provisions, the fundamental inconsistency approach is best because it gives teeth to all of the limitations in the Copyright Clause but acknowledges the ambiguous position the provisions have between the Copyright Clause and the Commerce Clause.<sup>128</sup>

#### IV. THE *MARTIGNON* DECISION

The *Martignon* court applied a categorization analysis to the anti-bootlegging provisions, but it mischaracterized copyright law in the process. A thorough evaluation of the *Martignon* decision may shed light on the pitfalls courts should avoid when applying the categorization approach to the anti-bootlegging provisions. This Part will outline the facts of the and the holdings of the district court and Second Circuit. Finally, it will argue that the decision was a mischaracterization of copyright law because criminal laws do enforce copyrights.

##### A. The Facts and the District Court Decision

In 1978, Jean Martignon opened Midnight Records.<sup>129</sup> He sold “hard to find” recordings through a catalog and on the Internet.<sup>130</sup> The Recording

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125. *Id.* at 1140.

126. *Id.*

127. *Id.* at 1142. The court also found that the anti-trafficking provisions did not unduly burden the fair use of copyrighted materials nor did they effectively establish perpetual copyrights. *Id.* at 1141-42.

128. *See infra* Part V.

129. Welcome to Midnight Records, <http://www.midnightrecords.com> (last visited Dec. 7, 2007).

Industry Association of America (“RIAA”)<sup>131</sup> initiated an investigation into Martignon’s activities, and in September of 2003, he was arrested.<sup>132</sup>

Martignon was charged with violation of 18 U.S.C. § 2319A, the criminal prohibition of bootlegging.<sup>133</sup> Martignon moved to dismiss the charges on constitutional grounds. He argued that § 2319A violated the Copyright Clause’s requirements that copyright protection last for “limited times” and be a fixed “writing.”<sup>134</sup> He also argued that because the anti-bootlegging provisions do not include an exception for fair use, the statute is facially invalid on First Amendment grounds.<sup>135</sup> The district court held that § 2319A violated the “limited times” provision of the Copyright Clause, but the appellate court reversed, holding that the Commerce Clause gave sufficient authorization for the statute, and remanded for a reconsideration of the First Amendment challenge.<sup>136</sup>

The *Martignon* district court ruled that § 2319A violated the limited times and the writings requirements of the Copyright Clause using both a *Gibbons* categorization analysis and a *Moghadam* fundamental consistency method.<sup>137</sup> Furthermore, it held that the criminal bootlegging prohibition was a copyright statute, or “copyright-like” enough that the limitations in the Copyright Clause should apply.<sup>138</sup> For this reason, the court followed *Gibbons* in holding that Congress is not authorized to enact laws expressly prohibited by one part of the Constitution but that are impliedly authorized by a separate part.<sup>139</sup> The court further held that § 2319A fundamentally conflicted with the Copyright Clause because it granted per-

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130. *Id.*

131. The RIAA is a trade group that represents the United States recording industry. RIAA members create and distribute approximately 90% of all music in the United States. RIAA.org, Who We Are, <http://www.riaa.org/aboutus.php> (last visited Feb. 1, 2008).

132. *United States v. Martignon*, 346 F. Supp. 2d 413, 417 (S.D.N.Y. 2004), *rev’d*, 492 F.3d 140 (2d Cir. 2007).

133. *Id.*

134. *Id.* at 416-17.

135. *Id.* at 429 n.22.

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

137. *Martignon*, 346 F. Supp. 2d at 428 (“This Court finds that the fixation and durational limitations inherent in the Copyright Clause restrict Congress’ power to legislate in the quasi-copyright field.”).

138. *Id.* at 422 (“[I]t is clear that [the anti-bootlegging statute] was enacted primarily to cloak artists with copyright-like protection”).

139. *Id.* at 424; *see also* *Ry. Labor Executives Ass’n v. Gibbons*, 455 U.S. 463, 469 (1982).

petual protection.<sup>140</sup> It found that the limited times provision of the Copyright Clause was integral to the grant of monopoly rights in order to protect the public.<sup>141</sup>

### B. The *Martignon* Rationale

The Court of Appeals for the Second Circuit reversed the district court, holding that Congress was empowered under the commerce clause to criminalize bootlegging.<sup>142</sup> The court used two distinct rationales to reach its decision: a textual approach and an historical approach. Proceeding textually, the court found that the Copyright Clause empowers Congress to “secure rights” to authors, which the court construed as giving authors some enforceable legal right. The court reasoned that because § 2319A is a criminal statute, it secures no rights to authors since only the government can enforce criminal laws.<sup>143</sup> Therefore, according to the court, Congress was not acting pursuant to the Copyright Clause in enacting § 2319A.

The court found that, “[Copyright laws] all seem to share a common feature: They allocate property rights in expression.”<sup>144</sup> Relying on *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the court held that § 2319A is missing the essential feature of a property right: the right to exclude others.<sup>145</sup> It explained that because this essential stick in the bundle of rights is allocated to the state in § 2319A, § 2319A is not, as the framers would have conceived, a copyright law.<sup>146</sup> The court then concluded that Congress had ample authority under the Commerce Clause to pass the law because the criminal anti-bootlegging provision substantially affects interstate trade.<sup>147</sup>

The *Martignon* court’s rationale was similar to the *Gibbons* categorization approach in reconciling the potential congressional power conflict. The *Martignon* court first determined that it was not appropriate to apply the Copyright Clause to § 2319A because copyright was not the applicable area of law. The court next held that § 2319A regulates “activities at the

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140. *Martignon*, 492 F. Supp. 2d at 429.

141. *Id.*

142. *Martignon*, 492 F.3d at 153.

143. The district court opinion makes clear, however, that the RIAA was involved in the prosecution of *Martignon*. *Martignon*, 346 F. Supp. 2d at 417.

144. *Martignon*, 492 F.3d at 150.

145. 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.”) (internal quotation marks omitted).

146. *Martignon*, 492 F.3d at 150-51.

147. *Id.* at 152-53.

core of the Commerce Clause.”<sup>148</sup> Because the Commerce Clause is a broad power, with only very weak limitations, the court held § 2319A constitutional.<sup>149</sup>

### C. The *Martignon* Court’s Mischaracterization of Copyright Law

Despite the court’s thorough analysis, its reasons for determining that § 2319A is not a copyright law are not persuasive. To begin with, the court’s textual analysis is not convincing because the criminal prohibition of bootlegging is part of a larger legislative system designed to protect live performers. The court never discussed how the civil prohibition of bootlegging, § 1101, affects the analysis.<sup>150</sup> Because § 1101 grants to performers a civil right to exclude bootleggers from making recordings of their performances, § 2319A complements the performer’s property rights rather than supplanting them.<sup>151</sup> Indeed, the RIAA instigated the investigation into *Martignon*’s business.<sup>152</sup> The owners of the right were the parties enforcing it, with government help. In truth, the *Martignon* court was being overly formalistic by looking only at § 2319A. It failed to take into account both the real world activities of the recording industry and the entire legislative scheme that protects the recording industry.

Secondly, criminal prohibition of bootlegging is a method of granting incentives to authors so that they produce more works of authorship, thus promoting progress.<sup>153</sup> This purpose is exactly in line with the purposes of copyright.<sup>154</sup> Section 2319A protects “the fruits of intellectual labor,”<sup>155</sup> original works of authorship. In light of these contextual clues, basing the constitutional focus of the law entirely on a counterintuitive construction of the word “secure,” meaning that the author can be the only one doing the securing, is not persuasive.

Furthermore, Congress passed § 2319A to make United States copyright law consistent with copyright law in other countries. § 2319A was passed as part of the URAA, which implemented the Uruguay Round of

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148. *Id.* at 152.

149. *Id.*

150. The court did distinguish § 2319A from § 1101 for purposes of the Commerce Clause, and held only that § 2319A, because it requires a commercial motive to violate the law, was authorized by the Commerce Clause. *Martignon*, 49 F.3d at 153 n.8.

151. *See* 17 U.S.C. § 1101 (2000).

152. *United States v. Martignon*, 346 F. Supp. 2d 413, 417 (S.D.N.Y. 2004), *rev’d*, 492 F.3d 140 (2d Cir. 2007).

153. *See supra* Section II.A.1.

154. *See id.*

155. *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

Agreements of the General Agreement on Tariffs and Trade.<sup>156</sup> That agreement implemented the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”), designed to give member states consistent and complementary intellectual property laws.<sup>157</sup> TRIPS mandates “criminal procedures and penalties to be applied at least in cases of willful . . . copyright piracy on a commercial scale.”<sup>158</sup> Because TRIPS classes bootlegging among “copyright and related rights,” it clearly mandates criminal penalties for the commercial dissemination of unauthorized recordings of live performances.<sup>159</sup> It is hard to support the proposition that a law reflecting the standards required of TRIPS signatories is in no sense a “copyright” law.

The *Martignon* court’s historical rationale is similarly unconvincing for two reasons. First, criminal enforcement of copyright is not an historical anomaly. It has been a crime to violate copyright since the Copyright Act of 1909.<sup>160</sup> Given the importance the *Martignon* court places on the criminality of § 2319A, it is surprising that the court spends barely a sentence analyzing 17 U.S.C. § 506 or 18 U.S.C. § 2319, which provide for criminal enforcement of the more traditional copyrights.<sup>161</sup> According to the court’s rationale, these provisions are not copyright laws at all and therefore need not respect the limitations in the Copyright Clause. Yet it would be inconsistent if Congress could evade the limited times requirement in criminal law, but could not do the same in civil law because both secure exclusive rights to works of authorship. Furthermore, under the Statute of Anne, England’s first modern copyright statute,<sup>162</sup> a fine (i.e., criminal penalty) of one half penny was recoverable by the Crown for

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156. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (codified at 19 U.S.C. § 3511 (2000)).

157. General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994 annex 1C, art. 1, 33 I.L.M. 1125, 1197-98.

158. *Id.* at 1220.

159. *Id.* at 1202.

160. Copyright Act of 1909, ch. 320 § 28, 35 Stat. 1075 (1909) (“[A]ny person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court.”).

161. *United States v. Martignon*, 492 F.3d 140, 151 (2d Cir. 2007) (noting that § 2319A is in between the laws criminalizing copyright violations and trafficking counterfeit goods in the statute book).

162. HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 15 (1956).

“every Sheet which shall be found in [the copyright infringer’s] Custody . . . contrary to . . . this Act.”<sup>163</sup> Parliament passed the Statute of Anne in 1710,<sup>164</sup> and it has many similarities with the first copyright act passed by the United States, including an initial fourteen-year term, and a provision for the deposit of books.<sup>165</sup> It is unlikely, therefore, that the Framers of the Constitution would have categorically held criminal enforcement of exclusive rights in original works of authorship to be non-copyrights.

Secondly, copyrights and property rights are too dissimilar to be conditioned on the same “essential stick.” The *Martignon* court relied on the proposition that because copyright acts have historically all “allocate[d] property rights in expression,” § 2319A is not a copyright law, as it grants only the government a right to exclude.<sup>166</sup> This argument presupposes that copyright protects rights analogous to common law property. The historical understanding of copyright, however, is that literary rights are not analogous to common law property rights. In England, after the passage of the Statute of Anne, the House of Lords decided that any common law property right in literary works was superseded by the statute.<sup>167</sup> Indeed, it decided that one of the cornerstones of a property right, perpetuity, did not inhere in copyrights.<sup>168</sup>

The Supreme Court decided essentially the same issue in *Wheaton v. Peters*.<sup>169</sup> There the Court held that there was no common law property right in literary works in the United States and that the Copyright Clause granted Congress the authority to create such a right totally apart from the

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163. *Id.* at 100, 101.

164. *Id.* at 98 (noting confusion about the date of passage due to differences between the legal year and the calendar year).

165. Copyright Act of 1790 ch. 15, §§ 1, 3, 1 Stat. 124 (1790) (providing for the deposit of books with the local district court and an initial copyright term of fourteen years with the possibility of an additional fourteen year term if the author were still living); RANSOM, *supra* note 162, at 102-03 (explaining that section five of the Statute of Anne required deposit of copies of the copyrighted works to both the royal library as well as various college libraries); JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 70 (Mansell 1994) (explaining that the Statute of Anne provided for an initial copyright term of fourteen years with the possibility of an additional fourteen year term if the author was still living).

166. *United States v. Martignon*, 492 F.3d 140, 150 (2d Cir. 2007).

167. FEATHER, *supra* note 165, at 92 (noting that the Statute of Anne created new rights that are limited in time, contrary to common law property rights which are perpetual).

168. *Id.*

169. 33 U.S. 591 (1834).

common law property system.<sup>170</sup> Though the *Martignon* court relied on *Wheaton* to show that a copyright must “create, bestow, and allocate” property rights to authors,<sup>171</sup> what *Wheaton* really stands for are the propositions that copyrights are not common law property rights and that the rules the two rights regimes follow are not the same.<sup>172</sup>

The *Martignon* court’s holding that copyright laws universally give authors an exclusive right to their works of authorship is not consistent with copyright law as it now stands. Several sections of the Copyright Act limit the “exclusive” rights an author has to her works. These limitations include statutory licensing schemes that allow anyone, upon payment of a fee set by the government, to exercise certain § 106 rights.<sup>173</sup> They also include wholesale exemptions to the § 106 rights for certain nonprofit users or publicly beneficial uses of copyrighted works.<sup>174</sup> If a copyright were “property” in the common law understanding with rights of exclusivity and perpetuity, these activities would be takings. They are not, however, because copyright is a different animal. In other words, the *Martignon* court’s holding that all copyright laws grant exclusive rights to the owners of copyrighted works was a misinterpretation of copyright law.

## V. THE CONSTITUTIONALITY OF THE BOOTLEGGING PROVISIONS

The rationale in the Court of Appeals for the Second Circuit mischaracterized copyright law; therefore, a proper basis for the constitutionality of the anti-bootlegging provisions has yet to emerge. The right method for resolving conflicts of power granted to Congress must be determined in order to properly evaluate the constitutionality of the anti-bootlegging provisions. In making this analysis, the solitary analysis method may be rejected out of hand, as it is inadequate to protect constitutional safeguards. The categorization approach is workable, but suffers from a near-

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170. *See id.* at 661 (“The word secure, as used in the constitution, could not mean the protection of an acknowledged legal right.”).

171. *Martignon*, 492 F.3d at 150.

172. *See Wheaton*, 33 U.S. at 661.

173. *See, e.g.*, 17 U.S.C. §§ 114(d)(2), 114(f) (2000) (providing for statutory licensing of digital audio transmissions under certain circumstances); 17 U.S.C. § 115 (2000) (providing for statutory licensing of making and distributing phonorecords of non-dramatic musical works).

174. *See, e.g.*, 7 U.S.C. § 107 (providing that certain uses of copyright material which are beneficial to the public and cause little to no economic harm to the copyright owner are not infringements of copyright); 17 U.S.C. § 117 (2000). (providing that certain uses of copyrighted computer programs are not infringements of copyright).

fatal flaw in that the final outcome of the statute's constitutionality is arbitrary.<sup>175</sup> The fundamental inconsistency approach solves this problem by supplying a definite answer, while giving some force to all constitutional provisions.<sup>176</sup> This Section will discuss each method in turn as applied to the anti-bootlegging provisions, and conclude that Congress does have the power to enact the anti-bootlegging provisions, but it must limit the term of protection it grants to live performances.

#### A. Solitary Analysis Applied to the Anti-Bootlegging Provisions

The solitary analysis approach used in *Heart of Atlanta* is not appropriate for the conflict between the Copyright Clause and the Commerce Clause. In *Gibbons*, a categorization approach was more appropriate because the Commerce Clause had the potential to swallow the Bankruptcy Clause whole.<sup>177</sup> That is, bankruptcies are intimately associated with commerce and bankruptcy law substantially affects interstate commerce.<sup>178</sup> If the solitary analysis approach had been applied to the fact pattern in *Gibbons*, then the whole requirement that bankruptcy laws be uniform would have been erased from the Constitution.<sup>179</sup> Particularized bankruptcy laws for individual corporate entities would then be possible.<sup>180</sup> Applying the solitary analysis approach to the Commerce Clause and Copyright Clause would produce a similar result because the creative industries protected by copyright certainly substantially affect interstate commerce. Furthermore, like in *Gibbons*, the Copyright Clause has affirmative limitations on Congress's power that the court would erase if it held that the Commerce Clause could enact copyright laws. It would be inappropriate to rely on a test that reads whole clauses out of the Constitution, and therefore the solitary analysis approach is not suited to the conflict between the Commerce Clause and the Copyright Clause.

#### B. Categorization

The categorization approach, unlike the solitary analysis approach, does not end once it finds a congressional power capable of upholding the statute in question. For purposes of the categorization approach, any law

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175. See Oliar, *supra* note 69, at 498.

176. Dotan Oliar argues that the fundamental inconsistency test is the more satisfying approach because it forces courts to confront the tension between the Commerce Clause and the Copyright Clause. *Id.*

177. See *Ry. Labor Executives Ass'n v. Gibbons*, 455 U.S. 463, 466 (1982).

178. See *id.*

179. See *id.* at 469.

180. See *id.*

that purports to grant exclusive rights in works of original authorship falls under the Copyright Clause, despite the Commerce Clause. That is, the purpose of the Copyright Clause is to grant Congress the power to give monopoly rights to the originators of intellectual goods. In the *Trade-Mark Cases*, the Court found that the Copyright Clause authorizes Congress to grant rights in the “fruits of intellectual labor.”<sup>181</sup> The Court held that writings suitable for copyright protection must be “founded in the creative powers of the mind.”<sup>182</sup> This accords with *Feist*’s reminder that, “originality remains the sine qua non of copyright.”<sup>183</sup> Because the categorization approach uses the purpose of the law at issue to decide what congressional power the law best fits under,<sup>184</sup> any law that gives exclusive rights to works of original expression should be categorized under the Copyright Clause. Because the Commerce Clause is such a broad power, it can authorize statutes that are not uniquely about commerce.<sup>185</sup> Nonetheless, statutes can fall uniquely under the Commerce Clause, as in the *Head Money Cases*, by regulating commerce as such—the movement of goods and people, for instance.<sup>186</sup>

The flaw with the categorization approach is that determining whether or not anti-bootlegging laws grant exclusive rights in the “fruits of intellectual labor” is difficult. On the side of the Copyright Clause, the anti-bootlegging provisions grant a performer exclusive rights to any recording of his or her performance. The recording is a “fruit[] of intellectual labor” because the performance itself is an artistic endeavor, and the recording of it has value precisely because of the unique artistic qualities of the performance. As a result, § 2391A and § 1101 fall within the scope of the Copyright Clause and must abide by duration limitations. Because the rights granted in the anti-bootlegging provisions are perpetual, the anti-bootlegging provisions would be unconstitutional.

On the other hand, however, the anti-bootlegging provisions do not protect the performance itself, but rather the right to record the performance.<sup>187</sup> That is, a rival performer could stage a substantially similar show the night after a box-office hit debuts and not violate the anti-bootlegging

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181. 100 U.S. 82, 94 (1884).

182. *Id.*

183. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

184. *See supra* Section III.B.

185. *See, e.g.*, *The Lottery Case*, 188 U.S. 321 (1903).

186. *See Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 595 (1884).

187. *See Oliar, supra* note 69, at 491; 17 U.S.C. § 1101 (2000); 18 U.S.C. § 2319A (2000).

provisions. Sections 1101 and 2319A do not protect an original performer from direct competition even where the competitor is stealing the original performer's act. The anti-bootlegging statutes are more like federal rights of publicity in that the right of publicity protects the image of the performer performing and not the performance itself.<sup>188</sup> Interpreted in this way, § 1101 and § 2319A are not within the scope of the Copyright Clause because they do not protect the actual "fruit of intellectual labor" with respect to the original artist. Thus, because bootlegging concededly substantially affects interstate commerce, the Commerce Clause authorizes them.

The categorization approach has the advantage of giving effect to all limitations on Congress's constitutional powers. It is a constitutional interpretation appealing in its simplicity because under it, every law is enacted under one power only and only the limitations in that power apply. It has the disadvantage, however, of pigeonholing statutes so that they are analyzed under only one part of the Constitution, when they may actually relate to several areas of the law. For example, § 1101 and § 2319A have aspects of copyright laws even though they are not entirely copyright laws. This has led numerous courts to classify them as "copyright-like."<sup>189</sup> In the face of statutes like § 1101 and § 2319A, the categorization approach used in *Gibbons* is arbitrary.<sup>190</sup> There is no way to tell, in close cases, which constitutional power the law at issue actually falls under.

### C. Fundamental Inconsistency

Unlike the categorization approach, the fundamental inconsistency approach analyzes the statute according to the fundamental limitations of every applicable constitutional power. Under this approach, in order to rule on the constitutionality of the anti-bootlegging provisions, it is necessary to identify the fundamental limitations in the Copyright Clause. Notably, the Copyright Clause has at least two fundamental limitations: a work protected by copyright must be original<sup>191</sup> and copyright protection cannot last for perpetuity.<sup>192</sup> In contrast, that a work must be fixed is not a fundamental limit on the Copyright Power, because of the very wide definition of "fixed" in copyright law.<sup>193</sup>

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188. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

189. See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999).

190. See *Oliar*, *supra* note 69, at 498.

191. See *supra* Section II.A.3.

192. See *supra* Section II.A.2.

193. See *supra* Section II.A.3.

The anti-bootlegging provisions easily pass fundamental inconsistency with regard to originality. The Copyright Clause only requires a “modicum” of originality and the variations that naturally occur in any live performance are enough to meet this test.<sup>194</sup> However, the anti-bootlegging statutes violate the “limited times” provision of the Copyright Clause. A bootlegger may never sell an unauthorized videotape of a live performance, even seventy years after the performer dies. No bootlegs of live performances will ever fall into the public domain, frustrating the benefit to the public on which copyright is based.<sup>195</sup> Thus, under the fundamental inconsistency test, § 2319A and § 1101 are unconstitutional due to their perpetual nature. In fact, the district court in *Martignon*, the only court to apply the fundamental inconsistency test to the anti-bootlegging provisions, found the statute unconstitutional.<sup>196</sup> While both the Second Circuit Court of Appeals in *Moghadam* and the *Kiss II* court acknowledged the incompatibility between the perpetual nature of the anti-bootlegging provisions and the Copyright Clause, neither court applied the fundamental inconsistency test.<sup>197</sup> The *Moghadam* court declined to rule on the limited times provision because the issue was not properly before it.<sup>198</sup> Because the *Kiss II* court held that the Copyright Clause did not protect unfixed works (i.e., live performances), it found that the Copyright Clause was irrelevant to the constitutionality of the anti-bootlegging provisions.<sup>199</sup> It then held that the Commerce Clause independently authorized the anti-bootlegging provisions and that, therefore, no duration limitation was necessary.<sup>200</sup> While the *Kiss II* court purported to apply the *Moghadam* fun-

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194. See, e.g., *Moghadam*, 175 F.3d 1280 (“A live musical performance clearly satisfies the originality requirement.”).

195. See Heald & Sherry, *supra* note 15, at 1165.

196. *United States v. Martignon*, 346 F. Supp. 2d 413, 428 (S.D.N.Y. 2004), *rev'd*, 492 F.3d 140 (2d Cir. 2007).

197. See *Moghadam*, 175 F.3d 1269; *Kiss Catalog, Ltd. v. Passport Int'l Prods. (Kiss II)*, 405 F. Supp. 2d 1169 (N.D. Cal. 2005).

198. See *id.* at 429 n.22

199. See *Kiss II*, 405 F. Supp. 2d at 1176 (“In contrast to *Railway Labor*, the question is not whether legislation empowered by the Copyright Clause-but invalid under it-can otherwise be empowered by the Commerce Clause. The question is whether matters not encompassed within the Copyright Clause can be addressed by the Commerce Clause free of the restrictions of the Copyright Clause. The answer to that question is, clearly, yes.”).

200. *Id.*

damental inconsistency test,<sup>201</sup> it actually applied an analysis similar to the *Gibbons* categorization approach.<sup>202</sup>

While the precedent on the proper method is ambiguous, the fundamental inconsistency test has the virtue of holding the entire Constitution in view. That is, broad powers have their full effect even when a statute authorized by the broader power conflicts with a narrower power. It also gives effect to limitations on Congress's power where those limitations are important in the larger constitutional scheme; for example, the anti-bootlegging provisions are not unconstitutional because of their conflict with the fixation requirement, which is a weak limitation, but they are unconstitutional because of their conflict with the duration requirement, which is a much more fundamental limit on congressional power to enact copyright laws. The method has the disadvantage, however, of stretching narrow powers. Because copyright law substantially affects interstate commerce, if the Copyright Clause did not exist, Congress could enact copyright laws free of all the restraints in the Copyright Clause. Applying the fundamental inconsistency test, therefore, requires designating some of the limits the Copyright Clause fundamental and others not so. This causes some of the limitations in the Copyright Clause, such as the fixation requirement, to lose effectiveness.<sup>203</sup> The alternatives, however, to fundamental inconsistency have disadvantages that make them worse choices. The *Heart of Atlanta*<sup>204</sup> solitary analysis approach completely erases limits on congressional powers by upholding a law as soon as any one power can be found that would uphold it. The *Gibbons*<sup>205</sup> categorization approach arbitrarily pigeonholes a law under one congressional power or another with no guidance about how to make that decision in close cases. Fundamental inconsistency is therefore the method best suited to maintaining the limitations on congressional power that ought to be maintained. Moreover, the fundamental inconsistency approach is capable of stretching the constitutional requirements that, like the fixation requirement, are not part of the foundations of copyright law.

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201. *See id.* at 1173.

202. *See supra* text accompanying notes 119-120.

203. *See Moghadam*, 175 F.3d 1280.

204. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

205. *Ry. Labor Executives Ass'n v. Gibbons*, 455 U.S. 463 (1982).

## VI. CONCLUSION

Ultimately, the *Martignon* court's holding that § 2319A is not a copyright law was misguided. The criminal nature of the law is not determinative because copyright laws have had criminal aspects in the United States since 1909, and the United States has entered into a multi-national agreement giving copyright criminal enforcement the world-over.<sup>206</sup> Additionally, § 2319A has a civil corollary in § 1101, which grants the performer the right to exclude; the criminal provision, therefore, is another tool that secures the author's intellectual property. Finally, the *Martignon* rationale, that criminal copyright laws need not abide by the limitations in the Copyright Clause implies that criminal copyright enforcement could be perpetual, while the civil remedies could not be. This undermines the limited times requirement in the Copyright Clause.

The best method to determine the constitutionality of the anti-bootlegging statutes is the fundamental inconsistency approach pioneered by the *Moghadam* court. This approach holds the entire Constitution in view, and only invalidates a law if it breaks an important constitutional rule. Measured against this approach, the anti-bootlegging provisions are unconstitutional because they confer perpetual rights in violation of the "limited times" requirement in the Copyright Clause.

The appropriateness of the fundamental inconsistency test is not surprising. The *Moghadam* court designed it specifically within the context of the anti-bootlegging provisions and the Copyright Clause. It is a specifically engineered tool, adept at separating out important underpinnings of the copyright regime (like duration and originality) from the ones with a bit of stretch (like the promotion of progress and fixation). The categorization approach, used by the Second Circuit in *Martignon*, does not have the flexibility required to maintain the coherency of copyright. The Second Circuit's reasoning makes it look like any criminal copyright law is actually governed by the Commerce Clause. This is a *reductio ad absurdum* that underscores the categorization approach's rigidity. In a technologically advancing society, in which copyright laws require adaptability, our constitutional system needs to give copyright that room. The choice should not be, however, between giving up the basic quid pro quo of intellectual property rights (legal protection for public access) and preventing the exploitation of creative individuals; copyright law requires both. In the end, the fundamental inconsistency test strikes the appropriate balance because it allows Congress to use its broad Commerce Clause powers to pro-

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206. See *supra* Section IV.C.

protect the works of live performers, but it does not erase the fundamental limitations imposed on Congress by the Copyright Clause.