UNITED STATES V. MARTIGNON & KISS CATALOG V. PASSPORT INTERNATIONAL PRODUCTS: THE ANTI-BOOTLEGGING STATUTE AND THE COLLISION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW AND THE UNITED STATES CONSTITUTION

By Angela T. Howe

The rock group The Grateful Dead is well-known for allowing and even encouraging its fans to make recordings of their live performances and distribute them to other fans, a practice commonly known as "bootlegging." However, the ability to record and redistribute these bootlegged copies of live performances is not a legal privilege in cases where the artists have not authorized such behavior. In fact, the international intellectual property community has united in the last decade to eradicate such behavior. In accordance with the anti-bootlegging provisions of the international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the United States enacted the anti-bootlegging statute in 1994 that deems this behavior to violate the rights of the artist and declares bootlegging illegal.

However, bootleggers may still have a viable defense to the anti-bootlegging laws based on two recent district court decisions that have held the anti-bootlegging statute unconstitutional: United States v. Martignon and KISS Catalog v. Passport International Products. On September 24, 2004, the Federal District Court for the Southern District of

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1. A list of 1,317 bands that permit fans to record their concerts is located on the website “Bands That Allow Taping”, at http://btat.wagnerone.com/index.php (last visited Feb. 8, 2005).

2. 17 U.S.C. § 1101 (2000) (civil provision); 18 U.S.C. § 2319A (2000) (criminal provision). Even though there are two codifications of the anti-bootlegging statute, this Note will refer to both as "the anti-bootlegging statute" or "the statute."


New York declared the criminal portion of the U.S. anti-bootlegging legislation unconstitutional for extending beyond Congress's legislative authority. Specifically, the court ruled that the anti-bootlegging statute does not comply with the "Writings" for "limited Times" copyright protection restrictions in the Copyright Clause, and that Congress may not circumvent these restrictions by relying on its alternative grants of power, such as the Commerce Clause and Necessary and Proper Clause. Less than three months later, the Federal District Court for the Central District of California handed down a decision declaring the civil provision of the anti-bootlegging statute unconstitutional, following closely and citing heavily the rationale of the New York District Court. These district court decisions seemingly conflict with Eleventh Circuit case law upholding the constitutionality of the anti-bootlegging statute and ruling that Congress can legitimately implement this legislation under its Commerce Clause power.

The rulings in Martignon and KISS could have significant implications regarding the constitutional authority of the executive and legislative branches to make U.S. intellectual property law conform with international agreements. The rulings reflect the tension between Congress's power to implement copyright-like legislation and the ultimate strength of the Constitution's Copyright Clause. By showing great deference to the Copyright Clause with a strict construction of its limitations provisions, courts may work to the detriment of the United States' ability to fulfill its international treaty obligations.

Martignon and KISS are pivotal cases that highlight several timely copyright law issues. This Note explores both the constitutional issues raised by the anti-bootlegging statute in the domestic sphere, as well as the international law issues stemming from the tension between upholding the Constitution and honoring the United States' obligations to international agreements. Part I describes the anti-bootlegging statute itself, the international treaties that brought about its enactment, the critiques of the statute, and the potential constitutional authority for enacting the statute. Part II lays out the facts and the rationale of the Martignon and KISS cases. Part

6. Id. at 423 ("Because the anti-bootlegging statute provides seemingly perpetual protection for unfixed musical performances, it runs doubly afoul of Congress's authority to regulate under the Copyright Clause.").
7. Id. at 427 & n.15.
III discusses the possible alternatives for reconciling the anti-bootlegging statute with the Constitution by examining the possible rulings of the higher courts in considering the case on appeal and ways in which Congress might redraft the statute to comply with constitutional limits and international obligations.

I. BACKGROUND

A. The Anti-Bootlegging Statute

Though once the province of the states, regulation of bootlegging moved to the federal stage in 1994, as Congress sought to comply with the United States' international obligations and appease its foreign trading partners who believed the issue merited international harmonization. Bootlegging is defined as making or dealing in illicit goods such as unofficial recordings of copyrighted music. Both the Eleventh Circuit in United States v. Moghadam and the Martignon court noted that "piracy" is distinct from "bootlegging." Whereas "piracy" refers to the duplication of a sound recording that has already been commercially released, "bootlegging" involves the duplication of a commercially unreleased performance. Enacted in 1994, the anti-bootlegging statute provides that anyone who makes or distributes a fixation or broadcast of a live performance without the permission of the performer is subject to liability under the criminal and civil provisions of the statute. The civil provision is codified at 17 U.S.C. § 1101 and subjects offenders to the same civil remedies as those available for copyright infringement. The criminal provision, 18 U.S.C. § 2319A, subjects violators to fines and possible prison time. The criminal statute was the first to be addressed by the federal courts in two cases challenging its constitutionality—Moghadam and Martignon. Both courts considered the following portion of § 2319A:

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

11. 175 F.3d at 1272 n.3; 346 F. Supp. 2d at 418 n.3.
14. 175 F.3d 1269.
15. 346 F. Supp. 2d 413.
(1) fixes the sound 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 . . . .

The District Court for the Central District of California was then first to consider the constitutionality of the civil provision, which reads:

(a) Unauthorized acts. Anyone who, without consent of the performer and performers involved—

(1) fixes the sound or sounds and images of the live musical performance in a copy or phonorecord . . .

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

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

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright. 17

Before the enactment of the anti-bootlegging statute, the question of whether the law prohibits bootlegging was a matter of common law or state statute. 18 Although federal copyright law prohibited the copying of recorded musical performances through the Sound Recording Act of 1971, 19 there was no protection for live, unfixed performances. Under common law, musicians and record companies usually sought protection under the doctrine of unfair competition or unjust enrichment. 20 They

16. 18 U.S.C. § 2319A.
20. See Rousso, supra note 18, at 179. For example, Bob Dylan, Columbia Records, and his publishing company successfully obtained a restraining order against a pressing
could also obtain recourse under various state anti-bootlegging statutes, which were surprisingly non-uniform.\textsuperscript{21}

**B. The International Treaties that Give Rise to the Anti-bootlegging Statute**

The enactment of the anti-bootlegging statute grew out of the United States' obligations under the Uruguay Round of trade negotiations under the General Agreement on Tariffs and Trade (GATT).\textsuperscript{22} In 1994, the United States Congress enacted the Uruguay Round Agreements Act (URAA),\textsuperscript{23} a comprehensive act dealing with matters of international trade, which was the United States' implementation of its obligations under TRIPs.\textsuperscript{24} The United States was the leading proponent of TRIPs, which Professor David Nimmer describes as "the highest expression to date of binding intellectual property law in the international arena."\textsuperscript{25} Sections 512 and 513 of the URAA correspond with the United States' civil and criminal anti-bootlegging provisions, respectively.\textsuperscript{26} In passing the URAA and therefore inserting the anti-bootlegging statute into federal law, Congress extended federal protection against bootlegging in live performances for the first time in history and departed from its tradition of leaving this protection in the hands of the states.\textsuperscript{27}

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\textsuperscript{24} Joseph C. Merschman, Note, 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 (2002). In April 1994, the United States was one of 111 nations to sign the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, and thereby adopting TRIPs. United States v. Martignon, 346 F. Supp. 2d 413, 414 (S.D.N.Y. 2004).

\textsuperscript{25} Nimmer, supra note 22, at 1391-92.


\textsuperscript{27} Uruguay Round Agreements Act § 512, 17 U.S.C. § 1101, does, however, recognize the role that state law has played in regulating the practice of bootlegging and provides that the URAA's anti-bootlegging provisions do not preempt any remedies available to artists under state common law or statutory law.
Before TRIPs, most international intellectual property law was silent as to anti-bootlegging provisions. The United States had signed three prior intellectual property treaties, the Universal Copyright Convention, the Berne Convention, and the Geneva Convention, largely because their provisions were relatively limited. The Rome Convention, on the other hand, was the first treaty to prohibit bootlegging. The United States chose not to become a party because, in addition to prohibiting bootlegging, the Rome Convention also requires party states to give sound recording copyrights which would mandate that radio stations pay royalties to record companies or recording artists. Nonetheless, United States adherence to TRIPs ushered in a policy change whereby the United States became obliged to meet Rome Convention standards as mandated by the TRIPs agreement. These include performers' rights and remedies for unauthorized fixations of their live performances. TRIPs has been characterized as the most effective international copyright enforcement mecha-


29. Enacted after World War II, the Universal Copyright Convention unfortunately lacked effectiveness in providing comprehensive copyright protection in the international arena. See id.

30. Administered by the World Intellectual Property Organization (WIPO), the Berne Convention sets a minimum standard for copyright protections, including recording rights, but also says nothing about bootlegging. See Blunt, supra note 27, at 176.


32. See Blunt, supra note 28, at 176.


34. Sobel, supra note 21, at 11.

nism in existence for recording artists, record companies, and broadcasters concerned about bootleg recordings.\textsuperscript{36} One reason for this perceived strength is that for the first time, TRIPs incorporated World Trade Organization (WTO) enforcement mechanisms and dispute settlement procedures to protect intellectual property rights.\textsuperscript{37} For example, TRIPs article 4 invokes the Most-Favored Nation (MFN Treatment) provision which requires all WTO signatories to give reciprocal treatment of "any advantage, favour, privilege, or immunity" to all WTO members.\textsuperscript{38} Thus, TRIPs effectively brings intellectual property law to the forefront of issues within the realm of international trade.

Moreover, the internationalization of intellectual property law is becoming more prevalent every day—on May 20, 2002, the United States became a party to the WIPO Performances and Phonograms Treaty (WPPT).\textsuperscript{39} This treaty is even broader than TRIPs in the scope of its anti-bootlegging protections, including protection for artists' moral rights in live performances and a more expansive definition of the "performer" who merits this protection.\textsuperscript{40}

C. Critiques of the Anti-bootlegging Statute

The anti-bootlegging statute has a number of critics who have noted its major flaws.\textsuperscript{41} One criticism is that the provisions were not well thought out, as evidenced by their meager legislative history. Professor David Nimmer states that "[o]ne seeks in vain for evidence that anyone in Washington even considered the constitutional basis for these vitally important amendments to United States copyright law."\textsuperscript{42} Furthermore, neither the

\textsuperscript{36} Patterson, \textit{supra} note 20, at 407-08; \textit{see also} Nimmer, \textit{supra} note 22, at 1392 ("Indeed, [TRIPs] embodies "trade with teeth.""

\textsuperscript{37} \textit{See} TRIPs, \textit{supra} note 35, art. 9.

\textsuperscript{38} \textit{Id.} art. 4. ("With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.")


\textsuperscript{40} \textit{See} Deas, \textit{supra} note 10, at 595 (characterizing the WPPT as a "TRIPs-Plus" agreement).


\textsuperscript{42} Nimmer, \textit{supra} note 22, at 1409.
statute nor its legislative history make any mention of the doctrines of fair use, work made for hire, or statute of limitations, which form important bounds on the exclusive rights of copyright holders. The statute is also apparently retroactive and not incorporated into the flow of the Copyright Act. Critics also contend that the statute does more harm than good. Those who advocate legalizing bootleg recordings note that such recordings are complements and not substitutes for the studio recordings. For example, those who own bootlegs normally acquire them in addition to the studio manufactured copy, rather than as a replacement of the official version. Further, critics argue that the music industry can easily address the bootlegging problem by releasing live concert recordings, thereby fulfilling the demand for these works and eliminating incentives for unauthorized recording and distribution. Critics of the statute also note that the legal restrictions are ineffectual considering the ease with which bootleggers can continue their practices. Defenders of the anti-bootlegging statute, on the other hand, maintain that bootlegging causes significant loss of revenue to the artist and that the bootlegged copies do act as substitutes for the studio recordings, which therefore compete with the mainstream music sales.

D. Constitutionality of the Statute: Moghadam and the More Recent Challenges

Without much mention of the policy issues surrounding the anti-bootlegging statute, the current litigation addresses a more fundamental question: its constitutionality. The question was previously adjudicated by the Eleventh Circuit in *United States v. Moghadam* in 1999, which upheld the statute in the face of a narrow constitutional challenge. The more re-

43. *Id.* at 1399-400. Note, however, that the criminal provision, 18 U.S.C. § 2319A(f) (2000), provides that applicability of this section occurs on or after the date of enactment of the Uruguay Round Agreement Acts, which was enacted December 8, 1994. This argument was also quashed in *Kiss*, where the court ruled that even though the unauthorized recording occurred before the time period covered by the statute, the current distribution of the concert footage is actionable. *KISS Catalog v. Passport Int'l Prods.*, 350 F. Supp. 2d 823, 828-29 (C.D. Cal. 2004).

44. *Nimmer*, supra note 22, at 1399-400. The criminal provision is not even incorporated into Chapter 17 of the United States Code.

45. *See*, e.g., Rousso, supra note 18, at 191.

46. *See id.* at 174 (noting that bootleg collectors continue to buy studio recordings which are usually released before the artist goes on tour and are of better quality); *see also* Patterson, supra note 20, at 417.


49. 175 F.3d 1269 (11th Cir. 1999).
cent challenges are broader and require a deeper analysis of the constitutional authority underlying the law's enactment.

There are theoretically three constitutional sources of power under which Congress may enact a statute such as the anti-bootlegging law: the Copyright Clause, the Commerce Clause, and the Necessary and Proper Clause. The Copyright Clause states that Congress is empowered "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." The Commerce Clause grants to Congress the power "to regulate Commerce with foreign Nations and among several States." The Supreme Court generally has interpreted the broad scope of the Commerce Clause as empowering Congress to legislate regarding channels of interstate commerce, the subjects of interstate commerce, and intrastate activities that substantially affect interstate commerce. Congress also passes laws pursuant to its treaty power as augmented by the Necessary and Proper Clause, which states "Congress shall have power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." This last clause is the most controversial source of congressional authority due to its inextricable tie to United States foreign affairs and diplomacy concerns.

Before the two 2004 cases, the only prior case law ruling on the constitutionality of the anti-bootlegging statute was Moghadam. In that case, Ali Moghadam was convicted of violating the anti-bootlegging statute after he pled guilty to knowingly distributing, selling, and trafficking in bootleg recordings of live musical performances by artists such as Tori Amos and the Beastie Boys. Moghadam moved to dismiss on the grounds that the statute was unconstitutional because it did not fall within the enumerated legislative powers of the Copyright Clause. The district court denied the motion to dismiss. The Eleventh Circuit also rejected Moghadam's challenge on the grounds of constitutionality and affirmed his conviction.

The Moghadam court avoided the issue of whether the anti-bootlegging statute can be sustained under the Copyright Clause by confirming the constitutionality of the statute based on the congressional

51. U.S. CONST. art. I, § 8, cl. 3.
54. 175 F.3d 1269 (11th Cir. 1999).
55. Id. at 1271.
56. Id.
source of power found in the Commerce Clause.\textsuperscript{57} Ruling that the anti-bootlegging statute regulates conduct that has a substantial effect on both commerce between several states and commerce with foreign nations, the court simply reasoned "[i]f bootlegging is done for financial gain, it necessarily is intertwined with commerce."\textsuperscript{58}

In answering what the Moghadam court termed the "more difficult question," the court ruled that Congress can use its Commerce Clause power to pass the same legislation that may not have been explicitly permitted under the Copyright Clause.\textsuperscript{59} The court reasoned that, despite being partially incorporated into Title 17, neither the civil nor criminal provision of the anti-bootlegging statute mesh with the overall structure of the copyright code.\textsuperscript{60} The court concluded that "the protections that the anti-bootlegging statutes confer on musicians are best described as 'quasi-copyright' or \textit{sui generis} protections."\textsuperscript{61} In its analysis of the statute, the Moghadam court cited \textit{Nimmer on Copyright} in describing the anti-bootlegging provisions created by the URAA as "hybrid" rights that in some ways resemble the protections of copyright law but in other ways are distinct from copyright.\textsuperscript{62}

Additionally, the Eleventh Circuit distinguished between the affirmative requirements and negative limitations on the power granted by the Copyright Clause: the fixation requirement of the Copyright Clause, evident through the word "Writings," is an affirmative requirement in the clause, whereas "for limited Times," is a negative limitation regulating copyright protection. The court reasoned that the statute does not directly violate the affirmative fixation requirement of the Copyright Clause.\textsuperscript{63} It

\textsuperscript{57} Id. at 1274 (citing U.S. Const. art. I, § 8, cl. 3). The court "assumed without deciding" that the Copyright Clause would not provide Congress with the authority to protect these unfixed works. \textit{Id.}

\textsuperscript{58} Id. at 1276. The court held that the anti-bootlegging statute passes the "substantial effects" test of the post-Lopez Commerce Clause jurisprudence. That is, bootlegging is done for financial gain and is necessarily intertwined with commerce between several states and with foreign nations. \textit{Id.}

\textsuperscript{59} Id. at 1277-80 (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964), for illustrating that the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another grant of power.)

\textsuperscript{60} Id. at 1273.

\textsuperscript{61} Id.

\textsuperscript{62} Id. at 1272-73 (citing 3 \textit{MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT} § 8E.03[B][1] (1997)).

\textsuperscript{63} Id. at 1280-81 (setting up a "fundamentally inconsistent" test whereby "extending copyright protection in the instant case is not fundamentally inconsistent with the
explained that "the grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term 'Writings' operates as a ceiling on Congress's ability to legislate."64 Since the defense in the Moghadam case only advanced the fixation requirement in arguing against the constitutionality of the statute, the Eleventh Circuit did not have to address the constitutional question of the "for limited Times" durational limitation.65 Based on this distinction, the Eleventh Circuit upheld the constitutionality of the anti-bootlegging statute under the Commerce Clause as an alternative to the Copyright Clause.66

As this Part demonstrates, the anti-bootlegging statute has a surprisingly complex background. In analyzing the statute, courts must consider the legislative intent behind its enactment, the international legal environment surrounding the statute, and its constitutional underpinnings.

II. CASE SUMMARIES: MARTIGNON AND KISS

After ten years of relatively quiet acceptance of the anti-bootlegging statute, the year 2004 delivered two cases ruling against the constitutionality of statute. Martignon was the first case to hold the criminal provision of the statute unconstitutional, and KISS followed three months later, holding the civil provision of the anti-bootlegging statute unconstitutional for largely the same reasons.

A. United States v. Martignon

Jean Martignon is the operator of Midnight Records, which sells music through its Manhattan store location, a catalog service, and an Internet site.67 In September 2003, federal and state law enforcement agents acting in conjunction with the Recording Industry Association of America (RIAA) arrested Martignon for selling "unauthorized recordings of live performances by certain musical artists."68 On October 27, 2003, Martignon was indicted by a federal grand jury for violation of 18 U.S.C. § 2319A.69 The one count indictment provided no details as to the artists that Martignon allegedly bootlegged, the scope of the bootlegging, or the

fixation requirement" and so the Commerce Clause could be used as an alternative to avoid the requirements of the Copyright Clause.)

64. Id.
65. Id. at 1282 n.17.
66. Id. at 1271.
68. Id. (quoting Indictment ¶ 1).
69. Id.
distribution of the bootlegged works. On January 15, 2004, Martignon moved to dismiss the one count indictment pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure for failure to state an offense.\(^7\)

Martignon challenged the anti-bootlegging statute on several constitutional grounds, most significantly arguing that because the statute regulates “live” performances for “unlimited” time periods, the statute exceeds the Copyrights Clause’s authority to protect “Writings,” which are defined as fixed pieces of work, for “limited Times.”\(^7\) Martignon also challenged the constitutionality of the statute based on its violation of the free speech protections of the First Amendment and its violation of the basic tenets of federalism.\(^7\)

The district court granted the Martignon’s motion to dismiss, holding the anti-bootlegging statute unconstitutional.\(^7\) Specifically, the court upheld the first of Martignon’s challenges to the constitutionality of the anti-bootlegging statute in finding that the anti-bootlegging statute is impermissible under the Copyright Clause. The court found that the statute comes under the purview of the Copyright Clause, that Congress must be subject to the limitations thereunder, and that Moghadam was a narrow holding that is distinguishable.\(^7\)

1. The Anti-bootlegging Statute Is Subject to the Copyright Clause

Because the court considered the anti-bootlegging statute to be more like copyright law than a commercial regulation, it concluded that the statute fell under the purview of the Copyright Clause.\(^7\) The court noted that the context of Congress’s passage of the anti-bootlegging statute was to abide by the TRIPs agreement, whose subject matter dealt completely with intellectual property.\(^7\) The court further reasoned that the wording, legislative history, and placement of the statute within the United States Code demonstrated that it was an exercise of Congress’s Copyright Clause power.\(^7\) The court highlighted that the civil provision of the statute “subjects bootleggers to civil remedies under the Copyright Act.”\(^7\) Since the Copyright Clause necessarily bears on the issue, the Martignon court held

\(^70\) FED. R. CRIM. P. 12(b).
\(^71\) 346 F. Supp. 2d at 417 (citing U.S. CONST. art. I, § 8, cl. 8).
\(^72\) Id. at 416-17.
\(^73\) Id.
\(^74\) Id.
\(^75\) Id. at 417.
\(^76\) Id. at 418.
\(^77\) Id. at 418-20.
\(^78\) Id. at 418.
that this copyright-like legislation could not escape the constraints therein.\textsuperscript{79}

Since the court found that § 2319A allowed "seemingly perpetual protection for unfixed music performances," the statute violated both the fixation and durational limits prescribed by the Copyright Clause.\textsuperscript{80} The government conceded that the live musical performances are not "Writings" as defined by Title 17. The court pointed out that the lack of a durational limitation was incongruent with the express limitation of copyright protection in the Constitution's "limited Times" wording which has been statutorily set at a term of the life of the author plus 70 years for all other provisions of the Copyright Act.\textsuperscript{81} Therefore, the court held the anti-bootlegging statute to be an improper exercise of Congress's Copyright Clause Powers.

2. Congress Cannot Side-Step the Copyright Clause

Because the anti-bootlegging statute was "fundamentally inconsistent"\textsuperscript{82} with the restrictions of the Copyright Clause, the Martignon court further ruled that Congress was not permitted to resort to another constitutional grant of authority, such as the Commerce Clause, in order to evade the limitations imposed by the Copyright Clause: "Congress may not do indirectly what it is forbidden to do directly."\textsuperscript{83} The court assumed that the Commerce Clause or the Necessary and Proper Clause could have otherwise supported the legislation.\textsuperscript{84}

The opinion relied on Railway Labor Executives' Ass'n v. Gibbons, where the Supreme Court ruled that Congress may not utilize its Commerce Clause authority to bypass the affirmative uniformity requirement of the Bankruptcy Clause of the Constitution.\textsuperscript{85} Furthermore, the court rea-

\textsuperscript{79} Id.
\textsuperscript{80} Id. at 420 (emphasis added).
\textsuperscript{81} Id.; see 17 U.S.C. § 302 (2000).
\textsuperscript{82} Martignon, 346 F. Supp. 2d at 427. The court noted the standard used in United States v. Moghadam, 175 F.3d 1269, 1289 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000), that the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the use was "fundamentally inconsistent" with the Copyright Clause.
\textsuperscript{83} Id. at 424.
\textsuperscript{84} Id. at 425 n.14
\textsuperscript{85} Id. at 426 ("If we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.") (quoting Ry. Labor Executive Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982)). The court explained the analogy: "Just as Congress may not override the Bankruptcy Clause's limitation through reference to the Commerce Clause, Congress may not side-step the Copyright Clause's limitations through legislating under the Commerce Clause." Id.
soned that even when Congress may enact copyright-like legislation under other Constitutional grants of power, such legislation may not be "fundamentally inconsistent" with the fixation and durational limitations imposed by the Copyright Clause.86

3. Divergence with the Eleventh Circuit’s Moghadam Opinion

The Martignon court began its discussion by noting that the Eleventh Circuit’s decision in Moghadam was a narrow holding.87 The key difference between the two cases was that the Moghadam defendant did not challenge the statute as unconstitutional under the “limited Times” provision in the Copyright Clause, instead only arguing that the “Writings” fixation requirement was not met because bootlegs were of live performances.88

On the other hand, the Martignon case dealt with a broader constitutional challenge, by bringing the issue of the durational requirement to the table. Moghadam ruled that because “Writings” is not an affirmative restriction in the Copyright Clause, it is not directly in conflict with the Constitution to pass such a statute. The “limited times” restriction of the Copyright Clause, however, provides that Congress may not grant indefinite or perpetual protection for the fruits of intellectual labor.89 The anti-bootlegging statute states no specific duration for the term of protection granted to live performances and therefore is allegedly in violation of the Constitution. In contrast to the Martignon case, the defendant’s challenge in the Moghadam case only covered the constitutionality of live music as a fixed work or “Writing.”

The requirement that copyright protection afforded to authors (or performers in this case) only be granted for “limited times” is a more obvious affirmative limitation, which is concededly different from “Writings.”90

86. Id. at 428.
87. Id. at 417.
88. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”)
89. U.S. CONST. art. I, § 8, cl. 8.
90. The court in Moghadam held:

that the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term Writings. The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term ‘Writings’ operates as a ceiling on Congress’s ability to legislate pursuant to other grants.
The Martignon court distinguished the narrow Moghadam ruling by stating, "[i]n concluding that the anti-bootlegging statute was not ‘fundamentally inconsistent’ with the Copyright Clause, the [Moghadam] Court did not consider the durational component." The court further differentiated the issue at hand from the ruling in the Eleventh Circuit, noting that "[t]his Court is faced with a much broader challenge . . . to both the Copyright Clause’s fixation and durational limitations." Indeed, in Moghadam, the Eleventh Circuit noted that its ruling could well have come out differently if the defendant’s objection to the statute was articulated on a broader scale.

Both the Moghadam and Martignon courts seem to agree that the statute cannot be upheld under the Copyright Clause of the Constitution, but could otherwise conceivably be authorized by the Commerce Clause or perhaps the Necessary and Proper Clause. Martignon builds upon Moghadam, using the “fundamentally inconsistent” test employed by Moghadam to strike down the statute based on the broader constitutional challenge at hand.

**B. Kiss Catalog v. Passport Int’l Prods.**

The constitutionality of the anti-bootlegging statute also arose in a suit by members of the iconic rock band, KISS, against Passport International Products, a California corporation involved in the distribution of DVDs for the allegedly unauthorized distribution of the KISS “Spirit of ’76”

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United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000).

91. 346 F. Supp. 2d at 419. Another recent example of legislation clashing with the Copyright Clause’s “limited times” provision is the Copyright Term Extension Act (CTEA). Critics argue that the CTEA achieves perpetual copyright “on the installment plan.” See Graeme W. Austin, Does the Copyright Clause Mandate Isolationism?, 26 COLUM. J.L. & ARTS 17, 24 (2002). The U.S. Supreme Court held otherwise in Eldred v. Ashcroft, 537 U.S. 186 (2003).

92. 346 F. Supp. 2d at 419.

93. 175 F.3d at 1281, 1274 n.9, 1282 n.17 (“[O]ur holding in this case is further narrowed by the fact that we do not address potential arguments based on the ‘Limited Times’ requirement.”).

94. See 175 F.3d at 1274-77; 346 F. Supp. 2d at 425 n.14.

95. Note that the scope of the Martignon holding is arguably broader than that of Moghadam. The Moghadam court seemed willing to strike down the statute based on constitutional challenges based on the durational requirement of the Copyright Clause. In contrast, the Martignon court was willing to strike down the statute as unconstitutional based on either the fixation or durational requirement. Therefore, the Martignon court enforced both the affirmative limitations and the normal requirements of the Copyright Clause.
concert footage. In response to the copyright infringement and anti-bootlegging claims put forth by KISS, defendant Passport contended that a "Stock Footage License Agreement" allowed them to use the footage. While the plaintiff's copyright infringement claim survived the defendants' motion to dismiss, the Federal District Court for the Central District of California largely echoed the rationale of the Martignon opinion in deciding that the anti-bootlegging claim should be dismissed because the statute was unconstitutional.

The court agreed that the civil provision of the anti-bootlegging statute, just like the criminal provision of the statute in the Martignon decision: (1) was sufficiently copyright-like legislation; (2) was not a proper exercise of power under the Copyright Clause; and (3) that Congress may not resort to its legislative powers under the Commerce Clause because the statute is in direct conflict with limiting language of the Copyright Clause. KISS is highly similar to Martignon in its constitutionality analysis, save for the fact that the California district court only ruled on the anti-bootlegging statute's conflict with the "limited times" provision of the Copyright Clause, while abstaining on the analysis of the fixation requirement.

III. ANALYSIS: RECONCILIATION OF THE ANTI-BOOTLEGGING STATUTE WITH THE CONSTITUTION

Based on the rationale of Martignon and KISS, the incongruence between the anti-bootlegging legislation and the U.S. Constitution cannot stand. The Second and Ninth Circuits have the option of overruling these district court decisions, perhaps by reading a durational limitation into the statute or by extending the rationale of the Moghadam court to allow the

97. Id. at 825.
98. Id. at 827 ("The court holds that Plaintiffs' copyright infringement claim should not be dismissed since they have pled ownership of the copyright via the work-for-hire arrangement, registration of the copyright, and infringement by the Defendants.")
99. Id. at 829-31.
100. Id. at 832 ("Like the Moghadam court, see 175 F.3d at 1274, this Court will not attempt to reach a conclusion on this question. As further discussion will indicate, the Court finds other unconstitutional defects with § 1101.") The broader Martignon opinion held the statute unconstitutional because it violated both the fixation and durational limitations. United States v. Martignon, 346 F. Supp. 2d 413, 428 (S.D.N.Y. 2004).
101. Courts have previously exercised judicial restraint and deference to Congress in the area of intellectual property law. See Eldred v. Ashcroft, 537 U.S. 186 (2003) (deciding that the Copyright Term Extension Act, which enlarged the duration of copyrights by
anti-bootlegging statute to remain intact, thereby granting deference to the federal legislature to enact the statute according to the Commerce or Treaty powers afforded by the Constitution. Perhaps a better solution, hinted at by the \textit{KISS} court, is for Congress to redraft the statute to include a durational limitation and/or state specifically which grant of Constitutional authority under which it is acting.

\textbf{A. Granting Congressional Authority Outside of the Copyright Clause}

The Courts of Appeals have many options on how to approach the constitutional challenge posed by the anti-bootlegging statute. First, the courts could overrule the district court holdings by simply stating that the anti-bootlegging statute does not fall within the purview of the Copyright Clause and therefore does not have to abide by its limitations. Thus, Congress could have legitimately passed the statute under the Commerce Clause or the Necessary and Proper Clause. This argument was summarily dismissed by the \textit{Martignon} court, however, since courts repeatedly refer to the statute as "copyright-like" and since the civil provision is incorporated into the Copyright Act and relies upon other parts of the Act for instructions on remedies.\textsuperscript{102} Nonetheless, the alternative argument exists that the statute is not copyright-like because it is not regulating "Writings" but objects of interstate commerce. As the \textit{KISS} court pointed out, "it would seem that a live performance protected by \S\ 1101 is not a fixed work....Thus, one would be inclined to think that...live performances could not be regulated via the Copyright Clause."\textsuperscript{103} If the statute does not come in under the Copyright Clause, then it is not bound by the clause's

\textsuperscript{102} The government argues, circuitously, that because the anti-bootlegging statute regulates a subject matter, live performances, that is not copyrightable—by virtue of the lack of fixation and durational limitation—Congress was not bound by the Copyright Clause's restrictions. I find this argument to be wholly unconvincing. Congress is not bound by the Copyright Clause’s limitations when it legislates in an unrelated field and enacts legislation for a purpose other than the one embodied in the Copyright Clause. However, when Congress enacts copyright or copyright-like legislation, for the purpose stated in the Copyright Clause, it is constrained by the Copyright Clause’s boundaries.

\textsuperscript{103} Despite noting this possibility, the court ultimately held that the statute does fall under the purview of the Copyright Clause.
limitations. Since these live performances are not "Writings," they do not have to be regulated as copyright and the courts could find the statutes easily accord with Congress's power under the Commerce or Treaty Clauses.

1. The Commerce Clause

The Commerce Clause offers Congress the ability to enact a wide range of regulatory laws. Congress has used the broad scope of this clause to legislate on a range of other concerns, including racial discrimination, environment, crime, safety, and, of course, trade. Presumably, it is within Congress's Commerce Clause power to implement international trade agreements. In the case of the anti-bootlegging statute, there is little doubt that it is within the power of Congress under the the Commerce Clause to enact this legislation. The Eleventh Circuit explicitly stated:

The specific context in which [the anti-bootlegging statute] was enacted involved a treaty with foreign nations, called for by the World Trade Organization, whose purpose was to insure uniform recognition and treatment of intellectual property in international commerce. The context reveals that the focus of Congress was on interstate and international commerce.

The pertinent international trade agreement is TRIPs, as enacted by the URAA. The anti-bootlegging statute also fulfills the United States's obligations under the WIPO Performances and Phonograms Treaty. According to Nimmer:

The law that [enacts the Uruguay Round Agreement Act] amends the 1976 Act to extend past 'writings,' beyond 'limited times,' and to unpublished works. It mandates these revolutionary outcomes in order to bring U.S. law into conformity with the constraints of international commerce requisite to join the World Trade Organization. Therefore, although that 1994 enactment does not expressly invoke the Commerce Clause, its various heresies, if defensible, must find their justifications thereunder.

105. Both cases involving the statute acknowledge that the Commerce Clause is a legitimate authority for the enactment of the anti-bootlegging statute. The Martignon opinion held that if the statute was not copyright-like in nature, it could have alternatively been legislated under the Commerce Clause. See discussion infra Part II.B.
106. United States v. Moghadam, 175 F.3d 1269, 1276 (11th Cir. 1999).
The higher courts could rule that the statute escapes the purview of the Copyright Clause since it does not regulate "Writings," but is contemplated under the Commerce Clause authority of Congress. The WTO is the primary international organization dealing with the rules of trade between nations. Its mission is to facilitate commerce for producers of goods and services, exporters, and importers to conduct their business. It is imperative to the financial interests of the United States that it remain a member in good standing of the WTO and be able to reap the benefits of the most-favored nation status, which stretches beyond the boundaries of international intellectual property law into all areas of trade. In this way, intellectual property law has become intertwined with international commerce, as evidenced by the significant involvement of the United States Trade Representative in intellectual property matters. Therefore, the anti-bootlegging statute is necessary to bolster the U.S. national interest in international commerce, and it should be permissible under the Commerce Clause of the Constitution.

2. The Necessary and Proper Clause

A lesser explored alternative is Congress's power to enact the anti-bootlegging statute under its treaty power, which stems from the Necessary and Proper Clause of the Constitution. This treaty power authorizes Congress to implement legislation as a necessary and proper means of effectuating a treaty. While the Moghadam court mentioned this option of congressional authority, all three cases failed to explore it. This Note contends that the treaty power is a viable source of authority for enacting the anti-bootlegging statute.

A controversial point as to whether Congress's treaty power could be a viable option is whether or not the anti-bootlegging obligations are actually part of a treaty to which the United States is an adherent. Nimmer maintains that the treaty power may not be used to enact the anti-bootlegging statute because:

109. See Moghadam, 175 F.3d 1269.
112. 175 F.3d at 1281 n.13.
The United States does not adhere to the Rome Convention. And Congress explicitly decided not to ratify any treaty when it enacted the Uruguay Round Agreements Act, concluding that all that needed to be done was accomplished by the domestic legislation. There is therefore no treaty on which to hang an invocation of treaty authority.\footnote{13}

On the contrary, the substantial body of international agreements adhered to by the United States containing anti-bootlegging provisions is a sufficient source in which to anchor Congress’s treaty power. The United States was a leading proponent of the TRIPs agreement, and is an active member of the WTO and signatory of the WPPT. Even though TRIPs is not a formal treaty, it implies adherence to the Rome Convention.\footnote{14} Also the implementation of the anti-bootlegging legislation is part of U.S. obligations under the WTO, to which the United States must adhere in order to maintain its most-favored nation status with other trading partners of the WTO. Finally, and most convincingly, implementation of anti-bootlegging legislation is called for by the WPPT, to which the United States became a party in May 2002.\footnote{15} Article 6 of this treaty provides for exclusive rights of performers to authorize the broadcasting and communication of their unfixed performances to the public and the fixation of their unfixed performances.\footnote{16}

Congress or the President can invoke the treaty power even when the agreement is not an official treaty. Even though TRIPs was approved as a Congressional-Executive Agreement (requiring simple majorities of both Houses of Congress) as opposed to formal treaty ratification (requiring two-thirds of Senate approval), the Supreme Court has recognized that Congressional-Executive Agreements may “pass constitutional muster.”\footnote{17} In fact, only approximately five percent of all the international agreements entered into by the United States are submitted to the Senate for advice

\begin{footnotes}
\item[14]  See Blunt, supra note 28.
\item[17]  Made in the USA Found. v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999) (upholding the constitutionality of a Congressional-Executive Agreement); Peter S. Menell, Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights, 33 LOY. L.A. L. REV. 1399, 1462 (citing United States v. Belmont, 301 U.S. 324, 331 (1937), which stated that international agreements are to be treated like treaties and given supremacy over state law).}

\end{footnotes}
and consent. The President usually passes international agreements that explicitly or implicitly follow on to a prior treaty without obtaining further approval from the Senate. The TRIPs obligations are part of a continuing body of integrated international intellectual property law that began over 100 years ago with the Berne Convention. The Constitution itself implies the validity of alternative types of international agreements, and further, the practice of entering into international agreements while foregoing the formal treaty process is a long-standing tradition in U.S. history and reflects the practical accommodation of the mandates of foreign affairs. Finally, the URAA did receive two-thirds of the Senate’s vote. Thus, the URAA should be regarded as a legitimate implementation of treaty obligations.

Pursuant to the power of the Necessary and Proper Clause, Congress may sometimes enact required statutes by treaty that it would otherwise lack the authorization to pass. For example, in Missouri v. Holland, the Supreme Court found that the federal government could regulate migratory birds pursuant to a treaty, even though the statute was deemed unconstitutional because this matter was usually reserved for the states. This case exemplifies the extensive power of the Necessary and Proper Clause—the Court validated a measure which was normally beyond Congress’s power to enact because it was passed to give effect to a treaty. By way of analogy to the case at hand, the treaty power of Congress should be sufficient to nullify its contravention with the Copyright Clause of the Constitution.


119. JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW ch. 18 (2d ed. 2004).

120. U.S. CONST. art. I, § 10, cl. 1 (such as agreements by “alliance,” “confederation” and “compact”); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5 (3d ed. 2000).

121. See Deas, supra note 10, at 574.

122. 252 U.S. 416 (1920). But see Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion) (ruling that treaties are also subject to constitutional limitations).

When ruling on the legitimacy of the anti-bootlegging statute, the courts should exercise judicial deference because the treaty power bestowed upon the legislative and executive branches is especially broad in areas of foreign affairs and international commerce. Since the statute was implemented as part of an international trade agreement, the courts should be especially wary of nullifying these efforts containing political questions of foreign affairs. For instance, Frances Fitzgerald and Professor John Yoo state that the judicial branch should avoid the business of treaty development and interpretation. Fitzgerald and Yoo argue that both a formalist and functionalist interpretation of the Constitution mandate absolute deference to the President in the interpretation of treaties due to the executive's expertise in foreign affairs. The Supreme Court has also recognized that the executive branch's interpretation of treaty deserves deference. Furthermore, Congress's role in shaping foreign policy and power to regulate foreign commerce also demands judicial deference. Clearly, both the legislative and executive branches did not interpret this anti-bootlegging provision to be in contravention with the Constitution.

B. Redrafting the Statute to Conform with the Constitution

Regardless of what the Courts of Appeals decide, Congress has the option to amend the anti-bootlegging statute to rectify its current tension with the Constitution. There are at least two different ways Congress can redraft the statute so as to be in congruence with the constitutional mandates. One way is for Congress to expressly invoke its authority for implementing this legislation under the Commerce Clause or the Necessary and Proper Clause. The Commerce and Treaty powers would be sufficient to sustain the anti-bootlegging statute for all of the reasons addressed.

124. In general, the political question doctrine is most liberally employed in offering political autonomy to the non-judicial branches in areas of foreign affairs. "A controversy is non-justiciable—i.e., involves a political question—where there is '... lack of judicially discoverable and manageable standards for resolving it.'" Nixon v. United States, 506 U.S. 224, 225 (1993) (citing Baker v. Carr, 396 U.S. 186, 217 (1962)). The Supreme Court has established that the conduct of foreign relations involves "considerations of policy ... certainly entirely incompetent to the examination and decision of a Court of Justice." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796). Furthermore, the Supreme Court has been reluctant to hear cases involving the legality of executive actions, for example, in the Vietnam War. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 264 (5th Ed. 2003).


126. Id. at 868-71.

above. This clarification would likely prevent courts from ruling the statute unconstitutional under the Copyright Clause, since the statute would explicitly be independent from the Copyright Clause and its limitations.

Perhaps the most fitting solution to this constitutional dilemma is for Congress to amend the anti-bootlegging statute by adding a "limited Times" provision, which will presumably bring the statute in line with the affirmative limitations of the Copyright Clause. Various proposals have been made to effectuate a "limited Times" provision. For example, Congress could apply existing copyright duration provisions to the performer's rights in a live musical performance. Specifically, the legislature could mandate that live performances be treated as other copyrightable material and afforded the protection of life of the author plus 70 years. The KISS court suggested as much in its discussion of the constitutionality of the statute. Upon the suggestion by the plaintiff for the court to incorporate the terms for copyright contained in 17 U.S.C. § 302, the court answered that it was "unwilling to insert the statutory term of protection provided by § 302 without some indication that Congress had contemplated doing so at some point during its deliberation." Further the California district court stated that incorporating § 302 into § 1101 was "much closer-to legislating an amendment to the United States Code than this Court is willing to venture." Evidently, the court was signaling Congress to re-draft the anti-bootlegging statute in order to alleviate judicial concerns for its constitutionality.

Congress could also opt to apply Article 17(1) of the WPPT, which required a fifty-year term of protection from the end of the year in which

128. See infra Parts III.A.1 and III.A.2.

129. Congress should state explicitly that the statute falls outside of the purview of the Copyright Clause, as its subject matter of live performances does not fall within the protections of copyright.

130. Note that this change would still not satisfy the "Writings" requirement of the Copyright Clause.

131. See Deas, supra note 10, at 579.

132. In 1998, the Sonny Bono Copyright Term Extension Act added 20 years to 1976 Copyright Act so that the duration of copyright protection extended from the life of author plus seventy years, or 95 years after for a work made for hire. See 17 U.S.C. § 302 (2000).


134. Id. at 833. A variation of this option is for Congress to analogize or apply 17 U.S.C. § 301(c) to fixations of live performances. This suggestion would extend Section 301(c) duration limitations to all similar fixations that are now subject to Section 1101. Deas, supra note 10, at 588.

135. Kiss, 350 F. Supp. 2d at 833.
fixation occurs. Similarly, the TRIPs agreement also suggested such a time limit. The *KISS* court noted that Article 14 of TRIPs specified that anti-bootlegging protection "shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made." However, the court noted that the agreement established only a floor rather than a ceiling for intellectual property protection and the intent of Congress was still unknown. Nonetheless, it is apparent that these international agreements also contain examples of durational limitations that Congress can draw from.

By following these suggestions and invoking a time limit, Congress would ensure that bootlegs which have already been recorded will not be subject to perpetual protection.

C. Effects of *Martignon* and *KISS*

If upheld on appeal, the decisions of *Martignon* and *KISS* effectively nullify the anti-bootlegging statute and will cause the United States to come into direct conflict with its international obligations. This will undoubtedly lead to undesirable consequences in the arena of foreign affairs.

The absence of a federal anti-bootlegging law, and the subsequent failure to comply with TRIPs obligations, may lead to difficulty in the international trade arena, potentially manifesting as an adverse WTO ruling. Professor David Nimmer has pointed out five likely outcomes when a U.S. judicial decision comes into conflict with a WTO panel ruling. The United States could:

1) play the elephant in international trade by throwing its weight around and resisting WTO pressure;
2) withdraw from the WTO altogether;
3) refuse to obey WTO panel rulings and therefore leave itself open to cross-sectoral retaliation;
4) simply pay off the aggrieved party; or

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138. *Id.*
5) change the law or practice that gave rise to the offending situation (that is, amend the bootlegging statute).¹⁴⁰

The United States explored several of these options in previous cases in which the United States’ WTO obligations were left unmet. For example, in 1999, WTO members requested a panel to examine the conflict between the TRIPs agreement and the Fairness in Music Licensing Act of 1998, which places limitations on the exclusive rights provided to owners of copyright with respect to certain performances and displays.¹⁴¹ Following four years of settlement negotiations between the United States and the European Communities, in 2001, a panel of arbitrators issued an initial judgment of $1.1 million a year owed to European musicians.¹⁴² However, the case is far from resolved. The United States delayed by asking for multiple time extensions in order to implement the required changes to the national legislation. The European Communities responded by threatening reciprocal trade sanctions in the form of tariffs on imported U.S.-copyrighted goods. The WTO Dispute Settlement Understanding further permits the European Communities to impose tariffs on other types of goods (having nothing to do with copyright) manufactured in the United States and exported to Europe. Currently, the case is still tied up on the grounds of procedural objections to the WTO arbitration.¹⁴³

In another case, after noting the discrepancies between United States copyright law and European Union copyright law, a German regional court of appeals denied copyright protection to artists for an unauthorized bootleg that was recorded at a concert in New Orleans. The court urged reciprocity among the international community and reasoned that the United States should not be able to garner the benefits of Germany’s protection if there was no analogous United States law that would protect German nationals.¹⁴⁴

¹⁴⁰ Id. (footnotes omitted). Nimmer notes that this “would be a rather disappointing culmination to years of American effort, to say the least.” Id. at 1417-18.
¹⁴³ World Trade Organization, Recourse by the United States to Article 22.6 of the DSU, WT/DS160/22 (Mar. 1, 2002).
¹⁴⁴ Re Copyright in an Unauthorized U.S. Recording, [1993] ECC 428, Regional Court of Appeal, Cologne, Germany.
Absent the anti-bootlegging provisions in 17 U.S.C. § 1101 and 18 U.S.C. § 2319A, the lack of reciprocity between U.S. law and the law of other nations’ laws could reverse generations of integrated efforts to develop sound international intellectual property law. Bootleggers will simply find safe havens in the countries with the least restrictive laws and/or enforcement mechanisms against bootlegging. Moreover, without the federal anti-bootlegging provisions, the United States will run the risk of international trade sanctions, diplomatic pressures, and endless international court proceedings. In the context of today’s increasing pressure to protect global intellectual property rights, the discrepancies between U.S. law and that of its trading partners may give rise to trade wars.

Obviously, these cases have importance beyond whether Joe Bootlegger can bring a tape-recorder to his next concert. There are many issues on the horizon of international intellectual property law that may run up against the same or similar concerns as the anti-bootlegging statute. For instance, the WIPO is currently engaging in discussions about treaty protection for genetic resources, traditional knowledge, and folklore. These treaties would be important for protecting the intellectual property rights of developing countries, which are normally left without any intellectual property rights and therefore have no incentive to adhere to international intellectual property legal regimes. Treaties protecting folklore and native plants may encounter the same problems as the anti-bootlegging statute in reconciling with the Constitution’s limited times provision and U.S. law’s conception of the public domain. It is also likely that WIPO or the WTO

German copyright law already grants foreign artists a considerable degree of protection by way of section 125(2)-(4) and also offers other states the opportunity by way of section 125(5) of extending that protection for their artists in Germany by acceding to international conventions or by concluding reciprocal agreements... If other countries (like the USA in the present case) do not make use of that opportunity, the gap cannot be filled by an extension of the sphere of application of section 125(6). Otherwise there would be no point in the incentive, deliberately created by the scheme of sections 121 and 125 in the interests of protecting German claimants abroad, for other states to act in accordance with the opportunity provided for in section 125(5) of the Act.


146. See Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 CALIF. L. REV. 1331 (2004). Chander and Sunder argue that despite scholar’s romantic portrayals of the public domain, it can function as a means for perpetuating global inequality. The article states that under the current concept of the public domain,
will soon propose a database protection treaty much like the one recently passed by the European Union (the Directive on the Legal Protection of Databases). Such a treaty would also come into contention with the United States’ conception of what the public domain should entail, as under *Feist Publications v. Rural Telephone Service*, unoriginal database information is not protected from being copied.

IV. CONCLUSION

Due to increased globalization and technological advancements, the need for improved international cooperation and coordination is imperative. However, the anti-bootlegging cases discussed in this Note demonstrate that this can be easier said than done because of the tension between international intellectual property law and our constitutional limits on the grant of intellectual property protection. Courts and Congress alike should strive to maintain the constitutionality of the anti-bootlegging statute for the sake of international treaty obligations and foreign relations concerns. Since most states already have such statutes, there is little reason to quash the effort to federally regulate bootlegging altogether. The real harm of maintaining the statute in its current form, as interpreted by *Martignon* and *KISS*, is that it would do a disservice to the founding father’s efforts to regulate copyright through the Constitution. Therefore, a redrafting of the statute to provide for a limited time provision is the best alternative to reconcile the anti-bootlegging statute with the U.S. Constitution, thereby appeasing the international community and allowing the United States to participate and progress in the arena of international law.

likely beneficiaries of the public domain resources of traditional knowledge... are multinational companies that are capable of converting these public domain resources into valuable patentable products... In the end, the international intellectual property regime leads to a transfer of wealth from the poorer countries of the world to the richer countries.

*Id.* at 1353.

