

AHOY, MUSIC PIRATES! NAVIGATING THE PAST, PRESENT, AND FUTURE OF PREEMPTION DEFENSES TO STATE AND FEDERAL CRIMINAL LAWS

by

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State and federal legislatures have enacted numerous anti-piracy copyright statutes protecting sound recordings. This paper provides an overview of the four types of anti-piracy statutes, the recording industry interests needing protection, and the preemption arguments used by defendants. Part I of the paper introduces the murky waters of state and federal sound recording legislation. Part II discusses protectionism and the sound recording industry. Part III reviews the leading Supreme Court decisions on Copyright Clause preemption and Commerce Clause Preemption. Part IV argues that the four types of anti-piracy laws—unauthorized duplication, anti-bootlegging, true name and address, and optical disc identification—are constitutional under the appropriate Copyright Clause preemption and Commerce Clause preemption.

I. Protectionism and the Sound Recording Industry

The Copyright Act of 1976 defines “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”¹ However, sound recordings were not a category of works regulated in the previous Copyright Act of 1909.² The Sound Recording Act of 1971 sought to remedy this omission.³ There are three categories of sound recording “piracy:” 1) piracy, 2) counterfeiting, and 3) bootlegging.⁴ Piracy is the unauthorized duplication and sale of sounds contained in a legitimate recording like a compact disc (hereinafter “CD”) or cassette tape.⁵ Counterfeiting is the unauthorized duplication and distribution of not only recorded sounds but also the original label artwork, trademark, and packaging.⁶ Bootlegging is the unauthorized recording of a live or broadcast performance that is not legitimately available, for example that of a live concert or studio out-take that is not intended for release.⁷ In the United States, federal law and most individual state’s laws prohibit all three types of piracy and treat them as criminal offenses.⁸

The sound recording industry consists of several players, primarily record labels, but also disc replicators and manufacturers, artists, producers, engineers, and even record stores. Sound recording piracy has adversely affected the recording industry since its earliest days, but the combination of technological development and weak laws and/or enforcement has enabled, and even encouraged, record pirates to become major criminals whose activity accounts for the annual loss of billions of dollars in displaced sales; in fact, one in three music discs sold is piratical.⁹ In considering federal legislation entitled the Piracy and Counterfeiting Amendments Act of 1982 (hereinafter “the 1982 Act”),¹⁰ the Senate Committee on the Judiciary agreed with Department of Justice testimony that:

Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white-collar crime. The dramatic growth of this problem has been encouraged by the huge profits to be made, while the relatively lenient penalties provided by the current law have done little to stem the tide.¹¹

After the 1982 Act’s passage, a New York publication discussed one Charlie LaRocco (“the legendary ‘Mr. Big’ of bootlegging circles”) after his third arrest for the illegal sale of bootleg CDs.¹² The article states that LaRocco’s manufacture and sales constitute a multi-million dollar operation, with his latest bust involving nearly one million bootleg CDs; still, LaRocco “scoffs at the notion” that he will be punished for his activities.¹³ Another example of the global magnitude and sometimes danger of the piracy problem is that customs officials seized 50,000 pirated CDs, 50,000 kilograms of polycarbonate material used in making CDs, and 400 CD stampers in the Philippines in October of 1998.¹⁴ International Federation of the Phonographic Industry (hereinafter “IFPI”) officials commented that the illegal activity was “a very organized, large-scale operation.” Criminal gangs from Hong Kong and China allegedly funded and organized the operation, which distributed illegal product to the Philippines, China, and India. The IFPI officials further commented that they had even experienced violence while enforcing copyright law in other countries.¹⁵ More recently, two individuals involved in a huge organized crime scheme involving sound recording piracy were sentenced to jail after a six year long investigation and the seizure of more than 19 million pirated discs.¹⁶

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An increasing number of people are attracted to record piracy because the potential profits are enormous. A record pirate bears none of the initial costs of investing in talent by creating, producing, and marketing a recording, which can add up to millions of dollars for a record company.¹⁷ Further, a record pirate does not pay union fees, artists, back-up vocalists and musicians, mechanical¹⁸ and performance¹⁹ royalties, or taxes. Unlike record companies, pirates do not lose money on albums that do not become “hits”²⁰ because pirates have the advantage of already knowing which recordings are popular with listeners—they generally create piratical products from only those songs.²¹ Finally, the pirate incurs only the minimal cost of purchasing a single commercial copy²² for use as a master and an inconsequential per-unit manufacturing cost.²³

Record pirates now have technology at their disposal by which they can produce near-perfect copies and/or recordings, making piracy even more lucrative than it was formerly.²⁴ The development of new recording media such as the digital video (or versatile) disc (DVD),²⁵ audio-compression techniques such as MPEG-3 (MP-3),²⁶ and peer-to-peer software (P2P)²⁷ enables users to store a greater amount of information in a smaller space and to transmit—“mass-transmit” if you will—or share CD-quality music over the Internet at the touch of a button (or, the click of a mouse).²⁸ ConneXus Corporation has developed software called *CD (“Star CD”) that allows radio listeners to use cell phones to instantly purchase music heard over the airwaves and the company also offers *CD service for its Palm VII wireless computer.²⁹ Napster and similar developers (iMesh, Cute MX, Gnutella) originally created programs that searched the Internet for MP-3 music files and connected users with those files, regardless of whether the music was legitimately available, making hundreds of thousands of such files accessible to users for instant download.³⁰ These and other advances made in recording technology have led to a corresponding increase in the level of piratical and counterfeiting activities.

The 2004 year-end anti-piracy statistics published by the Recording Industry Association of America, Inc. (hereinafter “RIAA”) show that seizure of counterfeit/pirate CDs increased from 246,452 in 2002 to 785,314 in 2003, a 218.6% increase; and then in 2004 to 1,232,487, another 58% increase.³¹ The seizure of counterfeit/pirate/bootleg labels increased from 72,822 in 2002 to 980,308 in 2003 (1306.3% increase) to 4,624,977 in 2004 (372% increase). This increase in piratical activity has encouraged more changes in federal and state laws in an effort to respond adequately to these challenges.³²

Enforcement of some of these laws has aided copyright owners and their representatives in fighting piracy more effectively. The RIAA prevented the production of nearly 1.5 million illegal CDs in 1998,³³ due in part to tighter anti-piracy statutes throughout the nation. The International Federation of the Phonographic Industry (hereinafter “IFPI”) reported that the level of piracy overall in the North American region was low in 1998 compared to other regions, which is largely due to an aggressive litigation strategy against pirate producers.³⁴ Courts are also issuing judgments that should send a message to future pirates: one court issued a \$13.7 million judgment on defendants Danny Jordan and Global Arts Productions, who acted as the hub of a worldwide music piracy ring. The organization, without authorization, licensed European and other international companies to reproduce and sell well-known recordings.³⁵ The biggest CD manufacturing raid in United States history—Operation Remaster—has yielded two guilty pleas as of April 2006; the defendants are subject to \$250,000 in fines and up to five years in prison per violation and agents seized almost 500,000 CDs and over 5500 CD stampers.³⁶ Operation Buccaneer has produced 16 convictions and up to 46 months imprisonment for Internet copyright piracy.³⁷ A glance at federal and state legislative dockets, however, reveals that copyright owners and their lobbyists and representatives do not feel that existing anti-piracy laws are enough.³⁸ Before blindly accepting this new legislation, as necessary as it may be, it is wise to consider the nationwide effect and the constitutionality of both existing and proposed anti-piracy legislation.

II. The Supreme Court Decisions on Copyright Clause Preemption and Commerce Clause Preemption are Critical

A. Common Constitutional Challenges

Defendants in a sound-recording piracy case are likely to set forth two arguments when contending that an anti-piracy law is unconstitutional: First, they argue that they cannot be convicted under state laws because the Copyright Clause³⁹ and federal copyright law⁴⁰ preempt state laws. Second, they argue that they cannot be convicted under federal and/or state laws because the federal laws and/or state laws violate the Commerce Clause.⁴¹ In the Commerce Clause argument, defendants may argue for or against preemption, depending on whether they are in federal or state court. Defendants make these claims against all types of anti-piracy laws.

1. Copyright Clause Preemption

The Supremacy Clause⁴² declares that federal laws preempt state statutes that regulate the same types of activities federal laws are authorized to regulate, to the extent that the laws conflict or to the extent that their objectives are inconsistent.⁴³ Normally, federal laws will preempt state statutes in fields traditionally left to federal control, no matter how

consistent a state statute is with federal law.⁴⁴ With respect to the Copyright Clause, the Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁵ This clause, justifies Congress’ enactment of Title 17 of the United States Code.⁴⁶ Title 17 serves as the jurisdictional basis for federal law enforcement in the copyright area, including federal law enforcement in the sound recording piracy area.⁴⁷

In an early case, *Aronson v. Quick Point Pencil Co.*,⁴⁸ the Supreme Court stated that “states are free to regulate the use of intellectual property in any manner not inconsistent with federal law.”⁴⁹ When a federal law does not clearly disclose its intended impact on state statutes or when the conflict between state statutes and federal laws is not clear, a court’s determination of preemption turns on a number of general principles, including congressional intent.⁵⁰ Within the Copyright Act of 1976 (the 1976 Act), Congress attempted to prevent just such an analysis by including Section 301, a section devoted to copyright law preemption.⁵¹ Section 301 provides that for works that are fixed in a tangible medium of expression,⁵² and that come within the subject matter of copyright under Sections 102 and 103, federal copyright law preempts state statutes that address rights *equivalent to any of the exclusive rights* protected by Section 106.⁵³ Sound recordings are, by definition, fixed in a tangible medium of expression⁵⁴ and Section 102 includes sound recordings as protectable works of authorship.⁵⁵

The exclusive rights in a copyrighted sound recording are to 1) reproduce copies of the work, 2) prepare derivative works based on the work, 3) distribute copies of the work, and 4) perform sound recordings publicly by digital audio transmission.⁵⁶ Therefore, a state statute that addresses rights equivalent to one of these four exclusive rights and that involves the protection of sound recordings is preempted by federal law under Section 301.⁵⁷

A court determines whether a right protected by a state statute is equivalent to a right protected by Section 106, to some extent, based on the legislative history of Section 301.⁵⁸ One general question courts have asked in making this determination is whether the conduct that would infringe the state right is essentially the same as that which would infringe the federal right or whether the state statute requires some qualitatively different element.⁵⁹ The lower courts have decided a number of cases addressing the issue of preemption in various state claims. The genesis of clarity is emerging from these decisions. First, a state statute that simply narrows the scope of conduct giving rise to Section 106 infringement is preempted.⁶⁰ For example, a state statute that only applies to *intentionally* infringing copyrighted material would be preempted.⁶¹ Second, a state statute that broadens the scope of Section 106 coverage without any other qualitative change, such as a statute that prohibits private as well as public performances of copyrighted works, would also be preempted.⁶² At least one scholar maintains that there is still room for traditional preemption analysis where the subject matter and equivalency tests do not work, but where there is an obvious conflict with copyright law or policy he claims that the 301 analysis is not the exclusive form of analysis in the copyright area.⁶³ Others have argued that the 301 test is inadequate and that traditional preemption analysis should replace it entirely.⁶⁴ In the future, Congress could change the law to reflect this viewpoint. For now, Section 301 controls whether federal copyright law preempts a particular state regulation.

2. Commerce Clause Preemption

In cases where state statutes regulate activities beyond the scope of the Copyright Clause, Congress may assert its authority to federally regulate such activity under the Commerce Clause, which gives Congress the power to “regulate Commerce . . . among the several states . . .”⁶⁵ As long as the means of regulation is reasonably related to Congress’s objective in regulating, Congress may regulate activities that substantially affect commerce.⁶⁶ The Constitution already authorizes Congress to regulate copyright law, so the Commerce Clause is not necessary for enforcement of federal copyright law, assuming the federal law is otherwise constitutionally valid.

Congress may use the Commerce Clause in preempting state statutes that affect interstate commerce.⁶⁷ Burdens on interstate commerce are permissible only when justified by the pursuit of legitimate state interests.⁶⁸ The Commerce Clause allows state legislation that burdens interstate commerce only if the regulated commerce is local and requires different treatment from state to state;⁶⁹ all other interstate commerce is subject to federal regulation.

A court must take three steps in evaluating a state’s regulation of activity: 1) identifying the burden on interstate commerce, 2) determining if the state asserts a legitimate state interest as justification for state regulation, and 3) determining whether state regulation furthers that state interest in an appropriately narrow way.⁷⁰ The state must show what distinguishes it from other states that would justify state protection and regulation rather than the federal regulation provided under the Commerce Clause.

In *Pike v. Bruce Church, Inc.*, the Supreme Court presented a test for determining whether a state statute is unconstitutional.⁷¹ First, a court determines whether and how the statute’s regulation burdens, or discriminates against, interstate commerce.⁷² A regulation is discriminatory on its face if it imposes restrictions or penalties on out-of-staters.⁷³ If the regulation is discriminatory on its face, but there are alternative nondiscriminatory ways to achieve the state’s interest, then the statute is unconstitutional.⁷⁴ A regulation is effectively discriminatory, hence unconstitutional, if its application or practical aspects put a greater burden on out-of-staters than on state residents.⁷⁵

The second question in the *Pike* balancing test is whether the burden the statute places on interstate commerce is clearly excessive compared to the local benefits the statute provides.⁷⁶ In making this determination a court balances what is good for the state and its citizens with what is good for the nation. The statute must be narrowly tailored to achieve its regulatory purpose with the least restrictive means.⁷⁷

B. Implications for Defendants

In copyright-related cases beyond the scope of Section 301 preemption,⁷⁸ Congress may assert its authority to regulate under the Commerce Clause through the above-analysis. The defendant in a copyright-related case will most likely challenge a statute under both Copyright and Commerce Clause principles. If the defendant allegedly violated a copyright-related state statute, he or she will claim that Congress alone has the authority to regulate under either of these theories and that the state statute is thus unconstitutional. If the defendant allegedly violated a copyright-related federal law, he or she will claim that Congress lacks the authority to regulate under either of these theories and that the federal law is thus unconstitutional. A statute may be allowable under one theory, but not under the other. The Supreme Court has not yet decided whether anti-piracy laws must pass both types of tests to defeat an unconstitutionality claim.

Under the Copyright Clause and Commerce Clause preemption arguments courts examine four different types of anti-piracy laws: 1) unauthorized duplication, 2) anti-bootlegging, 3) true name and address, and 4) optical disc identification. The next section of this paper argues that all four types of anti-piracy laws should be upheld as constitutional under both Copyright Clause and Commerce Clause preemption theories.

III. Four Types of Anti-Piracy Laws are Constitutional

Anti-piracy legislation exists on both the federal and state level. Unauthorized duplication statutes and anti-bootlegging laws effectively prohibit all forms of piracy.⁷⁹ True name and address statutes and optical disc statutes regulate the distribution, replication, and or manufacture of sound recording mediums, regardless of whether such activities are legitimate or illegitimate. These types of laws are intended to aid in the investigation and prosecution of record pirates. Congress and state legislatures continue to pass such laws and to amend existing laws by strengthening penalties and tightening the definitions of offenses. While some of these federal and state statutes have passed the constitutionality test, some are so new that they have not yet been tested.

The following sections address each of the four types of laws by outlining the current existence of state statutes and federal law, reviewing the histories of their enactments, addressing any relevant unique elements of the particular cause of action, and examining the constitutionality of the anti-piracy laws under common defense arguments: Copyright Clause preemption and Commerce Clause preemption.

A. Unauthorized Duplication

Forty-eight states and the District of Columbia currently have statutes prohibiting the unauthorized duplication of sound recordings.⁸⁰ At the federal level, copyright protection did not extend to sound recordings until the Sound Recording Act of 1971.⁸¹ A decade later, Congress passed federal legislation specifically prohibiting the unauthorized duplication of sound recordings when it enacted the Piracy and Counterfeiting Amendments Act of 1982.⁸²

The Supreme Court's first opinion on copyright preemption, and specifically on unauthorized duplication, occurred under the Copyright Act of 1909 (the 1909 Act), which did not have a specific preemption test.⁸³ In 1971, the government charged defendant Goldstein with violating California's unauthorized duplication statute by copying several musical performances from commercially sold recordings without the permission of the owner of the master record or tape.⁸⁴ The defendant moved for dismissal, arguing that California's statute conflicted with the Copyright Clause. Once the defendant's dismissal was denied, he entered pleas of *nolo contendere* and pursued state appellate remedies. The Supreme Court agreed to review the defendant's case after his argument failed in the California courts. In the Supreme Court, the defendant again argued that Congress alone had the authority to regulate unauthorized duplication via the Constitution's grant of such authority and Congress' passage of the 1909 Act. The defendant argued that either the Copyright Clause or the 1909 Act preempted California's sound recording legislation.⁸⁵ The Goldstein Court held that the Copyright Clause did not preempt the area for the following reasons: state regulation is not necessarily inconsistent with providing an incentive to promotion of the arts; state protection may provide an incentive where there is no national interest (given national diversity); state regulation will not adversely influence other states because it will only be effective within its own border; and, Congress can always preempt later if the state regulation causes problems.⁸⁶

The court also found that Congress did not occupy the sound recording field with the 1909 Act,⁸⁷ which originally protected only the lyrics and music of a song.⁸⁸ A sound recording copyright protects the fixed performance of the lyrics and music by a particular recording artist.⁸⁹ In effect, Congress's decision in 1909 not to cover sound recordings meant that

Congress did not intend to regulate them, but that the states could regulate; it did not mean that sound recordings should remain unregulated by either the federal or state governments.⁹⁰

Although not enacted until 1982, the effective date of the federal unauthorized duplication law⁹¹ is retroactive, i.e. February 15, 1972.⁹² It is at this point that Congress, under its Copyright Clause authority, occupied the field of sound recordings. The existence of a federal law regulating the same activity a state law regulates is sufficient to preempt the use of the state law under the Supremacy Clause.⁹³ Thus, state unauthorized duplication laws can only apply to sound recordings fixed and released prior to February 15, 1972⁹⁴ even though few state statutes specify this as the “cut-off” date. The federal law governs sound recordings fixed after that date.

B. Anti-Bootlegging

Thirty-four states and the District of Columbia currently have anti-bootlegging statutes.⁹⁵ Anti-bootlegging statutes benefit performers, as well as arenas and promoters, by prohibiting the unauthorized fixation of live performances.⁹⁶ Various definitions imbedded in the Constitution and Title 17 apply to the controversial term “fixation” and imply that anti-bootlegging laws are copyright laws. The Constitution authorizes Congress to grant rights to authors for their “Writings”⁹⁷ and Congress granted such exclusive rights in Title 17 of the United States Code.⁹⁸ Specifically, Section 102 affords copyright protection to “Writings” by defining them as “original works of authorship fixed in a tangible medium of expression, from which they can be communicated either directly or with the aid of a machine.”⁹⁹ It then lists works of authorship, including musical works and sound recordings, but it does not include “live performances” in this list of copyrightable works.¹⁰⁰

Title 17 defines a sound recording as a work that results from the fixation of a series of musical, spoken, or other sounds.¹⁰¹ Title 17 also states that a work is “created” when it is fixed for the first time and that a “work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.”¹⁰² A live performance is not inherently “fixed in any tangible medium of expression,” and thus does not fall within the subject matter of copyright law as enacted by Congress.¹⁰³

State and federal anti-bootlegging statutes protect different interests, therefore, the analysis applied by a court considering a violation of state statute can vary considerably from a similar violation under the federal version. A New York appellate court upheld the state’s anti-bootlegging statute under a Copyright Clause preemption claim in 1980.¹⁰⁴ The prosecution charged the defendant with numerous counts involving unauthorized recording of sound, specifically a 1978 radio broadcast of the group Blondie performing works that had not been previously fixed.¹⁰⁵ The court compared the subject matter the New York anti-bootlegging statute protects with the subject matter that federal copyright law protects.¹⁰⁶ It distinguished the two laws by finding that the state statute did not require proof that a recording had been fixed.¹⁰⁷ It further found that the essence of the state anti-bootlegging law was to prohibit the recording of *live* performances without the consent of the performers.¹⁰⁸ The court upheld the state anti-bootlegging statute because it protected different types of works than those the federal copyright law protected.¹⁰⁹

By comparison, in the federal statute, Title 17’s fixation definition also states that a work being transmitted is “fixed” if a fixation is being made simultaneously with the transmission.¹¹⁰ Artists may authorize certain parties to fix the sounds of their performances. The medium upon which those parties fix or record the performances then contain a copyrightable work. This situation is no different than when a band authorizes its record label to record its performance in a recording studio. The sound recordings are worthy of the same copyright protection regardless of whether they contain studio recordings or live performances, *as long as the artist has granted fixation permission*.¹¹¹ Legal author Henry H. Perritt, Jr. offers the following specific example:

[S]omeone who gives an extemporaneous lecture is not entitled to copyright protection in the lecture because there is no fixation, but if the lecturer causes someone to record the lecture as it is being given, the lecturer enjoys a copyright in the recording (and perhaps in the lecture itself). Moreover, if the lecture is being ‘transmitted’ at the same time that it is recorded *at the direction of the lecturer*, both the recording and transmitted representation enjoy copyright protections (emphasis added).¹¹²

Federal copyright law requires authorized fixation before it grants protection to any original work of authorship.¹¹³ Therefore, state anti-bootlegging statutes do not protect the same rights as copyright laws and are not preempted by Title 17 or by Congress’ Copyright Clause authority.

In addition to asserting unconstitutionality under the Copyright Clause, a defendant may claim that state statutes are unconstitutional under the Commerce Clause, requiring the court to perform a traditional preemption analysis.¹¹⁴ The state must justify its regulation, as opposed to federal regulation, by showing that 1) the statute does not discriminate against out-of-staters; 2) if the statute does burden interstate commerce, such burden is justified by a legitimate state interest and the

statute is narrowly tailored to achieve that purpose with the least restrictive means; and, 3) the burden is not clearly excessive to the local benefits it provides.¹¹⁵ A state anti-bootlegging statute governs the unauthorized fixation, and resulting transfer of such fixation within its state.¹¹⁶ The statute does not attempt to regulate the actual fixation that occurs outside of its state, but only regulates fixation that occurs within its state.¹¹⁷

State anti-bootlegging statutes are not all the same. Some state statutes do not allow any unauthorized fixations to be transferred within the state,¹¹⁸ this prohibition on transfer applies to state residents as well as to out-of-staters. The statute regulates interstate commerce only in that it prohibits persons from fixing performances in the state without authorization. The burden lies in the fact that bootleggers must leave the state to fix live performances. The statute does not discriminate against out-of-staters and actually burdens state residents more than out-of-staters. Therefore, the Commerce Clause should allow states to regulate unauthorized fixations provided there is no federal law that directly conflicts with state statutes.

1. Before Federal Anti-Bootlegging Protections

During the period of time when there was no federal anti-bootlegging law, prosecutors used other statutes to show that unauthorized fixations of live performances were federal criminal offenses.¹¹⁹ In *Dowling v. United States*, a district court convicted the defendant of mail fraud, interstate transportation of stolen property, and other crimes. The defendant appealed, claiming that the National Stolen Property Act (hereinafter, “NSPA”)¹²⁰ did not reach his activity: interstate transportation of bootleg Elvis records.¹²¹ The prosecution argued that the NSPA required this “extra element” of interstate transportation that took the defendant’s action out of the scope of federal copyright law.¹²² Consequently, the Supreme Court had to resolve a conflict among the Circuits on that point.¹²³ The *Dowling* Court held that phonorecords containing performances for which no authorization was sought nor monies paid are NOT consequently “stolen, converted or taken by fraud.”¹²⁴ The court explained that the phonorecord itself was not stolen or obtained unauthorizedly, even if the content on the phonorecord was taken unlawfully.¹²⁵ The Court believed that Congress intended for the wording of the statute to attribute a physical identity to the items obtained and then transported unlawfully.¹²⁶

In a weaker attempt to justify its decision, the Court alludes to the fact that interpreting the NSPA to include the interstate transport of bootlegs would make the offense equivalent to copyright infringement.¹²⁷ Further, the Court found that Congress enacted the NSPA to prohibit the transport of stolen goods across state lines as a way to stop criminals from escaping law enforcement officials.¹²⁸ According to the Court, copyrights did not need such an aid because the Copyright Clause already authorized Congress to legislate regarding intellectual property regardless of whether such goods affect interstate commerce.¹²⁹ The Court either fails to consider the possibility that live performances may not be copyrightable subject matter or it ignorantly assumes that the unauthorized fixations of live performances constitute copyright infringement.¹³⁰

2. Issues Outside of Preemption

If the Supreme Court had decisively held that live performances are sufficiently “fixed” such that federal copyright law protects them, defendants would raise other Constitutionality issues. Some would argue that such a holding effectively grants the “author” an unlimited time of protection, which directly contradicts the intent of Congress in its Constitutional wording, “for a limited time.”¹³¹ Any prohibition on unauthorized fixations of live performances would last at least for the performing capability period of the performer (until death, at the longest). The performer would enjoy an exclusive right to control the fixation of commercial public performances for as long as he or she is alive and capable of performing. However, this right would pass with the performer’s life, which is limited.

Artists (and their attorneys) must apply the Supreme Court’s hypothetical holding—that live performances are copyrightable subject matter—to two rights: the right to control the fixation of a live performance and the right to control the resulting sound recording. Suppose that performers possess the right to prohibit others from “fixing” their performances for life (a limited period of time) under Congress’ Copyright Clause authority. A *fixation* can only occur at the moment of the performance—it is not scientifically possible at this time for the sounds of a live performance to last such that those exact sounds could be “fixed” years later. A *live* performance by definition is an event that occurs at a specific moment in time,¹³² which would mean artists would have exclusive and unlimited control over their performances. This unlimited right directly conflicts with the text and the purpose of the Constitution to “promote the progress” of art by securing for a “limited time” rights for authors.¹³³ Trying to conform live performances protections to copyright law definitions is difficult, at best.

Second, suppose that because of the “unlimited right” problem, Congress only grants performers the right to prohibit unauthorized *reproductions* of performances under its Copyright Clause authority. Anyone can lawfully record a live concert, save the recording until the copyright expires (70 years after the creator’s death), and then make duplicates and sell them. Even though the performer is dead and cannot object, it does not seem fair that the bootlegger should profit from that person’s performance without having to pay the artist. More unfair is the fact that the public, which should be able to freely

enjoy music in the public domain, has to pay for it and worse yet that the public was deprived of the opportunity to enjoy it for at least 70 years. Possessing one right without the other is virtually useless.

The solution must be to grant both rights to performers, but under different authorities. Performers should enjoy the lifelong right to prohibit the unauthorized fixation of their live performances and additionally the right to control the reproduction, distribution, and performance of unauthorized fixations for a time period limited by copyright law (currently 70 years after the death of the author).¹³⁴ Artists could assign either of these rights to record labels or other representatives, but the limited times would be measured by the life of the author, not the ultimate or successive owners. This concept follows that of traditional copyright law and application;¹³⁵ the second right would be subject to the same scrutiny as federal copyright law, while the first right would be a separate, but related law and not subject to the confines of the Copyright Clause authority.

Nevertheless, the Court in *Dowling* did not hold that artists could prevent the unauthorized fixation of their performances under federal copyright law or under the NSPA.¹³⁶ In explaining, the Court distinguished intellectual property owners from other property owners by acknowledging that intellectual property owners do not have total control of their works of authorship.¹³⁷ If a thief steals personal property, he or she wholly deprives the owner of its use, but this is not the case with copyright according to the Court.¹³⁸ Undoubtedly in the days of *Dowling*, layman's technology was not advanced or widespread enough that a mere five-minute act of infringement could result in the distribution of millions of unauthorized, digital copies. The owner may continue to enjoy listening to his or her music copyrights after a pirate has infringed them, but the Court fails to consider that the copyright owner may lose the commercial use of his or her intellectual property and the financial benefit that is some part of the incentive "Authors" and "Scientists" have to share their creative works with the world.¹³⁹

3. Federal Anti-Bootlegging Law

Congress passed an anti-bootlegging statute in 1994, criminalizing 1) the unauthorized fixation of live musical performances; 2) the transmission to the public of live musical performances; 3) the distribution, sale, or rent of unauthorized fixations of live musical recordings; and, 4) trafficking in unauthorized fixations of live musical performances, if the actor acted without the consent of the performer, knowingly, and for purposes of commercial advantage or private financial gain.¹⁴⁰ Previously, the 1976 Act had provided for civil liability for bootlegging, but explicitly stated that the federal law did not preempt state statutes.¹⁴¹

The Eleventh Circuit considered the constitutionality of the federal anti-bootlegging law in *United States v. Moghadam*.¹⁴² The defendant in this case was one of thirteen convicted after United States Customs confiscated approximately 800,000 bootleg CDs with a street value of approximately \$20 million.¹⁴³ According to the court's analysis, what little legislative history exists suggests that Congress enacted the anti-bootlegging statute under its Copyright Clause authority.¹⁴⁴ The defendant challenged such authority based on the argument that live performances are not "fixed" as required by the Copyright Clause.¹⁴⁵ If the Moghadam Court agreed with the defendant that live performances were not fixed, it would have to hold that Congress exceeded its Copyright Clause authority. However, the Eleventh Circuit avoided deciding the fixation issue by considering the situation that arises when a federal law is not authorized under the Copyright Clause but is authorized under another of Congress' Constitutional powers.¹⁴⁶

The Moghadam Court concluded that Congress can use its power under the Commerce Clause to regulate bootlegging activities. Assuming *arguendo* that the law did not satisfy the Copyright Clause requirements for federal regulation, the Moghadam Court held that Congress's Commerce Clause power did authorize the law.¹⁴⁷ In effect, the Eleventh Circuit held that the Commerce Clause can provide the source of Congressional power that affirms a law's constitutionality when the "the extension of copyright-like protection is not fundamentally inconsistent with the . . . requirement[s] of the Copyright Clause."¹⁴⁸

No other Circuit Courts have decided whether the Commerce Clause or the Copyright Clause authorizes Congress' enactment of the anti-bootlegging law. On March 27, 2000, the Supreme Court denied writ of certiorari in the *Moghadam* case, allowing the Eleventh Circuit's holding that the Commerce Clause authorized Congress to regulate bootlegging to stand.¹⁴⁹ Although the Eleventh Circuit stated in dicta that it did not think the Copyright Clause authorized the federal bootlegging law,¹⁵⁰ neither the Supreme Court nor any of the Circuit Courts has decided this issue either. The determining factor is "fixation"—if the performance of a musical work is sufficiently fixed at the point of performance, then the performance is protectable as a sound recording under Title 17 and the federal anti-bootlegging statute applies.¹⁵¹ The federal law thus would preempt state anti-bootlegging statutes in cases where the performance was fixed on or after February 15, 1972, the date Congress extended copyright protection to sound recordings.¹⁵² However, as long as the Supreme Court allows the Eleventh Circuit's *Moghadam* holding that the Commerce Clause authorizes Congress's enactment of 2319A, to stand, courts are free to decide the issue otherwise.¹⁵³ Such exercise of the Commerce Clause power in combination with the Supremacy Clause allows Congress to regulate unauthorized fixations.¹⁵⁴ The existence of a federal law regulating the same activity a state law regulates is sufficient to preempt the use of the state law;¹⁵⁵ therefore, the federal anti-bootlegging law preempts state statutes at the time of its enactment, 1994.¹⁵⁶

Two recent district court decisions have renewed the debate over the constitutionality of anti-bootlegging laws. In *KISS v. Catalog Passport Int'l Prods., Inc.*, and *United States v. Martignon*, the district courts held that the federal bootlegging laws exceed Congress' authority under the Copyright Clause.¹⁵⁷ The decisions dramatically contradict the Eleventh Circuit's *Moghadam* decision. A current issue of scholarly debate is whether or not Congressional power to legislate in the area of intellectual property should be cabined by the 23 words of the Copyright Clause.¹⁵⁸

C. True Name and Address

A third type of legislation subject to constitutional review is known as "true name and address" legislation. A true name and address statute regulates the replication process and distribution of sound recordings.¹⁵⁹ Although applicable to both legitimate and illegitimate products, the statute is designed to prevent the distribution of illegal sound recording products.¹⁶⁰ Forty-six states and the District of Columbia have true name and address statutes.¹⁶¹ There is no federal true name and address statute.

Statutes generally require that an in-state manufacturer include its actual name and the state where the product was manufactured¹⁶² on the product's label and that all sound recording products transferred commercially within the state contain the actual name and address of its manufacturer, whether in-state or out-of-state. If an illegitimate manufacturer includes its own true name and address on the product replicated and that product is confiscated, the manufacturer is in compliance with the true name and address statute. However, law enforcement will be able to use the true name and address on the product to obtain an affidavit from the actual copyright owner that the owner did not license to the "manufacturer." Then either the state or federal government can choose to charge the manufacturer under the applicable anti-piracy law (for example, unauthorized duplication or anti-bootlegging). If a pirate tries to avoid such detection by not including its true name and address (it may include a false name or address, like the name and address of the sound recording owner-record label, or it may omit certain information), the state may charge the manufacturer under the true name and address statute without having to prove whether the replication of the recording is authorized. This type of statute thus allows for simpler prosecution of record pirates—prosecutors do not have to call expert witnesses to examine the validity of the sound recording and artists or record labels who own the copyright in the sound recording do not have to appear in court to testify whether or not they authorized the replication. There is no rational reason for a legitimate manufacturer to avoid including the true name and address on a product's label. All products should clearly display the true name and address on their outside labels such that prosecutors can charge the manufacturers with either unauthorized duplication or violation of the true name and address statute for any illegitimate product that is replicated within the state or that is in commerce in the state.

The first decision addressing the constitutionality of California's true name and address statute was *People v. Anderson*,¹⁶³ in which a California appellate court found the defendant guilty of violating the state's true name and address statute.¹⁶⁴ In the case that followed, *Anderson v. Nidorf*, the defendant argued that federal copyright law preempted California's statute.¹⁶⁵ Preemption is appropriate when a state creates legal or equitable rights equivalent to any of the exclusive rights within Section 301.¹⁶⁶ One of the purposes of federal copyright law is to protect the rights of copyright owners; California's true name and address statute shares that purpose, but also has a consumer protection purpose.¹⁶⁷ According to the California court, federal copyright law does not share this consumer protection purpose.¹⁶⁸ Further, California's statute prohibits the selling of labels that do not disclose the "true name and address" of the manufacturer; it does not prohibit copyright infringement.¹⁶⁹ The court held that federal copyright laws do not protect equivalent rights and thus do not preempt the state statute.¹⁷⁰

A New York court similarly resolved a case challenging the New York true name and address statute.¹⁷¹ The defendants in this case were charged under New York's unauthorized duplication,¹⁷² anti-bootlegging,¹⁷³ and true name and address statutes. The court upheld the constitutionality of New York's true name and address statute and stated, "[i]ndeed careful examination of Section 275.15 establishes that it is not a copyright statute, but rather a consumer protection statute enacted to protect the public from purchasing records under a false belief that they were, in fact, recorded by the performer or group named on the record jacket."¹⁷⁴

In a case involving the distribution of unidentified video cassettes, the New York true name and address statute again passed the constitutionality test.¹⁷⁵ The court discussed federal copyright law's Section 301 preemption test, which allows for preemption of state statutes that regulate an equivalent right with respect to a work of authorship protectable under copyright law.¹⁷⁶ Again the court sustained the true name and address statute, holding that copyright infringement was not an element of an offense under the true name and address statute and therefore, the statute did not affect equivalent rights within the scope of federal copyright law.¹⁷⁷

Other state courts have addressed the constitutionality of their true name and address statutes. A Maryland appeals court upheld its true name and address statute due to the statute's consumer protection purpose.¹⁷⁸ The Supreme Court denied certiorari to a Washington court of appeals case in which the court also upheld the true name and address statute's constitutionality under the defendant's Copyright Clause preemption challenge because the statute contained an "extra element" to that of copyright infringement—failure to disclose the origin of a recording.¹⁷⁹

True name and address statutes do attempt to regulate interstate commerce, however, and may violate the Commerce Clause. These statutes are new enough that most states have not even addressed this constitutionality question. However, state supreme courts have decided Commerce Clause questions in similar copyright-related cases. In *Associated Film Distribution Corp. v. Thornburgh*,¹⁸⁰ the plaintiffs (major distributors of motion pictures) challenged the constitutionality of Pennsylvania's Feature Motion Picture Fair Business Practice Law, which regulates the licensing of films to Pennsylvania theatres.¹⁸¹ The court had determined that federal copyright law did not preempt the Pennsylvania act in a previous decision,¹⁸² so the court did not revisit the issue in this case (except for a brief discussion at the end of the opinion, stating that the court was bound by its previous decision).¹⁸³ Instead the court focused on the plaintiffs' claims that the Act violated the Commerce Clause and that the Act was unconstitutional.¹⁸⁴

The plaintiffs claimed that the Act unduly burdened interstate commerce because it sought to promote an illegitimate objective and because the solution it used was not the one that had the "least impact" on the interstate commerce test.¹⁸⁵ The court applied the *Pike v. Bruce Church* test, which requires the burden placed on interstate commerce to be "clearly excessive in relation to the putative local benefits."¹⁸⁶ This balancing depends on the nature of legitimate local interests and on the availability of alternative means that have a lesser impact on interstate activities.¹⁸⁷ The plaintiffs' balancing argument failed because they offered no proof that the drafters of the Act intended to equalize bargaining positions between in-state and out-of-state distributors.¹⁸⁸ The court found that the Act promoted other legitimate state interests, such as reducing the risk of deceptive trade practices, providing more product to the public faster (greater dissemination of speech), and protecting small business from going out of business.¹⁸⁹ Thus, the court held that the Act did not violate the Commerce Clause because the plaintiffs did not establish that Pennsylvania's purposes were illegitimate or that the Act's burden outweighed its benefits.¹⁹⁰

The several states may resolve Commerce Clause challenges differently because of their residents' different interests. It is likely that Commerce Clause arguments will proceed similarly to that in the *Thornburgh* case. In all likelihood, a defendant would claim that the true name and address statute unduly burdens interstate commerce. The prosecution would respond that the state's legislators enacted the statute to serve a consumer protection interest that protects both in-state residents and out-of-staters. While the law may burden out-of-staters by prohibiting the in-state distribution of their products if they are not marked properly, this same prohibition exists as to in-state products. The actual burden exists in the fact that another state may not require its manufacturers to label their products. The out-of-state manufacturer would not be committing a crime when it did not label its replicated (out-of-state) products, but it would be guilty of a crime if the product later entered commerce in a state with a true name and address statute. This would be unfair to the out-of-state replicator, because it does not control the stream of commerce its products enter after they initially leave the factory.

The "unfairness" arguments will eventually fail because the law is not designed to prevent legitimate commercial behavior, but the replication of illegitimate product.¹⁹¹ A large majority of states have true name and address statutes; thus, only a small part of the nation's population is not required to include such information on its sound recording labels. However, if these manufacturers know or intend that their products will enter the stream of commerce of any of the forty-seven states that do require such labeling, they should either comply with those state laws or risk facing jurisdiction there. Only manufacturers that replicate (or cause the replication of) illegitimate product should struggle with whether to comply with the true name and address statutes because when they do, they make it easier for law enforcement to locate them and bring other anti-piracy claims against them. Manufacturers of legitimate product should only bear the cost of adding their true name and address to the labels of the products they replicate. After preparing labels for sound recording products, the additional cost of including a name and address on the labels is insignificant. A defendant who makes it to court to argue against the Commerce Clause constitutionality of a true name and address statute most likely will have performed illegitimate replication. Thus, such a defendant will not be able to argue that the statute is a "burden" to out-of-staters. The very activity that "burdens" the defendant in those cases is illegal, and thus not worthy of protection.

D. Optical Disc Identification

Optical disc identification legislation (hereinafter "ODIL") is important as a non-technical answer to a technology-driven problem. The term "optical disc" includes digital storage formats such as audio CD, video CD (VCD), CD-read only memory (CD-ROM), and digital versatile disc (DVD). Virtually the same technology and equipment are used to create the master versions of all optical disc formats.¹⁹² The digital format allows for high-quality, near-exact replication of the masters, and of copies of the masters, in mass quantities.¹⁹³

Optical disc piracy is often associated with organized crime and has become increasingly mobile, enabling wrongdoers to move around to avoid detection and to take advantage of territories where enforcement is less effective.¹⁹⁴ Thus, optical disc piracy has become a global problem. Further, facilities for mastering and replication may be totally devoted to unauthorized activity or may supplement income from legitimate activity with infringing production, making it difficult for investigators to trace the source of piratical activity. ODIL provides investigators with the necessary tools that

lead to the successful prosecution of intellectual property pirates. There is no federal ODIL at this point, but three states have enacted ODIL: California,¹⁹⁵ Florida,¹⁹⁶ and New York.¹⁹⁷

ODIL requires in-state replicators¹⁹⁸ to permanently mark every optical disc containing sound recordings that it replicates with a unique identifier.¹⁹⁹ If a replicator includes such an identifying mark on an illegitimate product and that product is confiscated, law enforcement will know where to begin its search for the record pirate, which may be a party beyond the replicator, like a customer-manufacturer. Then the prosecutor may charge the pirate under the relevant anti-piracy statute (federal or state unauthorized duplication, for example). If a replicator does not properly mark optical discs, the state may charge the replicator under ODIL without having to prove whether the replication of the recording is legitimate and can still bring charges against the replicator under the more traditional anti-piracy laws. Like true name and address statutes, ODIL allows for simpler prosecution of record pirates. It also provides additional motivation for replicators to verify the legitimacy of its customers' orders.

ODIL encourages replicators to make sure that any replication orders they receive from customers are accompanied by the proper licenses that grant the customers permission to make copies. If law enforcement traces an illegitimate copy to a replicator, the replicator should provide evidence that replication rights were granted by the copyright owner. If the replicator does not have this evidence, the replicator may be guilty of unauthorized duplication. Presumably, law enforcement will seek to contact the customer who placed the order and include the customer as a party to piracy. In effect, ODIL should limit the number of replicators that will be willing to provide illegal services to customers. Replicators will now hold the responsibility for ensuring that only legitimate product leaves their factories. All optical discs replicated after the effective date of a state's ODIL should contain the unique identifier such that prosecutors can charge the replicators with either unauthorized duplication or ODIL violations for any illegitimate product that leaves the factory. Further, commercial replicators will stop taking illegitimate orders from customers in an effort to protect themselves from ODIL or other anti-piracy lawsuits.

It is obvious that ODIL creates a burden to in-state replicators in requiring them to mark optical discs with a permanent²⁰⁰ and unique identifier. The in-state burden exists also in that some manufacturer-customers do not want the replicators' names on their optical discs.²⁰¹ Those manufacturers may hire out-of-state replicators located in states without ODIL to perform their pressings.²⁰²

ODIL not only requires in-state replicators to comply, but also may require that optical discs distributed in the state's commerce comply.²⁰³ If so, out-of-state replicators must also mark their products with unique identifiers if they know or intend that their product will enter the "stream of commerce" in one of the ODIL states. In-state and out-of-state replicators may have to reconfigure their pressing machines and other mastering and replicating equipment to create a way to permanently mark optical discs. This burden is actually smaller than it appears.

Commercial mastering and replication facilities already voluntarily participate in optical disc identification. The IFPI and Philips Consumer Electronics have developed the Source Identification (hereinafter, "SID") Code to "enhance the security of CD manufacturing at both the mastering and replication stages."²⁰⁴ Under the SID Code system, there are two codes: a Laser Beam Recorder Code, which identifies the plant that manufactured the master, and a Mould Code, which identifies the plant that replicated the disc.²⁰⁵ According to the IFPI, SID Codes have been allocated to about 80 percent of the world's 484 known CD plants and account for about 96 percent of the world's identifiable manufacturing capacity.²⁰⁶ Compliance with ODIL should only be a burden for the remaining 20 percent of the world's known CD plants and 4 percent of the world's identifiable manufacturing capacity. Those facilities that do not participate in the SID Code program are more likely to be involved in illegitimate replication. Thus as with the true name and address statutes, the burden ODIL creates is most borne by those participating in illegal unauthorized duplication. Therefore, the Commerce Clause test, which requires a balancing of the state's local interest in regulating an activity and the burden placed on out-of-staters in complying with the state's regulation,²⁰⁷ would not be met by a defendant and the state's ODIL would be constitutional.

ODIL is also similar to true name and address laws in that it may help to protect the public, although the state legislative histories do not mention such an intent.²⁰⁸ Unlike true name and address statutes, ODIL does not provide customers with a name and address to contact the manufacturer if an optical disc is unsatisfactory; ODIL assists law enforcement in locating the source of illegitimate product, action that only indirectly benefits consumers. However, there should be no Copyright Clause preemption problem in applying state ODIL because it does not cover an equivalent right protected under federal Copyright Law, as discussed previously in *Anderson* and other true name and address cases.²⁰⁹ Therefore, these statutes apply to all sound recordings, regardless of whether replication of them is authorized or unauthorized. Further, they do not attempt to regulate the same activities that any federal law regulates; thus, the Supremacy Clause does not preempt them.

Other nations have adopted optical disc identification laws on the federal level. A spokesperson for China's Trade and Industry Bureau made the following statement in support of China's new anti-piracy law:

The new requirement . . . is aimed at preventing Hong Kong from becoming a haven for the manufacture of pirated optical dis[c]s. . . . [It] will discourage the smuggling of optical dis[c] manufacturing equipment into or out of the territory. . . . [It] will also enable Customs officers to better

trace the origin and destination of legally imported equipment and facilitate the development of intelligence on suspected copyright piracy activities.²¹⁰

Malaysia also enacted a type of ODIL in 1999 that requires manufacturers in Malaysia to obtain a manufacturing license and then requires licensees to mark each optical disc with the code on the manufacturer's license.²¹¹ This global interest in anti-piracy legislation is a result of the increasing global nature of piratical activities. According to IFPI chairman Jay Berman, "[i]ntellectual property piracy is the big global growth crime of today. It is backed by sophisticated organized crime syndicates, it is nurturing . . . serious crime. . . . We now have . . . evidence that criminal gangs involved in music piracy are also involved in . . . drugs and firearms, credit card fraud, money laundering, and violence."²¹²

If the United States were to follow the lead of other nations and consider adopting federal ODIL, the law would preempt state ODIL under the Supremacy Clause. The Commerce Clause probably authorizes such an exercise by Congress because of the not just national, but global nature of the music industry. The Senate made the following statement when considering the Digital Millennium Copyright Act of 1998, implementing the World Intellectual Property Organization treaties:

The copyright industries are one of America's largest and fastest growing economic assets. According to International Intellectual Property Alliance statistics, in 1996 (when the last full set of figures was available), the U.S. creative industries accounted for 3.65 percent of the U.S. gross domestic product (GDP) -- \$278.4 billion. In the last 20 years (1977-1996), the U.S. copyright industries' share of GDP grew more than twice as fast as the remainder of the economy -- 5.5 percent vs. 2.6 percent. Between 1977 and 1996, employment in the U.S. copyright industries more than doubled to 3.5 million workers -- 2.8 percent of total U.S. employment. Between 1977 and 1996 U.S. copyright industry employment grew nearly three times as fast as the annual rate of the economy as a whole -- 4.6 percent vs. 1.6 per percent. In fact, the copyright industries contribute more to the U.S. economy and employ more workers than any single manufacturing sector, including chemicals, industrial equipment, electronics, food processing, textiles and apparel, and aircraft. More significantly for the WIPO treaties, in 1996 U.S. copyright industries achieved foreign sales and exports of \$60.18 billion, for the first time leading all major industry sectors, including agriculture, automobiles and auto parts, and the aircraft industry.²¹³

Intellectual property industry groups like the RIAA,²¹⁴ the Motion Picture Association of America, Inc.,²¹⁵ the Interactive Digital Software Association,²¹⁶ the Software Publishers Association,²¹⁷ the Business Software Alliance,²¹⁸ the International Recording Media Association,²¹⁹ the Optical Disc Manufacturing Association,²²⁰ and the Video Software Dealers Association would need to work together in drafting such federal legislation and then in lobbying for its passage in the Senate and House.

IV. Conclusion

Piracy is an increasing and geographically expanding problem. The United States Congress and state legislatures have enacted several useful pieces of legislation that will help fight piracy and deter would-be pirates from engaging in copyright-related criminal activities. Pirate defendants often claim that such laws are unconstitutional under either the Copyright or Commerce Clause.

This paper has focused on the arguments for and against constitutionality of both federal and state statutes. The defendant who has committed unauthorized duplication should be found guilty under either the federal law or a state statute. Likewise, the defendant who has committed unauthorized fixation should be guilty under either the federal law or a state statute (in 34 states). Defendants in state court will argue that the federal laws preempt the state statutes. Defendants in federal court will argue that only the states, not Congress are authorized to pass such laws. State and federal piracy laws complement, rather than conflict with each other, therefore, preemption defenses should fail. Federal investigators, state investigators, and prosecutors must work together in ensuring that cases are prosecuted in the jurisdiction that will provide the strongest case.

True name and address statutes and ODIL are tools that investigators can use to help identify the source of piratical activity. Prosecutors can also use these laws to send piracy cases through the legal system more efficiently and with better results. State-specific laws like these are useful, but cannot more effectively fight piracy until every state has such laws or until Congress legislates for the nation.

The federal unauthorized duplication and anti-bootlegging laws have been important steps toward fighting music piracy activity that ignores state boundaries. As pirates take advantage of new technologies, those state barriers and even national boundaries will erode. Congress must heed the anti-piracy legislative activities of other countries and continue to make strides toward achieving similar levels of copyright advocacy and protection.

Appendix A - Copyright Infringement: Criminal versus Civil

Copyright infringement, like other generally prohibited activities, may subject the actor to both civil and criminal penalties.^{ccxxi} A defendant who is found liable in a civil suit is not subject to a possible imprisonment, but may be responsible for correcting the harm he or she inflicted upon the plaintiff.^{ccxxii} The purposes of criminal punishment include incapacitation and deterrence of future offensive behavior by the defendant and others,^{ccxxiii} therefore, a defendant who is found guilty of criminal actions may be subject to imprisonment, as well as to restitution or fines.^{ccxxiv} The elements for establishing an offense may be the same in both cases, but a criminal action usually involves additional elements of proof because of the imprisonment possibility associated with a guilty verdict.^{ccxxv} Additionally, the burden of proof required in criminal and civil cases differs. Prosecutors must establish their cases in criminal courts by proving each element of the offense beyond a reasonable doubt.^{ccxxvi} Plaintiffs in a civil action can establish a defendant's liability by a lesser burden, for example, by a preponderance of the evidence.^{ccxxvii}

A. *Civil Elements*

A civil copyright infringement cause of action consists of establishing that the defendant violated one of the exclusive rights in a copyrighted work, as granted by Congress in the Copyright Act.^{ccxxviii} A copyrighted work must first be copyrightable, meaning it should be a work of authorship fixed in any tangible medium of expression.^{ccxxix} The exclusive rights granted to such copyrightable works include the rights to 1) reproduce, 2) distribute, 3) perform publicly, 4) display, and 5) create derivatives of the work.^{ccxxx} Application of these exclusive rights may differ depending on the type of copyrightable work at issue; Congress provided for limitations to the exclusive rights and other defenses in the sections following 106.^{ccxxxi} "Fair use" is an affirmative defense to otherwise infringing conduct.^{ccxxxii} A copyright owner must first prove that a defendant violated one of the exclusive rights that Section 106 grants, then the defendant may claim that such use of the copyrighted work was a "fair use" because it was for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.^{ccxxxiii} Thus, a fair use defense allows the violation of the exclusive rights for certain purposes and does not classify such uses as infringing. This discussion considers only situations where a defendant has *infringed* a copyrighted work.

Courts may enjoin civil defendants from their infringing uses of copyrighted works and may order them to pay damages, which consist of either statutory damages or copyright owners' actual damages and profits.^{ccxxxiv} A plaintiff may recover statutory damages in certain cases, thus simplifying the trial process.^{ccxxxv} Until 1997, statutory damages were \$500 to \$20,000 per copyrighted work infringed; however, the court could increase the amount to \$150,000 if the plaintiff proved the defendant's infringement was willful.^{ccxxxvi}

When statutory damages are not available, a plaintiff must prove the actual damages it suffered as a result of the infringement and need only present proof of the defendant's gross revenue to prove profits.^{ccxxxvii} The defendant then bears the burden of proving deductible expenses and other exclusions from gross profits to limit the amount he or she must pay.^{ccxxxviii} Juries have awarded actual damages as high as \$4 million in some cases,^{ccxxxix} which is a far greater monetary punishment than what a court may impose upon the convicted infringer in a criminal prosecution for the same behavior.

The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (hereinafter, "1999 Act") increased the cap on statutory damages (from \$500-\$20,000 to \$750-\$30,000).^{ccxli} The copyright owners had feared that the ease of digital copying would unacceptably reduce their revenue streams; thus Congress had previously justified increasing criminal sanctions as a means to encourage the creation of new works and the use of digital technology.^{ccxlii} In Senate debates, Senator Hatch discussed his concern that the House version of the bill did not contain a scienter requirement for these increased penalties for infringers.^{ccxliii} His concern was primarily that without a willfulness requirement for a statutory damages award in a civil case, a person who negligently engaged in repeated acts of infringement may be unfairly and harshly punished.^{ccxliv} This possibility, Senator Hatch feared, might chill legitimate fair uses of copyrighted works,^{ccxlv} which is why establishing criminal infringement requires the proof of additional elements.

B. *Criminal Elements*

Title 17 addresses the elements of criminal copyright infringement in Section 506.^{ccxlv} Most notably, it adds a *mens rea* requirement—willfulness—to the elements a civil cause of action requires.^{ccxlvi} A defendant additionally must have acted for purposes of commercial advantage or private financial gain.^{ccxlvii} Title 18 of the United States Code provides the punishment for defendants who are guilty of criminal copyright infringement.^{ccxlviii}

Congress originally punished criminal copyright infringement of sound recordings as a misdemeanor, with imprisonment for up to one year and a fine of up to \$25,000.^{ccclix}

Through the Piracy and Counterfeiting Amendments Act of 1982 (hereinafter, “1982 Act”), Congress adopted a tiered-punishment approach, based on the number of infringing items the defendant reproduced or distributed.^{cccl} The 1982 Act effectively raised the offense to a felony, punishable by a maximum fine of \$250,000 and allowable prison term of two years for offenses involving the reproduction or distribution of between 100 and 1000 infringing phonorecords within a 180-day period.^{cccli} Courts could sentence a criminal infringer to five years in prison for offenses involving the reproduction or distribution of more than 1000 infringing phonorecords.^{ccclii} The punishment remained as a \$25,000 fine and up to a one-year prison term for fewer than 100 infringing phonorecords.^{cccliii}

In 1992, Congress restructured the tiered-punishment approach to account for the retail value of the infringing items, or what the defendant could earn from selling them in the marketplace.^{cccliv} It also changed the tier levels so that offenses involving the reproduction or distribution of at least ten infringing phonorecords made the defendant vulnerable to a possible five-year prison term.^{ccclv} Congress has since amended these terms with the No Electronic Theft (hereinafter, “NET”) Act^{ccclvi} and the 1999 Act.^{ccclvii}

Criminal prosecution elements include that a person who willfully infringes does so for commercial advantage or private financial gain, or alternatively, that the defendant’s infringement activities meet a certain minimum requirement.^{ccclviii} Upon enactment in 1997, that minimum requirement was infringement by reproducing or distributing “1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1000.”^{ccclix} The maximum punishment for a first time offender who infringed solely by the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of at least \$2500 was a maximum of 3 years imprisonment and a \$250,000 fine.^{ccclx} The NET Act punished lesser infringement that still met the minimum requirements in Section 506(a)(2) by a maximum of a one-year prison term and a \$250,000 fine.^{ccclxi}

The NET Act granted authority to the Sentencing Commission to use the retail value of the infringing items rather than the value of the copyrighted works infringed upon in determining sentences of pirates.^{ccclxii} There are many distinctions between the two values. Most notably, an illegitimate sound recording may be a “bootleg,” the unauthorized recording of a live performance.^{ccclxiii} A recording of a live performance is not usually commercially available; thus, the illegitimate product does not have a retail value. Pirates may attach a value to the product when offering it for sale; however, this value may not correspond with the value the copyright owner places on such a recording. The actual value may be intangible, for example, an artist may increase the value of his or her performances by not recording and selling them. Audiences may pay higher prices to attend the performances because they cannot purchase recordings of them. Additionally, most artists do not achieve the perfect sound in a live performance that they do in a controlled environment like a studio. These artists may want to control the recordings of their performances so that the engineered recordings have a higher value than they would if the public heard a recording of that same artist’s live, uncontrolled performance.

Another distinction between the two values is that sound recordings duplicated without authorization are often sold for less than the price of the legitimate products. Pirates also create compilation albums on which they have copied the popular hits of several artists or the greatest hits of one artist and then sell the copies. Even legitimate “greatest hits” albums are more expensive than an artist’s other albums because consumers will pay a higher price for the best songs of their favorite artists. When pirates create these compilation albums, they are creating a product that is not commercially available; thus, it does not have a legitimate retail value.

Finally, it is nearly impossible to determine the harm incurred by pirates when measuring value by either the infringing product or the product infringed upon. When a pirate makes copies of Shania Twain’s *Come On Over* compact disc and sells them on the street for \$10, he may easily sell 100 or more copies. Whether all 100 people would go to a music store and purchase the same album for the full retail price of \$16.99 is unlikely. However, pirates charge higher prices for recordings that are not commercially available. When record labels do release recordings of an artist’s live performance, the price they charge may be lower than the price a pirate charges when the only product available is illegal. Thus, the valuation problem is and will continue to be elusive; it is perhaps properly left to the courts to determine on a case-by-case basis, although Congress continues to debate it, as in the 1999 Act.^{ccclxiv}

The 1999 Act addresses the distinction between the retail value of legitimate items and the retail value of infringing items.^{ccclxv} It amends the NET Act’s directions to the Sentencing Commission in two specific ways. First, the new language provides that the Sentencing Commission consider the retail price of the legitimate items (those infringed upon) along with the quantity of the infringing items.^{ccclxvi} Second, the new language specifically addresses the valuation used to sentence Section 2319A violations (“bootlegging”).^{ccclxvii} Here it again directs the Sentencing

Commission to consider the quantity of the infringing items, but in conjunction with the retail price of the infringing items instead of with the retail price of the infringed-upon items.^{cclxviii} The Committee recognized the fact that bootlegging cases must be treated differently because there is no commercially available counterpart from which to determine a value based upon the copyrighted work.^{cclxix} The Committee further stated that when infringement does not occur for commercial purposes or private financial gain, “the ‘retail price’ should be determined from the price of comparable items.”^{cclxx}

In the House Committee Report for the 1999 Act, Representative Coble expressed concern that there had been no prosecutions under the NET Act since its enactment.^{cclxxi} In further discussing the problem of unenforcement of current laws against copyright infringement, Representative Coble noted the Department of Justice and copyright industries reports—that the valuation issue prevented the prosecution of cases because the value thresholds as determined under the NET Act inaccurately estimated the damage to the economy and marketplace, such that the Department of Justice did not view prosecution as economically efficient.^{cclxxii} The Department of Justice and copyright industries also testified that the sentences imposed under the NET Act’s valuation scheme were too low to deter pirates.^{cclxxiii} The low sentences pirates received further operated as a disincentive to the government to commit resources to prosecute such cases.^{cclxxiv} Together these results contributed to the perception that criminal infringement was a high profit, low risk venture.^{cclxxv}

Proof of the additional elements required in a criminal case magnifies the cost to infringers who are caught and convicted of engaging in copyright infringement. Copyright industries continue to lobby for changes in the law that will increase the punishments to infringers. However, Congress’ many amendments providing for higher penalties in criminal cases may not effectively deter potential infringers if the proof of the elements that criminal actions demand is too uncertain and if enforcement is too lenient.

1. “Commercial Advantage and Private Financial Gain” Element

The first element that distinguishes criminal prosecutions from civil actions is that the defendant must have acted “for purposes of commercial advantage and private financial gain.”^{cclxxvi} When Congress included this phrase in Section 506 of Title 17,^{cclxxvii} it intended the phrase to mean acting “for profit.”^{cclxxviii} However, virtually every civil cause of action that proceeds to the point of litigation will involve a defendant who acted “for profit.” Nimmer considers that because penal provisions are strictly construed against the prosecution and in favor of the defendant, courts may construe what constitutes conduct “for purposes of commercial advantage or private financial gain” in the criminal sphere more narrowly than in civil cases.^{cclxxix}

In the *LaMacchia* case, the defendant established an electronic bulletin board upon which he encouraged correspondents to upload popular software applications like Excel and Word Perfect. He then transferred those applications to a second encrypted address so that other users with a password could access and download them. A grand jury indicted LaMacchia on one count of conspiring to violate the wire fraud statute. The indictment alleged that LaMacchia purposed to defraud by his unauthorized and illegal reproduction and distribution of copyrighted software. Although the indictment alleges that LaMacchia caused more than \$1 million in losses, it did not allege that he “sought or derived any personal benefit” from his scheme. The defendant moved to dismiss.^{cclxxx}

The federal district court granted the defendant’s motion to dismiss.^{cclxxxi} After discussing copyright law and Congress’ source of authority for creating such, the court addressed the distinction between criminal prosecutions and civil infringement actions: willful infringement for the purposes of commercial advantage or private financial gain. In its discussion, the court adopts the view that infringement for the purposes of “commercial advantage or private financial gain” means something less burdensome than “for profit.”^{cclxxxii} Likely because of the difficulty in proving the defendant acted for such purposes, the government charged the defendant under the wire fraud statute.^{cclxxxiii} The court dismissed the case as an attempt to stretch copyright-like protection too far, action a prior Supreme Court case precludes.^{cclxxxiv}

At the end of the opinion, the court expresses its belief that the defendant behaved inappropriately, although not necessarily criminally.^{cclxxxv} LaMacchia’s actions shocked copyright owners, who worried that the court’s decision would lead to an onslaught of copyright infringement on the Internet.^{cclxxxvi} Copyright industry representatives immediately began lobbying for Congress to overrule the case with new legislation and Congress eventually passed the NET Act, which amended copyright law so that future defendants might be convicted, for the purpose of “revers[ing] the practical consequences of *United States v. LaMacchia*.”^{cclxxxvii}

The NET Act redefined “financial gain” to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyright works.”^{cclxxxviii} Nimmer believes that this definition goes too far, so that the defendant will be guilty in some cases where he or she acted with no hope of any personal gain.^{cclxxxix} However, I disagree with Nimmer that the new definition is so broad as to capture these kinds of infringers.^{ccxc}

Under the NET Act, a copyright infringer may be guilty if he or she acted for purposes of commercial advantage or private financial gain, or by reproduction or distribution above a certain threshold.^{ccxc1} The court held that LaMacchia did not act for commercial advantage or private financial gain as it was then defined,^{ccxc2} but it presumably would under the new definition. Assume, as the court believed, LaMacchia did not personally profit from the uploading and downloading of copyrighted works in that he did not collect any sort of fee for his services nor charge for the sale of such products. LaMacchia, by inducing users to gain password access to his downloading sites, created a popular website in that many Internet users visited his site. Suppose he then took the story of his popular website to advertisers. LaMacchia could sell advertising space on his downloading sites, thus profiting from his infringement. It would be virtually impossible to prove that this was his intention; the new definition of financial gain captures such actions.^{ccxc3}

Another scenario the opinion did not discuss was whether LaMacchia actually used any of the downloaded software applications.^{ccxc4} If so, he DID personally profit in that he did not have to purchase his own legitimate copy of Excel or Word Perfect—personal financial gain, valued at the avoided cost of the software or by the gain of its use. Additionally, if any of the downloaders used the applications, LaMacchia was assisting them in a similar profit. Applying this to a sound recording infringement situation helps to clarify the point. If Joe burns copies of his Shania Twain *Come On Over* compact disc, Jane burns copies of her Will Smith *Wild, Wild West* compact disc, John burns copies of his Beach Boys *Endless Summer* compact disc, and the friends then exchange the illegitimate copies, each friend has profited in the savings of NOT purchasing a legitimate copy of the sound recording.

An application of this concept outside the copyright arena may help to clarify the point. The Internal Revenue Code (hereinafter, “Tax Code”) requires taxpayers to report income on their tax returns and it defines “gross income” to include compensation for services (including fringe benefits) and gains derived from dealings in property.^{ccxc5} Persons who trade services rather than paying for each others’ services must report the value of their respective services as income.^{ccxc6} The accountant who prepares a tax return in exchange for his son’s orthodontics must report the value of the orthodontic work as a benefit received under earned income. The Tax Code also specifically includes as gross income property transferred in connection with performance of services, if “property is transferred to any person other than the person for whom such services are performed.”^{ccxc7} These benefits qualify as income because the taxpayer avoided having to pay cash to receive them. A final example is that of the game-show contestant who wins a new car—he or she is required to pay income taxes based on the value of that car.^{ccxc8}

Under the above fact patterns, the infringers personally profited from their actions. The new definition of financial gain clarifies that money need not have exchanged hands, but that the expectation of receipt of anything of value is a sufficiently profitable motive.^{ccxc9} When Representative Goodlatte introduced the NET Act in the House of Representatives in July of 1997, he specifically noted that the nature of the Internet and online activities encourage copyright infringement that is not “for profit,” as defined at the time.^{ccc} Thus, Congress considered this nature of the Internet and presumably approved the supposed elimination of the commerciality requirement as an element of criminal copyright infringement in its eventual passage of the NET Act.^{ccci} The NET Act still requires that an infringer have the intent to gain something valuable from the exchange;^{ccci2} thus, there is room for many infringers to escape criminal punishment, especially those who did not willfully infringe.

2. “Willfulness” Element

The second element that distinguishes criminal copyright infringement actions from civil suits is willfulness.^{ccci3} Even though willfulness may increase a civil defendant’s damages, proof of willfulness is not required for a court to find a civil defendant liable of copyright infringement.^{ccci4} Conversely, innocent infringement is not a defense to a civil infringement suit, but proof of it can mitigate damages.^{ccci5} In other words, a copyright owner may sue a person for an inadvertent infringement, but the United States government cannot prosecute unless the defendant’s alleged infringement was willful.^{ccci6}

The definition of willfulness in copyright infringement cases has been uncertain. Other types of cases in which willful intent was an element have construed willfulness as a “voluntary, intentional violation of a known legal duty.”^{ccci7} Nimmer suggests that when parties are involved in a good faith dispute about whether or not the defendant was acting within one of the limitations on the exclusive rights, like fair use, then there was no willful intent.^{ccci8} Senator Hatch similarly offers the example that an educator who in good faith believes he or she is engaging in fair use would fail to meet the willfulness standard for prosecution under the NET Act.^{ccci9} Another unresolved uncertainty has been whether the application of “willful intent” should mean the intent to infringe or merely the intent to copy or distribute.^{ccci10} Congress sought to resolve some of these uncertainties with passage of the NET Act in 1997.^{ccci11}

When Congress passed the NET Act, it clarified what does, and does not, constitute “willful” conduct.^{cccxi} The NET Act explicitly states that evidence of reproduction or distribution of a copyrighted work alone are insufficient to establish willful infringement.^{cccxi} Effectively, the NET Act confirms that more is required to prove criminal infringement than to prove civil infringement and that the intent must be to infringe, not merely to copy.^{cccxi} When the prosecution charges a defendant under Section 506(a)(2), he or she must have infringed works above a certain minimum retail value.^{cccxi} Presumably, a person who engages in the sale or trade of illicit sound recordings greater than this minimum value knows he or she is behaving illegally.

The NET Act attempts to clarify what separates civil copyright infringement from criminal infringement. The main difference is that prosecutors must show that the defendant acted willfully and for purposes of commercial advantage or private financial gain. Although some critics of the NET Act believe the commerciality requirement no longer exists, the practical consideration is that “questionable” or “border-line” cases will not proceed to the point of litigation. One resolution to the “financial gain” controversy could be for courts to consider an inverse relationship between the two requirements: the greater the level of the defendant’s willfulness, the lower the “financial gain” threshold. In criminal cases, however, each element must be proved beyond a reasonable doubt. Perhaps this requirement helps to justify the more lenient definition of “private financial gain.”

Appendix B – Royalty Math

ROYALTY MATH

Consider this hypothetical example based on realistic figures. Suppose a new band signs a contract stipulating a royalty rate of 14%, which applies to cassette sales. The CD rate is 85% of that. The band records its first album on a \$300,000 budget with a producer who gets a standard 3% royalty share.

CD suggested retail price		\$18.98
Less packaging (25%)	-	4.74
Royalty base	=	\$14.24
Royalty rate	=	9.35%
14% minus 3% for the product, multiplied by .85 to determine CD rate		
Royalty rate per CD	=	\$1.33
Royalty amount x 500,000 CDs	-	\$665,000
Less 15% free goods	-	\$99,750
(Copies given away to retailers, distributors, radio stations and reviewers)		
Less recording costs	-	\$300,000
Less 50% of independent promotion	-	\$100,000
(Cost of hiring outside agents to secure radio airplay. Multi-format campaigns can run \$350,000 to \$700,000 per single)		
Less 50% of video costs	-	\$75,000
Less tour support	-	\$50,000
(Losses accrued on tour. Few new acts break even on the road)		
Total	=	\$40,250
(Before managers, agents, etc. take their cut)		

Appendix C – Alternatives to Legislation

Copyright industry representatives do not unanimously support legislative change as a way of combating the increase in piracy, which is due in large part to technological change. Technological developments are beneficial to the copyright owners as well as to the pirates; therefore, some scholars believe the copyright owners should use technology to protect music more effectively.^{cccxxvi} Other authorities believe that copyright owners should seek to maximize the value, not the protection, of their intellectual property.^{cccxxvii} One problem that remains regardless of the level of protection is the enforcement of the laws that protect copyrights.^{cccxxviii}

Another approach to protecting music copyrights is to remove the pirate's motivation to infringe. Infringers may wish to steal intellectual property in the hopes of profiting or at least depriving intellectual property owners of profiting from their copyrighted works, or they may simply want to enjoy the content by reading a book, watching a movie, or listening to a record.^{cccxxix} Tougher penalties and stricter enforcement may or may not deter those motivated in either way, but if copyright owners can adopt a business model that removes the motivation to pirate, artists may actually gain protection while encouraging the free flow of information to the public.^{cccxxx}

The market for music is changing from a product-based market to a service industry.^{cccxxxi} The challenge is for copyright owners to provide their music to the public in a way that feels free, but in a way that also allows the musicians to earn enough profit that they are motivated to continue creating music. Technological developments have made the reproduction and distribution of music over the Internet cheap and simple.^{cccxxxii} Some industry leaders believe these developments are transitioning the world from analog distribution of digits to digital distribution; however, Griffin believes we are moving to a future of digital delivery, not distribution.^{cccxxxiii} The Internet is not about a new way to distribute content—it is about the just-in-time delivery of content in a hyper-efficient way.^{cccxxxiv} Griffin recently spoke on the reasons the copyright industry should focus on the delivery of music as a service, rather than on the distribution of music as a product.^{cccxxxv}

For the past approximately five decades, the sound recording industry has valued the product of music in boxes: music is sold in boxes and it is counted in boxes.^{cccxxxvi} For thousands of years, however, music had great value without the boxes. A person happened to hear a song on the radio, he or she paid nothing to hear it, and such access felt free.^{cccxxxvii} Listeners eventually wanted the option to play that song whenever and wherever they wanted and they were willing to pay for this additional right, called option value.^{cccxxxviii} The Internet and digital technology provide a fusion of these personal rights to experience music for free and to control when and where you personally hear it.^{cccxxxix}

If people can access music “digits” wherever they are whenever they want to hear the music, they will not have to carry the music around with them. When music is in boxes and the owners distribute those boxes to record stores, consumers must purchase and store those boxes, then carry the boxes with them so that they can listen to the music freely. Griffin points out that by distributing music in this way, artists lose the opportunity to develop a relationship with their fans. If artists instead embrace the digital delivery of music to their fans, listeners must return to the source of the music every time they want to listen to it—listeners do not have to carry and store music.^{cccxxx}

Distribution of music in boxes is also a form of “taxing” new music. A consumer must pay \$15-\$20 to sample a new compact disc, but the same consumer can sample more new music on the Internet for less money.^{cccxxxxi} Music on the Internet draws a crowd and increases the diversity of the content. Music deliverers can develop and maintain a relationship with their fans, which allows them to launch a more direct and profitable merchandising campaign.^{cccxxxii}

Past technological developments caused many industries to revise their business models from being a product-based distribution into being a service-based delivery. Not too many years ago, many homes had large freezers for storing food, in the event that surprise guests arrived for dinner. In today's world, catering services provide food that is delivered just in time and in a customized way. The freezers are no longer necessary. Similarly, the delivery of money is now hyper-efficient. Travelers used to carry travelers' checks and people carried enough cash with them in case of emergencies. Automated teller machines and credit cards provide the delivery of money to people when they need it and in the amount they desire. People no longer need to carry bulky wallets so that they are prepared for future times when they may need money.

While copyright industry representatives continue to press Congress for changes that will punish pirates of sound recordings and other copyrighted works, the industries must also seek to change their business models. Changing the business model will take away the pirate's motivations to infringe. If the music industry can evolve from a product-based market into a service industry and can embrace the delivery of music instead of the distribution of boxes, it can achieve a balance between the interests of the copyright owners and the consumers in a way that promotes the progress of science and art.^{cccxxxiii}

Before enacting new legislation, lawmakers must consider whether increased penalties and other proposed changes will effectively deter infringement activity without stifling the dissemination of information to the public. Copyright owners and law enforcement must make practical applications of the existing law to the current market for sound recordings by balancing the interests of creators and consumers, considering the Constitutional charge to Congress to “promote the Progress of Science and useful Arts,” which is the basis for copyright law.^{ccccxxiv}

Footnotes

¹ Copyright Act of 1976, 17 U.S.C. §§ 101 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

² Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. §§ 1-216 (1909), *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

³ Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).

⁴ *Black's Law Dictionary* actually gives one definition of piracy as, “[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.” BLACK’S LAW DICTIONARY 482 (Pocket ed. 1996). Piratical activity involving sound recordings generally falls into one or more of the three categories mentioned.

⁵ See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 114 (7th ed. 1995) [hereinafter KRASILOVSKY & SHEMEL].

⁶ See *id.*

⁷ See *id.*

⁸ One important issue affecting the constitutionality of anti-piracy laws is whether the three types of piracy are “copyright infringement” offenses. This issue is addressed throughout the paper, but for those readers with little copyright law experience, a general discussion of criminal versus civil copyright infringement is at Appendix A.

⁹ The International Federation of the Phonographic Industry (hereinafter “IFPI”) reported \$4.6 billion of piratical product sold globally in 2005. See IFPI, *The Recording Industry 2005 Commercial Piracy Report* (visited Apr. 20, 2006) <<http://www.ifpi.org/site-content/library/piracy2005.pdf>>. See also KRASILOVSKY & SHEMEL, *supra* note 5, at 115 (stating that for the United States in 1987, IFPI reported a \$281.7 million loss in sales due to record piracy).

¹⁰ Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (effective May 24, 1982) (codified as amended at 18 U.S.C. §§ 2318-2319 (1994 & Supp. III 1997)). The ultimate passage of the 1982 Act established a graduated system of criminal penalties for copyright infringement of sound recordings and audiovisual works and also established a uniform penalty for trafficking in counterfeit labels. See *id.*

¹¹ S. REP. NO. 97-274, at 3 (1981), *reprinted in* 1982 U.S.C.C.A.N. 127, 130 (citing *Hearings on S. 691 Before the Subcomm. on Crim. Law of the Senate Comm. on the Judiciary*, 97th Cong. 1 (1980) (statement of Renee L. Szybala, Special Assistant to the Associate Attorney General, United States Department of Justice)).

¹² *Pirate King Music's No. 1 Bootlegger Gets Busted Again*, THE VILLAGE VOICE, Feb. 17-23, 1999.

¹³ See *id.*

¹⁴ See *Violence Doesn't Faze Piracy Fighters*, BILLBOARD, Dec. 4, 1999.

¹⁵ See *id.*

¹⁶ See IFPI, *The Recording Industry 2005 Commercial Piracy Report* (visited May 31, 2006) <<http://www.ifpi.org/site-content/library/piracy2005.pdf>>.

¹⁷ A major artist’s recording budget begins at \$500,000 and usually reaches millions of dollars. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 111 (Rev., updated, and expanded ed. 1994) [hereinafter PASSMAN]. More recently, a standard recording budget may be \$300,000 as outlined by the table at Appendix B. See Edna Gunderson, *Bye, Bye, a Piece of the Pie*, USA TODAY (May 16, 2004) <http://www.usatoday.com/life/music/news/2004-05-16-royalties-main_x.htm>, *citing* PASSMAN.

¹⁸ Mechanical royalties are paid to the owner of the copyright on the music and lyrics of a song for the use of that song in making a recording. The owner is usually the publisher and/or the writer of the song. Songwriters customarily receive half of all royalties paid for a mechanical license, regardless of whether they retain ownership of the copyright, and publishers receive the other half. This equation may become much more complicated when there are multiple songwriters and publishers for a single song or if there is an assignment agreement between the songwriter and publisher. See KRASILOVSKY & SHEMEL, *supra* note 5, at 178.

¹⁹ Performance royalties are paid to a performing rights organization (hereinafter “PRO”) by establishments that wish to present performances of music. In the United States, the three PROs are the American Society of Composers, Authors, and Publishers (hereinafter “ASCAP”), Broadcast Music, Inc. (hereinafter “BMI”), and SESAC, Inc. (hereinafter “SESAC”). Songwriters and publishers affiliate with one of the PROs, which distributes royalties received from performance licenses to its members. The PROs calculate the distribution of these royalties

to their members by various methods, but divide the amounts equally between songwriter and publisher. *See id.* at 181-82.

²⁰ Approximately 85 percent of recordings released in the United States do not recover their costs and even fewer earn a profit. *See id.* at 115. “In the end, less than 10% are profitable, and in effect, it's these recordings that finance all the rest.” RIAA, *Cost of a CD* (visited May 31, 2006) <<http://www.riaa.com/news/marketingdata/cost.asp>>.

²¹ *See* RIAA, *Anti-Piracy: Old as the Barbary Coast, New as the Internet* (visited May 31, 2006) <<http://www.riaa.com/issues/piracy/default.asp>>.

²² For example, Billboard magazine lists the album *Stadium Arcadium* by the Red Hot Chili Peppers as #1 on The Billboard 200 chart and sells it through Circuit City for \$21.99. *See* Billboard, *The Billboard 200* (visited May 31, 2006) <http://www.billboard.com/bbcom/charts/chart_display.jsp?g=Albums&f=The+Billboard+200>.

²³ The RIAA reports that CD burning hardware costs only a few hundred dollars and blank CD-R discs cost less than \$1 apiece. *See* RIAA, *CD/CD-R Piracy* (visited May 31, 2006) <<http://www.riaa.com/issues/piracy/cdcd.asp>>.

²⁴ *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 93 (1999) [hereinafter SHAPIRO & VARIAN] (“Digital copies are *perfect* copies of the original. . . . Illicit CDs can be stamped out for well under a dollar apiece.”).

²⁵ DVDs are essentially bigger, faster CDs that can hold “cinema-like video, better-than-CD audio, and computer data. DVD aims to encompass home entertainment, computers, and business information with a single digital format, eventually replacing audio CD, videotape, laserdisc, CD-ROM, and perhaps even video game cartridges. DVD Association, *DVD Demystified* (visited May 8, 2000) <<http://www.dvddemystified.com/dvdfaq.html#1.1>>.

²⁶ MP-3 is defined as “what has become the standard file format for the compression of music. Because MP3s significantly compress songs, it is a perfect candidate for distributing on the internet. It is clearly a standard online format and has resulted in the creation of dozens of software tools (like Napster and Gnutella) that encourage MP3 sharing/copying via the web.” Planet eBook, eBooks Glossary 1.0 (visited May 31, 2006) <<http://www.planetebook.com/mainpage.asp?webpageid=70>>.

²⁷ “In a P2P network, the ‘peers’ are computer systems which are connected to each other via the Internet. Files can be shared directly between systems on the network without the need of a central server. . . . Once connected to the network, P2P software allows you to search for files on other people's computers. Meanwhile, other users on the network can search for files on your computer.” Techterms.org, *P2P (Peer-To-Peer)* (visited May 31, 2006) <<http://www.techterms.org/definition/p2p>>.

²⁸ Computer users may not consider that copyright law applies to such actions, perhaps because of the ease and convenience of using the Internet. *See* H.R. REP. NO. 105-339, at 4 (1997).

²⁹ *See* Paul Bond, **CD Puts Ability to Buy Music in Users' Palms*, HOLLYWOOD REPORTER, Apr. 5, 2000.

³⁰ Napster was originally developed to allow users to locate and download music in MP-3 format from one convenient, easy-to-use interface. *See* Napster, *So, What the Heck is Napster?* (visited May 8, 2000) <<http://www.napster.com/whatisnapster.html>>.

³¹ *See* RIAA, *2004 Year-End Anti-Piracy Statistics* (visited May 31, 2006) <<http://www.riaa.com/news/newsletter/pdf/2004yrEndAPstats.pdf>>.

³² Not all copyright industry representatives support these legislative changes. For more information, please refer to the discussion at Appendix C.

³³ *See* RIAA, *Piracy: Piracy Strategies* (visited Jan. 2, 2000) <http://www.riaa.com/piracy/pir_ps.htm>.

³⁴ *See* IFPI, *Music Piracy Report 1998* (visited Mar. 25, 2000) <http://www.ifpi.org/antipiracy/piracy_now.html>.

³⁵ *See* RIAA, *Press Room: Recording Industry Wins \$13.7 Million Judgment Against International Music Piracy Ring* (visited May 31, 2006) <<http://www.riaa.com/news/newsletter/press1999/110999.asp>>.

³⁶ *See* United States Department of Justice, *First Two Defendants Plead Guilty in Largest CD Manufacturing Piracy Scheme Uncovered in U.S. to Date* (visited May 31, 2006) <<http://www.usdoj.gov/criminal/cybercrime/wenPlea.htm>>.

³⁷ *See* United States Department of Justice, *Operation Buccaneer* (visited May 31, 2006) <<http://www.usdoj.gov/criminal/cybercrime/ob/OBMain.htm>>.

³⁸ *See, e.g.*, 143 CONG. REC. H9885 (1997) (statement of Rep. Goodlatte). Again, not all copyright industry representatives believe that enacting tougher laws will solve the piracy problem, nor do they all believe maximum protection of intellectual property is in the best interest of the copyright owners or the public. *See supra* note 32. This paper addresses only the Constitutionality of anti-piracy legislation under Copyright and Commerce Clause preemption and does not consider whether the laws are otherwise an effective method of fighting piracy or promoting “the progress of Science and the Useful Arts.” U.S. CONST., art. I, § 8, cl. 8.

³⁹ U.S. CONST. art. VIII §8.

⁴⁰ 17 U.S.C.

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- ⁴¹ U.S. CONST. art. VIII §8.
- ⁴² U.S. CONST. art. VI.
- ⁴³ See *Felder v. Casey*, 487 U.S. 131, 138 (1988).
- ⁴⁴ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-27, at 497 (2nd ed. 1988) [hereinafter TRIBE].
- ⁴⁵ U.S. CONST., art. I, § 8, cl. 8.
- ⁴⁶ Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).
- ⁴⁷ Throughout this paper, “Title 17” refers to federal copyright law, without regard to which Copyright Act applies. The Copyright Act of 1909 and the Copyright Act of 1976 are the main copyright acts discussed in this paper. When a discussion is specific to the text of a particular act, this paper will refer to that act by its year.
- ⁴⁸ 440 U.S. 257 (1979).
- ⁴⁹ *Id.* at 302.
- ⁵⁰ See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 337 (David L. Shapiro et al eds., 13th ed. 1997).
- ⁵¹ 17 U.S.C. § 301.
- ⁵² A work is “fixed in a tangible medium of expression” when “its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101.
- ⁵³ See *id.* §§ 102, 103, 106, 301.
- ⁵⁴ Sound recordings are defined as “works that result from the fixation of . . . sounds, . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” *Id.* § 101.
- ⁵⁵ See *id.* § 102(7).
- ⁵⁶ Section 114 limits the exclusive rights so that the Section 106 rights to perform and to display a copyrighted work are not applicable to sound recordings. See *id.* §§ 106, 114. However, the RIAA released this statement on the Digital Performance Right in Sound Recordings Act of 1995: “For more than 20 years, the RIAA has been fighting to give copyright owners of sound recordings the right to authorize digital transmissions of their work. Before the passage of the Digital Performance Right in Sound Recordings Act of 1995, sound recordings were the only U.S. copyrighted work denied the right of public performance. This bill allows copyright owners of sound recordings the right to authorize certain digital transmissions of their works, including interactive digital audio transmissions, and to be compensated for others. This right covers, for example, interactive services, digital cable audio services, satellite music services, commercial online music providers and future forms of electronic delivery.” RIAA, *Legislation: Glossary* (visited Aug. 21, 1999) <http://www.riaa.com/musicleg/ml_gloss.htm##_top>.
- ⁵⁷ See 17 U.S.C. § 301.
- ⁵⁸ H.R. REP. NO. 94-1476, at 130-33 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746 (1976).
- ⁵⁹ See, e.g., *Wharton v. Columbia Pictures Indus.*, 907 F. Supp. 144 (D. Md. 1995).
- ⁶⁰ See, e.g., *Computer Associates Intern, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (requiring that to avoid preemption, a state law must have an “extra element” that changes the nature of the prohibited action so that it is qualitatively different from a copyright infringement claim).
- ⁶¹ See *id.* at 717; see, e.g., *Nash v. CBS, Inc.*, 704 F. Supp. 823, 832-33 (N.D. Ill. 1989), *aff’d* 899 F.2d 1537, citing *Baltimore Orioles v. Major League Baseball Players Ass’n*, 805 F.2d 663, 677-78, n.26 (1986).
- ⁶² See *Nash*, 704 F. Supp. at 832 (finding that state laws that attempt to make uncopyrightable material subject to copyright protection could be preempted).
- ⁶³ See Lackland H. Bloom Jr., *Lecture on Copyright Preemption at Southern Methodist University* (Nov., 1998) (transcript available at Southern Methodist University, Underwood Law Library).
- ⁶⁴ See *id.*
- ⁶⁵ U.S. CONST. art. I, § 8, cl. 3.
- ⁶⁶ See *Wickard v. Filburn*, 317 U.S. 111, 129 (1942).
- ⁶⁷ Congress may also use the “dormant” Commerce Clause, which refers to the unused power of Congress to legislate. It implies a limitation on state legislative activity in areas the Constitution authorizes the federal government to legislate, like copyright, regardless of whether Congress has actually exercised its authority. At this point of analysis, Commerce Clause and Copyright Clause preemption principles merge. See *supra* text accompanying notes 42-64.
- ⁶⁸ See HENRY H. PERRITT, JR., *LAW AND THE INFORMATION SUPERHIGHWAY* § 6.14, at 291 (1996) [hereinafter PERRITT].
- ⁶⁹ See *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1851).

⁷⁰ See PERRITT, *supra* note 68, § 6.14, at 291 (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977) and *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979)).

⁷¹ 397 U.S. 137 (1970).

⁷² See *id.* at 141-42.

⁷³ See PERRITT, *supra* note 68, § 6.14, at 292.

⁷⁴ See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); *Hughes v. Oklahoma*, 441 U.S. at 336.

⁷⁵ See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. at 331 (1977).

⁷⁶ See *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

⁷⁷ See PERRITT, *supra* note 68, § 6.14, at 291.

⁷⁸ Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

⁷⁹ Recall that counterfeiting is the unauthorized duplication of the sounds contained on a phonorecord (piracy) and the unauthorized duplication of the original label artwork, trademark, and packaging. See *supra* text accompanying note 4. Hence, prosecutors can bring charges involving counterfeit product under unauthorized duplication laws. They can also charge such defendants under trafficking in counterfeit goods statutes and trademark laws. See, e.g., 18 U.S.C. §§ 2318, 2320 (1994 & Supp. III 1997).

⁸⁰ Of those statutes, forty-two allow for punishment of unauthorized duplication as a felony and seven limit punishment to that of a misdemeanor. Vermont does not have an unauthorized duplication statute and the Indiana legislature repealed its unauthorized duplication statute because its larceny statute covered the same offense. See IND. CODE ANN. §§ 35-43-4-2, 35-43-5-2(4) (Michie 1998).

⁸¹ Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972); cf. Copyright Act of 1976, 17 U.S.C. § 102(a)(7) (1994 & Supp. IV 1998) (including “sound recordings” in the list of protectable works of authorship).

⁸² Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (codified as amended at 18 U.S.C. § 2319 (1994 & Supp. III 1997)).

⁸³ Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. §§ 1-216 (1909), *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

⁸⁴ See 412 U.S. 546, 548-49 (1973).

⁸⁵ *Id.*

⁸⁶ See *id.* at 558-560, 571.

⁸⁷ See *id.* at 570, n.28.

⁸⁸ Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. §§ 1, 5 (1909), *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

⁸⁹ As a simple illustration, Joe writes a song and gives Jane permission to record herself performing that song. If Jimmy then wants to record himself performing the same song, he must either pay or get permission from Joe, but he does not need to get permission from Jane. If Jimmy wants to sell copies of Jane’s performance, he then must obtain Jane’s permission.

⁹⁰ See 412 U.S. at 570.

⁹¹ See Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (codified as amended at 18 U.S.C. § 2319 (1994 & Supp. III 1997)).

⁹² See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391, § 3 (effective Feb. 15, 1972); see also Copyright Act of 1976, 17 U.S.C. § 301(c) (1994 & Supp. IV 1998) (addressing preemption of state laws for sound recordings fixed on or after February 15, 1972).

⁹³ See TRIBE, *supra* note 44, § 6-27, at 497; U.S. CONST. art. VI.

⁹⁴ See *Goldstein v. California*, 412 U.S. 546, 571 (1973).

⁹⁵ Of these statutes, thirty-four allow for punishment of bootlegging as a felony and one limits punishment to that of a misdemeanor. Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Maine, Minnesota, Nebraska, Nevada, Ohio, South Dakota, Utah, and Vermont do not have anti-bootlegging statutes.

⁹⁶ See, e.g., N.Y. PENAL LAW §§ 275.15-.20 (McKinney 1999).

⁹⁷ U.S. CONST. art. I, § 8, cl. 8.

⁹⁸ 17 U.S.C. § 106 (1994 & Supp. IV 1998).

⁹⁹ *Id.* § 102.

¹⁰⁰ See *id.*

¹⁰¹ *Id.* § 101.

¹⁰² *Id.*

¹⁰³ *Id.* § 102.

¹⁰⁴ See *People v. M & R Records, Inc.*, 432 N.Y.S.2d 846 (Sup. Ct. 1980).

¹⁰⁵ See *id.* at 847.

¹⁰⁶ See *id.* at 850.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ 17 U.S.C. § 101 (1994 & Supp. IV 1998).

¹¹¹ See *id.*

¹¹² PERRITT, *supra* note 68, § 10.5, at 428.

¹¹³ See 17 U.S.C. § 101.

¹¹⁴ A court would not use preemption analysis under the 1976 Act, 17 U.S.C. § 301 if the court has already determined that the Copyright Clause does not authorize federal regulation of bootlegging.

¹¹⁵ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970).

¹¹⁶ See, e.g. N.Y. PENAL LAW §§ 275.15-.20 (McKinney 1999).

¹¹⁷ See, e.g., *id.*

¹¹⁸ See, e.g., *id.*

¹¹⁹ See, e.g., *Dowling v. United States*, 473 U.S. 207 (1985).

¹²⁰ 28 U.S.C. § 2314 (1994 & Supp. III 1997).

¹²¹ See *Dowling*, 473 U.S. at 207.

¹²² See *id.* at 226.

¹²³ See *id.* at 213, *citing* *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982); *United States v. Drum*, 733 F.2d 1503, 1505-06 (11th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517, 1519-21 (11th Cir. 1984); *United States v. Whetzel*, 589 F.2d 707, 710, n.10 (D.C. Cir. 1978); *United States v. Berkwitz*, 619 F.2d 649, 656-58 (7th Cir. 1980).

¹²⁴ See *Dowling*, 473 U.S. at 216.

¹²⁵ See *id.* at 214.

¹²⁶ See *id.* at 216.

¹²⁷ See *id.*

¹²⁸ See *id.* at 219.

¹²⁹ See *id.* at 220-21.

¹³⁰ See *id.* at 207.

¹³¹ U.S. CONST. art. I, § 8, cl. 8.

¹³² WEBSTER'S COLLEGE DICTIONARY 794 (1991) (defining adjective as "being in play," "made up of people who are actually present, "broadcast while happening or being performed, or "by transmission at the actual moment of occurrence or performance.").

¹³³ U.S. CONST. art. I, § 8, cl. 8.

¹³⁴ Copyright Act of 1976, 17 U.S.C. § 302(a) (1994 & Supp. IV 1998).

¹³⁵ See *id.* §§ 201(d), 302(a)

¹³⁶ *Dowling v. United States*, 473 U.S. 207 (1985).

¹³⁷ See *id.* at 217.

¹³⁸ See *id.*

¹³⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁴⁰ See 18 U.S.C. § 2319A (1994 & Supp. III 1997).

¹⁴¹ Copyright Act of 1976, 17 U.S.C. § 1101 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

¹⁴² 175 F.3d 1269 (11th Cir. 1999), *cert. denied*, No. 99-879, 2000 WL 305841 (U.S. Mar. 27, 2000).

¹⁴³ See Stan Soocher, *Appeals Court Backs Anti-Bootlegging Statute*, ENT. L. & FIN., June 1999, at 3.

¹⁴⁴ See *id.* at *8, *citing* 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes).

¹⁴⁵ The fixation requirement is embedded in the definition of "Writings," which is used in the Copyright Clause. U.S. CONST. art. I, § 8, cl. 8. Congress is only authorized to protect original works of authorship that are fixed in a tangible medium of expression. See Copyright Act of 1976, 17 U.S.C. § 102 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

¹⁴⁶ See *Moghadam*, 175 F.3d at 1273.

¹⁴⁷ See *id.* at 1277.

¹⁴⁸ *Id.* at 1281.

¹⁴⁹ See *United States v. Moghadam*, No. 99-879, 2000 WL 305841 (U.S. Mar. 27, 2000).

¹⁵⁰ See Moghadam, 175 F.3d at 1273.

¹⁵¹ See 17 U.S.C. § 102 (1994 & Supp. IV 1998).

¹⁵² See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391, § 3 (effective Feb. 15, 1972); see also Copyright Act of 1976, 17 U.S.C. § 301(c) (1994 & Supp. IV 1998) (addressing preemption of state laws for sound recordings fixed on or after February 15, 1972).

¹⁵³ See 175 F.3d at 1269.

¹⁵⁴ U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI.

¹⁵⁵ See *TRIBE*, *supra* note 44, § 6-27, at 497.

¹⁵⁶ See 18 U.S.C. § 2319A (1994 & Supp. III 1997).

¹⁵⁷ See 350 F. Supp. 2d 823 (C.D. Cal. 2004) and 346 F. Supp. 2d 413, (S.D.N.Y. 2004), respectively.

¹⁵⁸ The constitutional basis for both congressional enactments comes from two clauses in Article I Section 8: the Commerce Clause and the Copyright Clause. A current area of debate among constitutional law scholars is whether the commerce clause does provide this authority. See Brian Danitz, Comment, *Martignon and KISS Catalog: Can Live Performances Be Protected?*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1143 (2005), William Patry, *The Enumerated Powers Doctrine and Intellectual Property: an Imminent Constitutional Collision*, 67 *GEO. WASH. L. REV.* 359, 394-97 (1999), Angela T. Howe, *Annual Review 2005: Part II: Entertainment Law and New Media: VIII: Entertainment & Constitutional Law: a Note: United States v. Martignon & KISS Catalog v. Passport International Products: The Anti-Bootlegging Statute and the Collision of International Intellectual Property Law and the United States Constitution*, 20 *BERKELEY TECH. L.J.* 829, (2005); *contra*. Joseph C. Merschman, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress's Copyright Power*, 34 *CONN. L. REV.* 661, (Winter, 2002). This paper adopts the position taken by Patry and others, that the Rehnquist Court rejected the notion that Congress' enumerated powers are hermetically sealed.

¹⁵⁹ See, e.g., CAL. PENAL CODE § 653w (West 1999).

¹⁶⁰ See *Anderson v. Nidorf*, 26 F.3d 100, 102 (9th Cir. 1994).

¹⁶¹ Of those laws, thirty-seven allow for punishment of a violation as a felony and nine limit punishment to that of a misdemeanor. The New Hampshire statute does not specify penalties for true name and address violations. See N.H. REV. STAT. ANN. § 352-A:3 (1995). Hawaii, Maine, Vermont, and Wyoming are the only states without true name and address statutes.

¹⁶² Note the difference between “replication” and “manufacture.” The true manufacturer of a sound recording is the holder of the master recording, usually the record label. A master recording goes through a process in which the manufacturer may create (or cause the creation of) many intermittent components before finally finishing with the product that will then be replicated for distribution. Additionally “pressings” ordered by the manufacturer would then merely need to be replicated, rather than proceeding through the entire manufacturing process. Each type of media has its own manufacturing process. In this case, the word “replication” is used to refer to the actual duplication, or copying, of the product and the word “manufacturer” is used to refer to the holder of a master or the person who orders the replication of a sound recording. Legitimate manufacturers are those parties who own the right to copy either because they are the initial owner of the right (record labels) or because the owner has issued a license to them of that right.

¹⁶³ 235 Cal. App. 3d 586 (1991).

¹⁶⁴ CAL. PENAL CODE § 653w (West 1999).

¹⁶⁵ 26 F.3d at 101. The defendant also argued that the statute violated the First Amendment. In response, the court noted that the statutes can be narrowly designed to serve a particular public need. The court concluded that California had a compelling interest in protecting the public from being victimized by false and deceptive commercial practices such as piracy of legitimate music industry product. Additionally, the court reasoned that the “speech at issue is deemed as commercial speech, which is subject to less severe scrutiny than other forms of protected communication.” The court stated that where commercial speech is affected, the state need only show a reasonable relationship between the statute and the state's interest in preventing deception of consumers. See *id.*

¹⁶⁶ See Copyright Act of 1976, 17 U.S.C. § 301 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

¹⁶⁷ See *Anderson v. Nidorf*, 26 F.3d at 102. The federal copyright law protects the rights of copyright owners because it is an incentive to them to continue creating and sharing their works with the public. See U.S. CONST., art. I, § 8, cl. 8 (authorizing Congress to enact laws that “promote the progress of Science and the Useful Arts”).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *People v. M & R Records, Inc.*, 432 N.Y.S.2d 846 (Sup. Ct. 1980).

¹⁷² The recordings involved were fixed before February 15, 1972; thus, the federal unauthorized duplication law did not yet apply and did not preempt use of the state statute. *See id.* at 847.

¹⁷³ The bootleg recordings involved were created in 1978, prior to the existence of the federal anti-bootlegging law. *See id.*

¹⁷⁴ *See id.* at 850.

¹⁷⁵ *See* *People v. Borriello*, 588 N.Y.S.2d 991 (Sup. Ct. 1992).

¹⁷⁶ *See id.* at 994.

¹⁷⁷ *See id.* at 995-96.

¹⁷⁸ *See* *Hicks v. State*, 674 A.2d 55 (Md. Ct. Spec. App. 1996).

¹⁷⁹ *See* *State v. Awawdeh*, 864 P.2d 965 (Wash. Ct. App. 1994), *cert. denied*, 115 S. Ct. 441 (1994).

¹⁸⁰ *See* *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3d Cir. 1986).

¹⁸¹ 73 PA. CONS. STAT. ANN. §§ 203-1 to -11 (West 1993).

¹⁸² *See* *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982).

¹⁸³ *See* 800 F.2d at 371, 375-377.

¹⁸⁴ *See id.* at 370.

¹⁸⁵ *See id.* at 371.

¹⁸⁶ *Id.* at 372 (citing *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970)).

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* at 372-373.

¹⁹¹ *See id.*

¹⁹² Users need only make relatively minor modifications to CD-mastering and CD-replicating equipment to use the same equipment to master or replicate CD-ROMs or DVDs.

¹⁹³ *See* SHAPIRO & VARIAN, *supra* note 24, at 93.

¹⁹⁴ *See supra* text accompanying notes 14-16.

¹⁹⁵ *See* CAL. BUS. & PROF. CODE §§ 21800-21806 (West Supp. 5A 1999) (effective Jan. 1, 1999).

¹⁹⁶ *See* FLA. STAT. ANN. § 817.5615 (West 2000) (effective Oct. 1, 1999).

¹⁹⁷ *See* N.Y. GEN. BUS. LAW § 390-a (McKinney 2000) (effective Jan. 1, 2000).

¹⁹⁸ Note here again the difference between “replicator” and “manufacturer.” *See supra* note 162. ODIL uses the term “manufacturer,” but defines it to mean “a person who replicates the physical optical disc or produces the master used in any optical disc replication process.” CAL. BUS. & PROF. CODE § 21802. This paper will continue to use the term “replicator” to refer to the party that must comply with ODIL. *See also* Larry Jaffee, *CA Law Requires ID on Discs*, REPLICATIONNEWS Dec. 1998, at 1, 68 (discussing California’s ODIL and referring to the language “manufacturers,” but discussing the responsibilities of “replicators”).

¹⁹⁹ *See, e.g.*, CAL. BUS. & PROF. CODE § 21800.

²⁰⁰ A permanent mark could conceivably include a mark made by a permanent marker; thus, independent artists who replicate their own optical discs using generic commercial equipment like CD-burners may comply by hand-writing their identifiers on their optical discs.

²⁰¹ *See* Larry Jaffee, *CA Law Requires ID on Discs*, REPLICATIONNEWS, Dec. 1998, at 68.

²⁰² *See id.* (revealing that a sales representative of an Austin, Texas replicator has received phone calls from California-based brokers inquiring whether they could use its services instead of using those of their regular California replicators).

²⁰³ *See, e.g.*, CAL. BUS. & PROF. CODE § 21805 (“Any person who buys, sells, receives, transfers, or possesses for purposes of sale or rental an optical disc knowing that the identification mark required by this chapter has been removed, defaced, covered, altered, or destroyed, or knowing it was manufactured in California without the required identification mark . . . is guilty.”).

²⁰⁴ IFPI, *SID Code Implementation Guide* (visited May 31, 2006) <<http://www.ifpi.org/site-content/library/sid-code-implementation-guide.pdf>>.

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42.

²⁰⁸ *See* California Committee Reports dated 4/21/98 (Assembly), 5/6/98 (Assembly), 6/22/98 (Senate), 6/30/98 (Senate), and 8/30/98 (Senate).

²⁰⁹ *See supra* text accompanying notes 159-190.

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- ²¹⁰ *Customs License Move to Curb CD Pirates*, SOUTH CHINA MORNING POST, Jan. 6, 1998.
- ²¹¹ See Optical Disc (Licensing and Control) Act 1999 §§ 4(1), 14(1) (Malaysia).
- ²¹² Gordon Masson, *IFPI Seeks Law Enforcers' Aid on Piracy*, BILLBOARD, Apr. 8, 2000.
- ²¹³ S. Rep. No. 105-190, at - (1998).
- ²¹⁴ The RIAA sponsored ODIL in California and New York. Its website is at <<http://www.riaa.com>>.
- ²¹⁵ The Motion Picture Association of America sponsored ODIL in Florida. Its website is at <<http://www.mpa.org>>.
- ²¹⁶ The Interactive Digital Software Association's website is at <<http://www.idsa.com>>. It along with the RIAA, the Motion Picture Association of America, the Software Publishers Association, and the Video Software Dealers Association have all supported the passage of California's ODIL. See Larry Jaffee, *CA Law Requires ID on Discs*, REPLICATIONNEWS, Dec. 1998, at 68.
- ²¹⁷ The Software Publishers Association's website is at <<http://www.spa.com>>. It is a trade association that represents the interests of its approximately 1200 software industry member companies. See Gary M. Lawrence and Charles B. Lobsenz, *New Weapons in the War Against Internet Software Pirates* (visited May 31, 2006) <<http://library.findlaw.com/1998/Feb/1/128745.html>>.
- ²¹⁸ The Business Software Alliance's website is at <<http://www.bsa.org>>. It represents the interests of publishers of software for personal computers and promotes continued growth of the software industry in 65 countries. See *id.*
- ²¹⁹ The International Recording Media Association's website is at <<http://www.recordingmedia.org/>>. The organization's members include commercial optical disc replicators (manufacturers).
- ²²⁰ The purposes of the Optical Disc Manufacturing Association included providing a forum for technical discussions regarding product and quality issues and providing leadership in the areas of education, clarification, methodologies, and standards. See Optical Disc Manufacturing Association, *ODMA Charter* (visited Jan. 4, 2000) <<http://www.odma.com/charter.htm>>.
- ^{ccxxi} See Copyright Act of 1976, 17 U.S.C. §§ 106, 501 (1994 & Supp. IV 1998).
- ^{ccxxii} See *id.* § 504.
- ^{ccxxiii} See 18 U.S.C. Federal Sentencing Guidelines, ch. 1, pt. A, ¶ 2 (1994 & Supp. III 1997).
- ^{ccxxiv} See 18 U.S.C. § 2319.
- ^{ccxxv} See 17 U.S.C. § 506.
- ^{ccxxvi} See *In re Winship*, 397 U.S. 358, 361, 364 (1970).
- ^{ccxxvii} See *Lavine v. Milne*, 42 U.S. 577, 585 (1976) (“Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment”); *Merzon v. County of Suffolk*, 767 F. Supp. 432, 444 (E.D.N.Y. 1991) (“To establish by preponderance of evidence means to prove that something is more likely so than not so; in other words, preponderance of evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in court's mind belief that what is sought to be proved is more likely true than not”).
- ^{ccxxviii} 17 U.S.C. §§ 106, 501.
- ^{ccxxix} See *id.* § 102.
- ^{ccxxx} See *id.* § 106.
- ^{ccxxxi} See *id.* §§ 106-120.
- ^{ccxxxii} See *id.* § 107.
- ^{ccxxxiii} See *id.* §§ 106, 107. The federal law states that courts should consider four factors in determining whether a particular use is a “fair use:” 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyright work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, 4) the effect of the use upon the potential market for or value of the copyrighted work. See *id.* § 107.
- ^{ccxxxiv} See 17 U.S.C. §§ 502, 504(a).
- ^{ccxxxv} Statutory damage awards are NOT available when the infringement of an unpublished copyrightable work began before the effective date of its registration or when the infringement of a copyrightable work occurred after its first publication and before the effective date of its registration, unless the registration occurred within three months after the first publication of the work. See *id.* § 412.
- ^{ccxxxvi} Likewise, the court may decrease the amount to \$200 if the defendant was not aware and had no reason to believe his acts constituted infringement. See *id.* § 504(c).
- ^{ccxxxvii} See *id.* § 504(b).
- ^{ccxxxviii} See *id.*
- ^{ccxxxix} See *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 780 (5th Cir. 1999).
- ^{ccxl} Pub. L. No. 106-160, 113 Stat. 1774, § 2 (codified as amended at 17 U.S.C. § 504(c)(2) (1994 & Supp. IV 1998)).

ccxli See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 178 (1995).

ccxlii See 145 CONG. REC. S7456 (daily ed. June 22, 1999) (statement of Sen. Hatch).

ccxliiii See *id.*

ccxliv See *id.*

ccxlv See Copyright Act of 1976, 17 U.S.C. § 506(a) (1994 & Supp. IV 1998).

ccxlvi See *id.*

ccxlvii See *id.*

ccxlviii 18 U.S.C. § 2319 (1994 & Supp. III 1997).

ccxlix See Copyright Act of 1909, 35 Stat. 1075, § 104(b) (1909), *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1994) (effective Jan. 1, 1978). The Sound Recording Act of 1971 added sound recordings to the list of protectable works of authorship. Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).

cccl Pub. L. No. 97-180, 96 Stat. 91 § 3 (effective May 24, 1982).

cccli See *id.*

ccclii See *id.*

cccliii See *id.*

cccliv See Copyright Felony Act of 1992, Pub. L. No. 102-561, 106 Stat. 4233 § 1 (effective Oct. 28, 1992).

ccclv See *id.*

ccclvi Pub. L. No. 105-147, 111 Stat. 2678 (effective Dec. 16, 1997) (codified as amended in scattered sections of 17, 18, and 28 U.S.C.) [hereinafter NET Act].

ccclvii Pub. L. No. 106-160, 113 Stat. 1774 (effective Dec. 9, 1999) (codified in scattered sections of 17, 18, and 28 U.S.C.) [hereinafter 1999 Act].

ccclviii See NET Act, *supra* note 256, § 2(b) (codified as amended at 17 U.S.C. § 506(a)).

ccclix NET Act, *supra* note 257, § 2(b).

ccclx See *id.* § 2(d).

ccclxi *Id.*

ccclxii See *id.* § 2(g) (codified as amended at 28 U.S.C. § 994(1)-(2) (1994 & Supp. III 1997)).

ccclxiii See M. WILLIAM KRASILOVSKY & SIDNEY SHELME, THIS BUSINESS OF MUSIC 114 (7th ed. 1995).

ccclxiv 1999 Act, *supra* note 257, § 3 (codified as amended at 28 U.S.C. § 994 (2)).

ccclxv *Id.*

ccclxvi See *id.*

ccclxvii See *id.*

ccclxviii See *id.*

ccclxix See H.R. REP. NO. 106-216, at n.4 (1999).

ccclxx *Id.*

ccclxxi *Id.* at 3-4.

ccclxxii See *id.*

ccclxxiii See *id.*

ccclxxiv See *id.*

ccclxxv See *id.*

ccclxxvi See Copyright Act of 1976, 17 U.S.C. §§ 106, 501 (1994 & Supp. IV 1998).

ccclxxvii *Id.* § 506(a).

ccclxxviii See H.R. REP. NO. 94-1476, at 163 (1976). The defendant need not have realized a “commercial advantage or private financial gain,” but merely have attempted to attain that goal. See *United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987).

ccclxxix See MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 15.01[A][2], at 15-5 (1999) [hereinafter NIMMER] (citing *United States v. Wells*, 176 F. Supp. 630 (S.D. Tex. 1959), *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Cal. 1974), *aff’d*, 540 F.2d 961 (9th Cir. 1976) (suggesting such a distinction in construing the Sound Recording Amendment Act of 1971)).

ccclxxx See 871 F. Supp. at 536-37.

ccclxxxi See *id.* at 535.

ccclxxxii See *id.* at 539.

ccclxxxiii See *id.* at 537.

ccclxxxiv See *id.* at 545.

ccclxxxv See *id.*

^{cclxxxvi} See 4 NIMMER, *supra* note 279, § 15.01[B][2], at n.117 (quoting 143 CONG. REC. H9885 (1997) (statement of Rep. Goodlatte)). For example, the court held in *State v. Perry* that “uploading” and “downloading” were both copying and that posting software on a bulletin board where others can access it and download it is distribution. Federal copyright law exclusively governs such activity, whether civil or criminal. At the time Perry committed the infringing acts, in 1995, reproduction and distribution were not criminal acts unless performed for profit. Therefore, the government could not bring a criminal infringement action against Perry, nor could it bring a state action due to preemption. See *State v. Perry*, 697 N.E.2d 624 (1998).

^{cclxxxvii} H.R. REP. NO. 105-339, at 3 (1997).

^{cclxxxviii} NET Act, *supra* note 256, § 2(a) (codified at 17 U.S.C. § 101 (1994 & Supp. IV 1998)).

^{cclxxxix} See 4 NIMMER, *supra* note 279, § 15.01[B][2], at 15-21.

^{ccxc} The definition may, however, go too far in that it restricts the free flow of information, contrary to the purpose of the Copyright Clause. U.S. CONST., art. I, § 8, cl. 8.

^{ccxci} NET Act, *supra* note 256, § 2(b) (codified as amended at 17 U.S.C. § 506(a)).

^{ccxcii} See *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

^{ccxciii} See NET Act, *supra* note 256, § 2(a) (codified at 17 U.S.C. § 101).

^{ccxciv} See 871 F. Supp. 535.

^{ccxcv} I.R.C. § 61(a)(1), (3) (1994).

^{ccxcvi} “For this purpose, property includes tangible items . . . and intangible items.” 26 C.F.R. § 1.61-6(a) (1999).

^{ccxcvii} See I.R.C. § 83.

^{ccxcviii} See *id.* § 74.

^{ccxcix} See NET Act, *supra* note 256, § 2(a) (codified at 17 U.S.C. § 101 (1994 & Supp. IV 1998)).

^{ccc} See 143 CONG. REC. E1529-01 (1997) (statement of Rep. Goodlatte). Representative Goodlatte later humorously urges that we not allow the Internet to become the “Home Shoplifting Network.” 143 CONG. REC. H9885 (1997) (statement of Rep. Goodlatte).

^{ccci} NET Act, *supra* note 256.

^{cccii} *Id.* § 2(a) (codified at 17 U.S.C. § 101).

^{ccciii} See 17 U.S.C. § 506(a).

^{ccciv} See *id.* §§ 504(c)(2), 501(a).

^{cccv} See *id.* § 504(c)(2).

^{cccevi} See 4 NIMMER, *supra* note 279, § 15.01[A][2], at 15-6 (citing *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938) and *Fisher v. Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924)). “In fact, the Department of Justice contracts criminal copyright actions with civil copyright infringement by noting that the latter remains a strict liability tort.” H.R. REP. NO. 105-339, at 10 (1997).

^{cccevi} *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991).

^{cccevi} See 4 NIMMER, *supra* note 279, § 15.01[A][2], at 15-7.

^{ccceix} NET Act, *supra* note 256; see 143 CONG. REC. S12,689 (1997) (statement of Sen. Hatch).

^{ccceix} Prior to the passage of the NET Act, the majority view was that willfulness referred to the intent to infringe. See *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988); *United States v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987); *United States v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995). The minority held that willfulness merely required the intent to copy. See *United States v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991); *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943).

^{cccexi} NET Act, *supra* note 256.

^{cccexi} *Id.* § 2(b) (codified as amended at 17 U.S.C. § 506(a)).

^{cccexi} *Id.*; see also, 143 CONG. REC. H9883 (1997) (statement of Rep. Coble).

^{cccexiv} See 17 U.S.C. § 506(a), 4 NIMMER, *supra* note 279, § 15.01[B][2], at 15-18 to -20.

^{cccexiv} See NET Act, *supra* note 256 § 2(a) (codified at 17 U.S.C. § 506(a)(2)).

^{cccexiv} See Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1719-1721 (1999) (citing Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1408, 1411 (1996); Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 606 (1997); Mark Stefik, *Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997); Mark Gimbel, Note, *Some Thoughts on the Implications of Trusted Systems for Intellectual Property Law*, 50 STAN. L. REV. 1671, 1672, 1675-80 (1998)).

^{cccexiv} See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 5, 97 (1999) [hereinafter SHAPIRO & VARIAN].

^{cccexiv} See *id.*, at 4.

^{cccxi} See Jim Griffin, Lecture on The Future of Music on the Internet at the Entertainment Law Institute, Austin, Tex. (Mar. 18, 2000) [hereinafter Griffin].

^{cccxx} See *id.*

^{cccxxi} See *id.*

^{cccxxii} See SHAPIRO & VARIAN, *supra* note 311, at 83-85.

^{cccxxiii} Griffin, *supra* note 317.

^{cccxxiv} See *id.* Griffin is not alone in his belief in the “delivery” model. See Christopher Jones, *Digital Music for the Living Room* (visited Apr. 1, 2000) <<http://www.wired.com/news/print/0,1294,34604,00.html>> [hereinafter “Jones”].

^{cccxxv} Other reasons include that supporting distribution would be too costly and that distribution does not protect privacy. See Griffin, *supra* note 319.

^{cccxxvi} The motion picture industry increasingly values its product in boxes and the book publishing industry always has valued its product in boxes. See Griffin, *supra* note 319.

^{cccxxvii} See *id.*

^{cccxxviii} See *id.*; SHAPIRO & VARIAN, *supra* note 317, at 87.

^{cccxxix} See Griffin, *supra* note 319.

^{cccxxx} See *id.*

^{cccxxxi} Consumers need to see samples, and the cost of providing those samples on the Internet is almost zero. See SHAPIRO & VARIAN, *supra* note 317, at 91.

^{cccxxxii} See Griffin, *supra* note 319.

^{cccxxxiii} See *id.*

^{cccxxxiv} U.S. CONST., art. I, § 8, cl. 8; see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that the level of copyright protection granted to copyright owners “must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).