

Fall 2014

A Survey of Copyright Law

Tammy W. Cowart
University of Texas at Tyler

Pam Gershuny
Southeast Missouri State University

Gwenda Hawk
Johnson County Community College, ghawk@jccc.edu

Follow this and additional works at: http://scholarspace.jccc.edu/legal_p



Part of the [Law Commons](#)

Recommended Citation

Cowart, Tammy W.; Gershuny, Pam; and Hawk, Gwenda, "A Survey of Copyright Law" (2014). *Legal Studies Papers and Presentations*.
2.
http://scholarspace.jccc.edu/legal_p/2

This Article is brought to you for free and open access by the Legal Studies at ScholarSpace @ JCCC. It has been accepted for inclusion in Legal Studies Papers and Presentations by an authorized administrator of ScholarSpace @ JCCC. For more information, please contact bbaile14@jccc.edu.

A SURVEY OF STATE COPYRIGHT LAW

TAMMY W. COWART^{*}
PAM GERSHUNY^{**}
GWENDA BENNETT HAWK^{***}

I. INTRODUCTION

State legislatures and Congress have enacted numerous anti-piracy copyright statutes protecting sound recordings. Technological developments in the early 1970s made duplication of sound recordings both easy and inexpensive,¹ allowing record pirates to make nearly \$100 million dollars for sales of duplicated records in 1971.² In 1972, Congress gave federal copyright protection to sound recordings, but all sound recordings made before February 15, 1972 remained protected under state law.³ Current law mandates that all pre-1972 sound recordings remain protected under state law until February 15, 2067.⁴ At that time, federal law will preempt all state copyright law protection, and all pre-1972 sound recordings will enter the public domain.⁵

In 2009, Congress asked the Register of Copyrights (Copyright Office) to study the “desirability and means” of extending federal copyright protection to all sound recordings fixed before February 15, 1972.⁶ The Copyright Office report on Federal Copyright Protection for Pre-1972 Sound Recordings recommended that sound recordings made before February 15, 1972 be brought into the federal copyright scheme.⁷

^{*} J.D., Assistant Professor of Business Law, University of Texas at Tyler.

^{**} J.D., Professor of Business Law, Southeast Missouri State University.

^{***} J.D., Adjunct Assistant Professor, Johnson County Community College.

¹ Elizabeth Townsend Gard & Erin Anapol, *Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate*, 15 TUL. J. TECH. & INTELL. PROP. 123, 124 (2012).

² Michael Erlinger, Jr., *An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L.REV. 45, 56-7 (2009).

³ 17 U.S.C. § 301(c) (2012).

⁴ *Id.*

⁵ Well known songs such as the Rolling Stones’ “Brown Sugar” (1971), Elvis’ “Hound Dog” (1956), and Bing Crosby’s “White Christmas” (1942) as well as many others will all enter the public domain on this date. See Gard & Anapol, *supra* note 1, at 124.

⁶ *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, U.S. COPYRIGHT OFFICE (Dec. 28, 2011), <http://www.copyright.gov/docs/sound> [hereinafter Copyright Office Study].

⁷ *Id.*

This paper examines the persistence of state copyright laws, and the extent to which they still exist in light of federal copyright law to further understand how those state laws will be affected by possible preemption. Specifically, the scheme and penalty of unauthorized duplication and bootlegging statutes are examined from all fifty states. We further address areas where the Copyright Act would preempt these state laws.

II. HISTORY

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.”⁸ However, sound recordings were not a category of works regulated in the previous Copyright Act of 1909.⁹ The Sound Recording Act of 1971 sought to remedy this omission and created three categories of sound recording “piracy:” 1) piracy, 2) counterfeiting, and 3) bootlegging.¹⁰ Piracy is the unauthorized duplication and sale of sounds contained in a legitimate recording like a compact disc (hereinafter “CD”) or cassette tape.¹¹ Counterfeiting is the unauthorized duplication and distribution of not only recorded sounds but also the original label artwork, trademark, and packaging.¹² 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.¹³ United States federal law and most states’ laws prohibit all three types of piracy and treat them as criminal offenses.¹⁴

The sound recording industry consists of several players, which include primarily record labels, but also disc replicators and manufacturers, artists, producers, engineers, and even record stores. Sound recording piracy has long adversely affected the recording industry, but the combination of

⁸ Copyright Act of 1976, 17 U.S.C. § 101 (1994 & Supp. IV 1998) (effective Jan. 1, 1978).

⁹ 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).

¹⁰ *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.

¹¹ See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 114 (7th ed. 1995) [hereinafter KRASILOVSKY & SHEMEL].

¹² See *id.*

¹³ See *id.*

¹⁴ One important issue affecting the constitutionality of anti-piracy laws is whether the three types of piracy are “copyright infringement” offenses.

technological development and weak laws and/or enforcement has enabled, and even encouraged, record pirates to engage in criminal activity. This accounts for the annual loss of billions of dollars in displaced sales; in fact, one in three music discs sold is piratical.¹⁵ In considering federal legislation entitled the Piracy and Counterfeiting Amendments Act of 1982 (hereinafter “the 1982 Act”),¹⁶ 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.¹⁷

After the 1982 Act’s passage, Charlie LaRocco (“the legendary ‘Mr. Big’ of bootlegging circles”) was arrested for the illegal sale of bootleg CDs.¹⁸ A New York publication stated that LaRocco’s manufacture and sales constituted a multi-million dollar operation, with his third arrest involving nearly one million bootleg CDs; still, LaRocco scoffed at the notion that he would be punished for his activities.¹⁹ Demonstrating the global magnitude of the piracy problem, 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 1998.²⁰ Criminal gangs from Hong

¹⁵ 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*, <http://www.ifpi.org/site-content/library/piracy2005.pdf> (visited Mar. 11, 2013). See also KRASILOVSKY & SHEMEL, *supra* note 11, at 115 (stating that for the United States in 1987, IFPI reported a \$281.7 million loss in sales due to record piracy). In 2013, the IFPI estimated that nearly a third of all internet users still access unlicensed sites. See IFPI, *IFPI Digital Music Report 2013*, <http://www.ifpi.org/content/library/DMR2013.pdf> (visited Mar. 11, 2013).

¹⁶ 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.*

¹⁷ 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)).

¹⁸ William Bastone, *Pirate King Music’s No. 1 Bootlegger Gets Busted Again*, THE VILLAGE VOICE, (Feb. 16, 1999), <http://www.villagevoice.com/1999-02-16/news/pirate-king-music-s-no-1-bootlegger-gets-busted-151-again/>.

¹⁹ See *id.*

²⁰ See *Violence Doesn’t Faze Piracy Fighters*, BILLBOARD, Dec. 4, 1999.

Kong and China allegedly funded and organized the operation, which distributed illegal product to the Philippines, China, and India. Officials from the International Federation of the Phonographic Industry (IFPI) commented that they had even experienced violence while enforcing copyright law in other countries.²¹

Record pirates used technology developments to produce near-perfect copies and/or recordings, which made piracy ever more lucrative.²² The development of new recording media such as the digital video (or versatile) disc (DVD),²³ audio-compression techniques such as MPEG-3 (MP-3),²⁴ and peer-to-peer software (P2P)²⁵ enabled 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).²⁶ Napster and similar developers (iMesh, Cute MX, Gnutella) 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.²⁷ These and other advances made in recording technology led to a corresponding increase in the level of piratical and counterfeiting activities.

²¹ See *id.*

²² 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.”).

²³ DVDs are essentially bigger, faster CDs that can hold cinema-like video, better-than-CD audio, pictures, and computer data. DVD “became the most successful consumer electronics product of all time” less than three years after it was introduced. DVD Association, *DVD Demystified*, <http://www.dvddemystified.com/dvdfaq.html#1.1> (visited Mar. 11, 2013).

²⁴ MP-3 is defined as a “digital audio file compressed with a standard definition by the Motion Pictures Experts Group (MPEG).” *What is an mp3?*, wiseGEEK, <http://www.wisegEEK.org/what-is-an-mp3.htm> (visited Mar. 12, 2013). Because MP3s significantly compress songs, it is a perfect candidate for distributing on the internet. It was used early on for widespread piracy. *What is Internet Piracy?*, wiseGEEK, <http://www.wisegEEK.org/what-is-internet-piracy.htm>, (visited Mar. 12, 2013).

²⁵ “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)*, <http://www.techterms.org/definition/p2p> (visited Mar. 12, 2013).

²⁶ 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).

²⁷ Napster was originally developed to allow users to locate and download music in MP-3 format from one convenient, easy-to-use interface. See Joan E. Solsman, *Remember Napster? Rhapsody is refreshing Europe’s Memory*, CNET, June 3, 2013, http://news.cnet.com/8301-1023_3-57587451-93/remember-napster-rhapsody-is-refreshing-europes-memory/.

The 2005 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 2005 to over 1,338,487, another 60% increase.²⁸ 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.

The outlook for digital music has improved recently, however. Global music industry revenues rose by 0.3 percent in 2012 to hit \$16.5 billion, the first year of growth since 1999.²⁹ Digital music revenues also increased by 9 percent to \$5.6 billion.³⁰ Some of this trend may be due to the increased enforcement of existing copyright laws. The cyberlocker service Megaupload was one of the biggest unlicensed content hosts before it was shut down by the FBI in early 2012.³¹ It was estimated that Megaupload generated \$175 million in revenues and cost the creative industry roughly \$500 million in damages.³²

III. STATE STATUTES

Anti-piracy legislation exists on both the federal and state level. Unauthorized duplication statutes and anti-bootlegging laws effectively prohibit all forms of piracy.³³ These types of laws are intended to aid in the investigation and prosecution of record pirates. Congress and state legislatures have passed such laws and amended 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 newer and have not yet been tested.

²⁸ See RIAA, *2005 Year-End Anti-Piracy Statistics*, <http://76.74.24.142/6BE200AF-5DDA-1C2B-D8BA-4174680FCE66.pdf> (visited March 5, 2013).

²⁹ IFPI, *IFPI publishes Digital Music Report 2013*, http://www.ifpi.org/content/section_resources/dmr2013.html (visited June 1, 2013).

³⁰ *Id.*

³¹ IFPI, *IFPI Digital Music Report 2013: Engine of a digital world*, <http://www.ifpi.org/content/library/DMR2013.pdf> (visited June 1, 2013).

³² *Id.*

³³ 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. 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).

The following sections address four types of copyright laws by outlining the current existence of state statutes and federal law, reviewing the histories of their enactments, and addressing any relevant unique elements of the particular cause of action. Finally, issues of preemption of state law causes of action will be addressed.

A. *Unauthorized Duplication*

Forty-nine states and the District of Columbia currently have statutes prohibiting the unauthorized duplication of sound recordings.³⁴ At the federal level, copyright protection did not extend to sound recordings until the Sound Recording Act of 1971.³⁵ 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 1982.³⁶ The state statutes are fairly uniform with some notable exceptions. Louisiana's statute specifies that it applies only to sound recordings and not to motion pictures or other audiovisual works.³⁷ Louisiana further authorizes the court to order the forfeiture or destruction of recordings, labels, and devices used to engage in unauthorized duplication,³⁸ as does Missouri.³⁹ New York authorizes the seizure and destruction of unauthorized recordings, but only after the court provides statutory notice to the district attorney and the custodian of the seized property within thirty days of the final order.⁴⁰ If the order to destroy the property is carried out, it may not be sold, auctioned or further distributed.⁴¹

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.⁴² In 1971, the government charged defendant Goldstein with violating California's unauthorized duplication statute by copying several musical

³⁴ Of those statutes, forty-four allow for punishment of unauthorized duplication as a felony and five 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).

³⁵ 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).

³⁶ Piracy and Counterfeiting Amendments Act of 1982, *supra* note 16 at § 2319.

³⁷ LA. REV. STAT. ANN. § 14:223 (West 1998 & Supp. 1999).

³⁸ LA. REV. STAT. ANN. § 14:223.3 (West 1998 & Supp. 1999).

³⁹ *Id.* at 223(5). MO. ANN. STAT. §570.255.2 (1997).

⁴⁰ N.Y. PENAL LAW §420.00 (McKinney 1999).

⁴¹ *Id.*

⁴² Copyright Act of 1909, *supra* note 9.

performances from commercially sold recordings without the permission of the owner of the master record or tape.⁴³ 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.⁴⁴ 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.⁴⁵

The court also found that Congress did not occupy the sound recording field with the 1909 Act,⁴⁶ which originally protected only the lyrics and music of a song.⁴⁷ A sound recording copyright protects the fixed performance of the lyrics and music by a particular recording artist.⁴⁸ 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.⁴⁹

Although not enacted until 1982, the effective date of the federal unauthorized duplication law⁵⁰ is retroactive, i.e. February 15, 1972.⁵¹ 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

⁴³ *Goldstein v. California*, 412 U.S. 546, 548-49 (1973).

⁴⁴ *Id.*

⁴⁵ *See id.* at 558-60, 571.

⁴⁶ *See id.* at 570, n.28.

⁴⁷ Copyright Act of 1909, *supra* note 9.

⁴⁸ 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.

⁴⁹ *See Goldstein*, 412 U.S. at 570.

⁵⁰ *See Piracy and Counterfeiting Amendments Act of 1982, supra* note 16.

⁵¹ *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, supra* note 8 (addressing preemption of state laws for sound recordings fixed on or after February 15, 1972).

activity a state law regulates is sufficient to preempt the use of the state law under the Supremacy Clause.⁵² Thus, state unauthorized duplication laws can only apply to sound recordings fixed and released prior to February 15, 1972⁵³ 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.⁵⁴ Anti-bootlegging statutes benefit performers, as well as arenas and promoters, by prohibiting the unauthorized fixation of live performances.⁵⁵ 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”⁵⁶ and Congress granted such exclusive rights in Title 17 of the United States Code.⁵⁷ 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.”⁵⁸ 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.⁵⁹

Title 17 defines a sound recording as a work that results from the fixation of a series of musical, spoken, or other sounds.⁶⁰ 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.”⁶¹ A live performance is not

⁵² See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-27, at 497 (2nd ed. 1998) [hereinafter TRIBE]; U.S. CONST. art. VI.

⁵³ See *Goldstein*, 412 U.S. at 571.

⁵⁴ 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. See, Table of State Copyright Statutes, Appendix 1.

⁵⁵ See, e.g., N.Y. PENAL LAW §§ 275.15-.20 (McKinney 1999).

⁵⁶ U.S. CONST. art. I, § 8, cl. 8.

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

⁵⁸ *Id.* § 102.

⁵⁹ See *id.*

⁶⁰ *Id.* § 101.

⁶¹ *Id.*

inherently “fixed in any tangible medium of expression,” and thus does not fall within the subject matter of copyright law as enacted by Congress.⁶²

State and federal anti-bootlegging statutes protect different interests; therefore, the analysis applied by a court considering a violation of a 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 1980.⁶³ 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.⁶⁴ The court compared the subject matter protected by the New York anti-bootlegging statute to the subject matter protected by federal copyright law.⁶⁵ It distinguished the two laws by finding that the state statute did not require proof that a recording had been fixed.⁶⁶ 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.⁶⁷ The court upheld the state anti-bootlegging statute because it protected different types of works than those the federal copyright law protected.⁶⁸

There are other examples as well. Alabama and New Mexico specifically provide that the performer is presumed to own the rights to record or authorize the recording of the live performance, obviating the need to prove the lack of consent.⁶⁹ Mississippi presumes the performer’s right to record the live performance, but also presumes in the same section the performer’s right to display and distribute personal images.⁷⁰ New Jersey’s Anti-Piracy Act adds the requirement that the offender have knowledge that the live performance has been recorded with the consent of the owner, but also allows a law enforcement officer or even a theater employee to detain a suspected bootlegger for a reasonable time to recover the illegal recording.⁷¹ New York law provides that it is a third degree felony to operate a recording device in a motion picture theater or live theater without the authority of the theater operator, not the performer.⁷² Interestingly, it appears that a plain reading of the New York statute would exempt recordings in outdoor venues.

⁶² *Id.* § 102.

⁶³ *See* *People v. M & R Records, Inc.*, 432 N.Y.S.2d 846 (Sup. Ct. 1980).

⁶⁴ *See id.* at 847.

⁶⁵ *See id.* at 850.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ ALA. CODE §13A-8-81(3)(e) (1994); N.M. STAT. ANN. §30-16B-5.C (Michie 1998).

⁷⁰ MISS. CODE ANN. §97-23-87(2)(b) (1999).

⁷¹ N.J. STAT. ANN. §2C:21-21c(3) & g (West 1995).

⁷² N.Y. PENAL LAW §§ 275.32 (McKinney 1999).

One wonders how this works with Good Morning America's concerts in Bryant Park or The Today Show's concerts in Rockefeller Plaza. Furthermore, the violation is elevated to a second degree felony if the recording is fifteen minutes or more in length.

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.⁷³ 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*.⁷⁴ 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).⁷⁵

Federal copyright law requires authorized fixation before it grants protection to any original work of authorship.⁷⁶ This creates a question about whether state anti-bootlegging laws protect the same rights as federal copyright laws and may not be preempted by Title 17 or Congress's Copyright Clause authority.

However, Congress did pass 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

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

⁷⁴ See *id.* (emphasis added).

⁷⁵ See HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 68 § 10.5, at 428 (1996).

⁷⁶ See 17 U.S.C. § 101.

purposes of commercial advantage or private financial gain.⁷⁷ Previously, the 1976 Act had provided for civil liability for bootlegging, but explicitly stated that the federal law did not preempt state statutes.⁷⁸

The Eleventh Circuit considered the constitutionality of the federal anti-bootlegging law in *United States v. Moghadam*.⁷⁹ 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.⁸⁰ According to the court's analysis, what little legislative history exists suggests that Congress enacted the anti-bootlegging statute under its Copyright Clause authority.⁸¹ The defendant challenged Congress's authority based on the argument that live performances are not "fixed" as required by the Copyright Clause.⁸² 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's Constitutional powers.⁸³

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.⁸⁴ 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."⁸⁵

⁷⁷ See 18 U.S.C. § 2319A (1994 & Supp. III 1997).

⁷⁸ Copyright Act of 1976, *supra* note 8 at § 1101.

⁷⁹ *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

⁸⁰ See Stan Soocher, *Appeals Court Backs Anti-Bootlegging Statute*, 15 ENT. L. & FIN. 3 (June 1999) at 3.

⁸¹ See *id.* at *8, *citing* 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes). See also Keith V. Lee, *Resolving the Dissonant Constitutional Chords Inherent in the Federal Anti-Bootlegging Statute in United States v. Moghadam*, 7 VILLANOVA SPORTS & ENT. L.J. 327 at 356-57 (citing the congressional debate over the federal law and discussion of the commercial detriment of bootlegging).

⁸² 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, *supra* note 8.

⁸³ See *Moghadam*, 175 F.3d at 1273.

⁸⁴ See *id.* at 1277.

⁸⁵ *Id.* at 1281.

No other Circuit Courts have decided whether the Commerce Clause or the Copyright Clause authorizes Congress's 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.⁸⁶ Although the Eleventh Circuit stated in dicta that it did not think the Copyright Clause authorized the federal bootlegging law,⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.⁹⁰ Such exercise of the Commerce Clause power in combination with the Supremacy Clause allows Congress to regulate unauthorized fixations.⁹¹ The existence of a federal law regulating the same activity a state law regulates is sufficient to preempt the use of the state law;⁹² therefore, the federal anti-bootlegging law preempts state statutes at the time of its enactment in 1994.⁹³

Two more 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's authority under the Copyright Clause.⁹⁴ The decisions dramatically contradict the Eleventh

⁸⁶ *Id.*; see *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

⁸⁷ See *id.* at 1273.

⁸⁸ See 17 U.S.C. § 102 (1994 & Supp. IV 1998).

⁸⁹ See Sound Recording Act of 1971, *supra* note 35; see also Copyright Act of 1976, *supra* note 8 (addressing preemption of state laws for sound recordings fixed on or after February 15, 1972).

⁹⁰ See *Moghadam*, 175 F.3d at 1269.

⁹¹ U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI.

⁹² See *TRIBE*, *supra* note 52, § 6-27, at 497.

⁹³ See 18 U.S.C. § 2319A (1994 & Supp. III 1997).

⁹⁴ See *KISS v. Catalog Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004) and *United States v. Martignon*, 346 F. Supp. 2d 413, (S.D.N.Y. 2004), respectively. See also David Patton, *The Correct-Like Decision in United States v. Martignon*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1287, 1298-99 (2006); Andrew B. Peterson, *To Bootleg or Not to*

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.⁹⁵

C. True Name and Address

A third type of state copyright legislation is known as “true name and address” legislation. A true name and address statute regulates the replication process and distribution of sound recordings.⁹⁶ Although applicable to both legitimate and illegitimate products, the statute is designed to prevent the distribution of illegal sound recording products.⁹⁷ Forty-six states and the District of Columbia have true name and address statutes.⁹⁸ There is no federal true name and address statute, so there are no real preemption issues here.

Statutes generally require that an in-state manufacturer include its actual name and the state where the product was manufactured⁹⁹ on the product's

Bootleg? Confusion Surrounding the Constitutionality of the Anti-Bootlegging Act Continues, 58 OKLA. L. REV. 723 (2005).

⁹⁵ The constitutional basis for both Congressional enactments come 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 provides this authority. See Brian Danitz, *Martignon and KISS Catalog: Can Live Performances Be Protected?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143 (2005); 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); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: an Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 394-97 (1999); *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's enumerated powers are hermetically sealed.

⁹⁶ See, e.g., CAL. PENAL CODE § 653w (West 1999). It is notable that North Carolina includes software programmers in its true name & address statute, but does not require software producers to disclose the name of their programmers. N.C. GEN. STAT. §14-435(a) & (b) (1993).

⁹⁷ See *Anderson v. Nidorf*, 26 F.3d 100, 102 (9th Cir. 1994).

⁹⁸ 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.

⁹⁹ 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. Additional “pressings” ordered by the manufacturer would then

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 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*,¹⁰⁰ in which a California appellate court found the defendant guilty of violating the state’s true name and address statute.¹⁰¹ In the case that followed, *Anderson v. Nidorf*, the defendant argued that federal copyright law preempted California’s statute.¹⁰²

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 to them a license of that right.

¹⁰⁰ *People v. Anderson*, 235 Cal. App. 3d 586 (1991).

¹⁰¹ CAL. PENAL CODE § 653w (West 1999).

¹⁰² *Anderson*, 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

Preemption is appropriate when a state creates legal or equitable rights equivalent to any of the exclusive rights within Section 301.¹⁰³ 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.¹⁰⁴ According to the California court, federal copyright law does not share this consumer protection purpose.¹⁰⁵ 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.¹⁰⁶ The court held that federal copyright laws do not protect equivalent rights and thus do not preempt the state statute.¹⁰⁷

A New York court similarly resolved a case challenging the New York true name and address statute.¹⁰⁸ The defendants in this case were charged under New York's unauthorized duplication,¹⁰⁹ anti-bootlegging,¹¹⁰ 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."¹¹¹

In a case involving the distribution of unidentified video cassettes, the New York true name and address statute again passed the constitutionality test.¹¹² The court discussed federal copyright law's Section 301 preemption test, which allows for preemption of state statutes that regulate an equivalent

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.*

¹⁰³ *See* Copyright Act of 1976, *supra* note 8.

¹⁰⁴ *See Anderson*, 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").

¹⁰⁵ *See Anderson*, 26 F.3d at 102.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See* *People v. M & R Records, Inc.*, 432 N.Y.S.2d 846 (Sup. Ct. 1980).

¹⁰⁹ 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.

¹¹⁰ The bootleg recordings involved were created in 1978, prior to the existence of the federal anti-bootlegging law. *See id.*

¹¹¹ *Id.* at 850.

¹¹² *People v. Borriello*, 588 N.Y.S.2d 991 (Sup. Ct. 1992).

right with respect to a work of authorship protectable under copyright law.¹¹³ 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.¹¹⁴

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.¹¹⁵ The Georgia Supreme Court granted an interlocutory appeal for the purpose of deciding whether the state's law requiring a label bearing the name and address of the "transferor" of a sound recording was preempted by the Copyright Act.¹¹⁶ It decided that the labeling requirement added an extra element and precluded preemption. 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 Washington statute contained an "extra element" to that of copyright infringement—failure to disclose the origin of a recording.¹¹⁷

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.¹¹⁸ The digital format allows for high-quality, near-exact replication of the masters, and of copies of the masters, in mass quantities.¹¹⁹

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.¹²⁰ Thus, optical disc piracy has become a global problem. Further,

¹¹³ *Id.* at 994.

¹¹⁴ *Id.* at 995-96.

¹¹⁵ See *Hicks v. State*, 674 A.2d 55 (Md. Ct. Spec. App. 1996).

¹¹⁶ *Briggs v. State*, 638 S.E.2d 292 (Ga. 2006).

¹¹⁷ See *State v. Awawdeh*, 864 P.2d 965 (Wash. Ct. App. 1994), *cert. denied*, 115 S. Ct. 441 (1994).

¹¹⁸ 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.

¹¹⁹ See SHAPIRO & VARIAN, *supra* note 22, at 93.

¹²⁰ See *supra* text accompanying notes 20-22.

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,¹²¹ Florida,¹²² and New York.¹²³

ODIL requires in-state replicators¹²⁴ to permanently mark every optical disc containing sound recordings that it replicates with a unique identifier.¹²⁵ If a replicator includes such an identifying mark on an illegitimate product and that product is confiscated, law enforcement will know where to begin the 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

¹²¹ See CAL. BUS. & PROF. CODE §§ 21800-21806 (West Supp. 5A 1999).

¹²² See FLA. STAT. ANN. § 817.5615 (West 2000).

¹²³ See N.Y. GEN. BUS. LAW § 390-a (McKinney 2000).

¹²⁴ Note here again the difference between "replicator" and "manufacturer." See *supra* note 99. 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").

¹²⁵ See, e.g., CAL. BUS. & PROF. CODE § 21800 (West 1999). California recently amended its ODIL laws to authorize law enforcement to inspect commercial disc manufacturing facilities, without a warrant or prior notice, to ensure they are properly marking the discs. CAL. BUS. & PROF. CODE § 21803 (West 1999) (as amended effective Jan. 1, 2012).

illegal services to customers. Replicators then 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 so that prosecutors can charge the replicators with either unauthorized duplication or ODIL violations for any illegitimate product that leaves the factory. Further, commercial replicators should 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 on in-state replicators by requiring them to mark optical discs with a permanent¹²⁶ and unique identifier. The in-state burden exists also in that some manufacturer-customers do not want the replicators' names on their optical discs.¹²⁷ Those manufacturers may hire out-of-state replicators located in states without ODIL to perform their pressings.¹²⁸

ODIL not only requires in-state replicators to comply, but also may require that optical discs distributed in the state's commerce comply.¹²⁹ 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."¹³⁰ 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

¹²⁶ 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.

¹²⁷ See Larry Jaffee, *supra* note 124.

¹²⁸ 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).

¹²⁹ See, e.g., CAL. BUS. & PROF. CODE § 21805 (West 1999) ("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.").

¹³⁰ IFPI, *SID Code Implementation Guide*, <http://www.ifpi.org/content/library/sid-code-implementation-guide.pdf> (visited Mar. 12, 2013).

disc.¹³¹ 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.¹³² 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.

ODIL is also similar to true name and address laws in that it may help to protect the public, although California's state legislative history does not mention such an intent.¹³³ 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 other true name and address cases.¹³⁴ 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 likely does not preempt them.

IV. CONCLUSION

While § 301 of the Copyright Act is broad and sweeping in scope, it is clear that state copyright law is alive and well, at least for now. In addition to the four state law claims outlined in this paper, courts have also allowed state law claims for unfair competition, unjust enrichment, breach of contract, misuse of trade secrets, and right of publicity.¹³⁵ However, some scholars argue that allowing state copyright law claims to proceed interferes with the goal of national uniformity in copyright law.¹³⁶

¹³¹ *See id.*

¹³² *See id.*

¹³³ *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).

¹³⁴ *See supra* text accompanying notes 102-117.

¹³⁵ Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1 (2007).

¹³⁶ *Id.* at 108.

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.¹³⁷

Intellectual property industry groups like the RIAA,¹³⁸ the Motion Picture Association of America, Inc.,¹³⁹ the Interactive Digital Software Association,¹⁴⁰ the Software & Information Industry Association,¹⁴¹ and the Business Software Alliance,¹⁴² are interested in maintaining some level of uniformity in national copyright law. Indeed, as mentioned in the introduction to this paper, the Copyright Office has recommended that pre-

¹³⁷ S. Rep. No. 105-190 (1998).

¹³⁸ The RIAA sponsored ODIL in California and New York. Its website is at <http://www.riaa.com>.

¹³⁹ The Motion Picture Association of America sponsored ODIL in Florida. Its website is at <http://www.mpaa.org>.

¹⁴⁰ The Interactive Digital Software Association's website is at <http://www.idsa.com>. It along with the RIAA, the Motion Picture Association of America, and others have all supported the passage of California's ODIL. See Larry Jaffee, *supra* note 124.

¹⁴¹ The Software & Information Industry Association website is at <http://www.siiia.net>. It is a trade association that represents the interests of the software and digital content industry.

¹⁴² The Business Software Alliance's website is at <http://www.bsa.org>. It represents the global interests of software publishers.

1972 sound recordings be brought under federal jurisdiction before they are allowed to enter the public domain in 2067.¹⁴³ Other scholars have likewise argued that the variance in state copyright law term, duration, and fair use exceptions leads to confusion among copyright holders if federal law is not applied.¹⁴⁴ Federal unauthorized duplication and anti-bootlegging laws have been important steps toward fighting music piracy that ignores state boundaries. However, as pirates continue to take advantage of new technologies, state and national boundaries may erode. Thus, the state true name and address and ODIL statutes are important tools that investigators can use to help identify the source of piratical activity. Prosecutors can use these laws to send piracy cases through the state legal system more efficiently and with better results. However, these state-specific laws cannot effectively fight piracy until every state has such laws or until Congress legislates for the nation.

¹⁴³ *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, *supra* note 6.

¹⁴⁴ See Erlinger, *supra* note 2 at 67-68; see also Gard & Anapol, *supra* note 1, at 130.

APPENDIX 1

Table of State Copyright Statutes

State	Penalty— Unauthorized Duplication	Unauthorized Duplication	Bootlegging	True Name & Address	Optical Disc Identification
Alabama	Felony	X ¹⁴⁵	X ¹⁴⁶	X ¹⁴⁷	
Alaska	Misdemeanor	X ¹⁴⁸		X ¹⁴⁹	
Arizona	Felony	X ¹⁵⁰	X ¹⁵¹	X ¹⁵²	
Arkansas	Felony	X ¹⁵³	X ¹⁵⁴	X ¹⁵⁵	
California	Felony	X ¹⁵⁶	X ¹⁵⁷	X ¹⁵⁸	X ¹⁵⁹
Colorado	Felony	X ¹⁶⁰		X ¹⁶¹	
Connecticut	Felony	X ¹⁶²		X ¹⁶³	
Delaware	Felony	X ¹⁶⁴		X ¹⁶⁵	
DC	Felony	X ¹⁶⁶	X ¹⁶⁷	X ¹⁶⁸	
Florida	Misdemeanor	X ¹⁶⁹	X ¹⁷⁰	X ¹⁷¹	X ¹⁷²

¹⁴⁵ ALA. CODE §§ 13A-8-81 to -82 (1994).

¹⁴⁶ ALA. CODE § 13A-8-81(a)(2) (1994).

¹⁴⁷ ALA. CODE Sec. 13A-8-83 ; 13A-8-86.

¹⁴⁸ ALASKA STAT. § 45.50.900(a) (Michie 1998).

¹⁴⁹ ALASKA STAT § 45.50.900(a)(2) (Michie 1998).

¹⁵⁰ ARIZ. REV. STAT. ANN. § 13-3705(A) (West 1989 & Supp. 1998).

¹⁵¹ ARIZ. REV. STAT. ANN. § 13-3705(A)(5) (West 1989 & Supp. 1998).

¹⁵² ARIZ. REV. STAT. ANN. § 13-3705(A)(3),(4) (West 1989 & Supp. 1998).

¹⁵³ ARK. CODE ANN. § 5-37-510(b) (Michie 1997).

¹⁵⁴ ARK. CODE ANN. § 5-37-510(b) (Michie 1997).

¹⁵⁵ ARK. CODE ANN. § 5-37-510(c) (Michie 1997).

¹⁵⁶ CAL. PENAL CODE § 653h (West 1999).

¹⁵⁷ CAL. PENAL CODE §§ 653s, 653u (West 1999).

¹⁵⁸ CAL. PENAL CODE § 653(w) (West 1999).

¹⁵⁹ CAL. BUS. & PROF. CODE §21800-21807 (West 1999).

¹⁶⁰ COLO. REV. STAT. ANN. §§ 18-4-602 to -603 (West 1999).

¹⁶¹ COLO. REV. STAT. ANN. § 18-4-604.

¹⁶² CONN. GEN. STAT. ANN. §§ 53-142b, -142f (West 1997).

¹⁶³ CONN. GEN. STAT. ANN. § 53-142c.

¹⁶⁴ DEL. CODE ANN. tit. 11, §§ 920-921 (1995).

¹⁶⁵ DEL. CODE ANN. tit. 11, § 922(a).

¹⁶⁶ D.C. CODE ANN. § 22-3814 (1996).

¹⁶⁷ D.C. CODE ANN. § 22-3814(b) (1996).

¹⁶⁸ D.C. CODE ANN. § 22-3214.01 (1996).

¹⁶⁹ FLA. STAT. ANN. § 540.11(2)(a)(1)-(2) (West 1997).

¹⁷⁰ FLA. STAT. ANN. § 540.11(2)(a)(3), (3)(a)(2) (West 1997).

¹⁷¹ FLA. STAT. ANN. § 540.11(3)(a)(3) (West 1997).

¹⁷² FLA. STAT. ANN. §817.5615 (West 1997).

State	Penalty— Unauthorized Duplication	Unauthorized Duplication	Bootlegging	True Name & Address	Optical Disc Identification
Georgia	Felony	X ¹⁷³		X ¹⁷⁴	
Hawaii	Felony	X ¹⁷⁵			
Idaho	Misdemeanor	X ¹⁷⁶		X ¹⁷⁷	
Illinois	Felony	X ¹⁷⁸	X ¹⁷⁹	X ¹⁸⁰	
Indiana	Felony		X ¹⁸¹	X ¹⁸²	
Iowa	Felony	X ¹⁸³		X ¹⁸⁴	
Kansas	Felony	X ¹⁸⁵	X ¹⁸⁶	X ¹⁸⁷	
Kentucky	Felony	X ¹⁸⁸	X ¹⁸⁹	X ¹⁹⁰	
Louisiana	Felony	X ¹⁹¹	X ¹⁹²	X ¹⁹³	
Maine	Felony	X ¹⁹⁴			
Maryland	Felony	X ¹⁹⁵	X ¹⁹⁶	X ¹⁹⁷	
Massachusetts	Felony	X ¹⁹⁸	X ¹⁹⁹	X ²⁰⁰	

¹⁷³ GA. CODE ANN. § 16-8-60(a) (Harrison 1998).

¹⁷⁴ GA. CODE ANN. § 16-8-60(b) (Harrison 1998).

¹⁷⁵ HAW. REV. STAT. ANN. §§ 482C-1 to -2 (Michie 1998).

¹⁷⁶ IDAHO CODE §§ 18-7603(1) to -(2) (Michie 1997).

¹⁷⁷ IDAHO CODE §§ 18-7603(3) to 18-7604 (Michie 1997).

¹⁷⁸ 720 ILL. COMP. STAT. ANN. 5/16-7(a)(1)-(2), -8(a) (West 1993).

¹⁷⁹ 720 ILL. COMP. STAT. ANN. 5/16-7(a)(4) (West 1993).

¹⁸⁰ 720 ILL. COMP. STAT. ANN. 5/16-8 ; 5/16-7(b)(5) (“unidentified sound or audio visual” defined as without having a true name and address).

¹⁸¹ IND. CODE ANN. § 35-43-4-1(b)(8)(B) (Michie 1998).

¹⁸² IND. CODE ANN. § 24-4-10-4; § 24-1-10-5 (Michie 1998).

¹⁸³ IOWA CODE ANN. § 714.15(1) (West 1993).

¹⁸⁴ IOWA CODE ANN. § 14.15.2 (West 1993).

¹⁸⁵ KAN. STAT. ANN. §§ 21-3748 to -3749 (West 1996).

¹⁸⁶ KAN. STAT. ANN. §§ 21-3748(a) to-3749 (West 1996).

¹⁸⁷ KAN. STAT. ANN. § 21-3750 (West 1996).

¹⁸⁸ KY. REV. STAT. ANN. § 434.445(1), (3) (Michie 1985 & Supp. 1998).

¹⁸⁹ KY. REV. STAT. ANN. § 434.445(2) (Michie 1985 & Supp. 1998).

¹⁹⁰ KY. REV. STAT. ANN. § 434.445(4) (Michie 1985 & Supp. 1998).

¹⁹¹ LA. REV. STAT. ANN. § 14:223 (West 1998).

¹⁹² LA. REV. STAT. ANN. § 14:223.5 (West 1998).

¹⁹³ LA. REV. STAT. ANN. §§ 14:223.6, 14:223.3 (West 1998).

¹⁹⁴ ME. REV. STAT. ANN. tit.10, § 1261(1)-(2) (West 1997).

¹⁹⁵ MD. ANN. CODE art. 27, § 467A(a) (1996).

¹⁹⁶ MD. ANN. CODE art. 27, § 467A(a)(2)-(3) (1996).

¹⁹⁷ MD. ANN. CODE., CRIM. LAW § 7-308(d)(2) (1996).

¹⁹⁸ MASS. GEN. LAWS ANN. ch. 266, § 143A (West 1992).

¹⁹⁹ MASS. GEN. LAWS ANN. ch. 266, § 143B (West 1992).

²⁰⁰ MASS. GEN. LAWS ANN. ch. 266, §§ 143C, 143D (West 1992).

State	Penalty— Unauthorized Duplication	Unauthorized Duplication	Bootlegging	True Name & Address	Optical Disc Identification
Michigan	Felony	X ²⁰¹	X ²⁰²	X ²⁰³	
Minnesota	Felony	X ²⁰⁴		X ²⁰⁵	
Mississippi		X ²⁰⁶	X ²⁰⁷	X ²⁰⁸	
Missouri	Felony	X ²⁰⁹	X ²¹⁰	X ²¹¹	
Montana	Felony	X ²¹²	X ²¹³	X ²¹⁴	
Nebraska	Misdemeanor	X ²¹⁵		X ²¹⁶	
Nevada	Felony	X ²¹⁷		X ²¹⁸	
New Hampshire	Felony	X ²¹⁹	X ²²⁰	X ²²¹	
New Jersey	Felony	X ²²²	X ²²³	X ²²⁴	
New Mexico	Felony	X ²²⁵	X ²²⁶	X ²²⁷	
New York	Felony	X ²²⁸	X ²²⁹	X ²³⁰	X ²³¹

²⁰¹ MICH. COMP. LAWS ANN. § 752.1052(b)-(c) (West Supp. 1999).

²⁰² MICH. COMP. LAWS ANN. § 752.1052(1)(a) (West Supp. 1999).

²⁰³ MICH. COMP. LAWS ANN. §§ 752.1053-.1054 (West Supp. 1999).

²⁰⁴ MINN. STAT. ANN. §§ 325E.169-.201 (West 1995).

²⁰⁵ MINN. STAT. ANN. §325E.18-.201 (West 1995).

²⁰⁶ MISS. CODE ANN. §§ 97-23-87 to -91 (1999).

²⁰⁷ MISS. CODE ANN. § 97-23-87(2)(b) (1999).

²⁰⁸ MISS. CODE ANN. § 97-23-89 (1999).

²⁰⁹ MO. ANN. STAT. §§ 570.225-.255 (West 1999).

²¹⁰ MO. ANN. STAT. §§ 570.226-.230 (West 1999).

²¹¹ MO. ANN. STAT. §§ 570.240, .241, .255 (West 1999).

²¹² MONT. CODE ANN. §§ 30-13-141 to -147 (1997).

²¹³ MONT. CODE ANN. §§ 30-13-142(2), 30-13-143(2) (1997).

²¹⁴ MONT. CODE ANN. § 30-13-144 (West 1999).

²¹⁵ NEB. REV. STAT. ANN. §§ 28-1323 to -1326 (Michie 1995).

²¹⁶ NEB. REV. STAT. ANN. §§ 28-1324, -1326 (Michie 1995).

²¹⁷ NEV. REV. STAT. ANN. § 205.217 (Michie 1997).

²¹⁸ NEV. REV. STAT. ANN. §§ 205.217(2), 193.30 (Michie 1997).

²¹⁹ N.H. REV. STAT. ANN. §§ 352-A:1 to :5, 352:1 (1995 & Supp. 1998).

²²⁰ N.H. REV. STAT. ANN. §§ 352-A:2(I)(b), (II)(b) (1995 & Supp. 1998).

²²¹ N.H. REV. STAT. ANN. §§ 352-A:3, 352-A:5.

²²² N.J. STAT. ANN. § 2C:21-21 (West 1995).

²²³ N.J. STAT. ANN. § 2C:21-21(c)(3) (West 1995).

²²⁴ N.J. STAT. ANN. § 2C:21-21.c(4) (West 1995).

²²⁵ N.M. STAT. ANN. §§ 30-16B-1 to -9 (Michie 1998).

²²⁶ N.M. STAT. ANN. § 30-16B-5 (Michie 1998).

²²⁷ N.M. STAT. ANN. § 30-16B-4 (Michie 1998).

²²⁸ N.Y. PENAL LAW §§ 275.00-.30, 275.35-.45, 420.00-.05 (McKinney 1999).

²²⁹ N.Y. PENAL LAW § 275.15-.20 (McKinney 1999).

²³⁰ N.Y. PENAL LAW §§ 275.35, 275.40 (McKinney 1999).

²³¹ N.Y. GEN BUS. Law §390-a (McKinney 1999).

State	Penalty— Unauthorized Duplication	Unauthorized Duplication	Bootlegging	True Name & Address	Optical Disc Identification
North Carolina	Felony	X ²³²	X ²³³	X ²³⁴	
North Dakota	Felony	X ²³⁵	X ²³⁶	X ²³⁷	
Ohio	Felony	X ²³⁸		X ²³⁹	
Oklahoma	Felony	X ²⁴⁰	X ²⁴¹	X ²⁴²	
Oregon	Felony	X ²⁴³	X ²⁴⁴	X ²⁴⁵	
Pennsylvania	Felony	X ²⁴⁶	X ²⁴⁷	X ²⁴⁸	
Rhode Island	Felony	X ²⁴⁹	X ²⁵⁰	X ²⁵¹	
South Carolina	Felony	X ²⁵²	X ²⁵³	X ²⁵⁴	
South Dakota	Felony	X ²⁵⁵		X ²⁵⁶	
Tennessee	Felony	X ²⁵⁷	X ²⁵⁸	X ²⁵⁹	

²³² N.C. GEN. STAT. §§ 14-432 to -437 (1993).

²³³ N.C. GEN. STAT. § 14-433(a)(3) to -(4) (1993).

²³⁴ N.C. GEN. STAT. § § 14-435; 14-437 (1993).

²³⁵ N.D. CENT. CODE §§ 47-21.1-01 to -06 (1978).

²³⁶ N.D. CENT. CODE § 47-21.1-02(2) to -(4) (1978).

²³⁷ N.D. CENT. CODE § 47-21.1-03 (1978).

²³⁸ OHIO REV. CODE ANN. §§ 1333.52, 1333.99(E)-(F) (Anderson 1993 & Supp. 1998); OHIO REV. CODE ANN. § 2913.32 (Anderson 1996).

²³⁹ OHIO REV. CODE ANN. §1333.52(B);1333.9(F) (Anderson 1996).

²⁴⁰ OKLA. STAT. ANN. tit. 21, §§ 1975-1981 (West Supp. 1997).

²⁴¹ OKLA. STAT. ANN. tit. 21, § 1978 (West Supp. 1997).

²⁴² OKLA. STAT. ANN. tit. 21§1979 (West Supp. 1997).

²⁴³ OR. REV. STAT. §§ 164.864 to -.869, 164.873, 164 .876 (1990 & Supp. 1998).

²⁴⁴ OR. REV. STAT. § 164.869 (1990 & Supp. 1998).

²⁴⁵ OR. REV. STAT. § 164.872 (1990 & Supp. 1998).

²⁴⁶ 18 PA. CONS. STAT. ANN. § 4116 (West 1983 & Supp. 1998).

²⁴⁷ 18 PA. CONS. STAT. ANN. § 4116(d.1) (West 1983 & Supp. 1998).

²⁴⁸ 18 PA. CONS. STAT. ANN. §4116(e) (West 1983 & Supp. 1998).

²⁴⁹ R.I. GEN. LAWS § 6-13.1-15 (1992).

²⁵⁰ R.I. Gen. Laws § 6-13.1-15(a)(2) to -(3) (1992).

²⁵¹ R.I. Gen. Laws § 6-13.1-15(c) (1992).

²⁵² S.C. CODE ANN. §§ 16-11-910 to -950 (Law Co-op. 1985 & Supp. 1997).

²⁵³ S.C. CODE ANN. § 16-11-915 (Law Co-op. 1985 & Supp. 1997).

²⁵⁴ S.C. CODE ANN. §§ 16-11-930, 16-11-940 (Law Co-op. 1985 & Supp. 1997).

²⁵⁵ S.D. CODIFIED LAWS §§ 43-43A-1 to -7, 22-6-1 (Michie 1997).

²⁵⁶ S.D. CODIFIED LAWS § 43-43A-3 (Michie 1997).

²⁵⁷ TENN. CODE ANN. §§ 39-14-105, -115, -139 to -140 (1997).

²⁵⁸ TENN. CODE ANN. § 39-14-139(c) (1997).

²⁵⁹ TENN. CODE ANN. §39-14-139(a) (1997).

State	Penalty— Unauthorized Duplication	Unauthorized Duplication	Bootlegging	True Name & Address	Optical Disc Identification
Texas	Felony	X ²⁶⁰	X ²⁶¹	X ²⁶²	
Utah	Misdemeanor	X ²⁶³		X ²⁶⁴	
Vermont					
Virginia	Felony	X ²⁶⁵	X ²⁶⁶	X ²⁶⁷	
Washington	Felony	X ²⁶⁸	X ²⁶⁹	X ²⁷⁰	
West Virginia	Felony	X ²⁷¹	X ²⁷²	X ²⁷³	
Wisconsin	Felony	X ²⁷⁴	X ²⁷⁵	X ²⁷⁶	
Wyoming	Felony	X ²⁷⁷	X ²⁷⁸		

²⁶⁰ TEX. BUS. & COM. CODE ANN. §§ 35.91 to -.96 (West Supp. 1999).

²⁶¹ TEX. BUS. & COM. CODE ANN. § 35.93 (West Supp. 1998).

²⁶² TEX. BUS. & COM. CODE ANN. §35-94(a) (West Supp. 1998).

²⁶³ UTAH CODE ANN. §§ 13-10-1 to -8 (1996).

²⁶⁴ UTAH CODE ANN. § 13-10-8 (1996).

²⁶⁵ VA. CODE ANN. §§ 59.1-41.1 to .6 (Michie 1998).

²⁶⁶ VA. CODE ANN. § 59.1-41.2 (Michie 1998).

²⁶⁷ VA. CODE ANN. §§ 59.1-41.4, 59.1-41.6 (Michie 1998).

²⁶⁸ WASH. REV. CODE ANN. §§ 19.25.010 to -.901 (West 1999).

²⁶⁹ WASH. REV. CODE ANN. § 19.25.030 (West 1999).

²⁷⁰ WASH. REV. CODE ANN. §19.25.040 (West 1999).

²⁷¹ W. VA. CODE § 61-3-50 (1997).

²⁷² W. VA. CODE § 61-3-50(a) (1997).

²⁷³ W. VA. CODE § 61-3-50(a) (1997).

²⁷⁴ WIS. STAT. ANN. § 943.207 (West Supp. 2000).

²⁷⁵ WIS. STAT. ANN. § 943.208 (West Supp. 2000).

²⁷⁶ WIS. STAT. ANN. § 943.209 (West Supp. 2000).

²⁷⁷ WYO. STAT. ANN. §§ 40-13-201 to -206 (Michie 1999).

²⁷⁸ WYO. STAT. ANN. § 40-13-202(a)(ii) (Michie 1999).