

# THE CONSTITUTIONALITY OF WIPO'S BROADCASTING TREATY: THE ORIGINALITY AND LIMITED TIMES REQUIREMENTS OF THE COPYRIGHT CLAUSE

ADAM R. TAROSKY<sup>1</sup>

## ABSTRACT

*Because the proposed WIPO Broadcasting Treaty extends perpetual copyright-like protections to unoriginal information, its implementation would violate at least two fundamental limitations on Congress's Copyright Clause power: the originality and "limited times" requirements. But Congress has a trump card—the Commerce Clause. This iBrief argues that to give proper effect to the limitations of the Copyright Clause, Congress should not be allowed to implement copyright-like legislation under the less restrictive Commerce Clause.*

## INTRODUCTION

¶1 “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”<sup>2</sup>

¶2 Since its first meeting in November 1998, the World Intellectual Property Organization's Standing Committee on Copyright Related Rights (“SCCR”) has been considering a new form of copyright-like protection for broadcasting organizations.<sup>3</sup> The SCCR has developed a bundle of “broadcasting rights” now consolidated in a second draft Treaty on the Protection of Broadcasting Organizations (“Broadcasting Treaty”).<sup>4</sup> Among

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<sup>1</sup> J.D./LL.M. candidate, 2007, Duke University School of Law; B.A. in Political Science and Broadcast Journalism, 2004, The Pennsylvania State University Schreyer Honors College.

<sup>2</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

<sup>3</sup> World Intellectual Property Organization [WIPO], Standing Committee on Copyright and Related Rights, Consolidated Text for a Treaty on the Protection of Broadcasting Organizations, Introductory Notes 1, SCCR/11/3, (Feb. 29, 2004), available at [http://www.wipo.int/documents/en/meetings/2004/sccr/pdf/sccr\\_11\\_3.pdf](http://www.wipo.int/documents/en/meetings/2004/sccr/pdf/sccr_11_3.pdf) [hereinafter SCCR/11/3].

<sup>4</sup> WIPO, Standing Committee on Copyright Related Rights, Second Revised Consolidated Text for a Treaty on the Protection of Broadcasting Organizations, SCCR/12/2 (Rev. 2), (May 2, 2005), available at

the exclusive rights secured to broadcasting organizations by the proposed Treaty are the rights to authorize retransmission of a broadcast,<sup>5</sup> transmission of a broadcast to the public,<sup>6</sup> fixation of a broadcast,<sup>7</sup> reproduction of a broadcast,<sup>8</sup> and distribution and dissemination of a broadcast.<sup>9</sup> Broadcasting organizations will enjoy these exclusive rights for a period of “at least” fifty years following their broadcasts.<sup>10</sup>

¶3 As currently written, the Broadcasting Treaty would likely be unconstitutional as exceeding Congress’s Article I, Section 8 powers if implemented into U.S. law. First, the Broadcasting Treaty would grant copyright-like protections to unoriginal broadcast “signals” in violation of the originality requirement of the Copyright Clause.<sup>11</sup> Second, by extending what can be construed as perpetual copyright-like “broadcasting rights,” the Treaty violates the “limited times” requirement of the Copyright Clause.<sup>12</sup> While the Treaty could theoretically be implemented under the less restrictive Commerce Clause, this iBrief argues that Congress should not be able to circumvent express limitations of the Copyright Clause by invoking its commerce authority.

¶4 The iBrief begins by examining congressional power to enact “copyright-like” legislation under the Copyright Clause. It then considers congressional authority to enact this legislation under the Commerce Clause. Finally, it concludes with a discussion of the relationship between the two clauses and the implications of the relationship for the constitutionality of the Broadcasting Treaty.

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[http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_12/sccr\\_12\\_2\\_rev\\_2.doc](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_12/sccr_12_2_rev_2.doc)

[hereinafter SCCR/12/2 (Rev. 2)].

<sup>5</sup> *Id.* art. 6.

<sup>6</sup> *Id.* art. 7.

<sup>7</sup> *Id.* art. 8.

<sup>8</sup> *Id.* art. 9.

<sup>9</sup> *Id.* arts. 10–12; *cf.* United States Copyright Act, 17 U.S.C. §§ 106–106A (2000).

<sup>10</sup> SCCR/12/2 (Rev. 2), *supra* note 4, art. 15.

<sup>11</sup> SCCR/12/2 (Rev. 2), *supra* note 4, art. 3.

<sup>12</sup> *Id.* art. 15; U.S. CONST. art. I, § 8, cl. 8. This iBrief focuses exclusively on the originality and “limited times” problems with the Broadcasting Treaty.

However, there are other potential constitutional infirmities in the Treaty. For a good summary of other potential problems, see Top 10 Reasons to Reject the WIPO Committee Chairman’s Consolidated Text for a Broadcasting Treaty, <http://www.ipjustice.org/WIPO/top10reasons.shtml> (last visited Mar. 27, 2006) [hereinafter Top 10], and James Boyle, “James Boyle’s Predictions in Technology Law and Policy for 2006,” DUKE L. & TECH. REV. iBlawg, <http://www.law.duke.edu/journals/dltr/iblawg/?p=16> (Feb. 15, 2006).

## I. THE BROADCASTING TREATY AND THE COPYRIGHT CLAUSE

¶5 The Copyright Clause of the United States Constitution is “both a grant of power *and a limitation*.”<sup>13</sup> When forming the Clause, the Framers struck a delicate balance between unrestricted competition and creation incentivised through state-granted monopolies.<sup>14</sup> To protect this balance, the Clause assures that copyrights cover only original material and last for finite periods of time.<sup>15</sup>

*A. The originality requirement of the Copyright Clause is a fundamental limitation on Congress’s power to legislate under the Clause.*

¶6 The Copyright Clause grants to Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”<sup>16</sup> The U.S. Supreme Court has interpreted the words “authors” and “writings” in the clause to require a degree of originality before copyright protection may attach.<sup>17</sup> In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court rejected the “sweat of the brow” theory that copyright protection was justified by effort alone<sup>18</sup> and held, “Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”<sup>19</sup>

¶7 While the Court made the originality hurdle a low one—requiring only independent creation by the author and some minimal level of creativity<sup>20</sup>—it nonetheless considered the requirement constitutionally mandated.<sup>21</sup> Thus, copyright protection cannot be extended to cover works lacking at least a modicum of originality.<sup>22</sup>

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<sup>13</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (emphasis added)).

<sup>14</sup> *See* *Graham v. John Deere*, 383 U.S. 1, 5 (1966).

<sup>15</sup> James Boyle, “Constitutional Circumvention,” FT.COM, <http://www.ft.com/cms/s/fa07af4a-fadc-11da-b4d0-0000779e2340.html> (June 13, 2006).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>17</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

<sup>18</sup> *Id.* at 359–60.

<sup>19</sup> *Id.* at 348.

<sup>20</sup> *Id.* at 345.

<sup>21</sup> *Id.* at 346.

<sup>22</sup> *Id.*

*B. The “limited times” provision of the Copyright Clause is a fundamental limitation on Congress’s power to legislate under the Clause.*

¶8 In addition to requiring originality, the Copyright Clause mandates that copyrights be granted only for “limited time[s].”<sup>23</sup> The “limited times” provision was the subject of a recent Supreme Court decision on the constitutionality of the federal Copyright Term Extension Act (“CTEA”).<sup>24</sup> In *Eldred v. Ashcroft*, the petitioners (whose businesses relied on formerly copyrighted works that had passed into the public domain) argued that the CTEA created perpetual copyright protection by retrospectively extending the term of existing copyrights from the life of the author plus fifty years to the life of the author plus seventy years.<sup>25</sup> If Congress could extend the duration of existing copyrights, the petitioners argued, Congress could effectively create a perpetual right through successive term extensions.<sup>26</sup> While the Court held that the CTEA should not be construed as creating perpetual copyrights because of a long history of similar copyright extensions,<sup>27</sup> it nonetheless recognized that the “limited times” language of the Copyright Clause imposed an express limitation on Congress’s ability to grant copyrights.<sup>28</sup>

¶9 Since *Eldred*, several U.S. courts have likewise viewed the “limited times” portion of the Copyright Clause as a limitation on congressional power.<sup>29</sup> In particular, a line of cases has developed interpreting the constitutionality of federal “anti-bootlegging” statutes passed by Congress to implement provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).<sup>30</sup> The statutes impose both civil<sup>31</sup> and criminal<sup>32</sup> penalties on anyone who makes unauthorized recordings of live musical performances, or who transmits, distributes, sells, rents, or traffics in such recordings. Crucially, these protections have no

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<sup>23</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>24</sup> 17 U.S.C. § 302 (2000); *Eldred*, 537 U.S. at 192–93.

<sup>25</sup> *Eldred*, 537 U.S. at 193.

<sup>26</sup> *Id.* at 208.

<sup>27</sup> *Id.* at 209–10.

<sup>28</sup> *Id.*

<sup>29</sup> See *United States v. Moghadam*, 175 F.3d 1269, 1274 n.9 (11th Cir. 1999); *Kiss Catalog v. Passport Int’l Prods. (Kiss II)*, 450 F. Supp. 2d 1169, 1176 (C.D. Cal. 2005); *United States v. Martignon*, 346 F. Supp. 2d 413, 422–23 (S.D.N.Y. 2004); *Kiss Catalog v. Passport Int’l Prods. (Kiss I)*, 350 F. Supp. 2d 823, 832–33 (C.D. Cal. 2004).

<sup>30</sup> See *Moghadam*, 175 F.3d at 1272 (explaining history of anti-bootlegging laws); see also 18 U.S.C. § 2319A (implementing TRIPS).

<sup>31</sup> 17 U.S.C. § 1101 (2000).

<sup>32</sup> 18 U.S.C. § 2319A (2000).

time limit and apparently last into perpetuity.<sup>33</sup> Consequently, critics have challenged the anti-bootlegging statutes as running afoul of the Copyright Clause's "limited times" requirement.<sup>34</sup>

¶10 In 1999, the Eleventh Circuit first recognized that "the anti-bootlegging statute may be faced with . . . constitutional problem[s] under the Copyright Clause," because "the protection afforded to live performance . . . contains no express time limitation and would arguably persist indefinitely."<sup>35</sup> While the court did not decide the Copyright Clause issue because the argument was raised only in a footnote, two subsequent district court decisions definitively held the anti-bootlegging statutes unconstitutional as violating the "limited times" requirement.<sup>36</sup>

¶11 First, in *United States v. Martignon*, the District Court for the Southern District of New York held, "It is undeniable that the anti-bootlegging statute grants seemingly perpetual protection to live musical performances, and therefore would run afoul of the Copyright Clause."<sup>37</sup> Shortly thereafter, in *Kiss Catalog v. Passport International Productions* ("*Kiss I*"), the District Court for the Central District of California held that the civil version of the anti-bootlegging statute "creates perpetual copyright-like protection in violation of the 'for limited times' restriction of the Copyright Clause."<sup>38</sup> Taken together, these cases support the conclusion that laws granting perpetual copyright-like protections cannot be sustained under the Copyright Clause.

*C. The Broadcasting Treaty unconstitutionally creates copyright-like rights over unoriginal information that can last into perpetuity.*

¶12 Like the rights granted by the anti-bootlegging statutes, the rights granted under the current draft of the Broadcasting Treaty are copyright-like. Closely mirroring the substantive protections in the Copyright Act, the rights in the Broadcasting Treaty include the exclusive rights of fixation (art. 8), transmission (arts. 6, 11), distribution (arts. 7, 10, 12), and reproduction (art. 9) of broadcasts.<sup>39</sup> In fact, the WIPO committee

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<sup>33</sup> *Moghadam*, 175 F. 3d at 1274 n. 9; 18 U.S.C. § 2319A.

<sup>34</sup> *See, e.g., Moghadam*, 175 F. 3d at 1274 n.9.

<sup>35</sup> *Id.*

<sup>36</sup> *United States v. Martignon*, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004); *Kiss Catalog v. Passport Int'l Prods. (Kiss I)*, 350 F. Supp. 2d 823, 833 (C.D. Cal. 2004).

<sup>37</sup> *Martignon*, 346 F. Supp. 2d at 424.

<sup>38</sup> *Kiss I*, 350 F. Supp. 2d at 833.

<sup>39</sup> SCCR/12/2 (Rev. 2), *supra* note 4. Compare these rights to those reserved to copyright holders in the U.S. Copyright Act, 17 U.S.C. §§ 106–106A (2000), including the exclusive rights of a copyright holder to reproduce, distribute, perform, display and transmit their work.

responsible for drafting the Treaty is tellingly named the “Standing Committee on *Copyright and Related Rights*.”<sup>40</sup> There can be little doubt that the Broadcasting Treaty is meant to confer upon broadcasters a right closely analogous to a copyright. Thus, the natural place to find congressional authority to implement the Treaty is the Copyright Clause. However, for at least two reasons, the Broadcasting Treaty cannot be implemented under this clause.

*1. The broadcasting rights cover unoriginal broadcast signals.*

¶13 First, the Broadcasting Treaty would grant copyright-like protection to unoriginal information in violation of the express mandate of *Feist*.<sup>41</sup> While a number of courts have recognized that some broadcasts are sufficiently original for copyright protection because of the creativity in the selection and arrangement of camera shots,<sup>42</sup> the broadcasting rights do not attach to the broadcast’s content.<sup>43</sup> Instead, they attach only to broadcast “signals.”<sup>44</sup> While this may be too obvious to state, it is hard to imagine what originality could subsist in the creation of electronic “signals.”<sup>45</sup>

¶14 For example, consider the broadcast of “The Little Mermaid,”<sup>46</sup> a work already covered by an existing U.S. copyright held by Disney. A broadcaster, say ABC Family, could get Disney’s permission to broadcast the movie, and in broadcasting it, gain its own additional right over Ariel and her aquatic entourage. ABC’s efforts here would fall short of the “independent creation” and “minimal creativity” tests of *Feist*.<sup>47</sup> ABC did not create Ariel, Sebastian, Ursula, or Prince Eric—Disney did. Moreover, “once published, a work is no longer original.”<sup>48</sup> The only thing ABC can claim to have independently created is a “signal,” which surely does not possess even a minimal degree of creativity. While creating this signal may have required effort, effort alone does not merit protection.<sup>49</sup> And yet, the

<sup>40</sup> SCCR/12/2 (Rev. 2), *supra* note 4, Introduction (emphasis added).

<sup>41</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991); *see also supra* Section I.A.

<sup>42</sup> *E.g.*, *Nat’l Basketball Ass’n v. Motorola*, 105 F.3d 841, 847 (2d Cir. 1997).

<sup>43</sup> SCCR/12/2 (Rev. 2), *supra* note 4, art. 3(0) (“The protection granted under this Treaty extends only to *signals* used for the transmissions by the beneficiaries of the protection of this Treaty, *and not to works and other protected subject matter* carried by such signals.” (emphasis added)).

<sup>44</sup> *Id.*

<sup>45</sup> *See* Top 10, *supra* note 12 (noting the Broadcasting Treaty “grants copyright protection over ‘signals,’ something that is neither creative nor original and outside the scope of copyright protection”).

<sup>46</sup> *THE LITTLE MERMAID* (Walt Disney Pictures 1989).

<sup>47</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>48</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003).

<sup>49</sup> *Feist*, 499 U.S. at 359–60.

Broadcasting Treaty would grant ABC exclusive copyright-like rights over its quite un-extraordinary signal.

¶15 In the case of an already-copyrighted work like “The Little Mermaid,” this additional right does not seem overly troubling in practice. The right would require only one additional step from someone wishing to use ABC’s broadcast of the film.<sup>50</sup> Instead of getting permission from Disney only, as would be required under the current regime, the subsequent user would also need permission from ABC. Yet even if this additional layer of protection might seem insignificant in practice, its constitutional significance is another matter. Granting a copyright-like right over plainly unoriginal information runs directly counter to the Copyright Clause’s originality requirement. Because of this requirement, the Broadcasting Treaty cannot be implemented under the Copyright Clause.

2. *The broadcasting rights can last indefinitely.*

¶16 Second, like the anti-bootlegging rights, the broadcasting rights arguably last into perpetuity. While Article 15 of the Broadcasting Treaty implies that countries will impose a term limit for protection, the provision is inadequate. It reads, “The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcasting took place.”<sup>51</sup> The problem is that the provision is easily circumvented. When a broadcasting organization finds its protections on a certain broadcast are about to expire, it can simply rebroadcast the segment and obtain another fifty years of protection.<sup>52</sup> Such action by broadcasters will effectively lock up the content of the broadcast indefinitely. Indeed, even if it were possible to distinguish between original and rebroadcasts, the difficulty of making the distinction will lead many to err on the side of caution and treat the work as broadcast-right protected.<sup>53</sup>

¶17 It appears the drafting parties recognized this potential loophole as the majority of draft proposals suggested that the term of protection begin when the broadcast took place “for the first time.”<sup>54</sup> The “for the first time”

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<sup>50</sup> Cf. Boyle, *supra* note 12 (noting that the broadcasting rights will add to the already dense “rights thicket” which requires extensive clearance procedures for utilizing copyrighted works).

<sup>51</sup> SCCR/12/2 (Rev. 2), *supra* note 4, art. 15.

<sup>52</sup> See Boyle, *supra* note 12 (noting that broadcasting rights “could be gained again and again over the same work, even one on which the copyright term had lapsed”).

<sup>53</sup> See Boyle, *supra* note 15 (noting that already “[m]any libraries simply refuse to allow screening of movies until the copyright term has expired” even though no one would object because “the legal risk is too great”).

<sup>54</sup> SCCR/11/3, *supra* note 3, Explanatory Comment 15.04.

qualification was removed from the consolidated draft Treaty, however, because the parties agreed the Treaty is meant to apply to broadcast “signals” that “by their nature occur only one time.”<sup>55</sup> Even if this explanation is accepted, it is still incomplete. If the Broadcasting Treaty protects only broadcast signals without regard to the content of the broadcast, a given piece of content (again using the example of “The Little Mermaid”) could be rebroadcast via a different signal and thereby tied up in a new fifty-year term of protection.<sup>56</sup> After all, how can one distinguish between two broadcasts with identical content (Ariel, Sebastian and Eric look exactly the same) but different signals? Potential valid uses of the “expired” original broadcasts will be chilled because of the difficulty in distinguishing between the original and the rebroadcast version. Again, the effect of these deficiencies is to permit broadcasters to lock up content indefinitely.

¶18 Because the Broadcasting Treaty creates an unlimited term of copyright-like protection for unoriginal information, it would likely be unconstitutional if implemented under the Copyright Clause.<sup>57</sup> Thus, the question becomes whether Congress may nonetheless implement the Treaty under another of its Article I powers.

## II. THE BROADCASTING TREATY AND THE COMMERCE CLAUSE

*A. Standing alone, the Commerce Clause seems to provide Congress with the authority to implement the Broadcasting Treaty.*

¶19 After the Copyright Clause, the most likely place for finding congressional authority to implement the Broadcasting Treaty is under the Commerce Clause.<sup>58</sup> Copyrights are, after all, limited monopolies meant to incentivize creation—to “promote the progress” of the useful arts by securing their value in commerce.<sup>59</sup> And indeed, the Supreme Court has construed Congress’s commerce power broadly to include the ability to regulate the channels and instrumentalities of interstate commerce as well as intrastate activities substantially affecting interstate commerce.<sup>60</sup>

¶20 A plainly “interstate” law, the Broadcasting Treaty is meant to apply “across borders.”<sup>61</sup> It seeks to protect “authors, performers and producers” from having the legitimate market for their works diminished by

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<sup>55</sup> *Id.*

<sup>56</sup> Boyle, *supra* note 12.

<sup>57</sup> U.S. CONST. art. I, § 8, cl. 8; *infra* Section II.A.

<sup>58</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>59</sup> *Id.* cl. 8.

<sup>60</sup> See *United States v. Lopez*, 514 U.S. 549, 558 (1995).

<sup>61</sup> SCCR/12/2 (Rev. 2), *supra* note 4, Preamble.

piracy.<sup>62</sup> This concern about market harms clearly suggests the Treaty's intended impact on interstate and international commerce. Indeed, the difficult question is not whether the Commerce Clause, standing alone, gives Congress the power to implement the Broadcasting Treaty; it does.<sup>63</sup> The difficult question is whether, in light of the express originality and "limited times" requirements of the Copyright Clause,<sup>64</sup> Congress may nevertheless enact the Treaty under the less restrictive Commerce Clause.

*B. Considered in context, the Commerce Clause cannot permit Congress to implement perpetual copyright-like protection for unoriginal information.*

¶21 The question of whether Congress may use the Commerce Clause to implement legislation that would be unconstitutional under the Copyright Clause has been most debated in the context of the anti-bootlegging statutes. Because the anti-bootlegging rights are similar to the broadcasting rights, these cases are instructive in the present analysis of the Broadcasting Treaty.

1. *United States v. Moghadam.*<sup>65</sup>

¶22 The first court to consider whether the Copyright Clause imposes affirmative limits on other constitutional powers was the Eleventh Circuit in *United States v. Moghadam*.<sup>66</sup> The court phrased the issue in the following manner: "[W]hether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same [anti-bootlegging] legislation under the Copyright Clause."<sup>67</sup> To answer the question, the Eleventh Circuit developed two models of constitutional interpretation. The first, following the reasoning of *Heart of Atlanta Motel, Inc. v. United States*,<sup>68</sup> is that "each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another."<sup>69</sup> The second, following the reasoning

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<sup>62</sup> See *id.*; see *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999) (noting that activities that "depress . . . legitimate markets" by satisfying demand through "unauthorized channels" are inherently commercial in nature).

<sup>63</sup> See *Moghadam*, 175 F.3d at 1282; *Kiss Catalog v. Passport Int'l Prods. (Kiss II)*, 405 F. Supp. 2d 1169, 1171–73 (C.D. Cal. 2005).

<sup>64</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>65</sup> 175 F.3d 1269.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1277.

<sup>68</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discussing the relationship between congressional power under Section 5 of the Fourteenth Amendment and the Commerce Clause).

<sup>69</sup> *Moghadam*, 175 F.3d at 1277.

of *Railway Labor Executives' Ass'n v. Gibbons*,<sup>70</sup> is that “some of the grants of legislative authority in Article I, § 8 contain significant limitations” that should affirmatively prohibit Congress “from passing certain types of legislation, no matter under which provision.”<sup>71</sup>

¶23 Because the *Moghadam* Court found that the Copyright Clause’s “fixation requirement” (found in the word “writings”) was stated in “positive terms” with no express limitations—and because the statute in question was not “fundamentally inconsistent” with this fixation requirement—it held that the requirement did not prevent Congress from enacting copyright-like protections under the Commerce Clause.<sup>72</sup> The decision left open the question, however, of whether the Copyright Clause’s more “fundamental”<sup>73</sup> originality and “limited times” requirements—arguably stated in less “positive terms” with a clearer “negative pregnant”—could likewise be circumvented.

## 2. *United States v. Martignon*.<sup>74</sup>

¶24 *United States v. Martignon* answered this narrower question in the negative.<sup>75</sup> Like *Moghadam*, *Martignon* involved the constitutionality of an anti-bootlegging statute,<sup>76</sup> but unlike *Moghadam*, *Martignon* explicitly considered the effect of the Copyright Clause’s “limited times” requirement on other constitutional powers.<sup>77</sup> This difference proved crucial to the court’s holding. Adopting *Moghadam*’s suggestion that legislation “fundamentally inconsistent” with a requirement of the Copyright Clause may not be constitutionally passed under the Commerce Clause,<sup>78</sup> the *Martignon* court held, “The anti-bootlegging statute’s failure to impose a durational limitation on its regulation is ‘fundamentally inconsistent’ with the Copyright Clause’s requirement that copyright-like regulations only persist for ‘Limited Times.’”<sup>79</sup> In so holding, the court rejected the *Heart of*

<sup>70</sup> *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468–69 (1982) (discussing conflict between the “uniformity requirement” of the Bankruptcy Clause and the Commerce Clause).

<sup>71</sup> *Moghadam*, 175 F.3d at 1279.

<sup>72</sup> *Id.* at 1280.

<sup>73</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991).

(characterizing the originality requirement as “fundamental”); *United States v. Martignon*, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004); *see also supra* Section II.A–B.

<sup>74</sup> 346 F. Supp. 2d at 413.

<sup>75</sup> *Id.* at 419.

<sup>76</sup> In this case, it was the criminal version of the statute (18 U.S.C. § 2319A (2000)) at issue.

<sup>77</sup> *Martignon*, 346 F. Supp. 2d at 424.

<sup>78</sup> *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999).

<sup>79</sup> *Martignon*, 346 F. Supp. 2d at 429.

*Atlanta* model—that each of Congress’s powers is an alternative to all the others.<sup>80</sup> Instead, the court distinguished *Heart of Atlanta* from cases involving the Copyright Clause because the Fourteenth Amendment (the authority under which Congress erroneously believed it was acting when passing the Civil Rights Act at issue in the case), unlike the Copyright Clause, “is solely an affirmative grant of power—without any express limitations.”<sup>81</sup>

3. *Kiss Catalog v. Passport International Productions (“Kiss I”).*<sup>82</sup>

¶25 The *Martignon* decision was followed three months later in *Kiss I*, another decision on the constitutionality of the anti-bootlegging legislation.<sup>83</sup> Following similar reasoning as *Martignon*, *Kiss I* held the civil anti-bootlegging statute unconstitutional as violating the “limited times” requirements of the Copyright Clause.<sup>84</sup> And, on the more critical question of whether Congress could still pass the statute under the Commerce Clause, the court adopted the *Railway Labor* logic: “[A]llowing Congress to invoke the Commerce Clause in a situation where the Copyright Clause would otherwise be violated would ‘eradicate from the Constitution a limitation on the power of Congress.’”<sup>85</sup>

4. *Kiss Catalog v. Passport International Productions (“Kiss II”).*<sup>86</sup>

¶26 The *Kiss I* holding was short-lived, however. Upon a motion to intervene by the United States, Judge Rea, who wrote the opinion in *Kiss I*, agreed to reconsider the anti-bootlegging statute’s constitutionality.<sup>87</sup> Then, exactly one year after Judge Rea held the anti-bootlegging statute unconstitutional in *Kiss I*, Judge Fischer reached the opposite conclusion in *Kiss II*.<sup>88</sup>

¶27 The holding of *Kiss II* is twofold. First, the court held that the anti-bootlegging statute “does not fall within the purview of the Copyright Clause” and is therefore not subject to that Clause’s limitations.<sup>89</sup> The court found the anti-bootlegging statute to be outside the ambit of the Copyright Clause because the law covers subject matter (i.e. live musical

<sup>80</sup> *Moghadam*, 175 F.3d at 1279–80.

<sup>81</sup> *Martignon*, 346 F. Supp. 2d at 428 n.19.

<sup>82</sup> 350 F. Supp. 2d 823 (C.D. Cal. 2004).

<sup>83</sup> *Id.* The case concerned the civil version of the anti-bootlegging statute (17 U.S.C. § 1101 (2000)).

<sup>84</sup> *Kiss I*, 350 F. Supp. 2d at 836–37.

<sup>85</sup> *Id.* at 837 (quoting *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 469 (1982)).

<sup>86</sup> 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

<sup>87</sup> *Id.* at 1170.

<sup>88</sup> *Id.* at 1176.

<sup>89</sup> *Id.* at 1175.

performances) “not otherwise addressed, prohibited, or protected by the Copyright Clause.”<sup>90</sup> In the alternative, the court held that even if a “fundamental conflict” with the Copyright Clause would negate legislation otherwise sustainable under the Commerce Clause, no such conflict existed in this case.<sup>91</sup> Because, as noted, the court believed the anti-bootlegging statute covers subject matter “not previously protected—or protectible—under the Copyright Clause,” the statute “complements” rather than conflicts with the Copyright Clause.<sup>92</sup>

¶28 In sum, while the majority of these cases suggest that Congress may not use its commerce power to transcend a fundamental limitation of the Copyright Clause, the question is far from resolved. In the case of the Broadcasting Treaty, the conflict between the Copyright and Commerce Clauses is even more pronounced.

*C. Because the Broadcasting Treaty creates perpetual copyright-like rights over unoriginal information, it cannot be constitutionally implemented by Congress even under the Commerce Clause.*

¶29 Since *Kiss II* is the only dissenting voice in the anti-bootlegging cases, its arguments supporting Congress’s ability to implement the Broadcasting Treaty under the Commerce Clause<sup>93</sup> are worth addressing first. *Kiss II*’s holding—essentially that anti-bootlegging rights are not the stuff of copyright—cannot realistically be read to cover the broadcasting rights. The broadcasting rights are distinguishable from the anti-bootlegging rights for several reasons.

¶30 In many ways, the broadcasting rights are even closer to falling within the ambit of copyright than anti-bootlegging rights. First, while copyrights have never been available for unrecorded live musical performances,<sup>94</sup> they are available for simultaneously recorded live

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<sup>90</sup> *Id.* at 1176 (“[O]nce the Court concludes that the Statute does not fall within the purview of the Copyright Clause, it need no longer consider whether it complies with the limitations of the Copyright Clause. To do so imports into the Commerce Clause limits that clause does not have. That the Statute might provide ‘copyright-like’ or ‘copyright-related’ protection to matters clearly not covered by the Copyright Clause is not important. One need only find an alternative source of constitutional authority.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (noting that the anti-bootlegging statute “proscribes conduct not otherwise addressed . . . by the Copyright Clause: the non-consensual recording of a live performance”).

broadcasts.<sup>95</sup> Indeed, Congress recently adopted a statute specifically intended to permit copyright protection for such broadcasts.<sup>96</sup> Thus, while anti-bootlegging rights may not be “otherwise addressed, prohibited, or protected by the Copyright Clause,”<sup>97</sup> broadcasting rights clearly are. A broadcaster can obtain a copyright over his creation (the content, not the signal) by simply recording (i.e. “fixing”) the broadcast (as, for example, the National Basketball Association does when it broadcasts its games).<sup>98</sup>

¶31 Second, the substantive protections afforded to broadcasters by the Treaty<sup>99</sup> are nearly identical to the protections granted to copyright holders by the Copyright Act.<sup>100</sup> Both secure the exclusive rights of reproduction, distribution, and transmission of the work.<sup>101</sup> Like traditional property rights, these rights all make information excludable, the very essence of “intellectual property.”<sup>102</sup>

¶32 Third, the same policy underlies both copyrights and broadcasting rights. Both rights seek to increase the amount and quality of works of authorship by incentivizing investment in content production.<sup>103</sup> Similar to copyright protection, the Broadcasting Treaty grants to the broadcaster an exclusive right to his creation and protection against copying and piracy to encourage production and dissemination.<sup>104</sup>

¶33 There is also an important difference between the anti-bootlegging and broadcasting rights. Unlike the anti-bootlegging rights, which were created by Congress in the first instance, the broadcasting rights were created by an international body (WIPO). Thus, while there may be a “presumption of constitutionality”<sup>105</sup> when Congress actually creates the

<sup>95</sup> See *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 847 (2d Cir. 1997) (noting that “recorded broadcasts of NBA games . . . are now entitled to copyright protection”); Boyle, *supra* note 12 (noting that broadcasting rights cover “works that are at the heart of copyright, indeed which might themselves be copyrighted by their authors”).

<sup>96</sup> 17 U.S.C. § 101 (2000).

<sup>97</sup> *Kiss II*, 405 F. Supp. 2d at 1176.

<sup>98</sup> See generally *Motorola*, 105 F.3d 841.

<sup>99</sup> See SCCR/12/2 (Rev. 2), *supra* note 4, arts. 6–13.

<sup>100</sup> See 17 U.S.C. §§ 106–106A.

<sup>101</sup> *Id.*; SCCR/12/2 (Rev. 2), *supra* note 4.

<sup>102</sup> See *United States v. Martignon*, 346 F. Supp. 2d 413, 421 (S.D.N.Y. 2004).

<sup>103</sup> Compare Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1 (1994) with SCCR/1/9, Report (Nov. 10, 1998), available at [http://www.wipo.int/documents/en/meetings/1998/sccr\\_98/pdf/1\\_9.pdf](http://www.wipo.int/documents/en/meetings/1998/sccr_98/pdf/1_9.pdf).

<sup>104</sup> See SCCR/1/9, Report at ¶ 175.

<sup>105</sup> *Kiss Catalog v. Passport Int'l Prods. (Kiss II)*, 405 F. Supp. 2d 1169, 1172 (C.D. Cal. 2005).

rights at issue, the presumption seems inapposite where Congress is merely implementing rights created by an international body less familiar with the nuances of U.S. copyright law.

¶34 In considering the similarities between copyrights and broadcasting rights, it seems disingenuous to argue that the broadcasting rights are not the stuff of copyright—that they somehow fall outside the purview of the Copyright Clause. To the contrary, the broadcasting rights are copyrights, both in their terms and in their intended effect. As such, these rights should be implemented only under the Copyright Clause. Indeed, as one scholar has concluded, “Commerce Clause legislation that vests property rights in information decreases the amount and type of information freely available as surely as when Congress legislates under the Copyright Clause.”<sup>106</sup>

¶35 More generally, the logic of *Kiss II* represents one of two opposite constructions of the Constitution. The *Kiss II* Court conceived of the Constitution as “a series of hermetically sealed provisions.”<sup>107</sup> Once the court found congressional authority under the broad Commerce Clause, its analysis was essentially over.<sup>108</sup> To the extent that the other enumerated powers do not affirmatively limit congressional power, this construction is not especially problematic.<sup>109</sup> But, where the other enumerated powers contain limitations (like the “limited times” limitation of the Copyright Clause or the uniformity limitation of the Bankruptcy Clause) the danger of eradicating these limitations from the Constitution is great.<sup>110</sup> This danger is exacerbated by the Supreme Court’s broad reading of the commerce power.<sup>111</sup> If permitted to do so, the clause, covering nearly all activities even tangentially related to commerce, would subsume express limitations on more specific commercial acts.<sup>112</sup>

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<sup>106</sup> William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 371 (1999).

<sup>107</sup> *Kiss II*, 405 F. Supp. 2d 1169, 1172.

<sup>108</sup> *See id.* at 1172–73. While the court did go on to consider the statute under the Copyright Clause, it noted that this step was “not necessarily mandated.” *Id.* at 1173.

<sup>109</sup> Picture a Venn diagram where the Copyright Clause circle is entirely encompassed by the broader Commerce Clause circle. Any action taken within the Copyright Clause circle is also permissible under the larger Commerce Clause circle.

<sup>110</sup> Now picture a Venn diagram where part of the Copyright Clause circle (the originality and “limited times” portions) falls outside of the Commerce Clause circle. Action taken in this outlying part of the Copyright Clause circle would not be permissible under the Commerce Clause circle.

<sup>111</sup> *See United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>112</sup> *See id.* at 589 (Thomas, J., concurring) (“Much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect

¶36 A more appropriate conception of the Constitution is to see it as an integrated document; a limitation in one part of the document may well proscribe action pursuant to another part of the document. This view is well summarized by Harvard Law Professor Laurence Tribe: “Read in isolation, most of the Constitution’s provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government.”<sup>113</sup> In other words, the Constitution is a package deal.

¶37 Viewed as a whole, each of the congressional powers in Article I, Section 8 should not be seen as occupying the same plane of specification. The Commerce Clause is a general grant of authority while the Copyright Clause is a more specific application of that general authority.<sup>114</sup> Copyrights affect commerce, but they affect commerce in specific ways with specific consequences and are therefore handled in more detail in the Copyright Clause. To gloss over this detail and summarily conclude that copyright-like legislation is at its heart commercial legislation (and therefore permissible under the Commerce Clause) is to render a good portion of Article I, Section 8 surplusage.<sup>115</sup> The Supreme Court rejected this result as early as *Marbury v. Madison* when Chief Justice Marshall famously announced, “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”<sup>116</sup> In short, instead of viewing the Copyright Clause and the Commerce Clause as parallel and co-equal grants of power,<sup>117</sup> it is more in keeping with the goals of each provision to view the Copyright Clause as a subset of the general Commerce Clause power.

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interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court’s Commerce Clause jurisprudence has endorsed just such an interpretation: the power we have accorded Congress has swallowed Art. I, § 8.”)

<sup>113</sup> Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995).

<sup>114</sup> See William W. Van Alstyne, *Reconciling What the First Amendment Forbids with What the Copyright Clause Permits*, 66 LAW & CONTEMP. PROBS. 225, 226 (2003) (describing the Copyright Clause as a “very specific, enumerated power” and a “specifically targeted clause”).

<sup>115</sup> See *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 469 (1982); *Kiss Catalog v. Passport Int’l Prods. (Kiss I)*, 350 F. Supp. 2d 823, 837 (C.D. Cal. 2004).

<sup>116</sup> *Marbury v. Madison*, 5 U.S. 137, 167 (1803).

<sup>117</sup> E.g., *Kiss Catalog v. Passport Int’l Prods. (Kiss II)*, 405 F. Supp. 2d 1169, 1175 (C.D. Cal. 2005) (discussing the “separate, co-equal character of constitutional grants” (quoting 1 RAYMOND T. NIMMER, INFORMATION LAW § 6:30 (2005))).

¶38 If properly constructed to recognize both grants and limitations of power,<sup>118</sup> the Constitution leaves little room for the implementation of the Broadcasting Treaty. An honest evaluation of the broadcasting rights reveals that they are nearly indistinguishable from copyrights in almost every respect. The broadcasting rights do differ, however, in two crucial respects—they protect unoriginal information and are perpetual. These differences place the Broadcasting Treaty beyond Congress’s copyright authority and ought to place it beyond Congress’s commerce authority as well.

#### CONCLUSION

¶39 Both on its face, and in effect, the Broadcasting Treaty creates rights over information closely analogous to copyrights. By allowing broadcasters to acquire rights over unoriginal broadcast signals, and to acquire a new term of protection over the same content by simply re-broadcasting, the Treaty violates the originality and “limited times” requirements of the Copyright Clause.<sup>119</sup> Because the Treaty would violate fundamental limitations of the Copyright Clause (the clause under which the Treaty would be most properly enacted) Congress should be forbidden from enacting the Treaty under the less restrictive Commerce Clause. While the Copyright Clause may appear to be solely a grant of power, it must be read to have limitations.<sup>120</sup>

¶40 As Justice Marshall stated, “Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have not operation at all.”<sup>121</sup> To construe the Copyright Clause as a self-contained affirmative grant of power is to give certain words in the Clause no operation at all.

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<sup>118</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966)).

<sup>119</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>120</sup> *Eldred*, 537 U.S. at 212; *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999).

<sup>121</sup> *Marbury*, 5 U.S. at 167.