United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-5469-cr

UNITED STATES OF AMERICA,
Appellant,

-v.-

JEAN MARTIGNON,
Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The United States of America appeals from a judgment entered by the Honorable Harold Baer, United States District Judge, on September 24, 2004, in the United States District Court for the Southern District of New York, dismissing the one-count Indictment 03 Cr. 1287 (HB) filed against Jean Martignon on October 27, 2003.

The Government filed a timely notice of appeal on October 22, 2004. The jurisdiction of this Court is invoked pursuant to Title 18, United States Code, Section 3731. The Solicitor General has approved prosecution of this appeal.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Title 18, United States Code, Section 2319A (the "Anti-Bootlegging Act") – which criminalizes knowingly and for purposes of commercial advantage making or selling an unauthorized recording of a live musical performance – is a constitutional exercise of Congress' plenary authority to regulate commerce under the Commerce Clause, or whether the Copyright Clause's grant to Congress of the "power . . . to promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Rights to their . . . Writings" implicitly bars Congress from utilizing its authority under the Commerce Clause to enact legislation protecting non-copyrightable forms of intellectual property like live performances.

2. Whether the Anti-Bootlegging Act is in any event a proper exercise of Congressional authority under the Necessary and Proper Clause to implement treaty obli gations and to protect the rights of

performers in other, copyrighted works.

STATEMENT OF THE CASE

Indictment 04 Cr. 1287 (HB) was filed on October 27, 2003 (the "Indictment"). The Indictment charged Martignon with a single count of violating the Anti-Bootlegging Act. On January 15, 2004, Martignon moved to dismiss the Indictment, arguing that the Anti-Bootlegging Act was unconstitutional for various reasons, including that the "limited times" requirement of the Copyright Clause barred Congress from providing perpetual protection to intellectual property even when Congress purported to rely on its Commerce Clause authority. On September 24, 2004, Judge Baer granted Martignon's motion and dismissed the Indictment.

STATEMENT OF FACTS

A. Martignon's Offense Conduct

Martignon owns Midnight Records, a music store located in Manhattan. Through this store as well as a related newsletter and mail order service, Martignon openly sold "bootleg" recordings – that is, recordings of live musical performances made without the consent or knowledge of the musical artists, and sold without payment to those artists.

B. The Proceedings Below

The Anti-Bootlegging Act makes it a crime to, "without the consent of the performer or performers involved, knowingly and for

purposes of commercial advantage," make or sell a recording of a live musical performance. 18 U.S.C. § 2319A.

In his motion to dismiss the Indictment, Martignon claimed that the Anti-Bootlegging Act violated limits on Congressional authority which Martignon found in the Copyright Clause.*

Martignon claimed that the Copyright Clause limits Congressional authority over intellectual property exclusively to the protection of "Writings" – which, in Copyright parlance, means works that are fixed in some permanent medium by or with the permission of the author. Martignon argued that the live musical performances governed by the Anti-Bootlegging Act do not constitute writings since they are not fixed (that is, recorded) with the artists' permission. Second, Martignon claimed that the "limited times" provision of the Copyright Clause precludes Congress from granting authors perpetual exclusive rights to their works. The Anti-Bootlegging Act, however, places no durational limit on its bar on selling unauthorized recordings of live musical performances.

In response, the Government conceded that the Anti-Bootlegging Act was likely beyond Congressional authority under the Copyright Clause, and urged the district court to join the Eleventh Circuit in holding that the Anti-Bootlegging Act was nonetheless a proper exercise of Congressional authority under the Commerce Clause. *See United States v. Moghadam*,175 F.3d 1169 (11th Cir. 1999). The Government explained that the Copyright Clause, at most, limits Congressional authority over copyrightable subject matter –

*Martignon also alleged that the Anti-Bootlegging statute violated the First Amendment.

that is, creative, fixed works of authorship. Relying on cases upholding on Commerce Clause grounds the constitutionality of trademark legislation – which the Supreme Court has held is *not* authorized under the Copyright Clause, because trademarks are insufficiently creative – the Government argued that the Commerce Clause similarly authorizes Congress to regulate other forms of intellectual property that fall outside of Congress' authority under the Copyright Clause. Because the works at issue under the Anti-Bootlegging Statute fall outside Congressional authority under the Copyright Clause (since they are not fixed), the Government argued that they also fall outside the scope of any limits the Copyright Clause places on the Government's ability to regulate copyrightable subject matter pursuant to the Copyright Clause.

The Government also argued that the Necessary and Proper Clause provided an additional basis for the Anti-Bootlegging Act. The Anti-Bootlegging Act implemented the United States's treaty obligation to combat the trade in unauthorized recordings of live performances. Under the Necessary and Proper Clause, Congress has authority to enact legislation to meet treaty obligations so long as the legislation does not contravene any express constitutional provision. Since the Copyright Clause contains no express implicit limits on Congressional authority, the Government argued that the Anti-Bootlegging Statute was within Congressional authority under the Necessary and Proper Clause.

Judge Baer did not rule on this argument.

C. The District Court's Opinion

On September 24, 2002, the District Court issued its opinion and order (the "Opinion") dismissing the indictment. (A. 4-21).[**] The District Court accepted the defendant's contention that the Copyright Clause places limits on Congressional action under the Commerce Clause. (A. 15). The Court also found that those limits apply to the Anti-Bootlegging Act even though the clause expressly applies to "writings" and the live musical performances governed by the statute are not "writings." The District Court reasoned that live musical performances are sufficiently "copyright-like" to be governed by the Copyright Clause. (A. 17). The District Court articulated no real test for determining whether material was sufficiently "copyright-like" such that the Copyright Clause limited Congress' Commerce Clause authority, but instead distinguished cases upholding trademark legislation from similar attacks on the ground that trademarks were not "copyright-like" because they were not creative works. (A. 17-18). Having determined that the Anti-Bootlegging Statute was subject to implicit limits on Congressional authority found in the Copyright Clause, the District Court then concluded that the Anti-Bootlegging Act was unconstitutional because it violated one of these limits – the rule that copyright protection may be extended only for a limited time. (A. 19-20).

SUMMARY OF ARGUMENT

Bootlegging – the sale of unauthorized recordings of live

[**]"A." refers to the Government's appendix, filed along with this brief.

musical performances – is theft. Bootleggers like Martignon profit by selling copies of an artist's work – specifically, live performances not recorded by the artist – without compensating the artist and without regard to the artist's decision not to record the performance at all. The Constitution's Commerce Clause provides ample authority for Congress to make such theft criminal, and the Anti-Bootlegging Act is accordingly constitutional. The Commerce Clause grants Congress broad authority to regulate commercial activity, and the activity in question, selling unauthorized recordings of live performances, is plainly commercial.

Nothing in the Copyright Clause bars Congress from punishing this conduct. The Copyright Clause is an affirmative grant of power to Congress to provide protection for an author's "writings" for a limited time, and contains no express limitations on Congress' authority to protect other aspects of an artist's work – like live performances – in other ways pursuant to other constitutional grants of authority like the Commerce Clause. Indeed, prior to the District Court's decision, no court had ever held that the Copyright Clause placed any limits at all on Congress' authority under the Commerce Clause or any other clause of the constitution.

Even if one assumed that the Copyright Clause places some limits on Congressional power, surely those limits only apply to forms of intellectual property actually subject to regulation under the Copyright Clause – that is, an author's writings. The Copyright Clause cannot fairly be read to limit Congress' Commerce Clause authority over things which are not within the scope of the Copyright

Clause at all – like the unrecorded live performances covered by the Anti-Bootlegging Act.

In holding that the Copyright Clause barred the Anti-Bootlegging Act, the District Court (1) in effect read the "writings" language out of the Copyright Clause, and (2) placed a "limited times" requirement on Congressional power to regulate "non-writings" despite the absence of any textual anchor for this proposition in the Constitution. The District Court's holding misreads the Copyright Clause, unduly limits Congressional authority under the Commerce Clause, and threatens to undermine Congressional regulation of other forms of intellectual property, including trademarks. The Court's ruling also ignores Congress' authority under the Necessary and Proper Clause. This Court should reverse.

A R G U M E N T

POINT I

THE ANTI-BOOTLEGGING STATUTE IS A VALID EXERCISE OF COMMERCE CLAUSE AUTHORITY NOTWITHSTANDING THE COPYRIGHT CLAUSE

A. Relevant Law

1. The Scope of Congressional Power Under The Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and

with the Indian Tribes." U.S. Const. art. I, §8, cl. 3. This power afforded to Congress is broadly construed to cover "all the external concerns of the nation," as well as "those internal concerns which affect the States generally." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196, (1824). Under the Commerce Clause, Congress may regulate (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, . . . [i.e.,] those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549 (1995).

The Supreme Court has in recent years found limits on Congressional power to regulate non-commercial activity pursuant to the Commerce Clause. *See United States* v. *Morrison*, 529 U.S. 598, 617 (2000) (Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *Lopez*, 514 U.S. 549, 567 (1995) ("[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"). However, congressional authority to regulate commercial activity under the Commerce Clause remains plenary. *See Southland Corp.* v. *Keating*, 465 U.S. 1, 11 (1984) ("[a]t least since 1824 Congress' authority under the Commerce Clause has been held plenary"). Congress may, under the Commerce Clause, regulate even wholly intrastate commercial activity, "so long as the

activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. 264, 276-277 (1981) (upholding regulation of intrastate coal mining); *Perez* v. *United States*, 402 U.S. 146 (1971) (upholding regulation of intrastate extortionate credit transactions); *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (upholding regulation of production and consumption of homegrown wheat).

Indeed, "[i]t is established beyond peradventure that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." *Federal Energy Regulatory Commission* v. *Mississippi*, 456 U.S. 742, 754 (1982). Accordingly, a court may "invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce." *Id*.

Nor is there any requirement that Congress have actually considered whether the activity in question impacts on interstate commerce. *Fullilove* v. *Klutznick*, 448 U.S. 448, 473-75 (1980) (Congress did not enumerate the specific basis for legislation at issue, but "[h]ad Congress chosen to do so, it could have drawn on the Commerce Clause," so the legislation therefore is "within the power of Congress"); *Mills* v. *Maine*, 118 F.3d 37, 43 (1st Cir. 1997) ("An otherwise valid exercise of congressional authority is not, of course, invalidated if Congress happens to recite the wrong clause (of the Constitution) . . . or, indeed, if Congress recites no clause at all.");

College Savings Bank v. *Florida Prepaid Postsecondary Educ. Expense Board*, 131 F.3d 353, 358 (3d Cir. 1997) ("Congress is not required to discuss or explain explicitly the constitutional basis for laws that it enacts.").

2. The Structure of The Copyright Clause

The Copyright Clause provides that Congress shall have the "power . . . to promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Rights to their . . . Writings." U.S. Const. art. I, § 8, cl. 8.

The term "author" has been construed, in its "constitutional sense" to mean "an 'originator,' 'he to whom anything owes its origin.'" *Goldstein* v. *California*, 412 U.S. 546, 561 (1973). The word "writings," as used in the Copyright Clause, "may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." *Id*. Thus, the Copyright Clause does not authorize protection of ideas themselves; rather, the Copyright Clause authorizes Congress to grant exclusive rights only to the physical rendering of the idea in some "fixed, tangible and durable form." *Moghadam*, 175 F.3d at 1274. *See also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyrights*, § 8E.01[C], at 8E-6 ("the Copyright Clause empowers Congress to extend copyright protection solely to works fixed in tangible form").

Moreover, Congress may not rely on the Copyright Clause to grant exclusive rights to all writings. As the Supreme Court indicated

in *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), the Copyright Clause provides authority for granting exclusive rights only to creative works, rather than mere factual compilations.

Finally, the Copyright Clause confers to Congress the power to grant exclusive rights to such writings only for a "limited time[]."*See Eldred* v. *Ashcroft*, 537 U.S. 186, 199-205 (2003).

B. Discussion

There is no serious doubt that (putting the Copyright Clause aside) the Anti-Bootlegging Act falls squarely within Congress' authority to regulate commerce under the Commerce Clause. As the Eleventh Circuit found in rejecting a constitutional challenge to the Anti-Bootlegging Act, the Act

> clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations. The link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident . . . . Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels.

United States v. *Moghadam*, 175 F.3d at 1276.

Judge Baer, however, found that the Copyright Clause created limits on Congressional authority to legislate pursuant to the Commerce Clause, and that the Anti-Bootlegging Act transgressed those limits. According to Judge Baer, whenever Congress enacts "copyright-like legislation," its power to act is "limited by the

confines of the Copyright Clause" and Congress "may not enact copyright-like legislation . . . under the commerce clause (or any other clause) when the legislation conflicts with the limitations imposed by the Copyright Clause." (A. 15). Judge Baer found that the Anti-Bootlegging Act conflicted with two such limitations: (1) the requirement that the copyrighted work be a writing, that is, something fixed by the author in tangible form; and (2) the requirement that the exclusive rights be granted only for a limited time. (A. 19).

There are numerous flaws in Judge Baer's analysis. First, it is inconsistent with the plain language of the Copyright Clause. On its face, the Copyright Clause is simply a grant of authority and contains no express limits on Congress' power to act pursuant to other grants of authority in the Constitution. *See Moghadam,* 175 F.3d at 1280 ("The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests . . . a ceiling on Congress' ability to legislate pursuant to other grants.").

Second, Judge Baer's conclusion is wholly unprecedented, and indeed conflicts with settled intellectual property law precedents. Prior to Judge Baer's ruling, no court had *ever* found that the Copyright Clause rendered unconstitutional *any* Congressional action authorized by some other constitutional provision. Even within the realm of intellectual property, the law is well settled that Congress can act pursuant to the Commerce Clause to provide protections beyond the scope of the Copyright Clause. The Second Circuit so held in *Authors League of America* v. *Oman,* 790 F.2d 220 (2d Cir. 1986). There, plaintiffs challenged as beyond Congress' authority

under the Copyright Clause a rule denying copyright protection to certain copyrightable material printed abroad. The Second Circuit suggested that the legislation might be beyond Congress' authority under the Copyright Clause, but nonetheless upheld the law as authorized under the Commerce Clause. *See Authors League,* 790 F.2d at 224 ("In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations.").[*]

Similarly, the entire edifice of Federal trademark legislation depends for its constitutionality on the Commerce Clause. *See, e.g., Dawn Donut Company* v. *Harts Food Stores,* 267 F.2d 358, 365 (2d Cir. 1959) ("Clearly Congress has the power under the commerce clause to afford protection to marks used in interstate commerce"). That is so because in 1879, the Supreme Court, in the *Trade-Mark Cases,* 100 U.S. 82 (1879), held that the Copyright Clause did *not* provide authority for Congress to grant exclusive rights to trademarks, on the ground that trademarks lacked the requisite originality. *Id.* at 94. Notwithstanding that conclusion, the Supreme

[*] Judge Baer sought to distinguish *Authors League* on the ground that the statute there was motivated by a commercial purpose – "fostering the growth of an American industry," rather than the purpose central to the Copyright Clause – "to promote the Progress of Science and the useful Arts." (A. 18). But the constitutionality of a statute does not depend on the subjective intent of the enacting Congress. The sole question is whether the Constitution grants the Congress the power to enact the statute in question; it makes no difference what Congress said was the purpose of the statute. *See Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise"). Nor, in any event, is there any real distinction between "fostering the growth of an American industry" and "promot[ing] the progress of . . . the useful Arts." Musical performers are part of an American industry – the music industry. Anything that promotes their progress also fosters the growth of their industry. The constitutionality of the Anti-Bootlegging Act cannot turn on whether Congress (a) meant to promote the music industry and did so by promoting the progress of artists, or

Court in the *Trade-Mark Cases* independently assessed whether the Commerce Clause provided such authority. The Court there, relying on a now-discredited interpretation of the Commerce Clause, held that the Commerce Clause lacked sufficient breadth to support that particular trademark legislation at issue. But the fact that the Court did not end its analysis at the Copyright Clause, but instead looked to the Commerce Clause, is powerful evidence that the Copyright Clause is not the exclusive source of Congressional authority over intellectual property. *See Moghadam* 175 F.3d at 1277 ("the Supreme Court's analysis in the *Trade-Mark Cases* stands for the proposition that legislation which would not be permitted under the Copyright Clause could nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met."). And as the Supreme Court's interpretation of the Commerce Clause expanded, Congress has over the last 100 years repeatedly enacted trademark legislation that, in light of the *Trade-Mark Cases*, probably cannot be sustained under the Copyright Clause. Every Court to consider that legislation has nonetheless found it Constitutional under the Commerce Clause. *See, e.g., Jellibeans, Inc.* v. *Skating Clubs of Ga., Inc.*, 716 F.2d 833, 838 (11th Cir. 1983); *Dawn Donut Company*, 267 F.2d at 365; *Philco Corp.* v. *Phillips Mfg. Co.*, 33 F.3d 733, 637 (7th Cir. 1943). The District Court's radical new interpretation of the Copyright Clause as placing substantive limits on Congress' power under the Commerce Clause, would, if accepted, call into question the entire body of federal trademark law.

(b) meant to promote the progress of artists and did so in a way that promoted their industry.

The District Court attempted to distinguish the *Trade-Mark Cases* on the ground that they established only what the District Court described as the "non-controversial point that when Congress does not regulate in the field covered by the Copyright Clause, it may look to an alternative grant of power." (A. 18). But that conclusion is enough to confirm the constitutionality of the Anti-Bootlegging Act. As we showed above, the Copyright Clause applies to the granting of exclusive rights to things that are (1) creative and (2) a writing, that is, fixed rather than ephemeral. The *Trade-Mark Cases* establishes that Congress may rely on other constitutional provisions (like the Commerce Clause) to grant exclusive rights to things like trademarks which fall outside the Copyright Clause because they lack one of these attributes – in the *Trade-Mark Cases*, creativity. It follows here that Congress may similarly rely on the Commerce Clause to grant exclusive rights to something lacking the other essential attribute – a creative work (like a live performance) which is *not* a writing.[*] Put differently, the District Court viewed the Anti-Bootlegging Act as falling "within the purview of the Copyright Clause." (A. 18). It could do so only by overlooking the fact that the "purview" of the Copyright Clause extends only to writings, and therefore does not

[*]It is far from clear that the Anti-Bootlegging Act even creates an "exclusive right" of the sort addressed by the Copyright Clause. The Anti-Bootlegging Act does not convey to the artist an exclusive right to record his or her own live performances. The statute punishes only one who records a live performance for a commercial purpose and places no limits on recording for personal listening pleasure. Nor does the Anti-Bootlegging Act convey an exclusive right to sell recordings of live performances. Once a live performance is recorded with the permission of the artist, the recording is protected by the Copyright Act, and it is the Copyright Act, rather than the Anti-Bootlegging Act, which gives the artist the exclusive right to sell that recording. All the Anti-Bootlegging Act does is allow an artist to decide that there will be no commercial exploitation by others of performances the artist decides not to record.

include the unrecorded live performances at issue here. These unrecorded live performances are in a sense pre-copyright. They are inherently ephemeral works that the artist does not seek to preserve for future commercial exploitation. Whatever limits the Copyright Clause places on Congress' ability to give artists the exclusive right to sell their fixed, creative works, those limits cannot control Congress' ability to give artists the power to decide that neither they nor anyone else will have the right to sell the artists' ephemeral, unfixed live performances.

Third, Judge Baer's reasoning conflicts with the general rule that "what cannot be done under one" constitutional provision "may very well be doable under another." *See Moghadam*, 175 F.3d at 1277. For example, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), the Supreme Court considered the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court had declared similar legislation beyond Congressional authority under the Fourteenth Amendment. The *Heart of Atlanta* court nonetheless found the public accommodations provisions to be a constitutional exercise of Congressional power under the Commerce Clause. *Heart of Atlanta*, 379 U.S. at 261-62. So too here, the mere fact that the Anti-Bootlegging Act falls outside of Congress' power under the Copyright Clause does not mean it also falls outside Congress' power under the Commerce Clause.[*]

[*]Judge Baer sought to distinguish *Heart of Atlanta* on the ground that the constitutional provision purportedly limiting Congressional power under the Commerce Clause there – the

This Court addressed a similar issue in *United States*. v. *Rahman*, 189 F.3d 88 (2d Cir. 1999). There, the defendant challenged the constitutionality of the law punishing seditious conspiracy, arguing that the law conflicted with the Constitution's Treason Clause, which provides that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. Const. art. III, § 3. The seditious conspiracy statute punished conduct – waging war against the United States – that is treason-like but did not comply with the Treason Clause's requirement of two witnesses to the same overt act. Nonetheless, because the elements of seditious conspiracy differed from the elements of treason (treason can exist only where there is a duty of allegiance, while the seditious conspiracy statute does not require breach of such a duty), this Court had no difficulty finding the statute constitutional notwithstanding the Treason Clause. *Rahman*, 189 F.3d at 114. So too here, because the unfixed live performances protected by the Anti-Bootlegging Act lack one of the essential elements of works covered by the Copyright Clause – the writing element – the Copyright Clause does not bar the statute.

Fourth, Judge Baer's reasoning is inconsistent with the structure of Article I, Section 8 of the constitution. Section 8 contains

Fourteenth Amendment – "is solely an affirmative grant of power," whereas the Copyright Clause contains "express limitations" on Congressional power. (A. 19). This argument simply assumes the conclusion – that the Copyright Clause limits Congressional power to act pursuant to other constitutional grants of authority.

numerous specific grants of authority in addition to the Copyright Clause. Like the Copyright Clause, many of these grants are stated wholly in affirmative terms. Applying Judge Baer's reasoning to these other grants of authority – and therefore reading them as containing implicit limits on Congressional authority – would quickly lead to absurd results.

For example, Article I, Section 8, Clause 6 of the Constitution authorizes Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." Reading the same kinds of negative implications into this affirmative grant that Judge Baer read into the affirmative grant contained in the Copyright Clause would lead to the unlikely result that Congress may not, acting under the Commerce Clause, criminalize other forms of counterfeiting, a result that would require declaring at least six criminal statutes unconstitutional. *See* 18 U.S.C. § 482 (making it a crime to counterfeit foreign bank notes); 18 U.S.C. § 488 (same for foreign coins); 18 U.S.C. § 502 (foreign stamps); 18 U.S.C. § 498 (military discharge certificates); 18 U.S.C. §505 (seals of court); 18 U.S.C. § 507 (ship's papers); 18 U.S.C. § 513 (stocks, bonds or checks).

Similarly, Article I, Section 8, Clause 7 grants to Congress the power to "establish Post Offices and post roads." One cannot seriously view this affirmative grant as implicitly barring Congress from establishing other sorts of roads, such as the interstate highway system. So too, that Clause 10 of Section 8 of Article I authorizes Congress to "define and punish piracies and felonies committed on

the High Seas" obviously does not mean that Congress lacks authority, under other clauses, to "define and punish" felonies occurring elsewhere.

That applying Judge Baer's analytical approach to other, similar, constitutional provisions quickly leads to absurd results strongly indicates this Court should not apply that approach to the Copyright Clause either. The affirmative language of the Copyright Clause no more imposes general rules on all "copyright like" legislation than the similarly affirmative language of the Counterfeiting Clause imposes general rules on all "counterfeit like" legislation.

As authority for the proposition that the Copyright Clause limits Congressional power under the Commerce Clause, the District Court incorrectly relied upon *Railway Labor Executives' Association* v. *Gibbons*, 455 U.S. 457 (1982), a case interpreting the Constitution's Bankruptcy Clause as limiting Congressional authority to enact bankruptcy legislation pursuant to the Commerce Clause. In *Railway Labor*, the Supreme Court ruled unconstitutional the Rock Island Railroad Transition and Employee Assistance Act ("RITA"). In 1975, the Rock Island and Pacific Railroad Company (the "Company") petitioned the District Court for reorganization under the Bankruptcy Act of 1898 and it was subsequently determined that the Company would cease to operate. *Id.* at 456. In response to this closing, Congress enacted RITA which applied *only* to the Rock Island bankruptcy case. RITA required the Company to pay benefits to Company employees unable to find other work in the railroad industry and also decreed that obligations to Company employees

would be treated as administrative expenses of the Company for the purposes of priority with respect to bankruptcy claims. *Id.* at 457. The trustee for the Company argued that RITA violated the uniformity requirement contained within the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, which provides Congress with the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

The Supreme Court determined that Congress enacted RITA in "an exercise of Congress' power under the Bankruptcy Clause," and proceeded to examine the "nature of the uniformity required by the Bankruptcy Clause." *Id.* at 466. The Court determined that the uniformity requirement of the Bankruptcy Clause "permits Congress to treat 'railroad bankruptcies as a distinctive and special problem'," *id.*, but determined that RITA was unconstitutional because the statute was aimed to affect only one regional bankrupt railroad rather than any class or category of bankruptcies. *Id.* at 470-71. The Court concluded that "[a] law can hardly be said to be uniform throughout the country if it applies to only one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." *Id.* at 471. Accordingly, the Court ruled that RITA was not a proper exercise of Congress' authority under the Bankruptcy Clause precisely because it violates an express term of the Bankruptcy Clause – the requirement of uniformity.

The Court's entire analysis of whether RITA was proper under the Commerce Clause was contained in a single, brief paragraph:

> We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws. It is therefore necessary for us to determine the nature of the uniformity required by the Bankruptcy Clause.

Id. at 468-69 (citations omitted).

Railway Labor thus stands for the common-sense proposition that Congress' authority under one constitutional provision ought not be construed to "eradicate from the constitution" a limit on Congressional authority found elsewhere in the Constitution. But even assuming that Congress cannot, pursuant to the Commerce Clause, "eradicate" a limitation on Congress' power imposed by the Copyright Clause, the Anti-Bootlegging Act is constitutional because it clearly does not do so.

Judge Baer held that the Anti-Bootlegging Act eradicated the Copyright Clause's rule requiring that exclusive rights be granted only for a "limited time." (A. 19-20). But the Copyright Clause does not require Congress to place time limits on laws protecting *all* forms of property. Indeed, one may own most tangible forms of property perpetually, and under current law, trademarks, though lasting only

ten years, may be renewed without limitation. *See* 15 U.S.C. ‘‘ 1058, 1059. Rather, at most the Copyright Clause prohibits Congress from granting perpetual protection to intellectual property falling within the scope of the Copyright Clause B that is, to copyrightable subject matter.

Because unrecorded live performances fall entirely outside the scope of the Copyright Clause, permitting Congress to grant perpetual protection against sales of unauthorized recordings of such performances simply does not change the bargain implicit in the Copyright Clause. That bargain - that artists should receive protection for creative written works, but only for a limited time - applies by its terms only to creative, original *writings.* Just as Congress was free to enact trademark legislation striking a different bargain (infinite renewability) with regard to *uncreative* writings used in commerce, Congress was free to strike a different bargain (perpetual protection against sale of unauthorized recordings) with regard to *unwritten* creative works like the live performances protected by the Anti-Bootlegging Act.[*]

The absence of tension between the Anti-Bootlegging Act and the Copyright Clause stands in sharp contrast to the direct contradiction

[*]Although the Anti-Bootlegging Act itself contains no express time limits, other general criminal law principles may well create implicit time limits. For example, the Due Process clause may limit the ability of the Government to charge a defendant with violating the Anti-Bootlegging Act by selling a recording made one hundred years ago, on the theory that the defendant cannot reasonably be expected to present a defense to charges that turn on whether, one hundred years ago, a now deceased artist in fact authorized a now deceased person to record his or her live performance. *See United States* v. *MacDonald*, 456 U.S. 1, 5 (1982) (“delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment”). The fundamental premise of Judge Baer’s analysis – that the Anti-Bootlegging Act created exclusive rights for an unlimited time – may well be incorrect.

between RITA and the Bankruptcy Clause in *Railway Labor*. Simply put, the Anti-Bootlegging Act regulates "non-writings" while the Copyright Clause governs "writings." The statute and the Copyright Clause can peacefully co-exist because each covers a different subject matter. In *Railway Labor*, however, RITA created non-uniform bankruptcy law, in direct violation of the Bankruptcy Clause which *required* all bankruptcy law to be uniform.

Judge Baer's conclusion that protection of live performances is "copyright-like" does not change the analysis. There is no basis to read *Railway Labor* as precluding Congress from acting under the Commerce Clause to regulate matters that are similar to matters addressed in other clauses. *Railway Labor* instead speaks only to the circumstance where Congress attempts to "eradicate" a limitation on how Congress can regulate a particular subject matter found in another constitutional clause that actually addresses that precise subject matter. The statute at issue in *Railway Labor* did not regulate something which was "bankruptcy-like." It instead directly created rules for a specific bankruptcy case; if Congress could do that pursuant to the Commerce Clause, there was nothing left of the Bankruptcy Clause's requirement that bankruptcy laws be uniform.

Here, by contrast, permitting Congress to provide perpetual protection to non-copyrightable subject matter will not "eradicate" the Copyright Clause's requirement that protection for copyrightable subject matter be for a limited time only. Accordingly, the District Court's decision that the Copyright Clause precluded Congress from

enacting the Anti-Bootlegging Act under the Commerce Clause was clearly wrong, and should be reversed.

POINT II

THE ANTI-BOOTLEGGING ACT IS ALSO A PROPER EXERCISE OF CONGRESSIONAL AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE

The Necessary and Proper Clause grants to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, §8, cl. 18. Under the Necessary and Proper Clause, Congress has the power to enact statutes necessary to implementing valid treaties. *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920) (when a "treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government"*); see also United States* v. *Wang Kun Lue*, 134 F.3d 79, 83 (2d Cir. 1997) ("If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause."). Congress may do so even where, but for the treaty, it might otherwise lack authority to enact the statute in question. *See Holland*, 252 U.S. at 433 ("It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."). This does "not . . . imply that

there are no qualifications to the treaty-making power." *Id.* Rather, Congress is permitted to pass legislation implementing a treaty so long as the relevant treaty language "does not contravene any prohibitory words to be found in the Constitution." *Id.*

Here, Congress passed the Anti-Bootlegging Act specifically to implement treaty obligations created by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPSs"), Article 14 of which required World Trade Organization members such as the United States to prohibit the unauthorized fixation of performances. *See* William F. Patry, *Copyright and the GATT: An Interpretation and Legislative History of the Uruguay Round Agreements Act*, 1-3 (The Bureau of Nat'l Affairs, Inc. 1995).

Moreover, there are no "prohibitory words" in the Constitution barring Congress from granting perpetual protection to non-copyrightable live performances. Rather, at best the District Court found a negative implication from the affirmative grant of authority in the Copyright Clause that Congress may not regulate matters which are copyright-like in ways not expressly authorized by that affirmative grant. Even if this negative implication is enough to restrain Congress' authority under the Commerce Clause, it falls far short of the sort of "prohibitory words" required under *Holland* to bar Congress from passing legislation required to meet treaty obligations. Accordingly, the Anti-Bootlegging Act is a proper exercise of Congressional authority under the Necessary and Proper Clause.

The Anti-Bootlegging Act is a proper exercise of Congressional authority under the Necessary and Proper Clause for a second reason as well. Prohibiting the unauthorized recording of an artist's live performance is a necessary and proper means to preserve the value of copyrights validly held on other, authorized recordings. In the marketplace, consumers interested in purchasing recorded music have a choice between purchasing bootlegged or authorized work. Because the bootlegged work competes against the authorized work in the marketplace, Congress could rationally conclude that the bootlegged work reduces the demand for the authorized work, and thereby reduces the value of the copyrights held in the authorized work. Because Congress has authority under the Copyright Clause to grant, for a limited time, exclusive rights to the authorized recording, Congress also must have the power under the Necessary and Proper Clause to take steps to protect the value of that right – like preventing bootleggers from offering for sale unauthorized recordings. *See M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). *See also Sabri* v. *United States*, 124 S. Ct. 1941, 1945 (2004) (because "Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare," it has "corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general

welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars").

CONCLUSION

The Court should reverse the decision below and remand the case to the District Court.

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