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RESOLVING THE DISSONANT CONSTITUTIONAL CHORDS INHERENT IN THE FEDERAL ANTI-BOOTLEGGING STATUTE IN UNITED STATES v. MOGHADAM

The layman’s constitutional view is that what he likes is constitutional and that which he doesn’t like is unconstitutional.¹

I. INTRODUCTION

With the advent of affordable, publicly available music recording technology, the number of “bootlegged” recordings on the market has grown.² A bootleg recording generally contains live concert performances never intended for commercial release.³ Differences exist between bootleg, pirate and counterfeit recordings.⁴ A coun-

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¹ Hugo L. Black, Justice Black, 85 Tomorrow, Has No Plans to Leave Court, N.Y. TIMES, Feb. 26, 1971, at 38.
³ See Dowling v. United States, 473 U.S. 207, 209-10 n.2 (1985) (defining “bootleg” as “contain[ing] an unauthorized copy of a commercially unreleased performance” from sources including “concert performances, motion picture soundtracks, or television appearances”); Susan M. Deas, Jazzy Up the Copyright Act? Resolving the UNCERTAINTIES of the United States Anti-Bootlegging Law, 20 HASTINGS COMM. & ENT. L.J. 567, 573 (1998) (noting that all it takes to make bootlegs “is attending a live performance, surreptitiously recording it, reproducing the master tape, then marketing the copies”); Todd D. Patterson, Comment, The Uruguay Round’s Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies, 15 Wis. Int'l L.J. 371, 373 (1997) (stating, “[a] bootleg tape, record, or compact disc (CD) generally contains live music by a performer or performers that has neither been nor ever was intended to be commercially produced and made available to the public.”) (footnote omitted).
terfeit recording is an unauthorized copy of a legitimate album. With counterfeit recordings, artists and record companies do not collect royalties that would otherwise be included in the price of a legitimate copy. Pirated recordings, however, generally compile songs from various albums, usually by the same artist. Similar to counterfeit recordings, record companies and artists do not receive royalties from these unauthorized compilations. Bootlegs, unlike


5. See Patterson, supra note 3, at 378 (defining "counterfeit" recording); Schwartz, supra note 4, at 620 (differentiating between different types of record piracy). Generally, counterfeit recordings are sold for less than the retail price. See Goodwin, supra note 4, at 345 (stating counterfeit recordings are priced substantially lower than retail prices).

6. See Goodwin, supra note 4, at 346 (commenting that over $300 million in revenue is lost each year from bootleg phonorecords in United States) (citing Grayzone, Inc., The Federal Anti-Piracy and Bootleg FAQ, at http://www.grayzone.com/faqindex.htm (last visited Oct. 7, 2000)); Patterson, supra note 3, at 374 (noting artist could feel bootlegged performance represented sub-par execution of songs and that music companies lose potential profits with bootlegs); cf. Greg Kot, Bootleg Bounty Illicit Industry Delights Fans, But Not Record Industry, CHI. TRIB., Dec. 28, 1995, § 5, at 1 (quoting music journalist Clinton Heylin commenting that "[o]n an artistic level, never trust the artist, trust the tale" and noting that most fans agree that bootleg version of famous song is "better" than official version). Additionally, record companies wish to limit their artists' output such that each release is surrounded by "big-budget promotion campaigns." See id.

In the United States, a combined $400 million in revenue is lost annually from counterfeit sound recordings and live performance bootlegs. See Patterson, supra note 3, at 413; see also Brown, supra note 4, at 8 (stating that in 1993, global music industry lost $2 billion to bootlegging). It is unclear if the Brown figure refers to sales lost strictly from bootlegging or music piracy in general. See also Brown, supra note 4, at 14 (stating that China has $347 million revenue from bootleg sales); Goodwin, supra note 4, at 362-64 (noting bootleg recordings exports from Luxembourg cost global music industry almost $500 million in 1996; Italian and German exports in 1996 cost industry $51 million and $31 million, respectively); Patterson, supra note 3, at 399 (noting German bootleg market worth in 1991 as $85.7 million annually and Italian bootleg market worth in 1994 as close to $150 million annually). Generally, it costs five dollars to manufacture and package a bootleg, which is then sold for ten dollars to an intermediary and sold by a retailer, usually a small independent store, for double to triple that amount. See Kot, supra note 6, at 1.

7. See Dowling, 473 U.S. at 210 n.2 (distinguishing "bootleg" from "pirated" record, noting that "[a pirated record is] an unauthorized copy of a performance already commercially released."); Schwartz, supra note 4, at 621 (defining pirates as those who release unauthorized compilations of previously released songs, usually by same artist); cf. Brown, supra note 4, at 4 (describing piracy as unauthorized duplication or sale of unreleased copyrighted works).

8. See Patterson, supra note 3, at 379 (noting that pirates pay neither royalties nor musicians, so compilations sell for less than retail price); Schwartz, supra note 4, at 621 (commenting that pirate compilations are cheaper than official releases). Even bands that allow taping of their concerts unkindly view bootleggers. See Kot, supra note 6, at 1 ("We're sick of bootlegs. Some people think that's a contradic-
counterfeit or pirated recordings, are studio or live performances not intended for public release.9 Similarly, music companies and artists do not receive royalties from bootlegs.10

This Note examines United States v. Moghadam,11 which held that the United States Constitution’s Commerce Clause provided sufficient constitutional authority to uphold the federal anti-bootlegging statute.12 The court’s holding raised the issue of whether a statute, essentially a copyright law, may derive authority from a source other than the Copyright Clause.13 Section II examines the facts behind Moghadam’s prosecution.14 Second, in Section III, the Note explores the procedural and judicial history behind the federal anti-bootlegging statute’s enactment.15 Third, in Sections IV and V, this Note examines the court’s analysis in upholding the anti-bootlegging statute under the Commerce Clause.16 Finally,
Moghadam’s impact upon the music industry is considered in Section VI.17

II. FACTS

Ali Moghadam was convicted of trafficking in bootleg compact discs containing live musical performances of popular artists.18 Moghadam pled guilty in district court but preserved his right to appeal on the ground that his conviction derived from an unconstitutional statute.19 Specifically, Moghadam argued that Congress lacked the constitutional authority to enact the anti-bootlegging

17. For a discussion of the impact of the Moghadam holding, see infra notes 208-18 and accompanying text.

18. See United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir. 1999) (citing criminal statute under which Moghadam was convicted). The relevant section of 18 U.S.C. § 2319A, which is the criminal corollary to 17 U.S.C. § 1101, makes the fixation of the “sounds or sounds and images of a live musical performance” for “purposes of commercial advantage or private financial gain” a federal crime. 18 U.S.C. § 2319A(a) (1994 & Supp. IV 1998). Moghadam was convicted in the United States District Court for the Middle District of Florida, an opinion is not on file. See Moghadam, 175 F.3d at 1270. The particular facts behind his conviction remain unreported by any judicial opinion.

19. See Moghadam, 175 F.3d at 1271 (arguing that statute did not fall under legislative power of Congress under Article I, section 8 of United States Constitution); see also Paul Farhi, CD Bootleggers Face the Music Supply of Illegal Recordings Shrinks After Customs Crackdown, WASH. POST, July 14, 1997, at A1 (stating “[t]hree others [including Moghadam] are contesting the charges and awaiting trial”).

Moghadam was arrested during the execution of Operation Goldmine, a sting operation designed to capture key figures in the underground music bootleg industry. See Farhi, supra note 19, at A1. Operation Goldmine persuaded eleven international and American bootleggers to meet a record distributor from Orlando, Florida. See id. Upon their arrival, the United States Customs Service arrested them. See id.; see also Stan Soocher, Appeals Court Backs Anti-Bootlegging Statute, 15 No. 3. ENT. L. & FIN. 3, 3 (June 1999) (commenting that only Moghadam appealed out of thirteen defendants convicted in Operation Goldmine). Over 800,000 illegal compact discs were recovered from Orlando warehouses. See Farhi, supra note 18, at A1. The compact discs, containing performances by musical artists Tori Amos and the Beastie Boys, had a total street value of $20 million. See Soocher, supra note 19, at 3. Interestingly, Moghadam was the first to constitutionally challenge the federal anti-bootlegging statute given that the first person charged under the statute was Keith Taruski in 1995. See Patterson, supra note 3, at 410; Kot, supra note 6, at 1 (commenting that Taruski was indicted and charged for illegal importation of live performance compact discs and conspiracy).

In 1997, an Ali Moghadam, most likely the same person captured in Operation Goldmine, was arrested in Los Angeles for unauthorized copying of bootleg performances by various musical artists. See Karen Denne, Man Denies Bootlegging Compact Discs Worth $218,000, L.A. DAILY NEWS, Oct. 17, 1992, at N3. Moghadam allegedly ran an international distribution ring for bootleg compact discs. See id. In just one year, Moghadam evidently manufactured over 20,000 illegal compact discs, with over 8700 seized during his arrest. See id.
statute. 20 Moghadam appealed to the United States Court of Appeals for the Eleventh Circuit after the district court denied his motion to dismiss. 21

III. BACKGROUND

The anti-bootlegging statute imposes penalties upon any unauthorized fixation of and trafficking in sound recordings and videos of live musical performances. 22 This section first examines the civil federal anti-bootlegging statute, 17 U.S.C. § 1101. 23 Next, this section examines the criminal federal anti-bootlegging statute, 18 U.S.C. § 2319A, along with the statute's underlying constitutional framework. 24 The section concludes by exploring past case opinions that examine the constitutional sources of various statutes. 25

Congress, in response to the burgeoning flow of pirated material, passed the Sound Recording Act of 1971, which granted federal copyright protection to sound recordings. 26 Unlike bootleg recordings, sound recordings are sanctioned performances re-

20. See Moghadam, 175 F.3d at 1271 (reviewing respondent's argument on appeal). For further discussion of the court's analysis of Moghadam's argument, see infra notes 140-43 and accompanying text.

21. See Moghadam, 175 F.3d at 1271 (noting lower court's denial of Moghadam's motion to dismiss indictment).


23. For the relevant statutory language of the civil federal anti-bootlegging statute, see infra note 29 and accompanying text.

24. For a discussion of the federal anti-bootlegging statute and its constitutional origins, see infra notes 26-92 and accompanying text. The section generally refers to both criminal and civil codifications of the statute, unless specifically noted otherwise.

25. For a discussion of past cases regarding the constitutional sources of various other statutes, see infra notes 93-111 and accompanying text.


[Granting copyright owner the exclusive right to] duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording . . . .

. . . . .

'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed . . . .

Sound Recording Act of 1971, Pub. L. No. 92-140(a) & (e), 85 Stat. 391, 391 (superseded and codified by Copyright Act of 1976, 17 U.S.C. § 102(a)(7) (1994)). See also Goldstein v. California, 412 U.S. 546, 563 n.17 (1973) (noting that Congress was “spurred to action by the growth of record piracy . . . .”) (citation omit-
duced to a tangible form for authorized commercial release.27 While Congress protected sound recordings from illegal copying and distribution, the enacted statute lacked protection for live performances.28 Eventually, Congress recognized the detrimental impact of bootleg recordings and enacted the first federal anti-bootlegging statute, 17 U.S.C. § 1101; thus, Congress expanded the scope of the antecedent Sound Recording Act of 1971.29 Section 2319A of Title 18 of the United States Code parallels § 1101, but


28. See Goldstein, 412 U.S. at 561-62 (declaring that Writing includes “any physical rendering of the fruits of creative intellectual or aesthetic labor . . . . Thus, recordings of artistic performances may be within the reach of the [Copyright Clause].”). For a discussion of the scope of “sound recordings,” see supra notes 26-27 and accompanying text. For the definition of “bootlegging,” see supra note 9 and accompanying text.

29. See 17 U.S.C. § 1101 (1994). The statute states in pertinent part: Anyone, who, without the consent of the performer or performers involved -
(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,
(2) transmits or otherwise communicates to the public the sound or sounds of a live musical performance, or
(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to [specified penalties].

imposes additional criminal penalties, including a five-year prison
term for the first offense. Contrary to past federal copyright pro-
tection laws, the federal anti-bootlegging statute does not rely upon
the Copyright Clause of the United States Constitution.

The Copyright Clause of the United States Constitution allows
Congress 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[]." Two centu-
ries of judicial and legislative interpretation firmly embedded into
law the concept that copyright protection is granted only to works
"fixed" in some tangible medium. This interpretation finds the
Copyright Clause incapable of granting protection to live perform-
ances as they cannot be "fixed" in some tangible medium at the
time of performance. As a result, unlike traditional copyright

§ 59.1-41.2 (Michie 1999) (criminalizing unauthorized recordings of live con-

is identical to 17 U.S.C. § 1101, except for the potential for prison and seizure and
destruction of any such copies upon conviction. See id.

31. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT
§ 8E.01(C), at 8E-7 (1999) (hereinafter NIMMER ON COPYRIGHT) (asserting that
"support under the Copyright Clause for this amendment . . . must be dis-
counted"); Goodwin, supra note 4, at 357-58 (discussing federal anti-bootlegging
statute's constitutional deficiency as opposed to traditional copyright protection
laws); Patterson, supra note 3, at 409 (commenting that "[t]echnically, the . . .
[anti-bootlegging] statute cannot classify live performances as copyrightable works,
given that musical artists never officially fix their performances in a phonorecord
as required by the Copyright Act"); Lionel S. Sobel, Bootleggers Beware Copyright Law
Now Protects Live Musical Performances But New Law Leaves Many Questions Unan-
swered, 17 NO. 2 ENT. L. REP. 6, 11 (1995) (stating that "[s]ince Congress only has
the power to protect fixed works under Article I, Section 8 of the Constitution, the
[constitutions] basis for Congress' power to enact the bootlegging law must be
some other provision of the Constitution."). For further discussion of the Com-
merce Clause's support of statutes related to interstate commerce, see infra notes
74-81 and accompanying text.


33. See Goldstein, 421 U.S. at 561-62 (holding that sound recordings were physical
renderings within scope of "Writings" clause); cf. CBS v. DeCosta, 377 F.2d 315, 320
(1st Cir. 1967) (concluding that Copyright Clause "extend[ed] to any con-
crete, describable manifestation of intellectual creation . . ." and thereby implying
negation of tangible form requirement). A noted commentator dismissed this
statement as dictum as the court categorized the disputed works as "Writing" within
the Copyright Clause's scope. See 1 NIMMER ON COPYRIGHT, supra note 31,
§ 1.08(C)[2], at 1-66.30 n.35. For a discussion of the elements needed to uphold
copyright protection, see infra notes 58-73 and accompanying text.

34. See 3 NIMMER ON COPYRIGHT, supra note 31, § 8E.02, at 8E-11 (stating that
"[g]iven the limitation of federal statutory copyright to 'Writings' by virtue of its
constitutional authorization, it has long been thought outside the domain of Con-
gress to accord protection to such unixed productions."); Deas, supra note 3, at
578 (questioning use of Copyright Clause as constitutional basis for federal anti-
bootlegging clause); Goodwin, supra note 4, at 359 (commenting on federal anti-
laws, the federal anti-bootlegging statute derives authority from another constitutional source.\textsuperscript{35}

A. General Background

In the past, federal law protected against the counterfeiting, pirating and bootlegging of some types of sound recordings.\textsuperscript{36} Not until 1994 did Congress enact protection for live performances.\textsuperscript{37} Congress enacted the anti-bootlegging statute to comply with the International Agreement on Trade Related Aspects of Intellectual Property ("TRIPs").\textsuperscript{38} The United States' participation in the General Agreement on Tariffs and Trade ("GATT"), an international trade agreement, paved the way for establishment of TRIPs.\textsuperscript{39} With congressional revisions of the federal copyright protection statutes in 1976, 1982 and 1992, the statutes remain a potent weapon in the recording industry's war against music piracy.\textsuperscript{40}

bootlegging statute's constitutional grounds). Before federal protection, states have traditionally granted copyright protection to live performances. For further discussion of this state protection, see supra note 29.

\textsuperscript{35} See David Nimmer, The End of Copyright, 48 VAND. L. REV. 1385, 1410 (1995) (commenting that "[t]he anti-bootlegging provision unquestionably violates Copyright Clause authority . . . ."); see also Deas, supra note 3, at 578 (stating "short of . . . amending the Constitution . . . one must find another constitutional mooring for [the federal anti-bootlegging statute] . . . ."); Goodwin, supra note 4, at 360 (asserting that Copyright Clause is not constitutional basis for anti-bootlegging statute); Sobel, supra note 31, at 11 (concluding "the Constitutional [sic] basis for Congress' power to enact the bootlegging law must be some other provision of the Constitution."). For a discussion of the alternative constitutional source for anti-bootlegging statute, see infra notes 74-92 and accompanying text.

\textsuperscript{36} For a discussion of the protections afforded to sound recording, see supra note 26 and accompanying text.

\textsuperscript{37} See generally 18 U.S.C. § 2319A (1994) (criminalizing, among other actions, unsanctioned recordings of live performances). For further discussion of copyright protection's statute history, see infra notes 41-73 and accompanying text.

\textsuperscript{38} See 3 NIMMER ON COPYRIGHT, supra note 31, § 8E.01[B], at 8E-5 to 8E-6 (discussing international communities' pressure for congressional enactment of this statute); Goodwin, supra note 4, at 350-51 (commenting that need for uniform global intellectual property laws led to statute's enactment); Patterson, supra note 3, at 402-03 (noting inefficient prior international treaties and that growth of bootlegging led to Uruguay Round of GATT). Composed as a requiem for those who bootleg and distribute live performances, the statute instead raised further constitutional discord. See Goodwin, supra note 4, at 355 (explaining that anti-bootlegging statute differs from other copyright statutes).

\textsuperscript{39} See Goodwin, supra note 4, at 350-51. GATT is a global trade agreement designed to promote trade among participating countries. See id. This agreement is constantly being revised, and during the eighth cycle of negotiations, called the Uruguay Round, participating countries addressed the issue of international protection of intellectual property rights. See id. TRIPs was the result of that negotiation round, requiring that GATT countries provide copyright protection for "sound recordings and the unauthorized fixation of live performances." Id. at 351.

\textsuperscript{40} See Patterson, supra note 3, at 385-86 (commenting on increased penalties for violating copyright laws with each successive statute); Schwartz, supra note 4, at
The first copyright statute, which was passed in 1790, offered protection only to maps, charts, and books.\textsuperscript{41} This statute was later expanded to protect “any person who shall invent and design, engrave, etch or work ... any historical or other print or prints ... .”\textsuperscript{42} Musical notation qualified for protection in 1831, specifically granting the copyright holder the right to sell the musical composition score.\textsuperscript{43} “Typically, a copyright holder is the composition’s author or a music-publishing company.”\textsuperscript{44} The performer generally did not hold the copyright unless the performer happened to be the composer or acquired the copyright.\textsuperscript{45} The statute protected written musical notation, but not the reproduction of actual sound, as Edison had not yet invented the phonograph.\textsuperscript{46}

This distinction apparently confused the Supreme Court in 1908 in \textit{White-Smith Music Publishing Co. v. Apollo Co.}\textsuperscript{47} Piano rolls, an early recording technology, are long scrolls of paper with holes telling a “player piano” what notes to play.\textsuperscript{48} With the piano roll, a person did not need the sheet music to appreciate the composition.\textsuperscript{49} Under the Act of 1831, the Court did not find the audible reproduction of the musical composition via piano rolls to be a musical notation.\textsuperscript{50} Based on this interpretation, any mechanism that


\textsuperscript{42}. Id. (quoting Act of Apr. 29, 1802, ch. 36, 2 Stat. 171).

\textsuperscript{43}. See id. (citing Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870)); Schwartz, \textit{supra} note 4, at 624 (noting exclusive right of copyright holder to disburse protected work).

\textsuperscript{44}. Schwartz, \textit{supra} note 4, at 624.

\textsuperscript{45}. See id. (discussing when performer could obtain copyright to musical score).

\textsuperscript{46}. See id. (noting that until Edison invented phonograph, there was little need to protect sound reproduction).

\textsuperscript{47}. 209 U.S. 1 (1908) (holding piano rolls were not entitled to copyright protection, as they were not “copies” within meaning of Copyright Act); Schwartz, \textit{supra} note 4, at 624 (discussing Supreme Court’s confusion between “reproduction of actual sound” and “reproduction of written musical notation”).

\textsuperscript{48}. See Schwartz, \textit{supra} note 4, at 624 n.69 (defining “piano rolls”).

\textsuperscript{49}. See \textit{Goldstein}, 412 U.S. at 564-65 (commenting on implications of piano roll technology as noted by 1907 Congressional report).

\textsuperscript{50}. See \textit{White-Smith}, 209 U.S. at 18 (holding, “[w]e cannot think that they are copies within the meaning of the copyright act . . . [A]s the act of Congress now stands we believe it does not include these [piano rolls] as copies or publications of the copyrighted music involved in these cases.”).
reproduced the composition's actual notes, rather than the written musical notation, could avoid copyright infringement claims.\textsuperscript{51}

In 1909, partly in response to the \textit{White-Smith} decision, Congress revised and consolidated all federal copyright statutes.\textsuperscript{52} Congress passed the Copyright Act of 1909, allowing the copyright holder to "select the first person to preserve or 'fix' the work on a record or musical roll."\textsuperscript{53} As long as a royalty was paid to the original copyright holder, later performers could record their own versions of the copyrighted work.\textsuperscript{54} The Act left unclear whether a party, without recording his or her own version, could reproduce the original performance as long as the royalty was paid.\textsuperscript{55} The Sound Recording Act of 1971 erased all uncertainties by granting federal copyright protection to the reproduction of performances in the form of actual sound recordings, assuming the performances were previously copyrighted, but it left unanswered the legality of recording live concert performances.\textsuperscript{56} Twenty-three years later, Congress addressed the live concert bootlegging issue but raised several constitutional concerns.\textsuperscript{57}

\textbf{B. Traditional Elements of the Copyright Clause}

Traditionally, Congress derived authority to enact copyright laws from the Constitution's Copyright Clause.\textsuperscript{58} The basic, neces-

\textsuperscript{51} See Schwartz, supra note 4, at 624 (alluding to impact of Court's holding regarding devices that can duplicate musical compositions' notes).

\textsuperscript{52} See Goldstein, 412 U.S. at 562 n.17 (stating that "[C]ongress agreed to a major consolidation and amendment of all federal copyright statutes"); Schwartz, supra note 4, at 625 (observing Congress' revision of copyright statutes in reaction to \textit{White-Smith} holding).

\textsuperscript{53} Schwartz, supra note 4, at 625.

\textsuperscript{54} See id. (offering example that if musician A wished to record song for which B held copyright and B had already selected C as "the first person to preserve . . . the work," then A must pay royalty to B).

\textsuperscript{55} See Patterson, supra note 3, at 382 (asserting that it was unclear "whether a third party could legally reproduce the copyright holder's original performance by paying the relatively inexpensive compulsory license fee rather than record his or her own performance.") (citations omitted); Schwartz, supra note 4, at 625 (quoting scholarly commentator who "believed that a third party could indeed copy the original work by paying the compulsory license fee . . . ") (citing Melville B. Nimmer, \textit{Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland}, 22 UCLA L. Rev. 1052, 1060 (1975)).


\textsuperscript{57} See 17 U.S.C. § 1101 (1994). For a discussion of alternative constitutional sources for a statute, see \textit{infra} notes 93-111 and accompanying text.

\textsuperscript{58} See U.S. Const. art. I, § 8, cl. 8. The Copyright Clause states Congress may "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["]." U.S. Const. art. I, § 8, cl. 8. To achieve this goal, Congress
sary element for federal copyright protection is that the work must have an "Author" and must be a "Writing." Since the Constitution's passage, technological advances have forced courts to reinterpret continually the Copyright Clause, particularly the "Writing" requirement. In *Schaab v. Kleindienst*, the court noted significant technological advances since the formation of the Copyright Clause and found that the Clause "must be interpreted broadly" for continued effectiveness. In upholding the constitutionality of a statute intended to protect sound recordings from music piracy, *Schaab* set the stage for the Supreme Court's Copyright Clause interpretation in *Goldstein v. California*.

There are two basic prerequisites to fulfill the "Writing" clause: intellectual labor and tangible form/fixation. Inherent in the tangible form concept, which is the focus of *Maghadam*, is the re-grants authors "exclusive right to the fruits of their respective works." *Goldstein v. California*, 412 U.S. 546, 555 (1973). This right allows the author to prevent any unauthorized copying of the work for commercial purposes. See *id.*

59. See 1 NIMMER ON COPYRIGHT, supra note 31, § 1.08[A], at 1-66.25 (asserting, "Only works that qualify as writing may claim the protection of federal copyright legislation") (footnote omitted). This section focuses on the meaning behind "Writings," specifically whether a live, unrecorded concert can be considered a "Writing" at the time of performance. For further discussion of the elements of a "Writing," see *infra* notes 64-73 and accompanying text.

60. See *Goldstein*, 412 U.S. at 561 (stating that "[the 'Writing' term has] not been construed in [its] narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles."). Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (granting copyright protection to photographs and noting photography was nonexistent when Copyright Act of 1802 was passed); Reiss v. Nat'l Quotation Bureau, 276 F. 717, 719 (S.D.N.Y. 1921) (concluding that "if our Constitution embalms inflexibly the habits of 1789 [the scope of copyright may be limited] . . . . But it does not; its grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise thereafter."); 1 NIMMER ON COPYRIGHT, supra note 31, § 1.08[C][2] to [F], at 1-66.30 to 1-66.38 (discussing various tangible forms that qualify as "[W]ritings" including plays and musical compositions reduced to writing); Goodwin, supra note 4, at 358-59 (commenting that definition of "Writing" has expanded beyond strict, literal sense).


62. See *id.* at 590. ("The copyright clause of the Constitution must be interpreted broadly to provide protection for this method [of sound recordings] of fixing creative works in tangible form."). The companies that actually "fix" musical performances into a tangible medium therefore fit both the authorship and "Writing" requirements of the copyright clause. See *id.* The *Schaab* court found for the respondents, upholding the constitutionality of the Sound Recording Act. See *id.* at 590-91.

63. 412 U.S. 546 (1973). For further discussion of *Goldstein v. California*, see *infra* notes 70-73 and accompanying text.

64. See *Goldstein*, 412 U.S. at 561 (commenting that "'[W]ritings' . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor").
quirement that the artistic work be “fixed” in some tangible medium. While current interpretation of medium includes a variety of media beyond traditional print, the definition remains consistent in mandating that the work be fixed in some discernible, corporeal format. Unless the work of art can be reduced to this tangible medium, it remains “unfixed” and not subject to copyright protection. Eventually, courts agreed that a sound recording is a “Writ-

65. See id. at 562 (interpreting “Writing” to include any physical manifestation of creative thought); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (holding that photographs are form of “Writing”); The Trade-Mark Cases, 100 U.S. 82, 94 (1879) (qualifying “Writing” as including only original designs derived from creative and intellectual labor).

66. See Goodwin, supra note 4, at 358 (discussing consistency among traditional judicial and legislative interpretation of “Writing”). Examples of “fixed” media include phonographs, tapes and compact discs. See 17 U.S.C. § 102(a)(6)-(7) (1994) (stating broad categories of works granted copyright protection). This broad interpretation of “Writing,” and by implication “fixation,” was not a recent development. See Goodwin, supra note 4, at 358 (asserting that “the word ‘[W]ritings’ has ‘always been construed to mean something that is tangible . . . .'”) (quoting Lionel S. Sobel, Bootleggers Beware: Copyright Law Now Protects Live Musical Performances, But New Law Leaves Many Questions Unanswered, 17 No. 2 ENT. L. REP. 6, 11 (1995)).

In 1884, the Supreme Court in Burrow-Giles Lithographic Co. v. Sarony, granted Copyright Clause protection to the works of photographers. 111 U.S. 53, 58 (1884) (holding, “We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”). This case concerned a suit filed by Sarony, a photographer, against Burrow-Giles, a lithography company, for infringement of a Sarony photograph. See id. at 54. Burrow-Giles contested the constitutionality of a statute granting photographs copyright protection, specifically asserting that a photograph was not an original work of art, but a mere reproduction of some feature. See id. at 56. The Court, analyzing the past legislative history of the Copyright Clause, analyzed photographs with “maps, charts, designs, engravings, etchings, cuts, and other prints” and could not find a reason to excuse photographs from the melange of other artistic works granted copyright protection. Id. at 57-58. As long as some original facet of the photograph was discernible, the Court concluded that copyright protection must be granted. See id. at 60. This case expanded the definition of “Writings” to include “all forms of writing . . . by which the ideas in the mind of the author are given visible expression.” See Sarony, 111 U.S. at 58. Note that the photograph was a portrait of Oscar Wilde, and the Court left unanswered whether “ordinary” photographs warranted copyright protection. See 1 Nimmer on Copyright, supra note 31, § 1.08[B], at 1-66.26 n.13.

67. See Goldstein, 412 U.S. at 561-62 (declaring that “physical rendering of the fruits of creative . . . labor” was “Writing” subject to copyright protection); 1 Nimmer on Copyright, supra note 31, § 1.08(C)[2], at 1-66.50 (noting that writing “to be given any meaning whatsoever, it must, at the very least, denote ‘some material form, capable of identification and having a more or less permanent endurance.’”) (quoting Canadian Admiral Corp. v. Rediffusion, Inc., Can. Exch. 382, 383 (1954)); cf. CBS v. DeCosta, 377 F.2d 315, 320 (1st Cir. 1967) (implying negation of tangible form requirement by holding “Writing” to include “any concrete, describable manifestation of intellectual creation”). For a refutation of the DeCosta implication, see supra note 33.
Congress implicitly expanded the scope of "Writing" to include, among other things, motion pictures, sound recordings and choreographic works.\textsuperscript{69}

The Supreme Court considered whether musical concert recordings fell under the auspices of the Copyright Clause in \textit{Goldstein v. California}.\textsuperscript{70} In \textit{Goldstein}, the petitioners illegally copied and distributed for sale audiotapes of popular musical performances.\textsuperscript{71} In examining the "Writing" concept, the Court concluded that, "although the word '[W]riting' 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."\textsuperscript{72} "Fixation," therefore, results when the "Writing" is reduced to the physical medium.\textsuperscript{73}

\section*{C. The Commerce Clause: An Alternative Constitutional Source}

If the Copyright Clause fails to support constitutionally a statute, other constitutional clauses may support that statute, particularly the Commerce Clause.\textsuperscript{74} In considering whether copyright

\begin{itemize}
  \item \textsuperscript{68} See Schaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972) (noting that as technical advances form basis of sound recording industry, broad interpretation of Copyright Clause is required).
  \item \textsuperscript{69} See 17 U.S.C. § 102(a) (1994) (noting eight categories of authorship granted copyright protection).
  \item \textsuperscript{70} 412 U.S. 546, 562 (1973).
  \item \textsuperscript{71} See id. at 549-50 (discussing petitioners' piracy operation, noting that petitioners would purchase single authorized recording, illegally duplicate it and distribute copies to retail outlets for public consumption).
  \item \textsuperscript{72} Id. at 561 (citations omitted); see also \textsc{1 Nimmer on Copyright, supra} note 31, § 1.08[C][2], at 1-66.30 n.34 (citing past cases interpreting "Writing" as requiring some tangible form).
  \item \textsuperscript{73} See \textit{Goldstein}, 412 U.S. at 561 (noting that "Writing" encompasses physical manifestations of intellectual labor); see also \textsc{1 Nimmer on Copyright, supra} note 31, § 1.08[C][2], at 1-66.31 n.38 (asserting that fixation results under Copyright Act when work is embodied in relatively permanent physical medium). Nimmer continues, quoting legislative discussion stressing the need for a further qualification of the fixation concept given the transient nature of such display and storage technologies as televisions and computers. See id. (citing H.R. 2237, 89th Cong., (2d Sess. 1966)).
  \item \textsuperscript{74} For a discussion of the Commerce Clause and relevant case law, see \textsc{infra} notes 82-111 and accompanying text.
\end{itemize}
statutes fall within Commerce Clause authority, the scope of that clause must be examined under the leading case of United States v. Lopez. In Lopez, the Court considered whether Congress exceeded its Commerce Clause constitutional limits in enacting the Gun-Free School Zones Act of 1990 ("Gun-Free Act"). The Gun-Free Act made it a federal crime to possess a gun within a school zone. The respondent contested his conviction, asserting that the Gun-Free Act was unconstitutional legislation under the Commerce Clause. The Supreme Court agreed, ruling that the activity of carrying a gun did not substantially affect interstate commerce. In so ruling, the Court established three categories of activities under which Congress may regulate interstate commerce. Generally, if a

76. See id. at 566 (discussing whether statute banning gun possession in school zones exceeded Congress’ power to regulate interstate commerce).
77. See 18 U.S.C. § 922(q)(2)(A) (1994 & Supp. IV 1998) ("It shall be unlawful for any individual knowingly to possess a firearm ... in a school zone."). A school zone is "in . . . or within a distance of 1,000 feet from the grounds of a . . . school." Id. § 921(a) (25).
78. See Lopez, 514 U.S. at 552 (noting that "[o]n appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause.").
79. See id. at 567-68 (holding Gun-Free Act failed test of whether regulated activity substantially affected interstate commerce). Specifically, the Court focused on the nature of the underlying activity. See 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 5-4 (3d ed. 2000) (noting that Court in Lopez wanted "to focus more attention on the nature of the underlying activity - paying particular attention to whether or not that activity could itself be described as part of an economic enterprise.") (emphasis in original). The statute would be sustained if the regulated activity was commercial or economic in nature and substantially affected interstate commerce. See id. (suggesting that statute meeting Lopez criteria would pass constitutional scrutiny).
80. See Lopez, 514 U.S. at 558-59 (identifying three categories of activities that Congress may regulate under Commerce Power).

The first category of activities that Congress may regulate are those affecting "channels of interstate commerce." Id. at 558 (citations omitted). Channels of commerce may be analogized to a "river of commerce" that Congress controls by excluding any good deemed unfit. See Tribe, supra note 79, § 5-5. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." Lopez, 514 U.S. at 558. (citations omitted). Finally, Congress may regulate "activities having a substantial relation to interstate commerce." Id. at 558-59 (citations omitted). Specifically, the third category requires that the activity "substantially affect" interstate commerce. See id. at 559 (noting unclear prior case law in determining necessary legal factors for constitutional analysis of regulated activities); Tribe, supra note 79, § 5-5 (stating that "the 'substantial effects' requirement applies only to the third category; the first two categories, by definition, substantially affect - because they are components of - interstate commerce.") (emphasis in original) (citing United States v. Robertson, 514 U.S. 669 (1995)).
statute relates to interstate commerce, the Commerce Clause provides sufficient constitutional authority.\(^8\)

\[\text{D. Congressional Intent and the Commerce Clause}\]

Legislative findings assist courts in determining the congressional intent of a statute.\(^8\) In \textit{United States v. Viscome},\(^8\) the Eleventh Circuit granted substantial deference to congressional findings in determining whether a statute met the \textit{Lopez} criteria.\(^8\) In \textit{Viscome},

\hspace{1cm}

Noting that \textit{Lopez} merely imposed "outer limits" to Congress' Commerce Clause regulatory authority, the \textit{United States v. Wright} court determined a statute's constitutionality by considering whether a rational basis existed for concluding that a regulated activity "substantially affected interstate commerce." 117 F.3d 1265, 1270 (11th Cir. 1997), \textit{vacated in part on other grounds}, 133 F.3d 1412 (11th Cir. 1998), \textit{cert. denied}, 525 U.S. 894 (quoting \textit{United States v. Lopez}, 514 U.S. 549, 557 (1995)) (discussing standard under which statute will survive constitutional scrutiny). Title 18 U.S.C. § 922(o) makes it a federal crime for any person to transfer or possess a machine gun. \textit{See 18 U.S.C. § 922(o) (1994)}. \textit{Wright} concerned a constitutional challenge to Congress criminalizing the possession of machine guns. \textit{See Wright}, 117 F.3d at 1267. Similar to \textit{Lopez}, the respondent asserted that Congress exceeded its power under the Commerce Clause to regulate machine gun possession. \textit{See id.} at 1268-69. Specifically, Wright asserted that, similar to the statute at issue in \textit{Lopez}, there was no justification for this statute under the Commerce Clause because no legislative findings and no jurisdictional element existed describing a connection between gun possession and interstate commerce. \textit{See id.} at 1268.

In denying respondent's claim, the court distinguished the statute in \textit{Wright}, which represented a total ban on the possession of machine guns, from the statute in \textit{Lopez}, which prohibited gun possession only within school zones. \textit{See id.} at 1270 (disagreeing with Wright's argument and sustaining statute's constitutionality). The court noted machine gun regulation qualified as an activity substantially affecting interstate commerce. \textit{See id.} Finally, the \textit{Wright} court found the statute had a direct connection with interstate commerce, thereby finding sufficient Congressional authority to regulate machine gun possession. \textit{See id.}

\[81. \text{See Tribe, supra note 79, § 5-4 (noting that "}[i]n essence . . . the power to regulate 'commerce' necessarily encompasses power . . . over all activities that are themselves part of the production or distribution of wealth in the broadest economic sense of that term . . . ").}\]

\[82. \text{See Lopez, 514 U.S. at 562-63 (agreeing that while Congress need not make "formal findings as to the substantial burdens that an activity has on interstate commerce," such findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . ").}\]

\[83. \text{144 F.3d 1365 (11th Cir. 1998), cert. denied, 525 U.S. 941 (1998).}\]

\[84. \text{See id. at 1371 (granting deference to explicit findings of Congress that use of weapons of mass destruction substantially affected interstate commerce).}\]
similar to Lopez, the respondent challenged the constitutionality of the Commerce Clause-based statute imposing his conviction. In upholding the statute’s constitutionality, the Viscome court distinguished the Lopez holding, noting that, unlike Lopez, Congress made findings about the regulated activity’s impact upon interstate commerce.

In addition to legislative findings, the existence of a jurisdictional element in a statute may assist a court in determining a stat-


Turner challenged the constitutionality of a provision requiring television cable operators to carry local broadcast television stations. See id. at 185. In upholding the provision’s constitutionality, the Court relied heavily upon congressional findings. See id. at 195 (concluding that Court’s “sole obligation is ‘to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.’”) (quoting Turner Broad. Sys., Inc., 512 U.S. at 666). This deference was owed to the legislature’s greater capacity to assimilate and evaluate data concerning legislative issues. See id. (quoting Turner Broad. Sys., Inc., 512 U.S. at 665-66) (citations omitted).

85. See Viscome, 144 F.3d at 1370. Gentile, a Viscome defendant, was convicted of violating a statute making it a criminal offense for anyone to use weapons of mass destruction. See id. Gentile was convicted of violating Title 18 U.S.C. § 2332a(a) (2), which states: “A person who uses, or attempts or conspires to use, a weapon of mass destruction . . . against any person within the United States . . . shall be imprisoned . . . .” See id. (citing 18 U.S.C. § 2332a(a) (2) (1994)). Congress later amended the statute to include an element requiring the government to show that “the results of such use affect . . . or would have affected interstate or foreign commerce.” 18 U.S.C. § 2332a(a) (2) (1994 & Supp. IV 1998); Viscome, 144 F.3d at 1370 (noting in April 1996, Congress amended 1994 statute to include interstate commerce element). Gentile asserted that because the unamended statute lacked the “interstate commerce” element, the conviction was invalid. See Viscome, 144 F.3d at 1370.

86. See Viscome, 144 F.3d at 1371 (commenting that “Congress finds that the use . . . of weapons of mass destruction . . . seriously affect[s] interstate and foreign commerce . . . .”) (quoting H.R. CONF. REP. No. 102-405, at 46 (1991)); Wright, 117 F.3d 1265, 1269 (rejecting argument that required “[C]ongress to place a jurisdictional element in every statute enacted pursuant to the Commerce Clause . . . .”) (citing United States v. Olin, 107 F.3d 1506, 1510 (11th Cir. 1997)). Based upon past congressional experience in regulating such weapons, the Viscome court abided by the Turner Court’s reasoning and granted substantial deference to Congress’ findings. See Viscome, 144 F.3d at 1371 (stating that “[c]onsidering Congress’[ ] experience in regulating explosives and their effects, we accord these findings substantial deference.”). The Viscome court also noted that the statute in question, unlike Lopez, completely regulated the activity and did not attempt to decide case-by-case whether the facts supported an impact upon interstate commerce. See id. (noting that statute at issue in Lopez statute did not contain “interstate nexus” requirement ensuring case-by-case inquiry into whether firearm possession affected interstate commerce).
ute's Commerce Clause validity. The absence of a jurisdictional element forces courts to determine independently whether the regulated activity substantially affects interstate commerce. Under this analysis, the Eleventh Circuit in *United States v. Olin* declined to overturn the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") on constitutional grounds. The court noted that even lacking that jurisdictional element, the statute fell within the *Lopez* requirements. Assuming that a statute exceeds the constitutional limitations of one clause, the court must determine whether Congress may pass that statute under a second constitutional clause, if that statute meets the second clause's requirements.

E. Choosing One Constitutional Clause Over Another

The Supreme Court considered choosing one constitutional clause over another in *Heart of Atlanta Motel, Inc. v. United States* when it declined to hold the public accommodation sections of the Civil Rights Act of 1964 unconstitutional, despite the fact that similar provisions were ruled unconstitutional under the Fourteenth Amendment.

87. See *Lopez*, 514 U.S. at 562 (distinguishing prior case by noting that instant statute had "no express jurisdictional element which might limit its reach to [activities] . . . hav[ing] an explicit connection with or effect on interstate commerce.").

88. See *United States v. Olin*, 107 F.3d 1506, 1509 (11th Cir. 1997) (holding that missing jurisdictional element forced courts to determine independently whether statute substantially affected interstate commerce). Olin, a chemical plant operator, contaminated portions of the land around the plant. See id. at 1508. The federal government filed suit against Olin under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and Olin responded by challenging CERCLA's constitutionality on Commerce Clause grounds. See id.

89. 107 F.3d 1506 (11th Cir. 1997).

90. See id. at 1510 (noting that missing legislative findings or jurisdictional element did not preclude constitutional soundness of contested legislation).

91. See id. (upholding constitutionality of CERCLA despite lack of legislative findings and jurisdictional element). The *Olin* court found that despite the absence of legislative findings and a jurisdictional element, CERCLA regulates activities substantially affecting interstate commerce. See id. at 1510 (stating "'[CERCLA] remain[ed] valid . . . because it regulate[d] a class of activities that substantially affects interstate commerce.'"). *Olin* also noted that while CERCLA lacks formal legislative findings, the Supreme Court had used such findings from antecedent statutes. See id. at 1510 n.6.

92. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). For a discussion of the *Heart of Atlanta Motel* decision, see infra notes 94-96 and accompanying text.

Amendment in the Civil Rights Cases.\(^\text{94}\) The Court in Heart of Atlanta Motel did so without directly overturning that earlier case.\(^\text{95}\) Given the close parallel between the two sets of Civil Rights Acts provisions in both cases, it appears that a statute invalid under one constitutional clause may be valid under another.\(^\text{96}\)

\(^{94}\) See id. at 250-51 (noting similar civil rights provision were found constitutionally deficient in 1883). In the Civil Rights Cases, the Supreme Court found that civil rights provisions enacted by the Civil Rights Act of 1875 exceeded the Fourteenth Amendment’s legislative bounds. See The Civil Rights Cases, 109 U.S. 3, 25 (1883) (asserting that no “authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must . . . be declared void . . .”). The Civil Rights Cases Court did not, as noted by the Heart of Atlanta Motel Court, determine if the Commerce Clause could sustain those provisions. See Heart of Atlanta Motel, 379 U.S. at 251 (noting “the fact that certain kinds of business may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today.”).

The Civil Rights Cases considered the constitutionality of the Civil Rights Act of 1875. See The Civil Rights Cases, 109 U.S. at 9. The Act forbade illegal racial discrimination against individuals exercising their right to use public accommodations. See id. at 9-10. Public accommodations included inns, public conveyances, theaters and other places of public amusement. See id. at 9 (citing Civil Rights Act of 1875, 18 Stat. 335). The Court declared the provisions unconstitutional because they went beyond Congress’ authority to regulate private conduct via the Fourteenth Amendment. See id. at 11 (concluding statute at issue violated Fourteenth Amendment because “[i]t nullified and [made] void all State legislation, and State action of every kind, which impair[ed] the privileges and immunities of citizens. . . .

\(^{95}\) See Heart of Atlanta Motel, 379 U.S. at 250 (declining to overturn Civil Rights Cases, considering that decision without precedential value for instant case). The Court found sufficient constitutional authority for the statute under the Commerce Clause. See id. at 258 (noting, “the power of Congress to promote interstate commerce also includes the power to regulate the local incidents . . . which might have had a substantial and harmful effect upon that commerce.”).

\(^{96}\) See id. at 250-52 (stepping through analysis that sustained, under one clause, the constitutionality of statute similar to statute held unconstitutional under different clause). The Civil Rights Cases Court could not apply the modern Commerce Clause analysis. See id. at 251 (noting overly broad nature of 1875 Act in Civil Rights Cases, which affected businesses that may not have engaged in interstate commerce, given state of transportation technology in nineteenth century). With nine decades of technological achievement, the Court noted that businesses formerly unaffected by the 1875 Act may now be subject to the 1964 Act. See Heart of Atlanta Motel, 379 U.S. at 251 (stating that, at that time, nineteenth century businesses “may not have been sufficiently involved in interstate commerce”). Given that (a) the Civil Rights Cases Court did not fully apply the Commerce Clause analysis to the 1875 Act and (b) the Heart of Atlanta Court declined to consider whether the 1964 Act is unconstitutional under the Fourteenth Amendment, there still remains an implicit assumption that legislation breaking constitutional boundaries under one clause “has no bearing on whether it can be sustained under another [clause].” United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999).
The Trade-Mark [sic] Cases\(^7\) applied this analysis in resolving a trademark protection statute's constitutionality.\(^8\) The statute protected trademarks from, among other things, counterfeiting.\(^9\) The defendants contested their convictions, arguing that there was no legislative authority to enact the statute.\(^10\) The government responded by asserting the Copyright Clause, or in the alternative, by stating that the Commerce Clause provided sufficient authority for statutory passage.\(^11\) The Court held it could not sustain the trademark statute under either the Copyright Clause or the Commerce Clause, thus recognizing the possibility of alternative constitutional support for a statute.\(^12\)

Almost a century later, the Second Circuit applied this analysis in its determination of a copyright statute's constitutionality in Au-

\(^7\) 100 U.S. 82 (1879).

\(^8\) See id. at 93-95 (considering whether statute derived its constitutional authority from Copyright Clause or Commerce Clause). The government asserted that either the Copyright or Commerce Clause could sustain the statute's constitutionality. See id. at 93.

\(^9\) See Act of Aug. 14, 1876, ch. 274, 19 Stat. 141 (granting protection to trademarks against counterfeiting). Specifically, the defendants were convicted of, among other things, forging trademarks belonging to foreign and domestic manufacturers of liquor. See The Trade-Mark Cases, 100 U.S. at 82-83. The imitation trademarks were used to delude customers as to the actual origin of champagne or whiskey sold by defendants. See id.

\(^10\) See The Trade-Mark Cases, 100 U.S. at 91-92 (inquiring whether trademark statute derived from constitutionally granted authority).

\(^11\) See id. at 86-87 (specifying government's two pronged argument in justifying enactment of trademark protection statute). While appellant failed with this argument here, it presaged the one used in Moghadam. See Moghadam, 175 F.3d at 1271 (discussing government's argument which closely paralleled that from Trade-Marks Cases).

\(^12\) See The Trade-Mark Cases, 100 U.S. at 98-99 (holding that trademarks lack elements necessary to grant Copyright Clause protection). Trademarks, unlike copyrights, do not promote the sciences or the arts; thus, under the 1876 Act, originality was not necessary to register a trademark. See id. at 93-94.

The Court declined to analyze the statute's constitutionality under the Commerce Clause, claiming that the statute regulated "commerce wholly between citizens of the same State, [thus] it is obviously . . . a power not confided to Congress." The Trade-Mark Cases, 100 U.S. at 96-97; Tribe, supra note 79, § 5-4 (noting statute did not qualify for Commerce Clause support, so Court felt no need to define congressional limits of power under Commerce Clause). Tribe concluded that "[t]he Trade-Mark Cases are notable . . . because of [the Court's] expressed reluctance to find that Congress was attempting to exercise its commerce power inasmuch as Congress had not said it was making such attempt." Id. (emphasis in original). The lack of a jurisdictional element that would qualify the statute for Commerce Clause protection was not conducive in the Court's analysis. See The Trade-Mark Cases, 100 U.S. at 97 ("Here is no requirement that such person [involved in trademark activity protected by the statute] shall be engaged in the kind of commerce which Congress is authorized to regulate.").
thors League of America, Inc. v. Oman. The plaintiff asserted, inter alia, that the statute could not derive its constitutional authority from the Copyright Clause. The court rejected the plaintiff's constitutional attack, concluding that while the statute may exceed Congress' Copyright Clause power, other sources of congressional power justified the statute's enactment. This line of cases, namely Heart of Atlanta Motel, the Trade-Mark Cases and Authors League, hold that one clause may constitutionally support a statute that fails under the other clause's scrutiny.

These cases, however, contradict the Supreme Court's holding in Railway Labor Executives' Ass'n v. Gibbons ("Railway"). The statute at issue in Railway conflicted with the Bankruptcy Clause's uniformity provision. The Court declined to find the statute

103. 790 F.2d 220 (2d Cir. 1986). The statute at issue, which has now lapsed, protected the domestic book publishing and printing industries by restricting "importation of copyrighted, foreign-manufactured, non-dramatic, literary works." Id. at 221.

104. See id. at 221 (stating plaintiff's constitutional arguments against clause based upon First and Fifth Amendments). The plaintiffs argued that the statute interfered with the Copyright Clause's purpose which was to promote the progress of useful arts. See id. at 224.

105. See id. (commenting that plaintiff failed to realize that Copyright Clause was not only constitutional source of congressional power). The court noted that the statute, regulating imports of foreign works, could derive authority from the Commerce Clause. See Authors League of America, 790 F.2d at 224 ("[D]enial of copyright protection . . . is clearly justified as an exercise of the legislature's power to regulate commerce . . . .").

106. For a further examination of this line of cases, see supra notes 93-105 and accompanying text.

107. 455 U.S 457, 471 (1982) (asserting that if statute were upheld, Bankruptcy Clause's uniformity provision would become meaningless). In 1975, the Chicago, Rock Island and Pacific Railroad Co. ("Rock Island"), received district court permission for reorganization under the Bankruptcy Act. See id. at 459. Rock Island continued to operate under the Act until September 1979, when Rock Island ceased operation due to a labor strike. See id. Consequently, the District Court ordered asset liquidation. See id. In June 1980, the court ordered that former employees could not make any claims upon the liquidation proceeds. See id. at 460. Congress, six days prior, however, enacted a statute ordering the railroad to pay $75 million to former employees. See Ry. Labor Executives' Ass'n, 455 U.S. at 461-62 (noting congressional passage of Rock Island Railroad Transition and Employee Assistance Act ("RITA"), providing economic and employment assistance to former employees). The Act ordered that those former employees who were still unemployed be paid $75 million. See 45 U.S.C. § 1008 (repealed 1983); Ry. Labor Executives' Ass'n, 455 U.S. at 462 n.3 (citing 45 U.S.C. § 1008).

108. See Ry. Labor Executives' Ass'n, 455 U.S. at 469 (noting that bankruptcy laws must be uniform throughout United States). The Bankruptcy Clause's uniformity provision requires any congressional statute to apply equally among classes of debtors, otherwise discrimination among debtors and creditors would result. See id. (noting also that clause prohibits Congress "from treating railroad bankruptcies as a distinctive problem"); Tribe, supra note 79, § 5-8 (noting congressional bankruptcy statute cannot apply to one debtor or discriminate among regional debtors and creditors). The District Court and Circuit Court of Appeals agreed, holding

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constitutional under the Commerce Clause. In so ruling, the Court noted that use of the Commerce Clause as an alternative constitutional source for a statute "would eradicate from the Constitution a limitation on the power of the Congress to enact bankruptcy laws." This case, while limited to bankruptcy law, exemplifies how a court may decline to sustain constitutionally a statute under an alternative clause when that statute fails initial constitutional scrutiny.

IV. NARRATIVE ANALYSIS

A copyright statute’s legality must hew to past judicial interpretation of the Copyright Clause or otherwise fall before a constitutional challenge. If the anti-bootlegging statute, relying upon the Copyright Clause, fails to comport with past judicial interpretation of the clause, then the statute must look elsewhere to find constitutional redemption. In United States v. Moghadam, the respondent asserted that Congress exceeded its constitutional authority by enacting the anti-bootlegging statute. The government countered, claiming that either the Copyright Clause or the

RITA constitutionally unacceptable. See Ry. Labor Executives’ Ass’n, 455 U.S. at 464-65 (citations omitted).

109. See Ry. Labor Executives’ Ass’n, 455 U.S. at 471 (“The language of the Bankruptcy Clause itself compels us to hold that such a bankruptcy law is not within the power of Congress to enact.”). To sustain this statute, the Court held, would enable discriminatory private bills that could favor some individual debtors over others. See id.

110. Id. at 469 (exploring history behind Bankruptcy Clause’s uniformity clause and concluding that individualized nature of RITA bars judicial approval). Further, the Court noted that “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.” See id. at 468-69.

111. For a discussion of the significance of Railway Labor Executives’ Ass’n, see infra notes 162-64 and accompanying text.

112. See Moghadam, 175 F.3d at 1271 (noting respondent’s challenge to anti-bootlegging statute’s constitutionality on grounds that it exceeded Congress’ authority to regulate copyrights).

113. See id. at 1273 (“This positive grant of legislative authority [of the Copyright Clause to protect works] includes several limitations.”); Deas, supra note 3, at 578 (asserting that as statute is outside purview of Copyright Clause, another “constitutional mooring” must be found); Nimmer, supra note 35, at 1411 (concluding statute “must not be rooted in the Copyright Clause”); Sobel, supra note 31, at 11-12 (“[A]nother Constitutional basis for [the anti-bootlegging statute] must be found.”); Goodwin, supra note 4, at 357-58 (asserting that anti-bootlegging statute cannot derive constitutional authority from Copyright Clause).

114. See Moghadam, 175 F.3d at 1271-73. Some of the enumerated powers granted to Congress include the regulation of interstate and foreign commerce (“Commerce Clause”) and the granting of patents and copyrights (“Copyright Clause”). See U.S. CONST. art. I, § 8.
Commerce Clause provided sufficient constitutional authority for enactment of the federal anti-bootlegging statute.\textsuperscript{115} With the motion to dismiss denied by the district court, Moghadam reasserted this argument before the Eleventh Circuit.\textsuperscript{116} The Eleventh Circuit upheld the conviction, affirming the district court's dismissal of Moghadam's constitutional challenge.\textsuperscript{117}

In so ruling, the court distinguished between two lines of cases that conflicted regarding whether Congress may use one clause to enact a statute barred by another clause.\textsuperscript{118} The court found that Congress could use other constitutional clauses, such as the Commerce Clause, to grant "copyright-like" protection to works that might not meet the full requirements of the Copyright Clause.\textsuperscript{119} The Eleventh Circuit concluded that the Commerce Clause provides sufficient authority for the federal anti-bootlegging statute.\textsuperscript{120}

The \textit{Moghadam} court first considered the federal anti-bootlegging statute's constitutionality under the Commerce Clause.\textsuperscript{121} The court then ascertained whether Congress could pass a law under the Commerce Clause to avoid obstacles raised by the Copyright Clause.\textsuperscript{122} The \textit{Moghadam} court concluded by resolving the statute's constitutionality under the Copyright and Commerce

\textsuperscript{115} See \textit{Moghadam}, 175 F.3d at 1271 (summarizing government's argument that statute is valid under one of two constitutional clauses).

\textsuperscript{116} See id. (stating procedural basis for Moghadam's appearance before Eleventh Circuit).

\textsuperscript{117} See id. (rejecting Moghadam's appeal of district court's motion to dismiss indictment).

\textsuperscript{118} See id. at 1279-80 (recognizing "tension" between two lines of cases, with one line asserting that, where Copyright Clause might bar statute, Commerce Clause may be used to uphold that statute and other line contesting that assertion). For further discussion of this conflict of case law, see infra notes 121-25 and accompanying text.

\textsuperscript{119} See \textit{United States v. Moghadam}, 175 F.3d 1269, 1280 (1999) (stating, "We hold 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'.").

\textsuperscript{120} See id. at 1282 (summing up reasons for upholding anti-bootlegging statute's constitutionality and Moghadam's conviction). For further discussion of the Eleventh Circuit's methodology, see infra notes 165-67 and accompanying text.

\textsuperscript{121} See id. at 1280 (noting that in this instance, use of Commerce Clause was acceptable because Copyright Clause could not affirm anti-bootlegging statute's constitutionality). For further discussion of the court's Commerce Clause analysis, see infra notes 141-51 and accompanying text.

\textsuperscript{122} See \textit{Moghadam}, 175 F.3d at 1282 (holding anti-bootlegging statute met Commerce Clause \textit{Lopez} requirements). The court assumed \textit{arguendo} that the Commerce Clause could not be used to avoid a Copyright Clause restriction, where the restriction conflicts with a particular Commerce Clause facet. See id. at 1280 n.12. For further discussion of the court's analysis in \textit{Moghadam}, see infra notes at 152-58 and accompanying text.
Clauses. The bulk of the court’s analysis laid in determining when Congress may constitutionally validate a statute under one clause to avoid the restrictions of another clause that would preclude validity. As this was an issue of first impression, the Eleventh Circuit looked to analysis from analogous past cases.

A. The Copyright Clause May Not Constitutionally Sustain the Anti-Bootlegging Statute

The Eleventh Circuit began by analyzing the anti-bootlegging statute’s constitutionality under the Copyright Clause. The court noted that past congressional and judiciary interpretations imposed several restrictions upon the clause. Given those limitations, the court considered whether the Copyright Clause could be a constitutional source of the anti-bootlegging statute.

The Supreme Court indirectly addressed the issue of whether a sound recording, but not a bootleg, was entitled to copyright protection in Goldstein v. California. The Court sustained a state statute granting copyright protection to sound recordings. If the anti-bootlegging statute, protecting live performances from unauthorized recordings, derived authority from the Copyright Clause, but failed to meet the clause’s elements, then Moghadam’s conviction was unconstitutional. The Moghadam court therefore examined the issue of whether a live musical performance qualifies as a “Writing.” Noting that

123. See Moghadam, 175 F.3d at 1273-76 (analyzing anti-bootlegging statute’s constitutionality under Copyright and Commerce Clauses).
124. See id. at 1277-81 (discussing whether Congress may use Commerce Clause power to avoid Copyright Clause restrictions).
125. See id. at 1271 (“The constitutionality of the anti-bootlegging statute appears to be a question of first impression in the nation.”).
126. See id. at 1273 (“Our analysis of the constitutionality of [the anti-bootlegging statute] begins with the Copyright Clause of the United States Constitution.”).
127. See id. at 1273-74 (discussing inherent aspects of Copyright Clause, including concepts of “Writing,” fixation and tangible form).
128. See Moghadam, 175 F.3d at 1273-74 (noting that Moghadam’s argument was based upon past judicial interpretation of Copyright Clause).
130. See Goldstein, 412 U.S. at 560 (concluding “the language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal government.”).
131. See Moghadam, 175 F.3d at 1271 (noting Moghadam’s motion to dismiss indictment on grounds that anti-bootlegging statute was unconstitutional under Copyright Clause).
132. See id. at 1274 (discussing Moghadam’s argument that live performance was not fixed in some tangible medium at time of performance).
fixation is among the Copyright Clause’s limitations, Moghadam asserted that, as the anti-bootlegging statute failed to abide by that concept, the statute was void.133 No cases have held directly that every “Writing” must be “fixed” in a tangible form in order to obtain copyright protection, though it had been strongly suggested.134

Every successive statutory revision of the copyright laws has required some form of “fixation” for the work to qualify for copyright protection.135 Over a century ago, the court in Burrow-Giles Lithographic Co. v. Sarony noted such a fixation.136 More recently, the Court in Goldstein interpreted “Writing” to encompass “any physical rendering of the fruits of creative intellectual or aesthetic labor,” concluding that artistic performance recordings may fall under the Copyright Clause’s protections.137 A year after Goldstein, a district court agreed with that assessment, noting, “it is now clear, then, that a writing may be perceptible either visually or aurally.”138 Yet, these holdings did not directly qualify live musical performances as within the Copyright Clause’s protective scope and the Moghadam court declined to hold otherwise.139

133. See id. at 1273 (commenting that Moghadam relied upon fixation concept as core of argument against constitutionality of anti-bootlegging statute).

134. See 1 Nimmer on Copyright, supra note 31, § 1.08[C][2], at 1-66.30 (asserting that no cases have directly held that for work to be “Writing” it must be in some tangible form).

135. See Moghadam, 175 F.3d at 1274 (noting that work must be reduced to some physical rendering of Authors creativity and originality).

136. 111 U.S. 53 (1884) (holding photographs are protected by copyright as long as some smidgen of originality exists). For a discussion of the Burrow-Giles holding, see supra note 66.

137. See Goldstein, 412 U.S. at 561-62 (noting sound recordings fall under that definition).


139. See Moghadam, 175 F.3d at 1274 (declining to decide whether fixation requirement included live performances). The court did not formally hold the federal anti-bootlegging statute unconstitutional under the Copyright Clause. See id. A noted copyright law commentator agreed with Moghadam’s assertion that a live performance is not in a tangible form at the time of performance. See Moghadam, 175 F.3d at 1274 (“[N]o respectable interpretation of the word ‘writings’ embraces an untaped performance of someone singing at Carnegie Hall.”) (alteration in original) (quoting Nimmer, supra note 35, at 1409). “But for the bootlegger’s decision to record,” Moghadam argued, “a live performance is fleeting and evanescent.” Moghadam, 175 F.3d at 1274.

The Moghadam court also noted that the anti-bootlegging statute’s lack of a copyright time limit conflicts with the Copyright Clause’s requirement that protection be extended only for “Limited Times.” See Moghadam, 175 F.3d at 1274 n.9. The court chose not to address this issue as Moghadam apparently did not preserve that argument. See id. At oral argument, the court apparently addressed this issue extensively. See Appeals Court Backs Anti-Bootlegging Statute, 15 No. 3, Enr. L. & Fin., 3, 3 (June 1999) (quoting Moghadam’s counsel, David A. Nickerson, “This [issue] was discussed a lot during oral arguments. The next case that comes along
B. The Anti-Bootlegging Statute Harmonizes With the Commerce Clause

With the anti-bootlegging statute lacking the "fixation" element, the Eleventh Circuit examined the Commerce Clause to determine if a more harmonious chord could be struck. ¹⁴⁰ The court turned to the Lopez case to locate the standard for determining the constitutional sufficiency necessary to sustain the federal anti-bootlegging statute.¹⁴¹ Lopez identified three categories of activities that Congress could regulate under the Commerce Clause.¹⁴²

The Moghadam court concluded that the federal anti-bootlegging statute fell under the third category of "intrastate activities that substantially affect interstate commerce."¹⁴³ To qualify for the third category, the court concluded that a rational basis must exist to support the contention that the regulated activity substantially affects interstate commerce.¹⁴⁴ A rational basis, supporting the relationship between the activity and interstate commerce, may be found by examining legislative history and any statutory jurisdictional elements.¹⁴⁵

¹⁴⁰ See Moghadam, 175 F.3d at 1274 (applying Commerce Clause scrutiny in determining anti-bootlegging statute's constitutionality).

¹⁴¹ See id. at 1275 (concluding Lopez is most appropriate case to apply to instant facts).

¹⁴² See United States v. Lopez, 514 U.S. 549, 558-59 (1995). For further discussion of the three categories which are appropriately regulated under the Commerce Clause, see supra notes 79-81 and accompanying text.

¹⁴³ See Moghadam, 175 F.3d at 1275 (stating, "our analysis here focuses on the third category of appropriate legislation"). The Moghadam court noted the "obviousness" of the link between bootleg compact discs and interstate commerce, concluding that if bootlegging is done for financial gain, it affects commerce. See id. at 1276. For a discussion of the interaction between bootlegging and commerce, see supra notes 80-81 and accompanying text.

¹⁴⁴ See Lopez, 514 U.S. at 557. That rational basis must form an apparent relationship demonstrating the regulated activity's impact upon interstate commerce. See United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997). For further discussion of the rational basis, see supra note 80 and accompanying text.

¹⁴⁵ See Moghadam, 175 F.3d at 1274-76 (discussing factors that would sustain constitutionality under Commerce Clause). The Moghadam court deferred to the Viscome court's finding granting substantial deference to legislative findings in evaluating whether the statute met Lopez criteria. See Moghadam, 175 F.3d at 1275 (noting that Wright commented that lack of legislative findings on record did not negate constitutionality); United States v. Viscome, 144 F.3d 1365 (11th Cir. 1998), cert. denied, 525 U.S. 941 (1998) (noting legislative findings important in upholding constitutionality of statute). The court in Viscome, similar to Lopez, assessed a statute's constitutionality under which the appellee was convicted. See Viscome, 144 F.3d at 1370-71 (upholding statute's constitutionality noting that, unlike Lopez, Congress made findings on impact of regulated activity upon interstate commerce).
The Moghadam court examined the federal anti-bootlegging statute and found it lacked both substantive legislative history and any jurisdictional element. Despite the statute’s failure to provide these two elements, the Moghadam court still found that bootleg compact discs substantially impact interstate commerce. The court relied upon Congress’ underlying motive in enacting the anti-bootlegging statute. Specifically, the statute was enacted to comply with an international treaty designed to secure uniform global protection of intellectual property rights. Given that context, the court concluded that protection of interstate and international trade was the impetus behind the anti-bootlegging statute and therefore within the Commerce Clause scope. Having resolved that issue, the Moghadam court examined a more troublesome legal question.

The court inquired whether Congress could enact a statute under one clause in order to avoid problems that arise under another clause. Assuming a statute falls under the auspices of constitutional clause A, but not B, the court must resolve whether Congress may pass a statute under B, avoiding clause A’s constraints. The Eleventh Circuit examined cases where a statute was found constitutional under one clause despite another clause’s

146. For further discussion of the federal anti-bootlegging statute’s legislative history, see infra notes 183-89 and accompanying text.

147. See Moghadam, 175 F.3d at 1276 (“The link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident.”).

148. See id. (concluding, “the very reason Congress prohibited [bootlegging] is because of the deleterious economic effect on the recording industry”). For a discussion of bootlegging’s economic impact, see supra notes 143-45 and accompanying text.

149. See Moghadam, 175 F.3d at 1276 (noting statute was passed to comply with World Trade Organization obligations (in form of GATT legislation known as TRIPs)). For further examination of the legislative impetus for passage of the anti-bootlegging statute, see supra notes 38-40 and accompanying text.

150. See Moghadam, 175 F.3d at 1276 (finding that, despite lack of specific findings, Congressional intent was to regulate interstate commerce).

151. See id. at 1277 (beginning analysis of whether statute that violates one constitutional clause, may pass scrutiny under another clause).

152. See id. (“The more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitation that might prevent it from passing the same legislation under the Copyright Clause.”).

153. See id. at 1277 (examining whether Congress can pass legislation under one constitutional clause to avoid limitations of another clause). The Moghadam court, in resolving this issue, assumes arguendo that the federal anti-bootlegging statute, lacking the “fixation” requirement inherent in traditional copyright protection laws, could not derive its constitutional authority from the Copyright Clause. See id.
conflicts. The court responded by examining the *Heart of Atlanta Motel* holding as the leading case on the issue of alternative constitutional construction.

A similar analysis was applied in the *Trade-Mark Cases*, concerning a trademark protection statute's constitutionality. The *Trade-Mark Cases* Court declined to sustain the disputed statute under either clause, but the *Moghadam* court distinguished this case by noting it demonstrated that legislation could be found constitutional under one clause and not the other, despite statutory conflicts with the other clause. Additionally, the statute at issue in the *Trade-Mark Cases* failed to meet the requirements of the nineteenth century interpretation of the Commerce Clause, whereas the anti-bootlegging clause met the more recent, twentieth century interpretation of Commerce Clause requirements under *Lopez*.

More recently, the Second Circuit applied the *Lopez* analysis in determining the constitutionality of a statute protecting the domestic publishing industry from foreign competition. The *Authors League* court resolved this issue, holding that even when the statute exceeds Congress' power under the Copyright Clause, other sources of congressional power justify the statute's enactment. In other words, the Second Circuit's analysis confirmed the pro-

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154. See id. at 1277-79 (noting cases, including *Heart of Atlanta Motel* and *Authors League*, exemplifying principle that constitutional clauses must be analyzed independently of each other, thus granting legitimacy under one clause to statute barred under another).

155. See *Moghadam*, 175 F.3d at 1277-79 (citing *Heart of Atlanta Motel* as clear demonstration of issue). The Supreme Court, in *Heart of Atlanta Motel*, sustained the constitutionality of the provisions at issue via the Commerce Clause, noting that unlike the earlier case, the Civil Rights Act was clearly based on the Commerce Clause. See *Heart of Atlanta Motel*, Inc. v. United States, 379 U.S. 241, 250-52 (sustaining provision under Commerce Clause, despite similar provision being overturned on Fourteenth Amendment grounds in nineteenth century). For further discussion of the *Heart of Atlanta Motel* decision, see supra notes 94-96 and accompanying text.

156. See *Moghadam*, 175 F.3d at 1277 (citing *Trade-Mark Cases* as case relevant to instant facts). For discussion of the *Trade-Mark Cases* decision, see supra notes 98-102 and accompanying text.

157. See *Moghadam*, 175 F.3d 1269, 1278 (reasoning that *Trade-Mark Cases* stand for proposition that, even given conflicting constitutional clauses, legislation may still be sustained).

158. See id. at 1278 (noting that Commerce Clause interpretation has changed since *Trade-Mark Cases* decision).

159. See *Authors League of Am.*, Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986) (holding statute constitutional under Commerce Clause, despite statute's nature). For a discussion of the *Authors League* decision, see supra notes 103-05 and accompanying text.

160. See *Authors League*, 790 F.2d at 224 (noting that plaintiff failed to realize Copyright Clause was not only constitutional source).
position that the Commerce Clause may be used to sustain a stat-
ute’s constitutionality despite other clauses’ conflicts.161

The Moghadam court also pointed to Railway Labor Executives’
Ass’n where the court declined to follow this line of reasoning.162
Railway refused to sustain a statute conflicting with the Bankruptcy
Clause under a clause that did not conflict.163 In resolving the con-
flict between the two lines of cases, the Moghadam court took great
pains in narrowing its holding to the particular facts of the case.164
The court found that the anti-bootlegging statute met the Lopez
Commerce Clause requirements.165 Additionally, the court also
found circumstances where, as noted in Railway, the Commerce
Clause cannot be used to support a statute that would fail constitu-
tional muster under a different clause.166 Given such findings, the
Moghadam court warned it would not sustain a statute under the
Commerce Clause if there were “fundamental inconsistencies” be-
tween the Commerce Clause use and the Copyright Clause
limitation.167

The Moghadam court held that the Copyright Clause does not
forbid Congress from granting “copyright-like” protection under
other clauses, such as the Commerce Clause.168 Unlike the Railway
case, the court concluded that imposing such protections raises no
conflicts between the two clauses.169 Moreover, granting quasi-cop-

161. See Moghadam, 175 F.3d at 1279 (“The Authors League analysis suggests
that the Commerce Clause may be used to accomplish that which the Copyright
Clause may not allow.”).

162. See id. (noting “tension” between analysis of Heart of Atlanta Motel, Trade-
Mark Cases and Authors League and the analysis of Railway Labor Executives).

163. For further discussion of Railway Labor Executives’ Ass’n, see supra notes
107-11 and accompanying text.

164. See Moghadam, 175 F.3d at 1280 (declaring that “in resolving this ten-
sion . . . we undertake a circumscribed analysis, deciding only what is necessary to
decide this case . . . ”).

165. See id. (noting that holding relied upon conclusion that anti-bootlegging
statute could be constitutionally justified by Commerce Clause). For a discussion
of the Lopez analysis of the Commerce Clause, see supra notes 141-50 and accompa-
nying text.

166. See Moghadam, 175 F.3d at 1280 (asserting that underlying holding is not-
ion that Commerce Clause may be used to support statute otherwise forbidden
under Copyright Clause).

167. See id. at 1280 n.12 (assuming that if statute’s use of Commerce Clause
fundamentally conflicted with Copyright Clause restriction, Commerce Clause
could not be used to bypass that restriction).

168. See id. at 1280 (noting that while live performances lack fixation, they
certainly are entitled to some quasi-copyright protection).

169. See id. at 1281 (“Common sense does not indicate that extending copy-
right-like protection to a live performance [under the Commerce Clause] is funda-
mentally inconsistent with the Copyright Clause.”).
Right protection for “unfixed” live musical performances was in the spirit of the Copyright Clause, even though it lacked the “fixation” requirement. The court noted that under the Sound Recording Act of 1971 and its immediate progeny, musical artists could impose copyright protection simply by simultaneously recording any live performances. Given that, the court concluded that the statute did not violate copyright precepts but merely extended protection, albeit via another clause.

V. CRITICAL ANALYSIS

The Moghadam court, faced with an issue of first impression, orchestrated a sound analysis in determining the anti-bootlegging statute’s constitutionality. The court sustained the statute under the Commerce Clause, declining to consider whether the constitutionality of the statute under the Copyright Clause also rang true. Additionally, with a close eye on the nation’s commerce pulse, the court avoided any sour notes by reconciling two conflicting lines of Supreme Court cases. In some respects, the court was almost forced to conduct itself the way it did.

The court avoided any conclusive Copyright Clause interpretation of the anti-bootlegging statute in its first prong of analysis. Despite citing a plethora of authority questioning the statute’s con-

170. See id. at 1280 (“[E]xtending such protection actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause.”).

171. See United States v. Moghadam, 175 F.3d 1269, 1281 (1999) (noting that performer under prior law could protect live musical performances, bypassing Copyright Clause’s fixation requirement by simultaneously recording performance).

172. See id. at 1282 (stating that anti-bootlegging statute satisfies Commerce Clause requirements, avoiding affirmative ruling that statute lacked fundamental Copyright Clause requirements).

173. See id. at 1272 (noting “what little legislative history exists tends to suggest that Congress viewed the [statute] as enacted pursuant to its Copyright Clause authority”) (citing 140 CONG. REC. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes)). For a discussion of the court’s Commerce Clause analysis, see supra notes 146-50 and accompanying text.

174. For further discussion of the court’s recognition of bootlegging’s economic impact and distinguishing of cases discussing use of one constitutional clause over another to sustain a statute, see supra notes 152-72 and accompanying text.

175. For a discussion of alternative holdings from the Moghadam decision, see infra notes 211-13 and accompanying text.

176. See Moghadam, 175 F.3d at 1274 (assuming, without affirmatively ruling, that Copyright Clause’s fixation requirement precluded constitutional support of federal anti-bootlegging statute). For a discussion of the reasons behind the court’s assumption, see supra note 139 and accompanying text.
stitutional support, the court declined to rule that the Copyright Clause's fixation requirement precluded support.177 If the court upheld the statute under the Copyright Clause, two centuries of judicial and legislative history maintaining fixation as an inherent copyright element would be questioned.178

The Moghadam court's second prong of analysis, holding the statute constitutional under the Commerce Clause, also withstands scrutiny, though not without criticism.179 This court was the first to sustain, under the Commerce Clause, copyright legislation exceeding the Copyright Clause's authority.180 The court had difficulty, however, locating rational basis elements that would assist in determining substantial economic impact upon commerce.181

The court asserted that no legislative findings discussing the impact of live performance bootlegs upon interstate commerce exist.182 Such findings, however, do exist with respect to statutory drafts of the anti-bootlegging statute.183 During a debate on the

177. See id. at 1274 (citing scholarly comments discounting notion that Copyright Clause could grant constitutional support for federal anti-bootlegging statute); cf. id. at 1281 (suggesting “fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power”).

178. For an historical overview of the fixation requirement, see supra notes 64-69 and accompanying text. But see CBS v. DeCosta, 377 F.2d 315 (1st Cir. 1967) (holding that “in view of the federal policy of encouraging intellectual creation by granting a limited monopoly at best, we think it sensible to say that the constitutional clause extends to any concrete, describable manifestation of intellectual creation [thereby excluding a tangible form requirement]”).

179. For a discussion of the Moghadam court's second prong of analysis, see supra notes 140-51 and accompanying text.

180. See 1 Nimmer on Copyright, supra note 31, § 1.09, at 1-66.39 (asserting that while several cases have mentioned possibility in dicta, no firm authority has emerged); see also Nimmer, supra note 35, at 1410 (commenting “notwithstanding that the anti-bootlegging provision unquestionably violates Copyright Clause authority, let us assume . . . it falls within Commerce Clause authority.”).

181. For a discussion of the apparent lack of substantive rational basis elements, see supra notes 147-50 and accompanying text. Rational basis elements would support a finding of constitutionality under the Commerce Clause. See id.

182. See Moghadam, 175 F.3d at 1275 (“[T]here are no legislative findings in the record regarding the effect of bootlegging of live musical performances on interstate or foreign commerce.”).

183. See Brown, supra note 4, at 47-55 (discussing proposed legislation that paralleled language of finalized anti-bootlegging statute).

In early August, Congress introduced House Bill 4894 and Senate Bill 2368. See id. at 47 (citing H.R. 4894, 103d Cong. § 102 (1994); S. 2368, 103d Cong. §§ 8-10 (1994)). The title of House Bill 4894 was the “Federal Anti-Bootleg Act of 1994” and contained language imposing civil liability upon those who trafficked in bootleg sound recordings. See id. at 48 (citing H.R. 4894, 103d Cong. § 102 (1994)). The bill imposed liability upon those who copied, transmitted or distributed an unauthorized fixation of a live performance. See id. Interestingly, the bill imposed liability upon unauthorized copying of music videos of live performances. See id. Unlike the House Bill, the Senate Bill excluded liability from music videos.
bills held before a joint session of Congress, the RIAA asserted that the proposed legislation, imposing criminal penalties for bootlegging, would help "curtail an illicit trade currently generating about one billion dollars annually."\textsuperscript{184}

Before Congress voted upon the statutory drafts, White House-approved legislation, similar in language to the proposed drafts, was introduced in Congress on September 27, 1994.\textsuperscript{185} The House Ways and Means Committee approved the White House version on September 28, 1994, and the Senate Finance Committee approved the same on September 29, 1994.\textsuperscript{186} Congress considered the legislation on November 29, 1994 after adjourning on October 7, 1994.\textsuperscript{187} The House passed the legislation that same day and the Senate followed in early December, leaving scant room for any debate or legislative findings.\textsuperscript{188} While the enacted statute contained of live performances but added criminal penalties. See id. at 49 (citing S. 2368, 103d Cong. § 3(a) (1994) (formulating draft version of criminal penalties eventually codified with similar language as 18 U.S.C. § 2319A)). The remaining statutory language of the civil portion of the Senate Bill was similar to the House Bill. See Brown, supra note 4, at 49.


\textsuperscript{185} See Brown, supra note 4, at 51-52 (noting introduction of House Bill 5110 and Senate Bill 2467, both bills containing language similar to Senate Bill 2368). House Bill 5110 included protection of music videos of live performances and kept relatively the same language as the earlier House draft. See id. (citing H.R. 5110, 103d Cong. § 510 (1994)).

\textsuperscript{186} See Brown, supra note 4, at 54 (stating dates proposed legislation passed in their respective committees). Perhaps Congress felt no need to debate given that a joint discussion on similar legislation was held a month earlier. For a discussion of this joint session of Congress, see supra note 184 and accompanying text.

\textsuperscript{187} See Brown, supra note 4, at 54 (commenting that procedural option was exercised delaying for forty-five days House's vote to consider proposed legislation which was originally scheduled for October 5, 1994).

\textsuperscript{188} See 3 NIMMER ON COPYRIGHT, supra note 31, § 8E.02, at 8E-6 to -7, nn.26 - 30 (noting scant legislative support justifying passage of statute); Intellectual Property: GATT Bill Brings Major Reforms to Domestic Intellectual Property Law, PAT. TRADEMARK & COPYRIGHT J. (BNA) 7 (Dec. 5, 1994) (stating that House passed House Bill 5110 on November 29, 1994 and Senate passed Senate Bill 2467 on December 1, 1994. "When passed in December by a largely lame duck Congress, not one comma was altered." Nimmer, supra note 35, at 1408 (commenting on lack of changes to legislation after committee approval) (footnote omitted). The Senate Report discusses the copyright provision for two pages while the House Report does the same but only in a single paragraph. See Sobel, supra note 31, at 10. When the White House presented its analysis of the proposed legislation, less than twelve pages discussed copyrights. See id. President Clinton soon thereafter signed House Bill 5110 into law. See Brown, supra note 4, at 54.
little legislative history given the time limits, the court declined to examine prior drafts.189

By that same token, no jurisdictional element is evident in the statutory language.190 Even lacking those elements, a statute does not necessarily fail Commerce Clause constitutional scrutiny.191 This finding is not without its critics, as any copyright legislation could theoretically find Commerce Clause support, eviscerating the Copyright Clause's intent.192 Additionally, while the court noted that Congress enacted this legislation under the Copyright Clause's

189. For further discussion of the statutory draft of the legislation, see supra notes 183-85 and accompanying text. Moghadam’s holding suggests that even in cases concerning fast-tracked legislation, the court may determine the congres-
sional intent on its own, despite a complete lack of legislative history.

190. See Moghadam, 175 F.3d at 1275 (“Section 2319A also contains no jurisdic-
tional element as is commonly found in criminal statutes passed under author-
ity of the Commerce Clause.”). For example, a jurisdictional element would be statutory language requiring that the bootleg copies traveled in interstate com-
merce. See id. (discussing various examples where jurisdictional element sustained statute’s constitutionality). The statutory drafts, discussed supra, also lacked a jurisdic-
tional element indicative of Commerce Clause reliance. See Brown, supra note 4 (citing H.R. 4894, 103d Cong. § 102 (1994); S. 2368, 103d Cong. §§ 8-10 (1994)). This is not surprising given that the final statutory language differs little from the proposed legislation. See Brown, supra note 4, at 52 (noting similarities between House Bill 5110 and House Bill 4894).

191. See Moghadam, 175 F.3d at 1275-76 (noting that lack of either jurisdic-
tional or legislative factors does not automatically negate statute). For a discussion of how the Moghadam court examined the federal anti-bootlegging statute without substantive legislative history or any jurisdictional element, see supra notes 147-50 and accompanying text.

192. See 3 NIMMER ON COPYRIGHT, supra note 31, § 8.01 [C], at 8E-8 (com-
menting that if Congress may lawfully pass anti-bootlegging statute, “is there any amend-
ment to copyright law it cannot make under the commerce banner?”); TRIBE, supra note 79, § 5-4 (“The power to regulate 'commerce' necessarily encompasses power, for whatever purpose it might be exercised, over all activities that are themselves part of the production or distribution of wealth in the broadest economic sense of that term, but not power over all activities, period.”) (emphasis in original); Nim-
mer, supra note 35, at 1409, 1411 (questioning use of Commerce Clause to sustain copyright legislation, commenting that “one seeks in vain for evidence that anyone in Washington even considered the constitutional basis for [this statute]”). “[C]opyright has been transformed into an instrumentality towards [the world of trade] . . . . The orchestrator of that instrumentality . . . is the law of trade . . . [C]opyright now serves as an adjunct of trade . . . .” Nimmer, supra note 35, at 1412 (footnotes omitted); cf. Goodwin, supra note 4, at 386 (noting need for new standard for contributory copyright infringement actions if anti-bootlegging stat-
ute was not passed under Copyright Clause). But see Sobel, supra note 31, at 11-12 (praising Congress' willingness to implement copyright protection for all sorts of unfixed works using the Commerce Clause). “[R]eliance on the Commerce Clause to amend the Copyright Act opens the door to all types of additional amendments . . . thought to be beyond the reach of copyright law.” Id. at 12 (not-
ing that lectures, dramatic performances, improvisational comedy and works in-
volving effort but not traditional requirements of “creativity” such as databases and alphabetized telephone directories may be granted copyright protection under Commerce Clause).
purview, the court found another constitutional basis supporting the statute.\textsuperscript{193} While this finding is not without precedent, it raises the specter that any copyright legislation lacking similar elements could find Commerce Clause redemption.\textsuperscript{194}

A similar apparition haunts the court's conclusion that Congress could pass a statute using one constitutional clause to avoid another clause's limitations.\textsuperscript{195} The court was wary that unfettered approval of the statute would allow Congress to pass a statute, falling within the scope of one clause, under another, avoiding any potential constitutional limitations of the first clause.\textsuperscript{196} Given that fear, however, the court adroitly avoided any pitfalls in determining if and when Congress may pass a statute conflicting with one constitutional clause under another.\textsuperscript{197} In holding that the Commerce Clause may be used in limited circumstances to pass a statute violating the Copyright Clause precepts, the court distinguished a case suggesting the opposite.\textsuperscript{198}

The court distinguished the holding from \textit{Railway Labor Executives' Ass'n} that the Commerce Clause could not sustain a statute undermining the Bankruptcy Clause's authority.\textsuperscript{199} Unlike the Bankruptcy Clause barring non-uniform laws, the \textit{Moghadam} court

\textsuperscript{193. See \textit{Moghadam}, 175 F.3d at 1275 (asserting that Congress thought it was acting under Copyright Clause); \textit{Nimmer}, \textit{supra} note 35, at 1409 (observing that all prior enactments under Title 17 derive constitutional authority from Copyright Clause); \textit{cf. Deas}, \textit{supra} note 3, at 570 (noting questionable reliance by Congress on Copyright Clause power).}

\textsuperscript{194. See \textit{Appeals Court Backs Anti-Bootlegging Statute}, \textit{supra} note 139, at 3 (quoting David A. Nickerson, \textit{Moghadam}'s counsel, "[T]he appeals court ducked what we clearly raised [in court]: If it's okay to assume that you can make copyright kind of rights under the commerce clause, why do you need the copyright clause at all?"). For further discussion of the effect of the \textit{Moghadam} holding, see infra notes 215-17 and accompanying text. The \textit{Moghadam} court noted in passing this possibility, commenting that "Congress would not be able to circumvent the originality requirement inherent in the term "Writings" in the Copyright Clause by passing a statute under the Commerce Clause which extended copyright-like protection to unoriginal works." \textit{Moghadam}, 175 F.3d at 1279 (citing Paul J. Heald, \textit{The Vices of Originality}, 1991 SUP. CT. REV. 143, 168-75 (1992)); \textit{see also 1 NIMMER ON COPYRIGHT, supra} note 31, § 1.09, at 1-66.41 (noting protection of unpublished works would probably be unavailable under Commerce Clause "copyright" statute).}

\textsuperscript{195. For an examination of the court's choice of the Commerce Clause over the Copyright Clause, see infra notes 199-207 and accompanying text.}

\textsuperscript{196. See \textit{Moghadam}, 175 F.3d at 1281 n.14, 1282 (taking great care in limiting its holding to facts and reiterating its decision to not constitutionally invalidate anti-bootlegging statute under Copyright Clause).}

\textsuperscript{197. For an examination of \textit{Railway Labor Executives' Ass'n}, see \textit{supra} notes 162-67 and accompanying text.}

\textsuperscript{198. For discussion of the court's distinguishing of the \textit{Railway Labor Executives' Ass'n} decision, see \textit{supra} notes 168-72 and accompanying text.}

\textsuperscript{199. For discussion of \textit{Railroad Labor Executives' Ass'n}, see \textit{supra} notes 162-67 and accompanying text.}
noted that the Copyright Clause does not restrict copyright legislation from passage under the Commerce Clause. The court's valid recognition of this both avoided constitutional conflict with the Copyright Clause and protected the music industry from theft.

The court’s analysis, however, relied on an assumption, not a firm ruling, that the anti-bootlegging statute violates the Copyright Clause. In Authors League, the court failed to apply any Copyright Clause analysis, sustaining the statute under the Commerce Clause. The Moghadam court applied both a Copyright and Commerce Clause analysis in finding Commerce Clause support. Both the Authors League and Moghadam courts heard the argument that the statute lacked Copyright Clause constitutional support. It is unclear why the Moghadam court did not solely apply a Commerce Clause analysis similar to Authors League. Given the liberal interpretation of the Commerce Clause, it appears that copyright legislation would almost always find constitutional support.

200. See Moghadam, 175 F.3d at 1280 (holding that Copyright Clause does not preclude Congress from granting quasi-copyright protection via other constitutional clauses to "Writing[s]") lacking fixation element). For a general discussion of the requirements of the Copyright Clause, see supra notes 59-73. The court in Moghadam asserted that "Writing" is not a limiting term, and it in no way limits copyright legislation solely to the Copyright Clause. See Moghadam, 175 F.3d at 1280. In just two sentences, the court allowed other clauses to sustain constitutionally copyright legislation. For a discussion of the dangers of substituting the Commerce Clause in place of the Copyright Clause for copyright legislation, see supra notes 191-94 and accompanying text. The court rationalized this assertion, noting that copyright legislation passed under other clauses furthers the core purpose of the Copyright Clause. See Moghadam, 175 F.3d at 1280.

201. For a discussion questioning the need to apply the Copyright Clause analysis when the Commerce Clause can be used, see infra notes 204-07 and accompanying text.

202. For a discussion of cases that balanced the commerce power against copyright protection, see supra notes 129-72 and accompanying text.

203. For a discussion of the Authors League holding, see supra notes 103-05 and accompanying text.

204. For a further explanation of the cases applied in Moghadam, see supra notes 126-77 and accompanying text.

205. See Authors League, 790 F.2d at 224. Plaintiffs argued that the statute was constitutionally invalid as it was "tenuously related to the goal[s]" of the Copyright Clause. See id. The court declined to respond directly to this argument, instead noting that the Commerce Clause justified this statute, regardless of the statute's placement in the copyrights section of the United States Code. See id. For a discussion of the Moghadam statute's lack of a fundamental copyright element, see supra notes 147-50 and accompanying text.

206. For a discussion of the Authors League holding, see supra notes 103-05 and accompanying text.

207. See Moghadam, 175 F.3d 1269, 1280 n.12 (noting that "the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the particular use of the Commerce Clause (e.g., the anti-bootlegging statute) were funda-
VI. IMPACT

Despite the noted constitutional flaws of the anti-bootlegging statute and the problems inherent with passing copyright statutes under the Commerce Clause, the court ruled properly.\(^{208}\) Perhaps the court was aware of the negative economic impact that bootleg recordings have on the music industry.\(^{209}\) There were several possible outcomes of this case.\(^{210}\) If the court had affirmatively ruled the anti-bootlegging statute constitutional under the Copyright Clause, that would have violated two hundred years of legal tradition requiring fixation.\(^{211}\) The music industry would be left to rely on state statutory protection against bootlegs if the court ruled the statute unconstitutional under the Copyright Clause.\(^{212}\) If the court applied only the Commerce Clause analysis, but found lacking a substantial effect upon commerce, the music industry would remain without federal protection.\(^{213}\) The court essentially was almost waylaid into following this path, balancing public policy against the requirements of law. The Moghadam court, nevertheless, did not affirmatively settle the issue raised by both parties and scholarly commentators alike, namely the anti-bootlegging statute's constitutionality under the Copyright Clause.\(^{214}\)

The Moghadam court's decision, despite those issues, is sound, lightly stepping through a constitutional minefield in choosing to grant live musical performances quasi-copyright protection.\(^{215}\) The court, caught between maintaining the public policy need of mentally inconsistent with the particular limitation in the Copyright Clause (e.g., the fixation requirement)\(^{*}\). If the court found the anti-bootlegging statute lacked the limited time requirement of the Copyright Clause, the Commerce Clause could not pass the statute. See id. at 1281 n.14. For a discussion of the court's handling of the Commerce Clause, see supra notes 192-94 and accompanying text.

208. For a discussion of the difficult choice the Moghadam court faced, see supra notes 124-25 and accompanying text.

209. For a discussion of bootlegs' detrimental impact upon the music industry, see supra note 6 and accompanying text.

210. For a discussion of the impact of alternative holdings such as upholding the statute under the Copyright Clause, see infra notes 211-13 and accompanying text.

211. For a discussion of the inherent requirement of fixation in copyright laws, see supra notes 65-73 and accompanying text.

212. For a list of states that classify bootlegging as a felony, see supra note 29.

213. For a discussion of the negative economic impact of bootlegged recordings upon music industry, see supra note 6 and accompanying text.

214. For a discussion of the failure by the court to settle the statute's constitutionality under the Copyright Clause, see supra notes 129-39 and accompanying text.

215. For an examination of the protection granted under the Commerce Clause, see supra notes 146-50 and accompanying text.
criminalizing bootlegging and judicial case law holding fixation a copyright clause elemental requirement, composed a decision that fulfilled public need without directly conflicting with two centuries of constitutional law.\textsuperscript{216} The music industry received what it requested: copyright protection for live musical performances. The judicial system also received what it wanted: a decision not conflicting with two centuries of case law. The court placed an analytical facade over the anti-bootlegging statute's constitutionality under the Copyright Clause, not affirmatively resolving all the raised constitutional issues.\textsuperscript{217} Instead, the Moghadam court declined to rule directly via a Copyright Clause analysis upon the anti-bootlegging statute's constitutionality.\textsuperscript{218} As the curtain rises on the twenty-first century and original works of intellectual labor are composed in non-tangible media, fundamental alterations must be orchestrated for continued Copyright Clause effectiveness. The Eleventh Circuit cleverly composed a decision that avoided tortuous legal brambles to a finale amenable to both sides. The next court to decide a similar issue may be unable to, and given the appropriate facts, may be forced to re-interpret the Copyright Clause for the twenty-first century.

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\textsuperscript{216} For further discussion of the impact of an unconstitutional ruling, see \textit{supra} notes 211-13 and accompanying text.
\textsuperscript{217} For further discussion of the analytical facade by the Moghadam court, see \textit{supra} notes 182-94 and accompanying text.
\textsuperscript{218} For a discussion of the Moghadam court's analysis, see \textit{supra} notes 126-39 and accompanying text.