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# THE CONSTITUTIONALITY OF STATE LAW PROTECTION OF SOUND RECORDINGS\*

by *Lewis S. Kurlantzick*\*\*

A is a musical performer, both an instrumentalist and vocalist, with a recording contract with the R record company. On February 1, R announces to its distributors that in two weeks it will be releasing a new album containing eleven songs or 'cuts' and featuring A as the singer. On February 15, the album is released in both phonograph record and pre-recorded 8 track cartridge form. Some time thereafter P, an avid reader of the record industry trade magazines, notes that A's album is number 40 on the Billboard weekly chart and that it is starred on the chart, a marking which indicates that it is one of the albums registering the greatest proportionate upward progress that week. P goes out and buys the album. From the album he duplicates the records and tapes and markets them commercially.

This scenario, repeated again and again in recent years, is followed by cries of foul play by performers and record manufacturers claiming that their "property" is being "stolen," and predicting that record production will drastically diminish or cease if the practice continues.<sup>1</sup>

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\*This article is part of a more comprehensive treatment of record duplication, which will appear in the near future. The forthcoming article will attempt to determine the need for protection against duplication, and to define the dimensions of an optimal balance between the requirements of record producers for protection and the interests of the public in the widest dissemination of music at the lowest possible prices. The article rejects most of the traditional arguments for protection and attempts a more intensive and sophisticated inquiry than Congress has undertaken in its ongoing revision of current copyright legislation. The article concludes that although record producers require some measure of protection, they need less protection than they have requested and than Congress seems prepared to give them.

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1. I am concerned here only with state protection of recordings against "piracy." By "piracy" I refer to the practice of reproducing or re-recording the actual sounds of a recorded performance. This practice is also known as "dubbing." The pirate may go beyond duplication of the recordings and also duplicate the label and album

Naturally, record producers have sought help from Congress, state legislatures and the courts, all of which have responded to some degree. Most importantly, Congress has amended the Copyright Act to permit copyrighting of records produced between February 15, 1972 and January 1, 1975. As shall appear, this enactment precludes state action with respect to such recordings. But the authority of state courts and legislatures to protect records produced before and after that date (assuming that Congress does not extend the January 1, 1975 date) remains an open question, involving extremely complex issues of federalism.

The constitutionality of any state law protection of recordings has been challenged. Duplicators claim that the combined effect of the copyright clause of the Constitution, the Copyright Act and the supremacy clause, and a federal policy in favor of the restriction of monopolies and the enhancement of competition nullifies existing state tort and criminal law aimed at unauthorized duplication. State regulation of any work subject to Congress' copyright powers is precluded, they maintain, whether or not such congressional power has been exercised. The issue, then, is the respective roles of the states and the federal government in protecting subject matter which comes within the reach of the copyright clause. More particularly, the principal question is whether our federal system imposes limits on the power of

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(or cartridge) cover, including the original manufacturer's name and trademark. I term this practice "counterfeiting." There is a third character in the duplication drama. Unlike the pirate and counterfeiter he does not derive his product from a publicly disseminated record. Rather he attends a live performance by an artist, tapes that performance, and in turn produces records from the tape. (Alternatively, he may gain possession of a recording which the artist and/or company decided not to release and produce records from it.) I call this character a "bootlegger." It is clear that a stronger argument can be made for protection against the counterfeiter and bootlegger than against the pirate. The counterfeiter introduces an element of deceptive merchandising into the transaction, thereby violating the interest of the consumer and of the economic system in providing accurate information to purchasers as to the source of the product being purchased. The bootlegger violates the artist's legitimate personal interest in determining which of his live performances will be fixed in recorded form, the quality of that recording, and whether that recording will be publicly disseminated. Under neither the existing Copyright Act nor the revision bill are states precluded from acting against counterfeiters who deceptively palm off their products as the original, or bootleggers who tape live performances. *E.g.*, S. 644, 92d Cong., 1st Sess. § 301(b) (3) (1971).

Recognizing that the term "piracy" implies a normative judgment about the behavior described, I have generally avoided its use in the article. When used, it is as a synonym for "copying," with no pejorative connotations attached.

the states to afford relief against unauthorized record reproduction and, if so, what those limits are.

Consideration of this problem must start with the changes in the Copyright Act effected by the enactment of the McClellan bill by the 92nd Congress in the fall of 1971. In response to increased industry pressure Senator John McClellan carved out for separate action several sections of the pending general Copyright Revision Bill which make "sound recordings" copyrightable and make unauthorized duplication an act of copyright infringement.<sup>2</sup> Under the new legislation, for the first time copyright protection will be extended to the recorded performance or rendition of a musical composition, in addition to the long standing protection afforded by the Copyright Act to the composition itself.

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2. Technically, the McClellan bill amended § 5 of the Copyright Act to add the category of "sound recordings" to the list of copyrightable subject matter and amended § 1 to give the copyright proprietor "the exclusive right" to make and distribute "reproductions of the copyrighted work if it be a sound recording." Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds." In other words, the aggregation of sounds which constitutes the performance captured on the master tape is a "sound recording." This protection lasts twenty-eight years and may be renewed for a second twenty-eight year period. The requirements of registration, notice, and similar details are delineated in Copyright Office, *Copyright for Sound Recordings*, Circular 56 (1972).

Senator McClellan originally introduced the "anti-piracy" bill on December 18, 1970, at the end of the 91st Congress. S. 4592, 91st Cong., 2d Sess. (1970). He re-introduced the identical bill on February 8, 1971, S. 646, 92d Cong., 1st Sess. (1971), and with some amendments, it passed the Senate on April 29, 1971. The House attached an amendment which limited protection to recordings fixed and published before January 1, 1975. The House passed the bill as amended on October 4, 1971. The Senate agreed to the House amendments on October 6, and the President signed the bill into law on October 15, 1971. Under the new legislation any recording fixed and published on or after February 15, 1972 and before January 1, 1975 is eligible for copyright protection. Pub. L. No. 92-140, 85 Stat. 391 (Oct. 15, 1971). According to the House report, the purpose of limiting the McClellan amendment to recordings produced before January 1, 1975, is "to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment. By January 1, 1975, moreover, the protection of sound recordings will, it is hoped, be part of a copyright law revision." H.R. Rep. No. 487, 92nd Cong., 1st Sess. 1-2 (1971).

The substance of the McClellan Bill is contained in sections 102, 106, and 114 of the general copyright revision bill. See S. 644, 92d Cong., 1st Sess. §§ 102(a)(7), 106(1)(3), 114(a) (1971). The general revision bill's passage has been delayed for some time by unresolved issues concerning the copyright liability of community antenna television systems (CATV) and the relationship of that copyright liability to regulation of CATV by the Federal Communications Commission. Even so, the principal sponsors of the revision bill have opposed suggestions for separate enactment of matter contained in the revision bill. Senator McClellan's justification for

The states also have attempted to assist the record companies through both their civil and criminal law. On the civil side, state courts have applied tort law, usually under the rubric of unfair competition, to the activities of duplicators and have consistently enjoined these activities at the request of performers and record companies.<sup>3</sup> Of the innumerable actions for injunctions and damages,<sup>4</sup> in no case has a duplicator won on the merits, *i.e.*, no court has held his behavior to be non-tortious under state law. On the criminal side, ten states have enacted legislation making the unauthorized manufacture or sale of duplicate recordings a crime,<sup>5</sup> and successful prosecutions have been accomplished.<sup>6</sup>

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splitting off part of the general revision bill was that the "piracy" situation demanded an urgent response and early passage and implementation of a general revision bill was dubious. *See* 116 Cong. Rec. 42446 (1970).

3. *E.g.*, *Liberty/UA, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414, *appeal dismissed*, 278 N.C. 702, 181 S.E.2d 600 (1971); *Capitol Records, Inc. v. Spies*, 167 U.S.P.Q. 489 (Ill. App. Ct., 1st District 1970); *Columbia Broadcasting System, Inc. v. Spies*, 167 U.S.P.Q. 492 (Ill. Cir. Ct., Cook County 1970); *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (Ct. App. 2d District 1969), *cert. denied*, 398 U.S. 960 (1970); *Capitol Records, Inc. v. Greatest Records, Inc.* 43 Misc.2d 878, 252 N.Y.S.2d 553 (Sup. Ct. 1964).

Duplicators have repeatedly contended that the states are constitutionally precluded from acting in this area. To date, only one court has accepted this argument. In that case an association of tape duplicators brought an action seeking injunctive relief from future criminal prosecutions threatened under the provisions of the Florida anti-piracy statute. The federal district judge declared the statute unconstitutional and granted the injunction. *Int'l. Tape Mfrs. Ass'n. v. Gerstein*, 174 U.S.P.Q. 198 (S.D.Fla. 1972).

4. The reported cases represent only a small fraction of the actions brought. *See, e.g.*, *Brief for Recording Industry Association of America, Inc. as Amicus Curiae* at 21 n. 52, *Goldstein v. California*, *cert. granted*, 406 U.S. 956 (1972); *Rosenblatt, Popular Music Firms Push War on Pirates*, *Portland (Maine) Evening Express*, March 9, 1970, at 7 (Capitol Records obtained injunctions against 75 individuals or companies over a 14 month period in Los Angeles County alone). Over the last few years a month has rarely passed without a trade magazine reporting some civil or criminal action against duplicators. *See, e.g.*, *Billboard*, Sept. 9, 1972, at 4, col. 1 (arrest and conviction of distributors of pirated tapes in New York); *Billboard*, June 24, 1972, at 64, col. 3 (injunction issued in Illinois against duplicator); *Billboard*, May 13, 1972, at 4, col. 1 (injunction issued in Oregon against duplicators); *Cash Box*, July 17, 1971, at 14 (criminal conviction in California); *Billboard*, July 17, 1971, at 23 (injunction issued in Michigan against duplicators).

5. ARIZONA REV. STAT. ANN. § 13-1024 (Supp. 1972) (misdemeanor); ARKANSAS STAT. ANN. § 41-4617 to -4621 (Supp. 1971) (punishable by fine of not less than \$50 nor more than \$250); CAL. PENAL CODE ANN. § 653h (West 1970) (misdemeanor); FLA. STAT. ANN. § 543.041 (1972) (misdemeanor); Louisiana Act 350 (Reg. Sess., 1972) (first offense punishable by fine up to \$1,000; subsequent offense punishable by fine up to \$2,000); N.Y. GENERAL BUSINESS LAW ANN. § 561 (McKinney 1968)

## PROTECTION OF RECORDS UNDER THE COPYRIGHT ACT

Since the extent of federal copyright legislation bears so directly upon the constitutionality of state action in this area, it would be well to consider why records could not be protected under the pre-McClellan bill Copyright Act.<sup>7</sup> Section 4 of the Copyright Act states: "The works for which copyright may be secured under this title shall include all the writings of an author".<sup>8</sup> Section 5 enumerates thirteen subsections of copyrightable items for registration purposes and recordings are not included in the list. However, section 5 concludes with a provision that "the above specifications shall not be held to limit the subject matter of copyright as defined in section 4. . . ."<sup>9</sup> Therefore, one can plausibly argue that recordings are encompassed within the Act, and the language will bear this meaning. However, despite sound arguments supporting the eligibility of records for copyright protection under the 1909 Act, the proposition fails, principally because a copyright on recordings does not fit well into the pattern of rights and duties established by the Act, or the administrative structure for enforcing them.<sup>10</sup>

There is no doubt that a recording constitutionally qualifies as a "writing,"<sup>11</sup> and section 4 appears to extend protection to all con-

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(misdemeanor); PA. STAT. ANN., tit. 18, § 4878.1 (Supp. 1973) (1st offense punishable by imprisonment for not more than 3 years or by fine of not more than \$5,000; subsequent offense punishable by imprisonment up to 10 years or fine up to \$20,000 or both); TENN. CODE ANN. § 39-4244 to -4250 (Supp. 1971) (felony; 1st offense punishable by imprisonment for 1 to 3 years or by fine up to \$25,000; subsequent offense punishable by 3 to 10 years imprisonment or fine up to \$100,000 or both); TEXAS PENAL CODE ANN., art. 1137r (Supp. 1972) (1st offense — misdemeanor punishable by fine up to \$2,000; 2nd offense — felony punishable by fine up to \$25,000 or imprisonment up to 5 years or both); VA. CODE ANN. § 59.1-41.1 to 41.6 (Supp. 1972) (misdemeanor). Los Angeles had a municipal ordinance prohibiting the unauthorized manufacture or sale of duplicate recordings. LOS ANGELES, CAL. MUNICIPAL CODE § 42.19.1 (1955). This provision was superseded by the state statute, and the section was repealed by Ord. No. 140,388 effective June 28, 1970, LOS ANGELES, CAL. MUNICIPAL CODE (1970).

6. Prosecutions have been brought and convictions obtained in at least Arkansas, California, Florida, New York, Tennessee, and Texas.

7. 17 U.S.C. § 1 et. seq. (1970).

8. 17 U.S.C. § 4 (1970).

9. 17 U.S.C. § 5 (1970).

10. See Kalodner & Vancce, *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1111-12 (1959); Chafec, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 735 (1945).

11. See, e.g., Note, *Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U. L. REV. 1263 (1956); *Hearings on H.R. 4347, H.R. 5680*,

stitutionally protectible works. Section 5 can be viewed as only an illustrative listing of the products eligible for copyright and as a guide in the classification of these products for registration purposes. Furthermore, interpreting writings in Section 4 as coterminous with Congress' constitutional authority to protect intellectual products would introduce flexibility into the Act and permit the law to adapt itself to changing methods of communication. Admittedly, the legislative history of section 1(e) of the 1909 Act may be read to render records ineligible for copyright. However, alternative readings are permissible. The committee report stated: "It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves but only to give the composer or copyright proprietor the control in accordance with the provisions of the bill of the manufacture and use of such devices."<sup>12</sup> Clearly this sentence could be read to mean that copyright protection of recordings would be inconsistent with the congressional purpose. Yet in the context of the issue addressed by section 1(e), one can strongly argue that the committee meant that Congress did not desire to permit the composer to copyright recordings but only to provide the composer with limited control of recordings as part of his underlying copyright in the sheet music. In other words, the passage does not address the question of whether an artist or record company, rather than the composer, should have any rights in the recordings they produce.<sup>13</sup>

A second argument that has been raised against coverage of records under the Copyright Act is based upon the supposition that at the time of the Act's passage in 1909 performances were not yet being recorded. Therefore, a statute enacted that year could not have included protection for recording.<sup>14</sup> This argument neither is persuasive on its facts nor its reasoning. Virtuosi were recording performances prior to 1909.<sup>15</sup> Even if this were not the fact, it may be argued

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*H.R. 6831 and H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 3, at 1863 (1965) (remarks of Abraham Kaminstein, Register of Copyrights).*

12. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909).

13. Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-emption Doctrine*, 71 COLUM. L. REV. 1444, 1466 (1971); see Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409, 414 n. 22 (1956).

14. See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 667, (2d Cir. 1955) (dissenting opinion).

15. See R. GELATT, *THE FABULOUS PHONOGRAPH* (1955).



that the congressional purpose is better served by an interpretation which permits the term "writing" to be redefined in accordance with economic and technological changes.<sup>16</sup>

The decisive factor mitigating against interpreting the Copyright Act to authorize copyright protection for records is the absence of any basis in the Act to delimit and administer an appropriate scope of protection for records.<sup>17</sup> Conceivably, certain details might be handled by stretching the statutory language. Thus, the notice requirement may be satisfied by notations on the record label. But other serious conflicts are not so easily resolved. In particular, it is unclear how the recording copyright would be integrated with the compulsory license mechanical reproduction section applicable to the underlying composition. To use Professor Fuller's apt metaphor, a construction recognizing a copyright in recordings would conflict with the "intention of the design."<sup>18</sup> In addition, such a construction would give rise to what Professor Chafee has termed the problem of "wide range."<sup>19</sup> That is, different writings may require different degrees of protection, and the protective scheme for recordings should be tailored to the characteristics of these works. A construction placing recordings under the 1909 Act is likely to result in excessive and unsuitable protection.

With a single exception, the cases have reached the same conclusion. In *Capitol Records, Inc. v. Mercury Records Corp.*<sup>20</sup> the Court of Appeals for the Second Circuit decided that recordings were excluded from copyright under the Act even though capable of copyright under the Constitution.<sup>21</sup> Since then, it has been uniformly assumed that

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16. In other words, it is questionable whether the historical claim is relevant to the issue of statutory construction at all, for one central issue is whether the congressional purpose is better served by an interpretation which attributes to the term "writing" a fixed or a dynamic, changed meaning over time. See generally H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1212-17 (tent. ed. 1958).

17. Chafee, *supra* note 10, at 735; see *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 665 (2d Cir. 1955) (dissenting opinion).

18. See L. FULLER, *THE MORALITY OF LAW* 83-87 (1964). See generally P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 391 (1965). For elaboration, in the constitutional context, of the "structural" method of interpretation which forces attention to considerations of structural and relational properties, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969), especially ch. I, "Inference from Structure: The Neglected Method."

19. Chafee, *supra* note 10, at 737.

20. 221 F.2d 657 (2d Cir. 1955).

21. A word can, of course, have a different meaning when used in a statute

prior to the McClellan amendment recordings were not statutorily copyrightable and that Section 4 does not expend Congress' entire constitutional grant.<sup>22</sup> The Copyright Office regulations explicitly state that the Office would not register claims to rights in recordings.<sup>23</sup> The only case contra is *Fonotopia Ltd. v. Bradley* where the court stated, in dictum, that records would be copyrightable under the Act.<sup>24</sup>

Some recordings did receive a measure of protection under the Copyright Act prior to passage of the McClellan bill. Sections 1(c) and 1(d) give an exclusive right to the copyright proprietor in a non-dramatic literary work and a dramatic work respectively "to make or procure the making of any transcription or record thereof. . ."<sup>25</sup> Thus a record of a copyrighted poem or play may not be duplicated without the permission of the proprietor of the copyright on the underlying poem or drama, and if an unauthorized duplicate is produced it constitutes an infringement of the copyright.<sup>26</sup> Furthermore, unauthorized duplication of recordings constitutes a violation of section 5 of the Federal Trade Commission Act.<sup>27</sup> However, the FTC has apparently concluded, quite correctly, that in most instances private action is preferable to regulation by the Commission. The position of the FTC staff is that if copies are of equal quality to the originals and are offered at competitive prices, unauthorized duplication has little adverse effect upon consumer interests, and therefore private remedies are the appropriate means for obtaining redress. A multiplicity of case-by-case proceedings before the Commission, it is thought, would represent a very inefficient enforcement approach.<sup>28</sup>

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than when used in the Constitution. Compare B. BITTKER & L. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 38 (4th ed. 1972) (use of the term "income" in the Internal Revenue Code and the sixteenth amendment).

22. E.g., Ringer, *The Unauthorized Duplication of Sound Recordings* in 1 *COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT* 123-25 (Arthur Fisher mem. ed. 1963) [hereinafter cited as *STUDIES ON COPYRIGHT*]; 1 M. NIMMER, *COPYRIGHT* § 35.21 (1972).

23. 37 C.F.R. § 202.8(b) (1972).

24. 171 F. 951, 963 (E.D.N.Y. 1909). At the time *Fonotopia* was decided the Copyright Act had been enacted but was not yet in effect. The court's dictum was not followed in subsequent cases.

25. 17 U.S.C. § 1(c),(d) (1970).

26. See Diamond, *Copyright Problems of the Phonograph Record Industry*, 15 *VAND. L. REV.* 419, 424 (1962).

27. See *FTC v. Orient Music Roll Co.*, 2 F.T.C. 176 (1919) (unauthorized duplication of piano rolls).

28. Letter from Carl D. Hevener, Attorney, Bureau of Competition, Federal Trade Commission, to Lewis Kurlantzick, Oct. 27, 1972.

With the passage of the McClellan amendment the relationship between federal and state protection of recordings would seem to be that any recording fixed and published after February 15, 1972 is entitled to federal protection and only to federal protection. For pre-February 15, 1972 recordings, state law is the sole source of protection.<sup>29</sup> With respect to records produced after February 15, 1972, passage of the McClellan amendment would seem to pre-empt state law prohibiting unauthorized duplication. Such pre-emption is made explicit under the revision bill, which abolishes any rights which are equivalent to copyright and which extend to works coming within the scope of the copyright law.<sup>30</sup> The argument that state laws supplement rather than conflict with the federal statute is unpersuasive. In fact, the states recognized the need for federal legislation and reluctantly filled the void they perceived. In New York, for example, Governor Dewey twice vetoed anti-piracy statutes in the 1950's on the belief that relief from piracy should appropriately come through federal legislation.<sup>31</sup> Moreover, pre-emption here does not involve the frustration of any significant "local" objective. The need for uniform nationwide protection in the record industry is clear.<sup>32</sup> The Copyright Act, a compendious statute in a narrow field, fulfills this need. The state laws do not and, in addition, are in conflict with the federal enactment in several respects. One key conflict centers on the duration of protection. The federal statute grants a twenty-eight year term with a permissible twenty-eight year extension, while the state statutes contain no time limitation and thereby conflict with the monopoly-competition balance struck by Congress.<sup>33</sup> The Copyright Act also provides for formal notice and registration requirements which are absent from the state laws. Even if the state statutes and the Copyright Act were not viewed as conflicting, the conclusion of displacement of state law by paramount federal law here is in line with the funda-

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29. The McClellan bill expires at the end of 1974, and therefore only covers recordings fixed and published between February 15, 1972 and the date of expiration. The copyright revision bill would provide permanent coverage for recordings. If the McClellan bill expires without being extended and the revision bill is not enacted, recordings produced after the expiration date would again have to look to state law for protection.

30. S. 644, 92d Cong., 1st Sess. § 301(a) (1971).

31. Billboard, Aug. 7, 1954, at 18.

32. See pp. 236-38 *infra*.

33. See pp. 222-28 *infra*.

mental thrust of *Wheaton v. Peters*<sup>34</sup> and *Sears, Roebuck & Co. v. Stiffel Co.*<sup>35</sup> against permitting state supplementation of the federal protective scheme. Once a statutory copyright is obtained, the Act fully controls.<sup>36</sup> Of course, if the states are constitutionally precluded from protecting records made prior to February 15, 1972, *a fortiori* they cannot protect records made after that date.

#### FEDERAL PREEMPTION

##### *Sears-Compco and the "Copying-Appropriation" Distinction*

Judicial consideration of the appropriate boundaries between the power of the federal and state governments in this area has pivoted about the Supreme Court decisions in the companion cases of *Sears, Roebuck & Co. v. Stiffel Co.*<sup>37</sup> and *Compco Corp. v. Day-Brite Lighting, Inc.* Although both these cases involved the patent laws, there is no doubt that the Court's reasoning also applies to copyright.<sup>38</sup> In *Sears*, the plaintiff, Stiffel Co., a manufacturer and designer of lamps, had obtained mechanical and design patents on a pole lamp. After the lamp had become popular, Sears began to market a substantially identical lamp at a lower price. Stiffel brought suit in federal district court alleging patent infringement and unfair competition. The district court invalidated Stiffel's patents for failure to meet the patent statute's standards for invention. However, the court deemed Sears' lamp to be a substantially exact copy of Stiffel's, and found that confusion between the two was likely and that some confusion had already occurred. Applying Illinois law, the court enjoined Sears from selling lamps identical or confusingly similar to Stiffel's and ordered

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34. 38 U.S. (8 Pet.) 591 (1834).

35. 376 U.S. 225 (1964).

36. See generally *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257, 2 Brown. Parl. Cas. 129, 1 Eng. Rep. 837 (H.L. 1774).

The conclusion that the states cannot protect post-February 15, 1972 recordings is accepted by most record company lawyers. The only case which has considered the issue agreed with this conclusion and held the Florida anti-piracy statute unconstitutional under the supremacy clause as in conflict with the Copyright Act. *Int'l. Tape Mfrs. Ass'n. v. Gerstein*, 174 U.S.P.Q. 198, 208-10 (S.D. Fla. 1972).

37. 376 U.S. 225 (1964).

38. 376 U.S. 234 (1964).

39. In its opinions the Court specifically mentions copyright and refers to both the patent and copyright schemes as components of the competition-monopoly balance struck by the Constitution and by Congress. *E.g.*, 376 U.S. 229, 231 n.7, 232-33, 237.

an accounting for profits and damages.<sup>40</sup> The Seventh Circuit Court of Appeals affirmed, holding that Stiffel had proved a sufficient likelihood of confusion among customers as to the source of the Sears lamp.<sup>41</sup>

The Supreme Court reversed.<sup>42</sup> In a sweeping opinion the Court held that the lower court injunction conflicted with the federal patent system in that states cannot protect from copying a product design which does not meet the federal statutory requirement of inventiveness. State protection in such a situation would undermine the competition-monopoly balance struck by Congress in the patent laws by creating a monopoly where the federal policy balance declares that none should exist.<sup>43</sup> The *Sears-Compco* opinions do not clearly indicate the extent to which the pre-emption of state law is based on the Constitution, the extent to which it is based on the federal copyright and patent statutes, and the exact scope of the pre-emption. *Sears* itself dealt with a work which was covered by the patent statute as to type but which failed to qualify for protection under the statutory standards. The question remains as to whether *Sears* applies inferentially to the case where the work, though constitutionally copyrightable, is not covered by the statute, *i.e.*, the situation of sound record-

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40. The district court proceeding is unreported. The court's action is summarized in the opinions of the Seventh Circuit Court of Appeals and the Supreme Court.

41. *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (7th Cir. 1963).

42. Although in both *Sears* and *Compco* the evidence did not clearly support the district court findings of confusion and likelihood of confusion, the Supreme Court chose not to reverse on this ground. Similarly both the district courts and the Seventh Circuit perceived a liberalization in the Illinois law of unfair competition in that the traditional notion that a product design must have obtained a secondary meaning indicating its source to buyers was thought to have been replaced by a less exacting standard of likely customer confusion. *Id.* at 118 and n.7; *Day-Brite Lighting, Inc. v. Compco Corp.*, 311 F.2d 26, 29-30 (7th Cir. 1963). Although the Supreme Court was highly dubious of the Seventh Circuit's reading of Illinois unfair competition law, it did not rely on this possible misreading by the appellate court for its reversal.

43. The issues and decisions in *Compco* were similar to those in *Sears*. Day-Brite had obtained a design patent on its reflectors for commercial fluorescent lighting fixtures. The district court held the patent invalid, but granted an injunction against the manufacture and sale of identical or confusingly similar reflectors on the basis of a tenuous extension of Illinois unfair competition law. The Seventh Circuit affirmed, *Day-Brite Lighting, Inc. v. Compco Corp.*, 311 F.2d 26 (7th Cir. 1963), and the Supreme Court reversed, holding as in *Sears*, that state law could not prohibit the copying of the design of goods unprotected by federal design patent. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The rulings on invalidity of the patents were not contested in the Supreme Court in either *Sears* or *Compco*.

ings. The duplicators, of course, have argued that the answer to this question is "yes." State law, they maintain, cannot extend the equivalent of copyright protection to any copyrightable article that Congress has not protected.<sup>44</sup> With one exception, the courts have disagreed, though they have given the question little sustained analysis.

Although the *Sears* and *Compco* decisions may be read as prohibiting state protection of uncopyrightable records, state and lower federal court decisions since *Sears* have consistently refused to hold that the states are constitutionally precluded from acting against duplicators under state civil or criminal law.<sup>45</sup> The courts usually have justified their decisions by a purported legally significant distinction between the factual situation in *Sears* and that in record piracy cases. Allegedly, *Sears* was an instance of "copying" while unauthorized duplication involves "misappropriation."<sup>46</sup> Apparently the distinction is that "appropriation" is the use of "the identical product" itself. That is, the record copier improperly uses more of the original producer's investment than does the design copier. This distinction is untenable. *Sears* can just as well be regarded as an example of "appropriation" as of "copying." Had Sears purchased a Stiffel lamp, created a master mold from the Stiffel product, and then reproduced duplicates (which may have been what actually happened) the Court's decision would have been the same. Similarly, since the record copier produces and sells his own record, he only

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44. *E.g.*, Petitioner's Brief for Certiorari at 10-18, *Goldstein v. California*, *cert. granted*, 406 U.S. 956 (1972). The Justice Department apparently agrees with the duplicators' reading of *Sears*. *Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Judiciary Comm.*, 92d Cong., 1st Sess. 122 (1971) (letter from Deputy Attorney General Kleindienst to Congressman Celler, June 29, 1971).

45. *E.g.*, *Liberty/UA, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414, *appeal dismissed*, 278 N.C. 702, 181 S.E.2d 600 (1971); *Tape Industries Ass'n. of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970), *appeal dismissed*, 401 U.S. 902 (1971) *appeal docketed*, No. 26-628, 9th Cir., Oct. 22, 1970; *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (Ct. App. 2d District 1969), *cert. denied*, 398 U.S. 960 (1970). One case has refused to accept the "copying-misappropriation" distinction as a limit on the impact of *Sears*. In *International Tape Mfrs. Ass'n. v. Gerstein*, 394 F. Supp. 198 (S.D. Fla. 1972) a federal judge held the Florida anti-piracy statute unconstitutional.

46. While the courts speak of "appropriation" as a form of "taking" or "converting", neither "appropriation" nor "copying" involves any interference with a possessory interest. In both the *Sears* sequence and in record piracy what is "taken" is an intangible, whether it is the combination of lines and forms which constitutes a lamp design or the combination of sounds which constitutes an artist's performance. See Note, *The Future of Record Piracy*, 38 BROOKLYN L. REV. 406, 415-16 (1971).

"appropriates" the combination of sounds underlying the record, just as the design copier makes his own lamp by appropriating the combination of lines and forms underlying the lamp. The design copier in actually producing the lamp has the same production costs as the original designer. It may be that the record copier obtains an additional cost advantage over the original producer in that he not only uses the original producer's "ideas," but he need not hire musicians and engineers to execute the idea. But this only adds to the economic disadvantages of the original producer vis-a-vis the copier and is only relevant to the need for and extent of the protection required by record producers. It says nothing about the appropriate division of jurisdiction over these matters between the states and the federal government.

In considering the extent of federal preemption there seems to be no ground for distinguishing between state civil tort law and state criminal law. The validity of state regulation in relation to the federal copyright scheme should not turn on whether the prohibition emanates from a state's legislature or its courts. Moreover, where state protection is the equivalent of copyright, in that it prohibits duplication and creates a monopoly valid against the world, the name given by the state to the theory of protection — whether "misappropriation," "common law copyright," "unjust enrichment," "interference with contractual relations," or something else—should be irrelevant. Duplicators have argued that both civil and criminal actions against them are constitutionally precluded.

Unfortunately, reliance on the copying-misappropriation distinction has permitted the courts to avoid the difficult textual and policy issues involved in setting the limits of federal and state competence over works within the reach of the copyright clause.<sup>47</sup> The courts in record piracy cases simply have failed to analyze the relationship between the Constitution, the Copyright Act, and the theories supporting state action. Perhaps the copying-misappropriation distinction has been motivated by a judicial distaste for record copying in a context where the alternative to limiting *Sears* may be no relief at all

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47. For cogent criticism of the "copying-appropriation" distinction, see Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Preemption Doctrine*, 71 COLUM. L. REV. 1444 (1971); 1 M. NIMMER, COPYRIGHT § 35.224 (1972); Nimmer, *Copyright and Quasi-Copyright Protection for Characters, Titles and Phonograph Records*, 59 TRADEMARK REP. 63, 74 (1969).

against unauthorized duplication. We are left to guesswork here since the courts which speak of "copying" and "appropriation" or equivalent distinctions have not attempted to explain the significance of these supposed distinctions in terms of any applicable policy.

*Total Preemption: The Copyright Clause and Learned Hand*

Does the Constitution by itself impose any limits on state power over recordings? Learned Hand has made the most forceful case for the position that authority over "published" "writings" is vested exclusively in the federal government.<sup>48</sup> This exclusive jurisdiction is necessary, he argued, in order to comply with the constitutional requirements that copyright protection be granted for "limited times" and be nationally uniform. Hand maintained that the copyright clause's "limited times" restriction should be regarded as a limitation with which both state and federal protection must comply.<sup>49</sup> He opposed perpetual state protection of writings not covered by the Copyright Act. Such protection, he thought, would discriminate against writings which are covered by the Act and which are therefore subject to the Act's limited term.<sup>50</sup> To insure against the possibility of perpetual state protection Hand limited state protection to unpublished writings with the definition of "publication" deemed a federal question. These objectives, however, could be effectuated by subjecting state protection to the constitutional limits on duration. Any particular state time limit, for example, might be subject to federal judicial supervision. Or the aim of restricting the duration of protection might be realized by having Congress impose a specific time limit on state protection of "writings" which are not statutorily copyrightable. The Constitution would then limit the content of state law without precluding all state power in the area.

Hand, however, interpreted the copyright clause to require national uniformity, and he therefore would bar state protection of published

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48. See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (dissenting opinion). For a succinct summary of Hand's position and its premises, see Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 51-53 (1969).

49. U.C. CONST. art. I, § 8:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

50. See, e.g., *Fashion Originators Guild of America, Inc. v. FTC*, 114 F.2d 80, 82 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941).



"writings" not covered by the Copyright Act even if that protection were for a limited time. This policy of national uniformity would prohibit state protection, with its potential for divergent rules among the states, even if the policy in favor of eventual dedication of published "writings" were fulfilled. Hand also believed the Copyright Act to be a comprehensive, consciously ordered scheme and that any omission from its coverage must be viewed "to have been as deliberate as though it were expressed."<sup>51</sup>

While Hand is correct in desiring a limited, uniform, post-publication monopoly and parity between "writings" protected under the Act and those protected by state law, he goes too far in insisting that the Constitution requires a unitary source for protection where "published" works within the copyright clause are concerned. Hand interprets the constitutional grant of copyright power to Congress as precluding concurrent state power. Generally, however, the vesting of a power in Congress does not automatically operate to exclude state power in that area. Rather, it usually has the effect of making the area one of concurrent federal and state power.<sup>52</sup> While the commerce clause, for example, by its own force and in the absence of congressional action, does preclude certain exercises of state power, normally absolute restrictions on state power stem from explicit constitutional prohibitions and not merely the negative implication arising from a substantive grant to Congress.<sup>53</sup> In addition, there is a growing tendency to look to the supremacy clause and the substantive policies behind the implementing statutes to determine the existence and scope of federal pre-emption rather than relying on the effect of the constitutional grant of power itself.<sup>54</sup> It is important to remember,

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51. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 281 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930). For criticism of this argument and its variants as applied to recordings, see pp. 228-30 *infra*.

52. See generally *THE FEDERALIST* No. 32 (C. Rossiter ed. 1961) (A. Hamilton).

53. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497, 525-26 (1954). While the Constitution does explicitly deprive the states of jurisdiction over certain matters, such as coining of money, art. I, § 10, generally it is concerned with delegating powers to the federal government rather than limiting state powers.

54. See Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). To the extent preemption questions are decided solely on the fact that Congress has been granted authority in a particular area, the division of power between the states and the federal government becomes very mechanical. Generally protection of federal objectives from state interference through a limitation inferred from a federal statute rather than by a negative implication arising from the constitutional grant of substantive power has a num-

though, that often the Court is governed less by canons of construction than by philosophic moods,<sup>55</sup> and the mood reflected in *Sears* seems to be a strongly anti-monopoly one which views patents and copyrights as singular, limited exceptions to the dominant rule of competition.

A further difficulty with Hand's position is that he insists only on exclusive federal authority over published "writings"; unpublished works can be protected by state law. This is consistent with Hand's greater concern over excess protection of published rather than unpublished works.<sup>56</sup> But the Constitution speaks of "Writings" with no distinction between published and unpublished works. Congress, in fact, has exercised this power with respect to a limited class of unpublished works.<sup>57</sup> Yet Hand does not challenge the general as-

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ber of advantages. This approach provides greater flexibility in that Congress always has the opportunity to accept or reject judicial decisions by explicitly expanding or contracting state jurisdiction, in accordance with Congress' superior capacity to assess the nature and degree of harm to federal concerns that any particular state action might entail.

55. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES 18-19* (1961).

56. Since publication has a direct effect upon an artist's privacy and reputation, it seems appropriate to give a writer or musician unlimited control over unpublished works, at least during his lifetime. Upon publication, though, the artist's interests are largely economic. Therefore the nature and extent of protection against unauthorized duplication legitimately may be limited by concern for the competitive and social effects of such protection.

57. 17 U.S.C. §12 (1970): "Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing."

If the term "Writings" in the copyright clause is limited to published works, section 12 is unconstitutional unless saved by the "necessary and proper" clause or the commerce clause. Similarly, the plan of the revision bill to replace state law protection with federal protection from the time of creation would be unconstitutional.

A reading of the Constitution which construed "Writings" as published works and limited exclusive federal authority to published works would not be inherently irrational or unworkable. Congress still would be able to afford some protection to unpublished works under the "necessary and proper" clause or the commerce clause. Moreover, if the framers had any model in mind it was probably that of the literary manuscript, unpublished while in the writer's possession, published when printed and sold; and they may have thought that federal regulation was

sumption that the states can protect unpublished works.<sup>58</sup> Indeed, section 2 of the Copyright Act explicitly acknowledges state power over unpublished works.<sup>59</sup> If states can protect unpublished works

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necessary only when the book left the author's hands. The restriction of the monopoly to a limited period is most appropriate for a published work, and significantly less so for unpublished works, which are so closely tied to the author's persona. However, lawyers in 1787 were acquainted with the importance of publication in copyright law, and the failure to use the word in the copyright clause may be argued to prove that no constitutional distinction exists between published and unpublished works. See Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409, 423, nn. 52-53 (1956).

58. There exists a substantial body of state common and statutory law dealing with unpublished works. See, e.g., Strauss, *Protection of Unpublished Works*, in 1 STUDIES ON COPYRIGHT 189; United States of America: Items 49-65, 2 UNESCO Copyright Laws & Treaties of the World (1971).

59. 17 U.S.C. § 2 (1970): "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." Section 2 of the Copyright Act can be interpreted either to undermine or to support state jurisdiction over unpublished works. One might view section 2 as an instance of congressional validation of a state practice which would violate the copyright clause in the absence of congressional permission. In other words, section 2 might be viewed as an instance of a congressional grant of jurisdiction to the states in an area where the state jurisdiction requires explicit congressional permission. There is precedent for such congressional regulation by permissive sanction to the states in the context of the commerce clause. While this technique has presented theoretical difficulties, there is now no doubt that Congress may authorize the states to act upon interstate commerce in ways that would be held to be precluded in the silence of Congress. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES*; 1 B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 278-81, 318-20 (1963).

However, section 2 has never been interpreted as the source of state power over unpublished writings. On the contrary, it seems to be a disclaimer of any intention to preempt state common law protection of unpublished works. Thus, rather than denying inherent state power to protect unpublished writings, section 2 implies that prior to its enactment the states enjoyed such power and passage of the Copyright Act was not intended to alter this situation. See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909). Every general copyright statute enacted by Congress from the first law of 1790 down to, but not including, the Act of 1909 granted a federal right of action for unauthorized printing or publishing of a manuscript. Act of May 31, 1790, ch. 15, § 6, 1 Stat. 125; Act of Feb. 3, 1831, ch. 16, § 9, 4 Stat. 438; Act of July 8, 1870, ch. 230, § 102, 16 Stat. 215; Act of March 3, 1891, ch. 565, § 9, 26 Stat. 1109. In enforcing this statutory remedy, the courts have never indicated that the federal law supplanted the power of the states to enforce an author's common law copyright in his manuscript. *Press Pub. Co. v. Monroe*, 73 F. 196 (2d Cir.), *appeal dismissed for lack of a federal question*, 164 U.S. 105 (1896); *Palmer v. DeWitt*, 47 N.Y. 532 (1872); *Kortlander v. Bradford*, 116 Misc. 664, 190 N.Y.S. 311 (Sup. Ct. 1921); J. Whicher, *The Ghost of Donaldson v. Beckett*, in *THE CREATIVE ARTS AND THE JUDICIAL PROCESS* 160-62 (1965). Section 12 of the present Copyright Act also seems to assume the existence of concurrent state power over unpublished writings. See generally Kaplan, *Publication in Copyright Law*:

despite federal copyright power over such writings, why cannot they protect published writings as well? Conceivably, the position against state copyright authority over published works may be defended by drawing a distinction between different legal concepts for protecting artistic products. Thus, the state's power to protect unpublished works is designed to insure that the author retains full right to decide whether or not to release his work to the public. This interest might be distinguished from that underlying copyright protection, which is aimed at protecting the author's economic interest in the reproduction and distribution of the work.<sup>60</sup> Under this analysis the existence of state common law protection of unpublished works does not necessarily imply the power to provide copyright protection to published works.

Finally, Hand's recognition of the desirability of a uniform nationwide rule governing intellectual property does not support his conclusion that the copyright clause itself precludes state protection. In finding a preemptive policy of uniformity inherent in the clause, Hand relied, in large part, on Madison's cryptic justification of the copyright power in *The Federalist Papers*. "The states," Madison observed, "cannot separately make effectual provision for [copyright]."<sup>61</sup>

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*The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 477-79 (1955).

It is impossible, however, to resolve the issue solely by textual exegesis. If one accepts the distinction between common law and copyright interests and remedies, section 2 may be read as Congress' desire to clarify its intention not to disturb state common law protection of unpublished works. Another possibility, of course, is that even if Congress did believe the states retained jurisdiction over unpublished works, it was in error, and the courts, not Congress, are the Constitution's final arbiter.

60. See p. 224 *infra*.

61. *THE FEDERALIST* No. 43 (C. Rossiter ed. 1961) (J. Madison). The limited research which has been done on the history and meaning of the copyright clause provides little illumination on our question. See, e.g., B. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* (1967); Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929). In a speech shortly before the Constitutional Convention Madison criticized the Articles of Confederation for their lack of provision for national protection for authors. He noted the state governments' "want of concert in matters where common interest requires it." Under this heading he deplored the "want of uniformity in the laws concerning . . . literary property . . ." *Observations by J. M., April 1787* in 4 DEPARTMENT OF STATE, *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 128 (1905). Story viewed the question whether the copyright power was "exclusive" or "concurrent" as a "matter for grave inquiry." J. STORY, 2 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1154, at 84 (5th ed. 1891). Curtis expressed similar doubts in his copyright treatise: "Whether this power is exclusive so that the states cannot now legislate for the protection of

The difficulty Madison refers to is the lack of power to grant effective protection due to limited state jurisdiction.<sup>62</sup> To remedy this problem it is sufficient to grant Congress power to enact copyright legislation. It is not necessary to withdraw from the states all power to protect writings. Although some limitations on state power may be appropriate, there is little warrant for a blanket prohibition, and there is no evidence that Madison proposed such a prohibition. Moreover, the copyright clause should not be read as being concerned with saving the states from exercises in futility. That is, absent congressional action with respect to a category of "writings," the clause should not be interpreted as itself forbidding a state to regulate that category even though such state protection might prove ineffective. The record companies, of course, are quite willing to live with the "burdens" which the limitations of state law impose. Furthermore, if particular state laws prove to unduly fractionize the national market or to discriminate in favor of local industries, judges may apply the commerce clause to invalidate such exercises of state power.<sup>63</sup>

#### THE "LIMITED TIMES" REQUIREMENT

Though the copyright clause need not be interpreted to bar all state action with respect to the protection of writings, certain forms of state protection are precluded. The Constitution permits Congress to grant exclusive rights to intellectual works only for "limited times" and this limitation may be argued to apply to the states as well as the federal government. Three positions are possible: the limited times provision does not apply to the states; the provision does apply; the applicability of the provision to the states may be determined by Congress. Both the language and purpose of the copyright clause point towards the second choice; the limited times provision applies to any

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authors within their own limits, is one of the grave questions of our complex system of government." G. CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 82 (1847).

An interesting early essay on the question of whether the copyright power is "exclusive" is contained in an article, *On Literary Property*, *THE NEW YORK REVIEW*, April 1839, at 276-91.

62. See J. Whicher, *The Ghost of Donaldson v. Beckett*, in *THE CREATIVE ARTS AND THE JUDICIAL PROCESS* 155-57 (1965).

63. It should be noted that the Constitution does contain express requirements of uniformity in relation to the taxing, naturalization, and bankruptcy powers, and of equality of treatment in the regulation of ports. U.S. Const. art. I, § 8, cl. 1, 4; § 9, cl. 6.

state or federal action designed to protect subject matter covered by the copyright clause.

The protective scheme established by the copyright clause, and incorporated in all federal copyright and patent legislation, attempts to strike a balance between providing incentives to inventors, writers and artists through protection of their intellectual efforts and ensuring maximum dissemination of their work. The essential purpose and justification of copyright protection is to stimulate intellectual and artistic expression by providing sufficient incentives to authors and distributors.<sup>64</sup> The federal Copyright Act attempts to accomplish this by giving authors and composers control over the use of their products. Such control raises the prices of these works and otherwise reduces their dissemination with the attendant loss of direct and spill-over benefits incident to maximum dissemination of ideas. Therefore, protection which might reduce public access to works should be limited to that level of protection necessary to induce the desired level of intellectual effort. This is particularly true in the case of literary and artistic works where restrictions on reproduction and distribution invoke first amendment concerns. This policy is recognized by the constitutional provision which grants Congress authority to protect intellectual works for "limited times." Given the constitutional concern with excess protection, state power in this area should be subject to similar limitations, since excessive state protection imposes the same unjustifiable costs as would excessive federal protection.<sup>65</sup>

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64. See generally Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970). The only persuasive reason for copyright is the economic one; protection is necessary in order to induce production. As Professor Breyer has shown in the context of book publishing, and as will be demonstrated in the author's comprehensive article on record production, the other arguments — particularly the "moral" entitlement of an author to the "fruits of his labor" and the necessity to protect an author's dignitary interests — do not justify a copyright system.

65. Perpetual protection of recordings is particularly inapt since the bulk of record sales are made within a relatively short period after their issuance. Most popular records are sold within the first three months after release, and companies normally base their production decisions on the expectation that the earnings of a popular recording will be achieved within one to two years. It is unlikely that problematical receipts from sales beyond this period enter into their budgetary calculations. Companies do engage in somewhat longer term planning with respect to classical records. Even classical releases, though, are expected to earn a return within five to ten years. Thus a relatively short term of protection for recordings, such as ten years, should satisfy the inducement or incentive rationale for copyright protection.

However, the right of states to provide temporally unlimited protection of intellectual works might be justified by asserting that state power in this area antedated the Constitution and therefore is not subject to the limited times restriction of the copyright clause. Although the states undoubtedly do retain much of their preconstitutional authority, this argument is unsound here for two reasons: there were no significant state attempts to provide copyright protection for published works prior to the Constitution, and preconstitutional forms of protection should be subject to the overriding constitutional policy against unlimited protection. The copyright clause and Copyright Act of 1790 represented the first substantial and effective American attempt to give the creator of an intellectual product control over unauthorized reproduction of his work. Except for an isolated instance of statutory protection in Massachusetts, copyright in published works was not secured by law in colonial America.<sup>66</sup> Moreover, the state statutes passed under the Articles of Confederation existed for less than a decade before being supplanted by the Act of 1790, and some of them by their own terms never became operative. Indeed, the explicit assumption of the Supreme Court in the landmark case of *Wheaton v. Peters* was that common law copyright protection of published works had never been adopted by any of the states and that Congress in the 1790 Act did not sanction an existing right but rather created a new one.<sup>67</sup> Since federal recognition of a right to control reproduction was not a continuation of traditional common law protection of tort and property interests, there is no basis for claiming preconstitutional state authority over copyright which can continue, free of the limited times policy of the copyright clause.<sup>68</sup>

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66. See L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183 (1968); B. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 65-67, 106 (1967).

67. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). See *Mazer v. Stein*, 347 U.S. 201, 214-15 (1954).

68. One scholar has argued that interstate protection of author's rights by federal legislation constitutes extraordinary relief and therefore requires a time restriction, whereas state protection represents ordinary relief and therefore calls for no such restriction. See Whicher, *The Ghost of Donaldson v. Beckett*, in *THE CREATIVE ARTS AND THE JUDICIAL PROCESS* 159 (1965). The argument is not persuasive. To the extent state protection is effective, it imposes the same kind of costs as federal protection. Moreover, if state protection is widespread, as it is in the case of recordings, it is difficult to see a significant difference in the extent or character of relief unless one is prepared to argue that protection by a single state dictates a different result than protection by a large number of states. Therefore,

Following the theme established by the courts in allocating federal and state power under the commerce clause, it has been suggested that the limited times policy should apply to the states unless Congress explicitly authorizes perpetual state protection.<sup>69</sup> True, Congress apparently has authorized perpetual state protection of unpublished works.<sup>70</sup> But Congress has not authorized the states to accord perpetual protection to published works; therefore existing state laws against record duplication, none of which are limited in time, would be unconstitutional under this approach. More fundamentally, it is very difficult to imagine that Congress can authorize the states to extend temporally unlimited protection when the copyright clause expressly prohibits Congress from doing it. The constitutional policy opposing unlimited protection is too clearly enunciated to permit avoidance through congressionally authorized state action.<sup>71</sup>

The reasoning supporting the application of the limited time restriction to state protection of published writings leads to the conclusion that the limited times policy applies to the protection of unpublished writings as well. This result is not as radical as might first appear. Although it has been widely assumed that protection of unpublished works is theoretically perpetual, the proposition has never been tested, at least in the sense that rarely, if ever, has a suit been brought to restrain publication of an unpublished work a very long time after the author's death.<sup>72</sup> Even if the limited time restriction does apply to unpublished works, the states still would be able to afford extensive protection to such works. And in light of the different interests which may be involved, the states should be able to extend longer protection to unpublished than to published works. Certainly they could protect unpublished works for at least as long

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the same considerations that underlie the limited times policy of the copyright clause should apply to state copyright remedies.

69. Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-emption Doctrine*, 71 COLUM. L. REV. 1444, 1467 (1971): "[U]nless Congress has expressly announced — as it has with respect to common law copyright protection of unpublished works — that perpetual state protection is not undesirable, a federal policy against such permanent monopolist privileges ought to be *prima facie* operative . . . ."

70. See 17 U.S.C. § 2 (1970); pp. 219-21 & note 59 *supra* and pp. 225-27 *infra*.

71. Moreover, unlike commerce clause cases where ordinary state police powers are involved, copyright protection is not a traditional state power.

72. See, e.g., *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949) (39 years after author's death).



as the period provided by the applicable federal copyright act.<sup>73</sup> In addition, privacy rights may survive the constitutional limit for copyright protection.<sup>74</sup> It is unlikely that many justifiable privacy claims will be asserted many years after the author's death.<sup>75</sup> But in the rare case of such a claim, a state should be able to protect the personal interest. The copyright revision bill now being considered by Congress would introduce a system whereby the same term of protection would apply to unpublished works, to works published during the author's lifetime, and to works published posthumously.<sup>76</sup> No one has suggested that this structure is extreme.

In fact, it is hard to make a persuasive case for perpetual protection of unpublished works. Such protection, after the death of the author and his heirs, cannot be justified as providing authors with

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73. Whicher has suggested that the limited times policy may be complied with by any statute which protects a writing from the moment of its creation until the end of a fixed period after publication or registration. Whicher, *supra* note 68, at 166-68; see Reply Brief for Petitioners at 11, *Goldstein v. California*, cert. granted, 406 U.S. 956 (1972). But see Kalodner & Vance, *supra* note 10, at 1083.

74. The copyright revision bill preserves state authority to act against invasions of privacy, as well as against other activities violating rights that are not "equivalent to copyright," such as breach of contract, defamation, and deceptive trade practices. S. 644, 92d Cong., 1st Sess. § 301(b)(3) (1971). This scheme may occasionally cause difficulties since vindication of the privacy right may, in certain circumstances, have effects similar to copyright. Unlike a breach of contract remedy, which may deny access to a writing to a limited class, a privacy remedy may bar everyone from access to the work involved. However, the interest protected by the privacy doctrine is substantively different from the copyright interest. And as long as the states are careful not to protect an interest in economic exploitation in the guise of a privacy claim, they should be empowered to protect personal interests even after expiration of the constitutionally permissible period of copyright protection. Also, it may be possible to fashion the privacy remedy so that complete prohibition of publication of the contested document is not necessary. See Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 74-76, 90-91 (1969).

75. Generally it will be difficult for an author's heirs or other parties to make a persuasive claim that publication will invade their own right of privacy. See, e.g., Note, *Copyright: Right to Common Law Copyright in Conversations of a Decedent*, 67 COLUM. L. REV. 366, 369-70 (1967); Note, *Personal Letters: In Need of a Law of Their Own*, 44 IOWA L. REV. 705, 712-14 (1959); Note, *Property Rights in Letters*, 46 YALE L.J. 493, 503-04 (1937).

76. The revision bill replaces the present dual system, whereby unpublished works are protected by state common law or statute and published works are protected by federal statute, with a single system of federal statutory protection for all published and unpublished works. Generally both published and unpublished works would be protected for a period measured by the life of the author plus fifty years after his death. S. 644, 92d Cong., 1st Sess. §§ 301-302 (1971).

an incentive to write for publication.<sup>77</sup> The only possible economic justification for protection long after the author's death is that it is necessary to provide sufficient economic incentive for the publisher.<sup>78</sup> The discovery of a valuable manuscript long after the author's death rarely occurs, and it is at least questionable whether the publisher requires a monopoly in order to induce him to publish such a work.<sup>79</sup> Another reason for applying the limited times policy to unpublished works is that the concept of "publication" has become distorted, and as a result regulation is to a considerable extent no longer responsive to economic realities. Under widely accepted decisions a work may be widely disseminated and commercially exploited and yet still remain "unpublished."<sup>80</sup> The suggested application of the limited times policy would limit or nullify the significance of the definition of "publication" and would avoid the undesirable consequences that distortion of the term has produced.<sup>81</sup> It also would facilitate scholarship and the dissemination of historical materials by making unpublished, undisseminated manuscripts available for publication after a reasonable period.<sup>82</sup>

This interpretation of the limited times policy invalidates virtually all existing state efforts to prevent record copying. Most state court injunctions have incorporated no time limit, and state criminal anti-piracy statutes also contain no limit on duration of the protection. Federal or state establishment of reproduction rights without definite time limits is inconsistent with the constitutional copyright scheme,

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77. See generally J. TAUBMAN, COPYRIGHT AND ANTITRUST 12 (1960).

78. As used here, "publisher" refers to the party who is responsible for the commercial reproduction and distribution of the work. In the case of a book it would be the publisher; in the case of a recording, the record company.

79. See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 302 (1970).

80. For example, public performance of a play, no matter how often and profitable and how large the audience, is not a publication of the drama. And it may be that public sale of records or tapes does not publish the underlying composition. Thus, those who exploit their works in this manner would be entitled to an indeterminate monopoly since their works remain "unpublished." See, e.g., B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 83-85 (1967); Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469 (1955).

81. One of the objectives of the revision bill is to avoid the effects of this distortion and to implement the constitutional limited times policy. H.R. Rep. No. 83, 90th Cong., 1st Sess. 97 (1967).

82. See generally Chaffee, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 725-27 (1945).

and therefore these creations of permanent rights should be held unconstitutional.<sup>83</sup>

#### THE EFFECT OF THE COPYRIGHT ACT

Unfortunately Judge Hand's approach, and indeed much of the analysis of the relationship between federal and state jurisdiction over the protection of "writings," focuses exclusively on the copyright clause and results in an all-or-nothing situation; either the Constitution itself precludes all state action or state power is unrestricted. More flexible positions are ignored. The better view is that the states are not constitutionally barred from all action, but their authority is subject to certain limitations. We have seen that state action must be subject to the limited times policy derived from the copyright clause itself. In addition, state action must operate within the explicit and implicit constraints imposed by relevant congressional enactments. Under the "intermediate" approach outlined here, the copyright power would be treated analogously to the commerce power. State action might be sufficiently inconsistent with the basic structure of the copyright clause, such as the limited times policy, to render the state law invalid. More likely, though, state laws would be judged in terms of their consistency with the purposes of congressional enactments in the copyright field.<sup>84</sup>

Would state recognition of a right of those responsible for the production of records to limit reproduction of their product be inconsistent with the provisions of the Copyright Act, particularly those bearing on music? To date, none of the record piracy cases has considered this issue. The most obvious argument for such an inconsistency is the failure of Congress to protect recordings under the Copyright Act.<sup>85</sup> If the Act, as Hand thought, constitutes a compre-

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83. The contention in a particular case that the records being duplicated were made only recently and that therefore the issue of perpetual protection is not raised should not be credited. The monopoly should be limited to a period defined in advance. Otherwise there is no assurance of the eventual dedication of the work.

While *Sears* essentially rested on the proposition that a state cannot provide the equivalent of patent protection to an item which does not meet the federal standards for patentability, the Court's opinion does reveal some stress on the evils of protection unlimited in time.

84. See B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 92 (1967).

85. The Act contains a list of covered works, and recordings are not among them. 17 U.S.C. § 5 (1970). For analysis and elaboration of the accepted view that pre-February 15, 1972 recordings are not covered by the Act, see pp. 208-11 *supra*.

hensive, consciously ordered scheme, then arguably any category not covered should go unprotected.<sup>86</sup> State protection, then, would interfere with the sensitive balance desired by Congress between what must be protected and what must be left open to competition. What the statute fails to protect it must be assumed that Congress intended to leave unregulated. Supporters of pre-emption often supplement this argument with a reference to the multiple, unsuccessful congressional attempts to grant protection to recordings.<sup>87</sup> This congressional inaction, the argument goes, demonstrates an intention to withhold protection from recordings.

Generally, one should not construe legislative failure to enact proposed legislation as an authoritative determination against such change.<sup>88</sup> There are many possible reasons why a bill might not be enacted unrelated to the merits of the bill, and it is virtually impossible for a court to determine the "real" reason. There is also a more fundamental objection to granting authoritative significance to legislative inaction. The United States Constitution establishes the various ways to enact law. Failure to pass a bill is not one of the ways prescribed, even when a bill has been introduced and defeated. To conclude that failure of Congress to legislate has legislative impact expands the permissible forms of law making beyond those set forth in the Constitution, thereby negating the relevance of the constitutionally prescribed legislative procedures.

However, it may be legitimate to draw inferences in situations where a comprehensive legislative scheme fails to regulate certain areas relevant to that scheme. Thus, there may be merit in the argument that the Copyright Act's omission of recordings from the list of covered works implies a congressional desire to permit record copying, thereby precluding state protection. Assuming, however, that there are occasions where an omission from a compendious federal enactment should be taken to preclude state action with respect to the omitted category, the omission of recordings from the 1909 Act does not represent such an occasion. The Act cannot be fairly characterized

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86. See p. 218 and note 51 *supra*.

87. See, e.g., Brief for Petitioner at 10-11, *Goldstein v. California*, *cert. granted*, 406 U.S. 956 (1972).

88. Hart, *Comment on Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 45-48 (M. Paulsen ed. 1959) ("the fallacy of legislating by not legislating"). See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1395-97 (tent. ed. 1958).

as representing a congressional choice between the competing objectives of maintaining unrestricted competition and encouraging the expression of performers' abilities through the medium of recordings.<sup>89</sup> Record piracy was not a significant problem in 1909. The focus of congressional consideration was the issue of composers' rights in copyrighted music, in particular their right to control mechanical reproductions of their work. In addition, at the time there existed serious doubts about the constitutionality of federal copyright for recordings.<sup>90</sup> In light of its legislative history, it would be inaccurate to regard the Act as an elaborate pre-emptive structure; that is, to assume that Congress surveyed the entire field of "writings" and then picked out all the meritorious categories which require protection, deliberately leaving the rest to fend for themselves under conditions of unrestrained competition.<sup>91</sup>

Though the Copyright Act's omission of record protection should not, *per se*, operate to preclude state protection of recordings, such protection of a recording of a copyrighted composition may be deemed inconsistent with or limited by specific provisions or basic policies of the Copyright Act.<sup>92</sup> Under the Act, once the holder of a copyright

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89. See Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-emption Doctrine*, 71 COLUM. L. REV. 1444, 1463-66 (1971).

90. See, e.g., Ringer, *The Unauthorized Duplication of Sound Recordings*, in 1 STUDIES ON COPYRIGHT 122. In 1909 there was doubt that a recording was a "writing" of an "author" as those terms are defined by article I, § 8 of the Constitution. This doubt derived much of its force from the case of *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). In that case the Supreme Court held that under the pre-1909 law a music roll was not a "copy" of a copyrighted musical composition and thus the manufacture and sale of rolls could not be enjoined as an infringement. In construing the term "copy" the Court spoke in terms of a form intelligible to the eye. As a result, some argued that copyright protection of aural works would be unconstitutional. However, the *Apollo* case involved only an interpretation of the existing statute, not the Constitution, and a construction of the term "writing" which required intelligibility to the eye would clearly represent an unacceptable rigid limitation on congressional power. It is now clear that a recording constitutionally qualifies as a "writing"; a musical performance fixed on a tangible record undoubtedly may be made the subject of copyright under the copyright clause. See note 11 *supra*.

91. See Price, *The Moral Judge and the Copyright Statute: The Problem of Stiffel and Compco*, 14 ASCAP COPYRIGHT SYMPOSIUM 90, 113 (1966); See generally H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

92. Our concern here is solely with the right of reproduction and does not include state recognition of a right to control the performance of a record, which raises different issues. The provisions of the Copyright Act should be held to preclude state recognition of a performance right in a recording of a copyrighted

on a musical composition records or licenses another to record his song, anyone else may make a record of the composition by paying him the prescribed fee of two cents per record manufactured.<sup>93</sup> It is not clear how a state recognized right of reproduction would be integrated with the compulsory license provisions applicable to the underlying composition. Would the holders of state copyrights on recordings be obliged to license reproduction of their records under the terms of section 1(e)? Probably not. The compulsory license provision for musical compositions was not designed to insure the free use of recorded renditions.<sup>93a</sup> Since anyone may make his own recording of a song upon payment of the stipulated license fee to the holder of the music copyright, and since entrance into the record business is quite easy, compulsory licensing is not required to assure wide dissemination of musical ideas.

Under section 7 of the Copyright Act, only arrangements of a copyrighted composition which have been produced with the consent of the proprietor may be copyrighted.<sup>94</sup> Conceivably, the reproduction of a performer's rendition may be deemed an arrangement in that like an arrangement it derives from and interprets the original composition. If so, it may be argued that a state granted record copyright

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work. Section 1(e) gives the proprietor of the copyright on a musical composition exclusive control over public performance for profit. State recognition of a performance right would involve a significant dilution of the control over performance which Congress vested in the proprietor of the composition. See Kalodner & Vance, *supra* note 10, at 1122.

93. 17 U.S.C. § 1(e) (1970): "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right . . . To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided, That* . . . as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured . . . . The payment of the royalty provided by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in the case of public performance for profit."

93A. See pp. 232-35 *infra*.

94. 17 U.S.C. § 7 (1970): "Compilations or abridgements, adaptations, arrangements, or other versions of . . . copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded as new works subject to copyright under the provisions of this title . . . ."

requires the consent of the copyright holder. But under the Copyright Act, the copyright proprietor's consent does not have to be obtained for an arrangement which is used solely for recording pursuant to the compulsory license provision of section 1(e). Clearly, requiring such consent would frustrate the purpose of compulsory licensing. Thus, one might argue that a state grant of a reproduction right would not be inconsistent with the language or policy of sections 1(e) and 7 if the protection were limited to prohibition of unauthorized duplications of recordings whose producers have paid the statutory license fee to the holder of the music copyright.<sup>95</sup> State protection would not be available for other kinds of arrangements unless the consent of the music copyright holder was obtained.

Based upon these arguments, some scholars have concluded that sections 1(e) and 7 of the Copyright Act permit states to grant performers or record producers protection from unauthorized duplication of records made pursuant to the compulsory license provisions of section 1(e).<sup>96</sup> But this reasoning seems to overlook the overriding concern of the Copyright Act with the welfare of the composer, and the fact that the Act only tempers the composer's absolute control over the use of his music in order to insure maximum use of musical ideas and prevention of their monopolization by a few recording companies. In the absence of such concerns, the Act unambiguously grants final control of the music to the composer. State protection of record producers would not expand the dissemination of musical ideas. If anything, it might restrict it. But such protection would limit the copyright holder's control over the use of his music in that record producers, rather than the copyright holder, could prevent copying of renditions of the copyright holder's music. The argument that copyright holders generally oppose record copying is irrelevant and irrational. Under the legal structure we support, unauthorized reproduction of a record would constitute a copyright infringement. Therefore a composer may prevent copying of the record of his copyrighted composition simply by refusing to permit such copying. Granting the record producer the right to control reproduction of recordings of copyrighted music shifts final control over record copying from the composer to the record makers.

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95. See Kalodner & Vance, *supra* note 10, at 1123-24.

96. See *id.* Clearly, states could not deprive the copyright holder of his right to approve arrangements not used for making records.

This issue is sharply focused by the question of a record duplicator's right to compulsory licensing under section 1(e). Pirates have operated on the assumption that prior to the McClellan amendment they were committing no copyright infringement so long as they followed the formalities and made the royalty payments prescribed by section 1(e) of the Copyright Act.<sup>97</sup> Recently, however, publishers have asserted that the duplicator is not making a "similar use" of the music within the meaning of the statute and is therefore not entitled to avail himself of the compulsory licensing privilege. A compulsory licensee, the publishers claim, is restricted to making new recordings of the copyrighted musical work; he is not permitted to invoke section 1(e) in order to duplicate recordings of the copyrighted music made by another. Thus, even though a duplicator complies with the statutory formalities and pays the statutory royalty, he infringes the copyright on the music used for the duplicated recording.

In 1972, two federal courts have split over the duplicator's right to compulsory licensing. In *Duchess Music Corp. v. Stern*, the Court of Appeals for the Ninth Circuit upheld the right of a music publisher to reject the tender of the statutory license fee by a record copier.<sup>98</sup> The decision heavily relied upon *Aeolian Co. v. Royal Music Roll Co.*<sup>99</sup> and adopted that court's characterization of record copying as misappropriation.<sup>100</sup> Subsequently, the New Jersey Federal District Court refused to follow the Ninth Circuit and upheld the right of a record copier to invoke the compulsory licensing provision.<sup>101</sup> Per-

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97. Prior to 1972 there was very little authority either way on this issue. In *Miller v. Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956), *rev'd on other grounds*, *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958), a case involving a duplicator who had neither paid the statutory royalty nor given the requisite notice, the court stated that the duplicator was entitled to a compulsory license if he had met the statutory requirements. *Id.* 177, 180 n.4. The only other case, *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912), ruled against the copier's right to a statutory license.

98. *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972), *rev'g* 331 F. Supp. 127 (D. Ariz. 1971), *cert. denied*, 93 S. Ct. 52 (1972).

99. 196 F.926 (W.D.N.Y. 1912).

100. The opinion of the Ninth Circuit, in relying exclusively on *Aeolian* and its characterization of the defendant's behavior as "appropriation," fails to squarely confront and analyze the difficult question of the correct interpretation of section 1(e). In any case, simply labeling a duplicator's behavior as "appropriation" is no answer to the complex issue of the extent of protection the law should afford to recordings. See note 64 *supra* and pp. 237-38, 245-46 and notes 110, 140 *infra*.

101. *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 176 U.S.P.Q. 110 (D.N.J. 1972).



mitting the copyright holder to refuse to license a record copier, argued the court, would have the effect of *de facto* extension to all records the copyright privileges granted by the McClellan amendment only to records produced after February 15, 1972.<sup>102</sup>

Adjudication of the controversy over the reproducer's claim that he may avail himself of the compulsory licensing right provided by section 1(e) involves a choice between the composer's right to maximum profit from his musical efforts and the public interest in maximum dissemination of musical ideas. If the latter consideration is deemed uppermost, the record reproducer should be entitled to compulsory licensing privileges, for this will expand the number of records produced and lower the price.<sup>102a</sup> In these circumstances, though, state action permitting the record producer to restrict unauthorized reproduction of his product permits the record producer to frustrate this purpose by refusing to permit duplication. In other words, the only valid reason to permit the record reproducer access to compulsory licensing privileges is to maximize dissemination of musical ideas. Granting the record producer the right to prevent reproduction can frustrate this purpose and therefore must be deemed inconsistent with the Copyright Act.<sup>102b</sup>

If the right of the composer to profit from his efforts is deemed most important, section 1(e) should be read to limit compulsory licensing to record producers. But if the copyright holder is to profit from this interpretation, he, and not the record producer, must have the final authority to permit the reproduction of records licensed under his copyright. State granted anti-copying protection would shift this authority from the copyright holder to the record producer. Con-

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102. The district court also argued that a construction in favor of the duplicator would be consistent with the understanding of the Act of the Congress which passed the McClellan bill. See H.R. Rep. No. 487, 92d Cong., 1st Sess. 2 (1971). Though the court regarded this correspondence as very persuasive, it should not be viewed as very weighty. After all, Congress and the witnesses who testified before it could be wrong, and they did not give the question of the correct interpretation of section 1(e) any sustained thought. The views of the 92d Congress on this issue should be treated no differently than those of a commentator; both should be judged on the basis of how well reasoned they are.

102a. This effect may be short-lived. See pp. 247-48 *infra*.

102b. Conceivably a state record copyright which included compulsory licensing of the recording would be consistent with a policy of maximum dissemination of music. However, none of the existing state anti-piracy laws contain a licensing provision, and the record industry has been unalterably opposed to such licensing of duplicators.

sistency with the goals of the Copyright Act requires that the copyright holder must be given the discretion to decide whether or not to permit copying. Of course, the copyright holder could agree with a record producer not to permit copying, but presumably he would receive compensation therefor.

The resolution of the issues surrounding a record copier's access to the compulsory licensing system established by section 1(e) ultimately depends upon whether one interprets section 1(e) as directed towards the widest possible use of musical ideas or the widest distribution of recorded performances. If the prevention of potential monopolies of musical ideas is the central concern, then limitation of compulsory licensing to record producers would serve this purpose. Extending the compulsory licensing privilege to record copiers is unnecessary since the copier is only interested in existing recorded performances, not musical ideas. Moreover, the record industry affords easy entrance, thereby assuring sufficient numbers of entrepreneurs to translate musical ideas into forms available to the listening public. If granting compulsory license rights to copiers would not further the purposes of section 1(e), the Act should be interpreted to maximize the composer's rights. This means denying copiers the right to compulsory licenses *and* granting the copyright holder sole discretion in licensing record reproductions. It also means that any state action which limits these rights would be inconsistent with the Act.

In attempting to determine the extent to which the Copyright Act limits state power to legislate in this area, it is essential to bear in mind that the driving intent of the Copyright Act is to strike the appropriate balance between encouragement of composers and maximum dissemination of musical ideas. Thus, it is the composer who holds the copyright. When the need to prevent monopolization of musical ideas calls for restriction of the composer's total control of his product, as exemplified by the compulsory licensing requirements of section 1(e), the composer's interests are protected by a compensatory license fee. The imperatives of this well articulated federal legislative scheme clearly preclude inconsistent state action. Permitting record producers to restrict reproduction of their product is inconsistent with the legislative scheme in that it deprives the copyright holder of the right to control the use of his composition, without any compensating public benefits through broader dissemination of

musical ideas. The assertion that composers oppose unauthorized record reproduction is beside the mark. They may well oppose unrestricted reproduction, but if given their choice they certainly would prefer having the final say on record reproduction themselves rather than granting this power to the record producer. The thrust of the Copyright Act (prior to the McClellan amendment) gives composers this right and no state action should be permitted to undermine it.

Preclusion of state authority to protect records against reproductions unauthorized by the record producers is consistent with the treatment of recordings of copyrighted literary works. The compulsory license provision (section 1(e)) does not apply here.<sup>103</sup> Sales of unauthorized reproductions of a recording authorized by the copyright holder is an infringement of the author's copyright, and is subject to the normal statutory remedies.<sup>104</sup> Clearly, state recognition of a reproduction right in a performer or recorder of a literary work would dilute the copyright proprietor's sole control over the recording and sale of recordings of his work.<sup>105</sup> Though the argument is somewhat more complex, exactly the same analysis should apply to state recognition of a reproduction right with respect to a musical composition; such state action undercuts the rights granted by the federal Copyright Act.<sup>106</sup>

#### THE RELEVANCE OF THE COMMERCE CLAUSE

In addition to the constraints derived from the copyright clause and the Copyright Act, the commerce clause may impose further

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103. 17 U.S.C. § 1(c),(d) (1970).

104. 17 U.S.C. § 101 (1970).

105. Kalodner & Vance, *supra* note 10, at 1125.

106. This conclusion points up another issue. Assuming a state cannot grant a reproduction right in a recording of a copyrighted composition, can it grant such a right in a recording of a work in the public domain? The answer should be "yes." By definition the Copyright Act does not apply because works become part of the public domain after the expiration of the copyright or in circumstances where no copyright was obtained. Thus there can be no dilution of the copyright proprietor's rights. The Act's purpose of providing incentive for composers has already been satisfied, and recognition of a right here does not significantly impair the dedication of the underlying work. The public will have access to the work through sheet music, radio performances, and other recordings. When the copyright on the underlying music expires, then a reproduction right should be permitted. See Kalodner & Vance, *supra* note 11, at 1124-26. But cf. G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952). The copyright clause still applies, but, as we have argued, the clause does not preclude state jurisdiction over records if the limited times provision is satisfied. See pp. 217-22 *supra* and pp. 249-52 *infra*. The same may be said with respect to the competitive mandate of the commerce

limits on state authority to control record copying.<sup>107</sup> Certainly, given the interstate character of the business of both record companies and duplicators, and the inevitable burden of differing state regulations of the same transaction, there is no doubt that the most appropriate source of protection for recordings is Congress.<sup>108</sup> Moreover, in light of the nationwide character of contemporary communications, it is best that a national perspective be applied when striking a balance between protection of intellectual and artistic writings (incentive) and dissemination of these writings (access).<sup>109</sup> In addition, the proper degree and form of protection for recordings is more appropriately a legislative, rather than a judicial question. An adequate response to the duplication problem must evaluate the record industry's contention that further legal protection is necessary to provide adequate incentives for artists and record companies, and to ensure the economic survival of the record industry.<sup>110</sup> Only extensive legislative

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clause. See pp. 246-48 *infra*. Conceivably, other aspects of the commerce clause may preclude implementation of state anti-copying laws which bar importation and sale of duplicated records shipped from other states, even if the limited times requirement were met. See pp. 236-46 *infra*.

107. Apparently the relevance of the commerce clause in this context has heretofore been completely ignored by the cases and commentators.

108. The desirability of a federal approach is underscored if one envisions a comprehensive scheme of protection which defines not only the record company's right of reproduction but also the right of public performance. The protective scheme therefore affects the broadcasting media which operate across state lines and require a uniform law of artistic "property" so that they are not subjected to possibly different state rules.

109. Holmes' admonition that the commerce clause is concerned with guaranteeing that certain decisions are made by those "trained to national views" seems particularly relevant with respect to intellectual and artistic products with their first amendment aura. O. W. HOLMES, COLLECTED LEGAL PAPERS 296 (1920). See generally *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (a "field in which the federal interest is . . . dominant").

110. The record duplication issue raises at least four sets of questions: 1) Is protection against duplication necessary? That is, is it required in order to obtain an adequate supply of records; would the normal functioning of the market, without the intervention of a copyright or other supporting mechanism, provide sufficient incentives to insure this supply? Do noneconomic interests necessitate a general restriction on duplication? 2) What is the requisite level of protection or support? 3) What is the most efficient and "fair" means of implementing this protection? Is a federal copyright the way to do it? 4) What should be the detailed terms of the protective scheme? The answer to the first question, in turn, requires the resolution of a series of difficult factual issues. What, in fact, is the duplicator's cost advantage? How large is the differential? Is it offset by advantages available only to the first record producer? For example, what is the extent and significance of the initial producer's headstart? Will this headstart permit him to recoup his fixed costs and more before competitors enter into production? Are there means

investigation can answer these questions and thereby accurately weigh all the interests at stake in a definition of rights in recordings. A court is limited in the materials it can consider by the forms it must observe, and it often will not have access to relevant information which is available to legislators. Neither measured quantities, such as specification of a precise term of protection, nor requirements of form are usually products of the judicial process.<sup>111</sup> A legislature is better equipped 1) to make the inquiries which should precede a determination of the limitations which should be set on protection for recordings, and 2) to introduce any machinery necessary for effectuation of the protective scheme.<sup>112</sup> The states, and particularly the state courts, are unlikely to produce a rational scheme for the protection of recordings.

But is this federal legislative preference of a constitutional order? The issue here is the limits imposed by the commerce clause on state authority to define "unfair business practices" and on the means of enforcement a state may choose to implement its concepts of legitimate business practices.<sup>113</sup> More precisely, may a state prohibit the sale in the original package of a product—in our case, a duplicated record—which has been shipped from another state? A line of Supreme

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for minimizing his risks? In short, what would happen if there were unrestricted competition in the production and sale of individual recordings? If copying were legitimate, would record production be as seriously threatened as record companies assert?

111. As Ernst Freund has said, "Principle can determine that a female employee shall not be overworked, it cannot say, ten hours, not eleven." Freund, *Prolegomena to a Science of Legislation*, 13 ILL. L. REV. 264, 269-70 (1918); E. FREUND, *LEGISLATIVE REGULATION* 3, 9-10 (1932).

Similarly, a court is not able to elaborate a compulsory licensing system. A court can provide a judicial analogue to the compulsory license by denying an injunction and confining the complainant's remedy to money damages. However, even if courts were prepared to consistently deny injunctions (and it was proper for them to so act), the advance planning of record production and royalty payments, leading to increased dissemination of recordings, would be far better served by legislative prescription of a compulsory licensing system than by judicial case-by-case determination of damages after the fact. Also, the limitation of rights by setting fixed ceilings on duration of protection or on remedies is generally foreign to the all-or-nothing predisposition of courts.

112. See generally *Int'l News Service v. Associated Press*, 248 U.S. 215, 262-67 (Brandeis, J. dissenting); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929) (L. Hand, J.); L. Fuller, *The Forms and Limits of Adjudication* (unpublished mimeo 1959).

113. Subsequently we will apply the commerce clause to determine if the probable anti-competitive consequences of state record production warrant a ban on such protection. See pp. 246-48 *infra*.

Court cases seems to say "no."<sup>114</sup> *Leisy v. Hardin*, which held a "dry" state may not prohibit the importation or sale in the original package of liquor sent from a sister state, and successor cases seem to hold that a state may not exercise prohibitory authority against outside products unless the aim is to prevent disease or commercial deception.<sup>115</sup> Duplicated records are obviously not inherently deleterious in any health sense. And while the states can act to curb deception, the sale of these records does not involve fraud, at least in the technical sense of deceptive advertising or "palming off." The duplicator, unlike the counterfeiter,<sup>116</sup> does not try to pass off his product as the original; he explicitly informs the consumer that his product is a copy. The exercise of state authority here does not involve the traditional basic police power concerns for public health, safety, or morals. Certainly state concern with record duplication seems less central than state interest in liquor.<sup>117</sup> State anti-piracy laws, then, may violate the commerce clause principle that except as indicated above, the states are not to decide what products from other states or countries may cross their boundaries or to admit for sale in the state only those products which satisfy local economic policy; rather it is for Congress to decide what articles shall pass in interstate commerce.<sup>118</sup>

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114. *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888) (liquor); *Leisy v. Hardin*, 135 U.S. 100 (1890) (liquor); *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898) (margarine); *Austin v. Tennessee*, 179 U.S. 343 (1900) (cigarettes); *Kirmeyer v. Kansas*, 236 U.S. 568 (1915); see 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 268-74 (1963); But see *Champion v. Ames*, 188 U.S. 321 (1903) (lottery tickets).

115. This concept is based in part on the adequacy of the political representation of groups affected by state legislation. Where legislative action burdens those outside the state, it may not "be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938) (Stone J.). Those outside the state have no representatives who participate in the legislation. This perception may be relevant in the record duplication context. An anti-piracy bill which was introduced in the North Carolina legislature, for example, failed to pass due in large part to the opposition of duplicators who reside in that state and whose views were presented to the legislature. A similar bill failed to be enacted in Georgia after duplicators had a chance to voice opposition to the legislature. On the other hand, Congress determined that record companies and performers required protection, even though duplicators had a fair opportunity to oppose the McClellan amendment.

116. See note 1 *supra*.

117. See *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 510-23 (1888) (dissenting opinion); *Leisy v. Hardin*, 135 U.S. 100, 125-160 (1890) (dissenting opinion).

118. Clearly, the due process clause of the fourteenth amendment does not prevent a state from prohibiting the manufacture and sale of duplicated records within its territory. But a law may be consistent with the due process clause of

Though effective state action against record duplication undoubtedly impedes some interstate shipments, many of the usual reasons for limiting state authority over interstate commerce do not apply. Unlike many enterprises, record duplicators can function effectively under a legal regime in which duplicated products may be sold in some states but not others, and where anti-duplication legislation varies from state to state. Duplicators require a minimum of fixed capital and can operate profitably at very low volumes. Moreover, it is unlikely that many states—particularly state courts—would permit duplication. In the last few years every state court presented with a duplication case has ruled against the duplicator. Prohibition of the sale of out-of-state duplications by most, but not all states, might change the posture of the constitutional issue if the duplicators could demonstrate that these restrictions prevented them from operating in those states which had not barred duplication. The effect here would be that action by some states had limited the freedom of other states to follow their concept of fair business dealing with respect to an aspect of interstate commerce that had not been proscribed by Congress.<sup>119</sup>

Another reason for limiting state regulation of interstate commercial activities is to preclude state efforts to discriminate against out-of-state businesses. However, both record companies and duplicators operate nationally, and existing state regulation evinces no prejudice against out-of-state enterprises. Thus, while New York, Tennessee, and California, the sites of the three principal recording centers in the country, have enacted anti-piracy statutes, other states which are not centers of record production have enacted similar laws.<sup>120</sup>

Interpreting the commerce clause to preclude states from prohibiting the fourteenth amendment and still offend the commerce clause. See, e.g., *Schollenberger v. Pennsylvania*, 171 U.S. 1, 16-17 (1898); Dowling, *Interstate Commerce and State Power—Revised Version*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 280, 293 (AALS 1963). However, since the duplicator can avoid state anti-duplication laws by reestablishing his operation in a state where duplication is legal, effective state protection of records would require a prohibitory law in each of the fifty states.

119. Where uniformity is a central issue, it is not clear whether existing conflicting laws must be shown or whether the risk of potential multiple inconsistent burdens is sufficient to justify a commerce clause claim. See G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 647-48 (1970). Compare *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) with *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) and *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

120. See note 5 *supra*; Brief for State of Texas Amicus Curiae at 2-4, *Goldstein v. California*, cert. granted, 406 U.S. 956 (1972).

ing the initial sale of duplicated records seems inconsistent with the line of decisions granting injunctions against the unauthorized re-broadcasting of sporting events<sup>121</sup> and the commercial copying of news reports.<sup>122</sup> The *INS* decision, based upon pre-*Erie* federal common law, involved unauthorized and uncompensated commercial use of news gathered by International News Service for sale to its subscribers.<sup>123</sup> Since *INS* involved the application of federal, rather than state, common law tort principles, the applicability of the commerce clause was not at issue. However, the Court condemned the copying of news as "fraudulent."<sup>124</sup> Assuming the Court would justify state regulation of news copying under the commerce clause by analogizing news copying to fraudulent advertising, it may be argued that record copying also falls into that category of interstate transactions that may be regulated by the states. The values at stake in *INS* seem exactly the same as those involved in record copying. Conceivably, *INS* may be distinguished from record duplication by finding a greater impropriety in copying news than copying records. And one might be reluctant to bar state action where the behavior involved is so gross that the lack of a public response is somehow unseemly. Denying power in such a situation would also deny the people of the states the intangible but nevertheless real satisfactions to be derived from responsive home government.<sup>125</sup> It may be argued, though without much conviction, that unauthorized record duplication is less offensive to widely held standards of propriety.

The same, or very similar, values at stake in *INS* were also present in *Sears-Compco*. There, without reference to *INS*, the Supreme Court invalidated state anti-copying law. Indeed, *Sears* may have overruled *INS*, at least to the extent that *INS* no longer can support the authority of a state to protect from reproduction a work, such as a newspaper, which is statutorily copyrightable. If *Sears* was based on the

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121. *E.g.*, *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955); *Mutual Broadcasting System, Inc. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

122. *E.g.*, *Associated Press v. KVOS, Inc.*, 80 F.2d 575 (10th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936); *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Rahl, The Right To "Appropriate" Trade Values*, 23 OHIO ST. L.J. 56 (1962).

123. *International News Service v. Associated Press*, 248 U.S. 215 (1918). The Court in *INS* spent little time on the relevance of the Copyright Act; rather, it viewed the case as raising a question of unfair competition. *Id.* 234-35.

124. *International News Service v. Associated Press*, 248 U.S. 215, 241-42 (1918).

125. See generally *Dowling, supra* note 118, at 294.



copyright-patent clause, no state may extend the equivalent of copyright protection to a "writing," whether that writing is copyrightable under the Act or not. In that case, one need not worry about the limits on state authority imposed by the commerce clause since the states would be constitutionally unable to protect records.<sup>126</sup> We, however, have argued that *Sears* need not be read to require such exclusion and that states should retain some limited jurisdiction over "writings."<sup>127</sup> If *Sears* is viewed as based on the limited times policy and/or the pre-emptive effect of patent and copyright legislation, then the commerce clause issue remains relevant in the record duplication context,<sup>128</sup> and therefore *INS* still may have significance. That is, despite the fact that under the existing Copyright Act the states cannot protect writings covered by the Act (and the newspaper articles at issue in *INS* clearly are copyrightable), the Court's characterization of the news copying as "fraud" may form the basis for permitting state protection of records or other duplicable products under the commerce clause.

In effect, the issue is the extent to which the federal courts under the commerce clause may second-guess a state determination of what constitutes a "legitimate" article of commerce.<sup>129</sup> The disposition of the courts to second-guess will be influenced by the prevailing climate of opinion. While half a century ago the Court indicated a state could bar lottery tickets,<sup>130</sup> it might reach a different conclusion today. Similarly, while the Court then stated that cigarettes could not be barred,<sup>131</sup> a similar prohibitory law might be upheld today in light of today's medical knowledge. With respect to duplicated records, *Sears* indicates a disposition to tolerate "copying." This is consistent

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126. Even if *Sears* is read to preclude all state protection of writings, the commerce clause would still be relevant to the question of the extent of state authority to protect non-writings, i.e., those communications, such as a live sports broadcast, which have not been reduced to tangible form.

127. See pp. 214-22, 228 *supra*, and pp. 249-52 *infra*.

128. That is, the commerce clause issue remains a live one if the Copyright Act does not preclude state protection of records, see pp. 228-36 *supra*, or if the limited times requirement does not apply to the states, see pp. 222-28 *supra*, or if the requirement does apply but the states enact laws with a time limit.

129. One should not make the mistake of arguing that the states should have jurisdiction over record copying because copying is "bad". Since there are valid economic, political, and social arguments supporting free use of recorded performances, copying is only good or bad to the extent federal and state law make it so.

130. See *Champion v. Ames*, 188 U.S. 321 (1903).

131. See *Austin v. Tennessee*, 179 U.S. 343 (1900).

with the Court's increasing tendency to view the use restrictions afforded by copyright and patent protection as an exception to the normal regime of full competition. In addition, an artistic product like a record is cloaked with a first amendment aura, however faint. The McClellan amendment represents a contrary attitude—a congressional determination to limit unauthorized reproduction of recorded performances.

In addition to the normal desire to preserve federalism by limiting restrictions upon state police powers to those situations exhibiting a clear threat to necessary federal powers, increased flexibility and responsiveness constitute the principal policy reasons favoring state authority over record duplication. Flexibility is gained by permitting states to improve federal protection of intellectual products where changed conditions require interstitial adjustments to existing federal legislation. And the general responsiveness of the nation's legal apparatus to new problems is enhanced by giving the states capacity to act in an area which receives only sporadic congressional attention. State authority is further supported by the limited anti-competitive effect of barring unauthorized record reproduction.<sup>132</sup> Yet increased state authority here is not without dangers. One might be justifiably wary of pumping life into the "misbegotten tort of misappropriation" and conclude that no state power is preferable to possibly diverse and excessive protection and that the loss of possible beneficent state protection is an acceptable price of a functioning federalism.<sup>133</sup>

In this context it is difficult to evaluate the impact of the McClellan amendment which grants copyright protection to records fixed and published between February 15, 1972 and January 1, 1975. Ordinarily, Congress can authorize state action which would otherwise be invalid under the commerce clause. However, the McClellan amendment cannot be construed as authorizing additional state jurisdiction with respect to record copying. Neither the amendment itself nor its legislative history addresses the question of state jurisdiction in this area. In fact, the legislative history explicitly indicates that Congress intended to take no position on the question of whether the states are barred by the copyright clause from acting against record

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132. See pp. 248, 251 *infra*.

133. See generally Brown, *Product Simulation: A Right or a Wrong*, 64 COLUM. L. REV. 1216, 1222 (1964).

piracy.<sup>134</sup> Had Congress deliberately decided to protect only those records produced after February 15, 1972 and to leave those made prior to that date to free competition, a strong argument could, of course, be made that the states cannot protect the latter class of records. However, Congress never even considered applying the amendment to previously produced records, and thus it would be equally inaccurate to characterize the enactment of the amendment as a judgment that records produced prior to its effective date are to be left to unrestricted competition.<sup>135</sup>

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134. See H.R. Rep. No. 487, 92d Cong., 1st Sess. 2-3 (1971); S. Rep. No. 72, 92d Cong., 1st Sess. 4 (1971). Since the relevant committee reports were addressing themselves to the impact of the copyright clause on state jurisdiction over record copying, *a fortiori* the amendment may not be interpreted to take a position concerning the impact of the commerce clause. Conceivably, if Congress did intend to expand state jurisdiction over record copying it could accomplish this equally well under the copyright or the commerce clause.

135. Passage of the McClellan amendment seems irrelevant to the constitutionality of state law protection of recordings produced prior to February 15, 1972. Section 3 of the amendment reads:

[N]othing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

The record companies, citing Professor Nimmer, have argued that this section implies that records produced prior to the McClellan amendment enjoy some measure of state granted anti-copying protection. See Brief for Recording Industry Association of America, Inc. as Amicus Curiae at 28, 33 n.86, *Goldstein v. California*, cert. granted, 406 U.S. 956 (1972); 1 M. NIMMER, COPYRIGHT § 35.225 (1972). Nimmer assumes that if not for section 3, *Sears* would bar state protection of records. However, he reads the phrase, "nothing in title 17 . . . as amended by section 1 of this Act," as applying to the entire Copyright Act, rather than just to the McClellan amendment. From this he concludes that section 3 overrules the pre-emptive effect of *Sears* on state protection of recordings. His argument is unpersuasive. It is clear from the legislative history that Congress meant to express no position on the issue of pre-emption of state law. Indeed, it never even considered this question. See H.R. Rep. No. 487, 92d Cong., 1st Sess. 3, 13 (1971); S. Rep. No. 72, 92d Cong., 1st Sess. 4 (1971). Moreover, to the extent that the preclusion of existing law is based on the copyright clause rather than on the Copyright Act, Congress cannot give the states any such authority. That is, Congress cannot do so unless one concludes that analogous to the treatment of the commerce clause, Congress under the copyright clause may allocate jurisdiction over writings between the states and federal government as it sees fit, and that section 3 represents such an allocation to the states. Finally, even if we accept Professor Nimmer's arguments, the limited times restriction still would apply to state protection, thereby invalidating most existing state record protection. See pp. 222-28 *supra*.

Whatever the merits of the constitutional arguments, one cannot characterize section 3 as an instance of a congressional grant of jurisdiction to the states. As noted above, Congress never considered giving such jurisdiction to the states.

Applying traditional tools of constitutional construction, the compatibility of the commerce clause with state authority to ban the importation and original sale of duplicated records is a very close question. So close, in fact, that the issue transcends its legal basis; that is, it cannot be solved by legal analysis. Professor Charles Black's doubts about the capacity of legal analysis to solve difficult commerce clause questions are particularly apt here:

No set of general concepts has proved apt for managing this material, and it is next to certain that none will. . . . It is regrettable that the Court . . . should have to spend its time on questions so lacking in legal quality, so little amenable to reasoned rule. . . . The questions that present themselves . . . are questions of economic policy pure and simple, questions as to which regulatory pattern is preferable in the circumstances. Courts must deal with policy questions within law, but these questions have no legal savor at all.<sup>136</sup>

I would hazard that the Supreme Court would not read the commerce clause to bar state authority to provide limited protection to records.<sup>137</sup> Such a decision is appropriate, given the infrequency of congressional action in copyright matters.<sup>138</sup> But I would insist that in exercising that power, whether judicially or legislatively, the state must make an informed finding that there is a real need for protection in order to provide sufficient incentives to composers, artists, or record producers.<sup>139</sup> The state should not be permitted to impede interstate

Moreover, the wording of section 3 is typical statutory boilerplate. When the claimed effect of a congressional enactment is to validate an exercise of state power which otherwise would be constitutionally precluded, Congress should be required to provide an unambiguous statement rather than relying on routine boilerplate language to achieve such a fundamental redistribution of governmental authority. For example, Congress made its intention very clear when it decided to permit the states to regulate the importation of intoxicating liquor. *See* Wilson Act, 27 U.S.C. § 121 (1970); *In re Rahrer*, 140 U.S. 545 (1891); Webb-Kenyon Act, 27 U.S.C. § 122 (1970); *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311 (1917).

136. C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 35, 37 (1970).

137. *But see* text at note 55 *supra*.

138. The conclusion that the copyright clause does not bar all state protection of writings not only preserves the commerce clause issue but somewhat strengthens my disinclination to interpret the commerce clause as precluding state action. The argument is that if the specific section of the Constitution treating copyright matters permits state protection, one should be reluctant to determine this issue on the basis of a very close commerce clause argument.

139. For a description of the kind of analysis which should be required, see *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 937, 941 (1964).

sales of duplicated records solely on the simplistic Lockean argument that "whenever one mingles his effort with the raw stuff of the world, any resulting product ought—simply ought—to be his."<sup>140</sup>

### *The Federal Competitive Mandate*

Although the direct applicability of the commerce clause to state protection of recorded performances is problematical, the Sherman Act and its brethren may establish a commerce clause based federal mandate for a competitive economy that, absent congressional direction to the contrary, should be applied by the courts to all state economic regulation subject to the commerce clause.<sup>141</sup> *Sears* itself might be viewed as an expression of a policy requiring that any state interference with commercial competition for the purpose of promoting aesthetic or scientific expression must be measured against federal anti-monopoly directives. In *Sears* the Court said that federal patent policy not only granted a public monopoly to inventors but also limited and controlled the anti-competitive impact of the patent system. In recent decades the Court has increasingly characterized the patent system as a particular and limited exception to the anti-

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140. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1164, 1204 (1967). Proponents of copyright protection and extension often support their position by reference to John Locke's celebrated "labor theory" as articulated in his *Second Treatise*. J. Locke, *The Second Treatise of Civil Government* ch. 5, §§ 27-30 (T. Cook ed. 1947). Unfortunately Locke's theory neither explains why property ought to be created on a labor basis nor does it describe our actual practice. See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 288-89 (1970). In my comprehensive article on the record duplication issue, I analyze the "ethical" arguments for protection, i.e., those arguments which assert the "moral" obligation of society to recognize an artist's natural property right in his creation and to give him his just reward for services rendered. I conclude that the Lockean theory of property is insufficiently discriminating to rationalize the creation and alteration of contemporary economic relationships and that none of the ethical arguments provides a convincing justification for a general prohibition against record duplication.

141. Professor Areeda refers to the antitrust laws to locate the paramount federal mandate for a competitive economy. See P. AREEDA, *ANTITRUST ANALYSIS* 57-58 (1967). This mandate also may have constitutional origins. Preferably it should be viewed as having mixed origins in the Constitution's commerce, copyright-patent, and supremacy clauses intermingled with antitrust legislation and decisions. See Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CALIF. L. REV. 873 (1971). Justice Black relied on the patent clause for his derivation of a "constitutional plan of a competitive economy," *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 522 (1964), but the language with which he characterized it suggests a broader base.

monopoly policies embodied in the federal antitrust laws.<sup>142</sup> Professor Areeda, an antitrust scholar, seems to have adopted this approach. Thus, he has restated the *Sears* reasoning in three steps: 1) Illinois unfair competition law clearly "affects" interstate commerce significantly; 2) such interference might be constitutionally permissible in the absence of a contrary federal policy; 3) the antitrust laws express a contrary federal policy.<sup>143</sup> Assuming we are unwilling to condemn every state law creating results which, if privately arranged, would conflict with the antitrust laws, this attitude requires us to develop an analytic framework to determine the consistency of particular state economic regulations with the federal competitive mandate. Fortunately, antitrust analysis is helpful in that those factors which must be considered in ordinary antitrust cases should also be relevant to a determination of the constitutionality of state laws aimed at curbing unauthorized duplication. These include the probable effects and dangers of the restriction, its severity, the social benefits claimed to justify the restriction, and the availability of less restrictive alternatives.<sup>144</sup>

What result does a discriminating appraisal of these factors yield? The restriction on duplication has been justified by the claim that continued record production requires the elimination of unauthorized duplication. The restrictive effects of enjoining duplication are clear. It preserves the monopoly of the record producer against the potential competition of record duplicators, thereby raising some record prices. It also imposes transaction costs which would not otherwise exist.<sup>145</sup> But despite the short-run lower prices and greater access that might result from permitting duplication, it is argued that in the long run

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142. P. AREEDA, ANTITRUST ANALYSIS 58 (1967).

143. *Id.* The issue in *Sears* may be analyzed as the propriety of state law achieving results which, if privately arranged, would contravene the Sherman Act.

144. The Sherman Act might be taken as an expression of federal policy on how to apply the commerce clause and to assess state compliance with the competitive mandate, in the absence of congressional action in the area.

145. Transaction costs are the costs incurred in obtaining permission to reproduce a work. These costs include contacting the owner of the right to reproduce, bargaining with him, and arranging for compensation. These transaction costs are likely to increase as the period of protection lengthens. As time goes by, people who are interested in duplicating old recordings will find it progressively more difficult to locate the owner of the reproduction right and obtain his permission. Facilitation of the copying of old recordings, though, is particularly important, for an old recording which someone wishes to duplicate is likely to be of unique merit or to be needed for socially valuable activities such as research and education.

such duplication would destroy the incentive to produce. It is the long-range competitive interest, then, that justifies some restriction of record copying. In fact, the monopoly effects of a ban on unauthorized duplication are limited by the competitive conditions in the record industry which circumscribe a producer's ability to control the market by restricting supply.<sup>146</sup> The potential dangers of anti-copying legislation are further reduced by the fact that, so far, the states only have prohibited record duplication; imitation of the performer's style has not been proscribed.

Though the problem is quite complex, a good case may be made supporting this concern about the socially injurious effects of unrestricted duplication.<sup>147</sup> The difficulty with existing state anti-duplication laws is the lack of a time limit on protection. Protection unlimited in time cannot be justified; a less restrictive alternative is available. State law protection with no durational limit violates the federal competitive mandate, thereby rendering it unconstitutional under the commerce clause.<sup>148</sup> State protection of recordings which is limited in time, however, need not violate federal anti-monopoly policies. The federal Copyright Act provides a model of a time-limited protective system which strikes a rational balance between access and incentive. The Act can serve as a frame of reference without dictating all the details of state protection.<sup>149</sup>

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146. In most cases the record industry is characterized by a high degree of competitiveness between records and record companies. Access to the industry is quite free, and the large number of artists effectively limits the producer's ability to control the market by restricting supply. Certain artists (for example, the Beatles) may be an exception, but even here the ability to raise prices is limited. Thus, the possibilities of record companies exploiting their monopolies at the public expense are limited.

147. Record production is characterized by a large proportion of fixed versus marginal costs. The fact that most of the costs of record production are incurred before the first record is produced and the cheapness of increasing the supply of records means that record duplicators can easily undersell the original producer. It also means that original producers must sell many records before reaching the break-even point. And, with respect to popular records, the producer must depend upon large sales of a relatively few successful records to recoup his costs for the larger number of unsuccessful ones. Thus, unlike most monopoly situations, the record companies can make a case that their very survival depends upon their full control over their product.

148. As previously noted, the federal competitive mandate may derive from the combined effect of several constitutional provisions. See note 141 *supra*. Unlimited protection also is inconsistent with the copyright clause. See pp. 222-28 *supra*.

149. See Goldstein, *supra* note 141, at 896, 903-04; Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 487-88

## IDENTIFYING THE RELEVANT FACTORS

Ultimately the allocation of jurisdiction between federal and state government over "writings" in general and recordings in particular should be resolved neither by textual exegesis nor by historical inquiry. Rather it should be accomplished by a careful appraisal of the relevant policy factors along the lines followed in our analysis of the impact of free market policies upon record protection.<sup>150</sup> The issue is now before the Supreme Court in a suit challenging the constitutionality of the California anti-piracy statute.<sup>151</sup> After analyzing the impact of the Constitution and existing federal legislation, the Court should consider three additional factors: 1) the likelihood of encountering "writings" which might require protection but are not covered by the Copyright Act; 2) the probability that Congress will promptly consider providing protection to such writings; 3) the probable nature of state law responses, *i.e.*, are the states capable of effectively considering the relevant issues and will they be sensitive to all the values at stake?

There is a distinct possibility that new forms of writings not contemplated by existing federal legislation will emerge. As we have seen, prior to the McClellan amendment sound recordings, though constitutionally copyrightable, were not granted protection under the 1909 Copyright Act. It is impossible to predict how often this kind of situation will reoccur. However, congressional attention is limited, complete foresight is impossible, and technological change always can render federal legislation obsolete. A medium of expression may not exist at the time of a congressional enactment, or the legislation may be passed before the medium reaches the stage of development where the need for protection is appreciated. In such circumstances state law may offer the only feasible source of needed protection. The existing statutory categories of works eligible for copyright may be elastic enough to cover some new forms of writings. The term, "book," for example, is sufficiently broad to encompass many new kinds of writings. And the Copyright Office will now accept for registration as "books" certain computer programs.<sup>152</sup> Yet technology always out-

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(1955). See also Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (1934).

150. See pp. 246-48 *supra*.

151. *Goldstein v. California*, *cert. granted*, 406 U.S. 956 (1972).

152. U.S. Copyright Office, Circular 61 (May 1969).



strips congressional foresight. Of course, Congress might avoid the problem by extending protection to all "writings," thereby expanding coverage to the limits of the copyright clause. But it is not clear, *a priori* that all "writings" require protection, and Congress appropriately might wish to determine the need for protection of new forms of writing case-by-case. Such an attitude, in fact, is reflected in the general revision bill, which does not exhaust Congress' constitutional copyright power.<sup>153</sup>

One might be more willing to prohibit "interstitial copyright" protection by the states—particularly if one thought the necessary instances of that protection are likely to be infrequent—if one were more confident that Congress would respond promptly when protection seems required. Of course, some delay in legislative response to new problems is inevitable. Though Congress finally did grant protection to recordings when the piracy problem became serious, Congress has been particularly slow to respond to the need to modify copyright law. The 1909 Act, for example, continues as our basic copyright statute, essentially unchanged since its enactment. The general revision bill has been bogged down now for several sessions of Congress. Copyright reform moves slowly, if at all. The fact that state relief is not available in a situation does not assure congressional concern since congressional treatment of the subject cannot be compelled. Therefore, complete reliance on Congress to respond to technological, economic, and social changes in the area of intellectual activity would be unrealistic.<sup>154</sup> Judge Hand recognized that if all state protection of "writings" is precluded, the result almost certainly will be that at some time a "writing" requiring protection will be denied it. Hand accepted the resulting "unfairness" as a cost of exclusive reliance on

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153. See S. 644, 92d Cong., 1st Sess. § 102 (1971); H.R. Rep. No. 83, 90th Cong., 1st Sess. 13-14 (1967); Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 11 (House Judiciary Comm. Print 1961).

154. It has occasionally been suggested that a delegated administrative power be established which could adapt the copyright statute to changing conditions. B. Kaplan, *An Unhurried View of Copyright*, 110-11 (1967); Wilmarth, *Statutory Remedies for Record Piracy*, 12 ASCAP COPYRIGHT SYMPOSIUM 261, 281-82 (1963); Chafee, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 737-38 (1945). While congressional responses to changed conditions are likely to be late or inadequate, those exercising this administrative authority could make continual adjustments. Despite the virtues of this suggestion, no such far-reaching power is contained in the revision bill or is likely to be established in the foreseeable future.

Congress.<sup>155</sup> This attitude is difficult to accept here unless there exists substantial probability of recurrent, excessive protection by the states.

Certainly states may grant protection to writings where no protection is justified, or they may grant excessive protection. But these dangers may be avoided by congressional and judicial controls, short of prohibition of all state jurisdiction. It is likely that the states often will be unwilling or unable to undertake the extensive analysis necessary to evaluate possible protections. Protection of writings equivalent to copyright imposes economic and social costs stemming from restricted access to the products involved. Thus each case requires sophisticated economic inquiry into the structure of the industry involved.<sup>156</sup> Yet it is hard to imagine a situation where copyright or its equivalent will produce grave economic consequences, especially if protection is limited in time. Since copyright protection is limited to the "expression" of ideas and not the "ideas" themselves and restricts competition only between copies of the same work, the possibility that such protection will produce very serious anti-competitive effects is significantly reduced.<sup>157</sup> The states have, on occasion, proven themselves capable of discretion.<sup>158</sup> The possibilities of restraint can be significantly enhanced if Congress and the federal courts make it clear that prudence is required and also provide clear guidance with

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155. See Price, *The Moral Judge and the Copyright Statute: The Problem of Stiffel and Compco*, 14 ASCAP COPYRIGHT LAW SYMPOSIUM 90, 104-06 (1966).

156. See pp. 237-38 and note 110 *supra*.

157. As a general matter, the power to accumulate patents is likely to prove more detrimental to actual and potential competition than the power to accumulate copyrights, for the scope of protection afforded patents is significantly greater. See generally P. AREEDA, *ANTITRUST ANALYSIS* 376-87 (1967). While copyright protection only extends to an author's "expression," a patent protects the use of an inventor's "idea." This protection limits the production of competing products which might keep down the price of the patented product.

158. In *Columbia Broadcasting System, Inc. v. Spies*, 167 U.S.P.Q. 492, 506 (Ill. Cir. Ct., Cook County 1970), the court limited its injunction to a period of ten years from the date of the first sale of a recording. In considering the question of a time restriction, it said:

[T]he time may be measured for a maximum by that which would protect the Plaintiff . . . [if he] had, in fact, obtained a copyright for the product in question. The time limit for the injunction should be that period for which the Plaintiff would have protection had the phonograph record been eligible for copyright protection less a reasonable period at the far end during which the popularity of the artists and the songs rendered may be expected to be of "de minimus" character.

*Id.* 500.

respect to the limitations of state action in this area. State courts must be induced to view the tort of misappropriation as fulfilling a modest, limited function to be applied with circumspection.<sup>159</sup> They must be particularly sedulous in insisting upon clear proof that protection is necessary to fulfill the legitimate expectations of inventors, authors, and artists and to ensure the economic viability of those responsible for making their products available to the public. They also must avoid basing their decision on simplicisms such as "record copying is bad because the copier steals the record maker's property."<sup>160</sup> They might well take the Copyright Act as a model.<sup>161</sup> And, if the states stray too far, Congress can always intervene, although, as we have seen, congressional action is not always quickly forthcoming.

### CONCLUSION

The constitutional status of state jurisdiction to control the duplication of records not eligible for federal copyright is extremely complex, comprising a cluster of intricate constitutional and statutory issues. We conclude that although state jurisdiction over record copying violates neither the copyright nor the commerce clause, such jurisdiction is inconsistent with rights granted the composer by the federal Copyright Act, and is thus barred under the supremacy clause. Even if the Copyright Act were amended to permit some state authority over record copying, virtually all existing state law in this area still would be unconstitutional because it is unlimited in time. According to our analysis, the copyright clause requires that all federal or state protection of published writings be limited in time. And application of the limited times requirement to published works necessarily and appropriately implies that the limited times requirement also applies to federal or state protection of unpublished works.

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159. See generally Rahl, *The Right To "Appropriate" Trade Values*, 23 OHIO ST. L.J. 56, 57 (1962).

160. See pp. 245-46 and notes 129, 140 *supra*; McDonald, Book Review, 47 CANADIAN BAR REVIEW 142, 145 (1969) ("Wringing hands or raising voices over 'expropriation of property' or 'piracy' or quoting the Eighth Commandment, will not contribute to the settlement of issues beyond providing an inarticulate point of view, without reasons, on policy questions concerning both the fact and form of incentive to be provided to creators.")

161. For an example of such refinement by reference to the Act, see note 158 *supra*.

The federal competitive mandate also requires that state protection of recordings be limited in time.

Since we believe that some effective state jurisdiction over the protection of intellectual and artistic products is desirable, we are not entirely satisfied with this situation. The strongest case for state jurisdiction is with respect to new forms of "writings" rather than existing forms such as records and tapes.<sup>162</sup> In this context, the need for prompt governmental response to new problems supports concurrent federal and state jurisdiction. The sole requirement for such jurisdiction with respect to writings would be an appropriate time limitation. The time limit could be imposed by the states alone, or Congress could provide limits or guidelines for establishing such limits, for example by imposing an upper time limit on state protection of writings. The last alternative seems preferable. Congressionally provided guidelines would provide an appropriate national perspective; state judges and legislatures and federal courts would not have to guess what constitutionally permissible lengths of protection might be with respect to each new category of writings.

The case for state jurisdiction to protect records is less clear. Since the problems surrounding records are known, the need for state authority to provide flexibility to handle new situations does not apply. Legally, state jurisdiction is impeded by two factors: the lack of a time limit on protection and the structure of the Copyright Act, which seems either to grant the composer the right to control record copying, the view of the author, or to deny the composer such control in order to maximize dissemination of recorded performances.<sup>163</sup> The means for overcoming the first impediment are outlined in the previous paragraph. Congress can remove the second simply by amending or clarifying the Copyright Act to give the record producer the right to control duplication. But in contrast to other writings, where the Copyright Act does not give anyone the right to control copying, the existing federal regulatory scheme may be interpreted as affording such control to the composer. And composers can cooperate with

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162. The reference here is to state protection of writings which are not statutorily copyrightable and the protection of which is not otherwise inconsistent with the existing copyright statute.

163. The Copyright Act precludes state recognition of a reproduction right in a recording of a copyrighted musical composition. The Act does not preclude the states from granting a reproduction right in a recording of a song in the public domain. See pp. 228-36 and note 106 *supra*.

record producers in this regard, if they so choose. If this analysis is incorrect and composers do not have the right to control the reproduction of records of their copyrighted compositions, or if Congress should determine that the record producer rather than the composer should have control over record copying, Congress can make permanent by the McClellan amendment the temporary right of reproduction or permit the states to do so. If record producers do require more control over their product, however, federal regulation is preferable to state regulation because of the usual weaknesses of piecemeal regulation by entities not constrained by a national perspective and because of the close connection of copyright with first amendment connected interests in maximum dissemination of ideas.