University of Miami Law Review

Volume 60 | Number 1 Article 5

10-1-2005

United States v. Martignon: The First Case to Rule that the Federal Anti-bootlegging Statute is Unconstitutional Copyright Legislation

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CASENOTE

United States v. Martignon: The First Case to Rule that the Federal Anti-Bootlegging Statute Is Unconstitutional Copyright Legislation

I. A First Look at *United States v. Martignon*[1]

Jean Martignon owns and operates Midnight Records, a small record business that includes a Manhattan retail store, a catalog service, and an Internet site.[2] Since 1978, Mr. Martignon primarily has sold authorized recordings produced and distributed by record companies.[3] However, Midnight Records also sells bootlegged albums and compact discs ("CDs") consisting of live musical recordings never released by their performers or their record labels.[4] Consequently, these recordings are not available in the traditional commercial market.[5] In September of 2003, federal and state law enforcement agents arrested Martignon after the Recording Industry Association of America ("RIAA") initiated an investigation into Midnight Records.[6] Less than two months later, Jean Martignon was indicted by a federal grand jury for selling unauthorized recordings of live performances[7] in violation of 18 U.S.C. § 2319A[8] ("anti-bootlegging statute" or "§ 2319A"), a federal criminal statute prohibiting bootlegging. Martignon subsequently moved to dismiss the indictment on the grounds that the anti-bootlegging statute is unconstitutional.[9] On September 24, 2004, Judge Harold Baer of the United States District Court for the Southern District of New York held § 2319A unconstitutional for its circumvention of the fixation and duration limita-

1. 346 F. Supp. 2d 413 (S.D.N.Y. 2004).

2. *Id.* at 417.

3. Defendant Jean Martignon's Motion and Memorandum in Support Thereof to Dismiss the Indictment at 4, United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) (1:03CR01287).

4. *Id.*

5. *Id.*

6. *Id.* at 7.

7. *Martignon*, 346 F. Supp. 2d at 417.

8. 18 U.S.C. § 2319A (2000).

9. *Martignon*, 346 F. Supp. 2d at 417.

tions[10] of the Copyright Clause.[11] Furthermore, the court held that because § 2319A is copyright-like legislation,[12] Congress may not justify the anti-bootlegging statute by evading Copyright Clause requirements and resorting to the separate grant of authority found in the Commerce Clause.[13] Having declared § 2319A unconstitutional, the court granted defendant Jean Martignon's motion to dismiss the indictment.[14]

II. HISTORICAL PERSPECTIVE

A. *A Brief History of Bootlegging*

The Supreme Court of the United States has defined a bootlegged phonorecord as one containing an "unauthorized copy of a commercially unreleased performance."[15] Sources of bootlegs include, but are not limited to, recordings of live concerts, radio or television broadcasts, and

10. U.S. CONST. art. I, § 8, cl. 8 ("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." (emphasis added)). While a duration limitation clearly exists due to the "limited Times" language, a fixation requirement is not explicit in the text of the Copyright Clause. However, the word "Writings" certainly connotes a degree of permanence in a work, and a fixation requirement has been read into the Constitution via an interpretation of "Writings." *See* 17 U.S.C. § 102 (2000) ("Copyright protection subsists, in accordance with this title, in original works of authorship *fixed* in any tangible medium of expression . . . ." (emphasis added)); H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (indicating that a fixed work exists "if there has been an authorized embodiment in a copy or phonorecord and if that embodiment 'is sufficiently permanent or stable' to permit the work 'to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'"); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2], at 1-66.30 (2005) ("If the word '[W]ritings' is to be given any meaning whatsoever, it must, at the very least, denote 'some material form, capable of identification and having a more or less permanent endurance.'"). Although in the modern era the term "[W]ritings" has allowed Congress to extend copyright protection to a great many things, they have always involved some fixed, tangible, and durable form. Goldstein v. California, 412 U.S. 546, 561 (1973) (holding that "Writings" may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor).

11. *Martignon*, 346 F. Supp. 2d at 423 ("Because the anti-bootlegging statute provides seemingly perpetual protection for unfixed musical performances, it runs doubly afoul of Congress' authority to regulate under the Copyright Clause.").

12. *Id.* at 422.

13. *Id.* at 425.

14. *Id.* at 429.

15. Dowling v. United States, 473 U.S. 207, 211 n.2 (1985). Bootlegs differ from the two other principal forms of musical piracy: counterfeits and pirated recordings. Counterfeits are defined as unauthorized copies of a legitimate album, designed to look like authorized copies. David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 620 (1995); Todd D. Patterson, Comment, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 378-80 (1997). Piracy, on the other hand, simply refers to the duplication of a sound recording that has already been commercially released. *See Dowling*, 473 U.S. at 209 n.2. This article is concerned solely with bootlegging.

studio outtakes.[16] Music bootlegging can be traced back to the 1920s and has encompassed all genres of music from opera and symphony to jazz and rock.[17] However, it was the 1969 release of the Bob Dylan bootleg entitled *Great White Wonder*,[18] which spawned the modern bootleg industry as we know it today.[19] The release of *Great White Wonder* "marked the first widely distributed and truly popular recording of this kind. The success of this new bootleg demonstrated that it would be possible to meet the public's demand for new music through the unsanctioned release of live recordings . . . [and] proved that fans were willing to pay top dollar . . . ."[20] Following the success of *Great White Wonder*, bootleg releases of other musicians' recordings, including the Beatles and the Rolling Stones, began to flourish.[21]

In the early stages of the modern bootlegging industry, quality control proved to be a major issue,[22] as the sound quality of studio recordings was far superior to bootlegged copies on vinyl.[23] However, the advent of cassette tapes soon made the production and distribution of bootlegs increasingly easy, serving to foreshadow the impact that technology would have on the underground bootlegging industry.[24] In the two decades that followed the release of *Great White Wonder*, further advances in technology ultimately culminated in the 1990s being dubbed the "Golden Age of boots."[25] For example, the advent of CDs and DAT

16. Patterson, *supra* note 15, at 374; Dawn R. Maynor, *Just Let the Music Play: How Classic Bootlegging Can Buoy the Drowning Music Industry*, 10 J. INTELL. PROP. L. 173, 175 (2002).

17. Greg M. Daugherty, *The Economics of Bootlegging*, http://members.tripod.com/~serenitymag/02/bootleg.html (last visited Mar. 4, 2005); Hank Hoffman, *Boot-Buyers Beware*, NEW HAVEN ADVOC., June 5, 1997, at 22.

18. Great White Wonder included cuts from home recording sessions in Minneapolis in 1961 and Woodstock in 1967. CLINTON HEYLIN, BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY 1 (1995); *see also* Patterson, *supra* note 15, at 371-72. Columbia Records enjoyed commercial success years later when it authorized the release of the very same material under the name "The Basement Tapes." Kurt Glemser, *A Brief But Incomplete History of Bootlegs*, http://log.on.ca/hotwacks/zhist.html (last visited Mar. 4, 2005).

19. *See* Patterson, *supra* note 15, at 371; Hoffman, *supra* note 17, at 22; Bootlegs Feature, Part 1, A Potted History (Nov. 1999), http://www.moremusic.co.uk/links/features/bootleg.htm [hereinafter Bootlegs Feature].

20. Patterson, *supra* note 15, at 371-72.

21. Hoffman, *supra* note 17, at 22.

22. *Id.*

23. *See* HEYLIN, *supra* note 18, at 184.

24. *See* Bootlegs Feature, *supra* note 19.

25. Hoffman, *supra* note 17, at 22.

recorders[26] not only brought bootlegs to the masses,[27] but did so with sound quality far superior to that of records or cassette tapes.[28] Furthermore, internet technology led to an increase in "tape trading"[29] by providing an improved platform for this more informal means of distribution.[30]

B. *The Road to Federal Protection of Unrecorded Live Music*

Federal copyright protection has existed for written musical compositions since 1831[31] and for sound recordings since 1971.[32] However, prior to 1994, such protection did not extend to unrecorded live performances.[33] When Congress did address this apparent gap in copyright protection by enacting § 2319A, it did so in response to developments during the Uruguay Round of trade negotiations under the General Agreements on Tariffs and Trade ("GATT").[34]

By the late 1970s, the aforementioned advances in technology that made counterfeiting cheaper and more profitable had led to "an explosion in international trafficking of counterfeit and pirated goods . . . ."[35]

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26. A Digital Audio Tape ("DAT") is a device that consists of a tape housed in a cassette. However, because the sound is recorded digitally, DATs have audio quality equal to that of compact discs, giving DAT technology the same superior audio quality that compact disc technology utilizes. HEYLIN, *supra* note 18, at 242-47.

27. While still miniscule compared to the mainstream music industry, the bootlegging industry became a multi-million dollar business. Hoffman, *supra* note 17, at 22.

28. Patterson, *supra* note 15, at 376-77; *see also* Jerry D. Brown, *U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy for Bootleggers*, 16 LOY. L.A. ENT. L.J. 1, 6 (1995).

29. Tape trading is an exchange of bootleg concert tapes or other unreleased material. Serious fans engaged in tape trading long before bootlegs were commercially available. Patterson, *supra* note 15, at 376-77.

30. *See* Hoffman, *supra* note 17, at 22.

31. Act of Feb. 3, 1831, Ch. 16, 4 Stat. 436.

32. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended at 17 U.S.C. § 102 (2000)). The Sound Recording Act amended Title 17 to include sound recordings as a category of protected works "for the purpose of protecting against unauthorized duplication and piracy of sound recordings." *Id.*

33. Prohibitions on bootlegs did exist at the state level. *See, e.g.*, Act of July 1, 1977, ch. 77-440, § 2, 1977 Fla. Laws 1802 (codified as amended at FLA. STAT. § 540.11(2)(a)(3) (2004)) (criminalizing the unauthorized recording of performances, "whether live before an audience or transmitted by wire or through the air by radio or television").

34. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994). The anti-bootlegging statute (§ 2319A) that is the focus of this paper originated in section 513 of the URAA, which was the domestic codification of GATT with respect to criminal penalties for "[u]nauthorized fixation of and trafficking in sound recordings and music videos of live musical performances." *Id.* "GATT is an international arrangement under which nearly eighty countries have negotiated common norms for international trade. . . . When it was first organized shortly after World War II, GATT focused primarily on promoting the reduction of tariff barriers to the international movement of goods." Patterson, *supra* note 15, at 402. "The goal of GATT is to find ways to encourage free trade among nations." *Id.*

35. Doris E. Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection*

The United States and other developed countries concluded that the absence of workable international protection mechanisms[36] to combat this illicit international traffic was negatively impacting international trade.[37] In response, the international community turned to GATT as a basis for addressing intellectual property issues.[38]

When the Uruguay Round of negotiations began in September of 1986, leaders identified "[t]rade-related aspects of intellectual property rights, including trade in counterfeit goods," as a subject for negotiation.[39] After seven years of negotiation and debate, the Uruguay Round concluded on December 15, 1993 with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[40] Signed by 111 nations,[41] TRIPS incorporated the most productive components of existing international copyright conventions,[42] added a new level of minimum rights and standards,[43] and introduced a powerful enforcement mechanism never before seen in international intellectual property law.[44] Professor Doris Long asserts that "[o]n a more fundamental level, TRIPS represents a new effort to improve copyright owners' ability to protect their copyrightable works internationally . . . ."[45] Most significant for present purposes, the new protection under TRIPS binds the signatory nations to providing complete protection for live performances.[46] In order to comply with TRIPS, and domestically imple-

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or An Illusory Promise?, 22 AIPLA Q.J. 531, 535 (1994). As is fairly common, Long uses the terms "counterfeits" and "piracy" interchangeably with "bootlegs". *See id.* However, as stated earlier, bootlegs are distinguishable from counterfeits or pirates. *See supra* note 15 and accompanying text.

36. Although other major international treaties such as the Berne and the U.C. Convention provided non-discriminatory access to the legal systems of member nations, their lack of mandatory enforcement procedures rendered them an incomplete solution to the bootlegging of live performances. *See* Patterson, *supra* note 15, at 402.

37. Long, *supra* note 35, at 535.

38. *Id.*

39. Ministerial Declaration on the Uruguay Round, *in* 3 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1, 7-8 (Terence P. Stewart ed. 1993); Long, *supra* note 35, at 534.

40. Long, *supra* note 35, at 533.

41. *Id.*

42. Patterson, *supra* note 15, at 404; *see, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 2(2), 3(1), 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS Agreement].

43. Long, *supra* note 35, at 533.

44. Patterson, *supra* note 15, at 404.

45. Long, *supra* note 35, at 533. This additional protection comes from "not only agreed-upon minimum levels of substantive rights in such works, but also minimum levels of enforcement of these rights, including certain minimum procedural and remedial standards, under the auspices of GATT dispute resolution mechanisms." *Id.*

46. *See* TRIPS Agreement, *supra* note 42, art. 14(1), at 1202. Live performances had no international copyright protection prior to the Uruguay Round of GATT negotiations.

ment its mandatory protection standards, Congress enacted the Uruguay Round Agreements Act ("URAA")[47] on December 8, 1994.[48]

The URAA served as the "bridge between the new requirements of the TRIPS Agreement and existing American copyright law."[49] One major change in domestic copyright law pursuant to the URAA's implementation of TRIPS was that, for the first time, federal protection against the production and distribution of bootlegs was extended to live performers.[50] Up until that point, U.S. copyright law contained almost no provisions protecting live performances,[51] as it was generally accepted that this would contravene the requirement that a work be fixed in a tangible medium of expression to be copyrightable.[52] Section 513 of the URAA added § 2319A, the criminal anti-bootlegging statute,[53] to Title 18 of the United States Code, providing that anyone who,

> without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain, fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, . . . [or] transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance . . . shall be imprisoned for not more than 5

47. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994).

48. Long, *supra* note 35, at 565. TRIPS was not self-executing in the United States, and required further action from Congress and the President before it went into action. *See id.* The URAA became effective in January 1995 via congressionally-authorized proclamation by President Clinton. Proclamation No. 6763, 60 Fed. Reg. 1,007 (Dec. 23, 1994), *modified by* Proclamation No. 6780, 60 Fed. Reg. 15,845 (Mar. 23, 1995).

49. Patterson, *supra* note 15, at 408.

50. Long, *supra* note 35, at 565-66; Patterson, *supra* note 15, at 408.

51. Patterson, *supra* note 15, at 408. One small exception was the following: "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords . . . ." Act of Oct. 19, 1976, Pub. L. No. 94-553, § 602, 90 Stat. 2541, 2588 (codified as amended at 17 U.S.C. § 602(a) (2000)). Use of this section was limited because Congress restricted its application to pirated or counterfeited albums imported into the United States, not actual bootlegging. CRAIG JOYCE ET AL., COPYRIGHT LAW 533-34 (3d ed. 1994).

52. *See, e.g.*, 17 U.S.C. § 102 (2004); Goldstein v. California, 412 U.S. 546, 561 (1973) (concluding that the term "Writings" generally includes "any physical rendering of the fruits of creative intellectual or aesthetic labor.").

53. 18 U.S.C. § 2319A (2000). The criminal anti-bootlegging statute at issue in *Martignon* has a sister provision which establishes civil liability for bootlegging. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4974 (codified at 17 U.S.C. § 1101 (2000)). "Besides the difference in penalties, the only substantive differences are that § 2319A also requires that the infringer 'knowingly' made an unauthorized recording and did so 'for purposes of commercial advantage or private financial gain.'" Kiss Catalog v. Passport Int'l Prods., 350 F. Supp. 2d 823, 830 (C.D. Cal. 2004). *See generally* Susan M. Deas, *Jazzing Up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 HASTINGS COMM. & ENT. L.J. 567 (1998) (explaining in detail the intricacies of § 1101).

years . . . .[54]

Conviction under § 2319A also requires the mandatory forfeiture and destruction of any bootlegs, and gives the court discretionary power to seize and destroy any equipment owned by the defendant by which bootlegs could be made.[55] Thus, congressional enactment of the URAA and section 513, and the subsequent codification at 18 U.S.C. § 2319, was designed to fulfill the United States' TRIPS obligations concerning bootlegging.[56] Because this legislation provided the first semblance of copyright protection to live music, § 2319A at the very least suggested that the "Golden Age"[57] of bootlegging in the United States could be nearing its end.

C. *The First Case to Challenge § 2319A:* United States v. Moghadam

Prior to *United States v. Martignon*, the only case to challenge the constitutionality of § 2319A was *United States v. Moghadam*,[58] an Eleventh Circuit Court of Appeals case decided in 1999. Ali Moghadam was convicted under the anti-bootlegging statute in the United States District Court for the Middle District of Florida for distributing unauthorized CDs featuring live performances by Tori Amos and the Beastie Boys.[59] On appeal, he argued that § 2319A was unconstitutional because it violated the "fixation concept" of the Copyright Clause by extending copyright protection to unfixed live performances.[60] Moghadam contended that, notwithstanding a bootlegger's decision to record it, a live performance is "fleeting and evanescent" and § 2319A impermissibly protects such material.[61] The government maintained that the anti-bootlegging statute was constitutionally sustainable under both the Copyright Clause and the Commerce Clause.[62]

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54. 18 U.S.C. § 2319A(a) (2000) (providing further that repeat offenders can be imprisoned for not more than 10 years or fined or both).

55. *Id.* § 2319A(b).

56. United States v. Martignon, 346 F. Supp. 2d 413, 418 (S.D.N.Y. 2004).

57. Hoffman, *supra* note 17, at 22.

58. 175 F.3d 1269 (11th Cir. 1999). Although many of the arguments that the court employed in *Moghadam* are subject to debate, in this article only a narrative account is necessary in order to give perspective on the state of the law leading up to *Martignon*. However, in analyzing *Martignon*, some of these arguments will be addressed in comparing the two cases.

59. *Id.* at 1271.

60. *Id.* at 1274. Note that Ali Moghadam chose to challenge § 2319A solely on fixation grounds, and not because the statute might circumvent the "duration" requirement as well. *See supra* note 10.

61. *Moghadam*, 175 F.3d at 1274.

62. *Id.* at 1271.

I. CONSTITUTIONALITY OF § 2319A UNDER THE COPYRIGHT CLAUSE

The Eleventh Circuit's holding in Moghadam assumed, without deciding, that § 2319A was invalid under the Copyright Clause.[63] The court explained that "[t]he concept of fixation suggests that works are not copyrightable unless reduced to some tangible form," and live performances "are merely capable of being reduced to tangible form, but have not been."[64] However, the court did not rule on whether copyright protection for live music squares with the Copyright Clause, and instead choose to analyze and uphold the anti-bootlegging statute under the Commerce Clause.[65]

II. CONSTITUTIONALITY OF § 2319A UNDER THE COMMERCE CLAUSE

The Commerce Clause gives Congress the legislative authority to regulate commerce with foreign nations and among the states.[66] Pursuant to this power, Congress can legislate within three categories: (1) to regulate the use of channels of interstate commerce; (2) to protect the instrumentalities, persons, or things in interstate commerce; and (3) to regulate activities that substantially affect interstate commerce.[67] Because a conviction under § 2319A does not require that the bootlegs cross state or national borders, the court's analysis was confined solely to the third category mentioned above.[68] Therefore, in order for the regulation of purely intrastate commerce under § 2319A to be valid, the court needed to find a rational basis for concluding that intrastate bootlegging substantially affects interstate commerce.[69] The *Moghadam* court asserted that "[t]o survive Commerce Clause scrutiny, § 2319A 'must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred.'"[70] Despite an absence of economic data regarding the effect of bootlegging on interstate or foreign commerce,[71] the court

63. *Id.* at 1274 ("For purposes of this case, we assume *arguendo*, without deciding, that the . . . fixation requirement would preclude the use of the Copyright Clause as a source of Congressional power for the anti-bootlegging statute.").

64. *Id.* at 1273-74.

65. *Id.* at 1282.

66. U.S. CONST. art. I, § 8, cl. 3.

67. United States v. Lopez, 514 U.S. 549, 558-59 (1995) (articulating the Supreme Court's current approach to Commerce Clause analysis).

68. *Moghadam*, 175 F.3d at 1275.

69. *Lopez*, 514 U.S. at 557.

70. *Moghadam*, 175 F.3d at 1275 (quoting United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997)).

71. *Id.* As Congress was under the assumption it was acting under the Copyright Clause, there are no legislative findings regarding the effect of bootlegged live musical performances on interstate or foreign commerce. However, Congress's failure to cite the Commerce Clause does not invalidate § 2319A. *See, e.g.*, Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("The

concluded that "[s]ection 2319A clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations."[72] The court was persuaded by the fact that, since § 2319A requires that the bootlegging is done "for purposes of commercial advantage or private financial gain,"[73] the offense "necessarily is intertwined with commerce."[74] Moreover, the court relied on the circular assertion that Congress criminalized bootlegging precisely because of its adverse economic effect on the legitimate music industry.[75] Finding that bootleg sales substantially affect interstate and foreign commerce, the court held that the anti-bootlegging statute met the Supreme Court's current standard for permissible Commerce Clause legislation.[76]

III. *MOGHADAM* UPHOLDS § 2319A PURSUANT TO THE COMMERCE CLAUSE DESPITE THE COPYRIGHT CLAUSE

Once the *Moghadam* court found a sufficient link between bootlegging and interstate commerce, it then had to address whether Congress could enact § 2319A under the Commerce Clause, given the court's earlier assumption that the Copyright Clause prohibits protection of unfixed works.[77] The court acknowledged the uncertainty created by two conflicting lines of Supreme Court precedent as to whether legislation failing the requirements of one grant of congressional power under the Constitution could nevertheless be upheld under another such grant.[78] A similar issue was confronted in *Heart of Atlanta Motel, Inc. v. United*

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question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."); Timmer v. Mich. Dept. of Commerce, 104 F.3d 833, 839 (6th Cir. 1997) (explaining that in exercising the power of judicial review, the court examines only the actual powers of the federal government).

72. *Moghadam*, 175 F.3d at 1276.

73. 18 U.S.C. § 2319A(a) (2000).

74. *Moghadam*, 175 F.3d at 1276.

75. *Id.* ("The very reason Congress prohibited this conduct is because of the deleterious economic effect on the recording industry."). This position was supported throughout an amicus brief submitted by the RIAA. Brief of Amicus Curiae Recording Industry Ass'n of Am., Inc. at 2-6, United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999) (No. 98-2180). Furthermore, the International Federation of the Phonographic Industry estimates that sales of pirated recordings can cost retailers over 30 percent of their business, with bootleg sales similarly affecting the sales of legitimate records. *Id.* at 4. There is disagreement among several scholars as to the validity of claims that bootlegging depresses the legitimate music market, because most bootleg buyers make such purchases in addition to, and not instead of, authorized recordings. *See, e.g.*, Maynor, *supra* note 16, at 175; Lee H. Rousso, *The Criminalization of Bootlegging: Unnecessary and Unwise*, 1 BUFF. INTELL. PROP. L.J. 169 (2002).

76. *Moghadam*, 175 F.3d at 1277.

77. *Id.*

78. *Id.* at 1279.

States,[79] whereby the Supreme Court held that even though the public accommodation provisions of the Civil Rights Act of 1964 were beyond the scope of Congress's power under section 5 of the Fourteenth Amendment, the provisions possessed sufficient connection to interstate commerce to sustain the Act under the Commerce Clause.[80] Thus, the reasoning in *Heart of Atlanta* and other decisions in this line of cases[81] "illustrates that, as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another."[82]

However, the *Moghadam* court also acknowledged[83] the conflicting Supreme Court precedent of *Railway Labor Executives' Ass'n v. Gibbons*.[84] In *Gibbons*, a statute that directly conflicted with the uniformity requirement of the Bankruptcy Clause[85] was deemed unconstitutional despite its validity under the Commerce Clause.[86] Thus, *Gibbons* indicates that some constitutional grants of power contain limitations that Congress cannot evade by relying on alternate constitutional authority.[87] As the Supreme Court in *Gibbons* explained: "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."[88]

In ruling on the constitutionality of § 2319A, the court in *Moghadam* was faced with these two lines of precedents that, on the one hand suggested that the Commerce Clause might be used by Congress to uphold something impermissible under the Copyright Clause, and on the other declared that some constitutional limitations cannot be circumvented by resorting to an alternative grant of power. The court chose to resolve this tension by following the *Heart of Atlanta* line of cases, carefully crafting a narrow holding that distinguished *Moghadam* from *Gib-*

79. 379 U.S. 241 (1964).

80. *Id.* at 250.

81. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) (holding that pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, Congress may condition its appropriation of money to the states on their agreement to impose restrictions that would be beyond Congress's constitutional legislative authority to enact directly); Authors League of Am., Inc. v. Oman, 790 F.2d 220, 224 (2nd Cir. 1986) (suggesting that the Commerce Clause provides plenary authority, allowing it to accomplish that which the Copyright Clause may not).

82. *Moghadam*, 175 F.3d at 1277.

83. *Id.* at 1279.

84. *Id.*

85. U.S. CONST. art. I, § 8, cl. 4 (providing that Congress is empowered to pass uniform bankruptcy laws).

86. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

87. *Moghadam*, 175 F.3d at 1279.

88. *Gibbons*, 455 U.S. at 468-69.

bons.[89] This holding was founded on the court's assumption that Congress can contravene one grant of power when doing so is not fundamentally inconsistent with the text of the grant, and the action is permissible under another clause.[90] According to the court, "[c]ommon sense does not indicate that extending copyright-like protection to a live performance is fundamentally inconsistent with the Copyright Clause."[91] First, the court reasoned that the Copyright Clause is a positive grant of power rather than a limit on Congress's authority under other grants of power, so that extending quasi-copyright protection under the Commerce Clause is not inconsistent with the Copyright Clause.[92] Furthermore, the *Moghadam* court found that extending copyright protection to unfixed works promotes the progress of the useful arts, in accord with the purpose of the Copyright Clause.[93] Finally, the court reasoned that fixation is "something less than a rigid, inflexible barrier to Congressional power."[94] Through this analysis, the court distinguished § 2319A's constitutional consistency from that of the statute at issue in *Gibbons*, where the nonuniform bankruptcy statute at issue was wholly inconsistent with the Bankruptcy Clause.[95] Thus, *Moghadam* preferred a case-by-case approach whereby statutes that contravene one grant of legislative power but accord with another are measured by whether they are "fundamentally inconsistent" with the former, an approach that ultimately upheld the federal anti-bootlegging statute and rejected Moghadam's constitutional challenge to it.[96]

D. Moghadam: *A Narrow Holding*

Before attempting an analysis of *United States v. Martignon*, it is important to note that the holding in *Moghadam* was relatively narrow. Most importantly, the court did not officially rule on the key issue of whether § 2319A is unconstitutional under the Copyright Clause—it

89. *Moghadam*, 175 F.3d at 1280.

90. *Id.*

91. *Id.* at 1281.

92. *Id.* at 1280.

93. U.S. CONST. art. I, § 8, cl. 8 ("*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." (emphasis added)).

94. *Moghadam*, 175 F.3d at 1281. The court was persuaded by the definition of "fixed" found in 17 U.S.C. § 101, which allows fixation to occur simultaneously with the work's transmission and permits live performers to "fix" works while performing them. *Id.* at 1280-81. The court reasoned that this allowance was evidence that the fixation requirement had become a mere formality, rendering § 2319A's extension of protection to unfixed works fundamentally consistent with the Copyright Clause. *See id.*

95. *Id.* at 1281.

96. *Id.* at 1282.

merely assumed so.[97] Moreover, in upholding this legislation under the Commerce Clause, the court was very careful to limit its holding to Moghadam's fixation challenge, and specifically declined to decide "whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the '[l]imited Times' requirement of the Copyright Clause . . . ."[98] The court's language strongly suggests that, had § 2319A's seemingly perpetual protection been challenged, it would have rendered the statute fundamentally inconsistent with the Copyright Clause and, hence, unconstitutional.[99] Rather, the *Moghadam* court decided to "reserve [that] issue[ ] for another day"[100] while foreseeing a future case that would challenge the perpetual protection of § 2319A.[101]

III. *UNITED STATES V. MARTIGNON*

A. *Is § 2319A Copyright or Commercial Legislation?*

When Jean Martignon challenged the constitutionality of § 2319A on both fixation and duration grounds, the United States District Court for the Southern District of New York was faced with the broader challenge envisioned by both the *Moghadam* court and scholars[102] alike.[103] Initially, the court set out to determine whether the anti-bootlegging statute was "copyright-like" or merely commercial legislation, finding it "essential to determine how to classify a statute in order to ensure that it does not run afoul of any express limitations imposed on Congress when regulating in the respective arena."[104] The court found unequivocally that the anti-bootlegging statute was a copyright statute based on its language, history, and placement within the United States Code.[105] By penalizing those who profit from live music "*without the consent of the*

97. *See supra* notes 63-64 and accompanying text.

98. *Moghadam*, 175 F.3d at 1281.

99. *See id. See generally* Goldstein v. California, 412 U.S. 546, 560-61 (2003) (suggesting that a copyright of unlimited duration would tend to inhibit the progress of the arts); Eldred v. Ashcroft, 537 U.S. 186 (2003) (holding that while extensions of protection are permissible, truly perpetual copyright protection is unconstitutional).

100. *Moghadam*, 175 F.3d at 1281.

101. *See id.* at 1281.

102. *See, e.g.*, Keith V. Lee, *Resolving the Dissonant Constitutional Chords Inherent in the Federal Anti-Bootlegging Statute in* United States v. Moghadam, 7 VILL. SPORTS & ENT. L.J. 327, 362 (2000) ("The Eleventh Circuit cleverly composed a decision that avoided tortuous legal brambles to a finale amenable to both sides. The next court to decide a similar issue may be unable to, and given the appropriate facts, may be forced to re-interpret the Copyright Clause for the twenty-first century.").

103. United States v. Martignon, 346 F. Supp. 2d 413, 419 (S.D.N.Y. 2004).

104. *Id.* at 420; *accord* Ry. Labor Executives' Ass'n. v. Gibbons, 455 U.S. 457, 467 (1982) (utilizing the "classification" method that the *Martignon* court employed as a starting point).

105. *Martignon*, 346 F. Supp. 2d at 420-22.

performer,"[106] § 2319A protects artists, rather than commerce, within the purview of the Copyright Clause.[107] Moreover, importance was placed on the fact that legislative materials[108] explaining the purpose of § 2319A included no discussion of commerce, but instead articulated its aim as the protection of performers.[109] Furthermore, the court was convinced that the anti-bootlegging statute was copyright legislation because Congress placed it in the United States Code "almost as a subset of the Copyright Act."[110] *Martignon* declared that just because § 2319A originated from an inter-country agreement whose purpose was "to 'ensure uniform recognition and treatment of intellectual property in international commerce,' does not mean that each . . . country's legislation has the same purpose domestically."[111] Finally, the court asserted that even if *Moghadam's* findings that bootlegging substantially affects commerce[112] are correct, such commercial consequences do not shift § 2319A's identity from copyright to commercial legislation.[113]

B. *Is § 2319A Constitutional Under the Copyright Clause?*

Whereas the *Moghadam* court simply assumed that the anti-bootlegging statute was not sustainable under the Copyright Clause,[114] *Martignon* confronted the issue head on.[115] Not surprisingly, *Martignon* confirmed *Moghadam's* assumptions, declaring § 2319A unconstitutional under the Copyright Clause for contravening both its fixation and duration requirements.[116] While *Moghadam* assumed that § 2319A violated the fixation requirement,[117] *Martignon* held unambiguously that unauthorized recordings of live musical performances are not "Writings" because they are unfixed and, therefore, are not entitled to copyright

106. 18 U.S.C. § 2319A(a) (2000) (emphasis added).

107. *Martignon*, 346 F. Supp. 2d at 420-21.

108. S. REP. No. 103-412, at 225 (1994) ("[The United States' obligation under TRIPS is] to allow performers to prevent the unauthorized fixation in sound recordings or music videos of their live performances and to prevent the reproduction of such recordings.").

109. *Martignon*, 346 F. Supp. 2d at 421-22.

110. *Id.* at 421. Furthermore, "rather than defining crucial terms, such as 'fixed,' 'musical work,' and 'sound recordings,'" the anti-bootlegging statute "adopts the definitions of these terms as stated in Title 17—the Copyright Title." *Id.* at 422.

111. *Id.* at 421 (quoting United States v. Moghadam, 175 F.3d 1269, 1276 (11th Cir. 1999)).

112. *See supra* text accompanying notes 70-82.

113. *Martignon*, 346 F. Supp. 2d at 422.

114. *See supra* notes 63-65 and accompanying text.

115. *Martignon*, 346 F. Supp. 2d at 420 ("If the anti-bootlegging statute is a copyright-like statute, as this Court finds that it is, it will be necessary to determine whether the statute falls within Congress' power to legislate in that field.").

116. *Id.* at 422-23. As evidence of just how uncontroversial this point of law was, not even the government argued that Congress had the authority to enact § 2319A under its Copyright Clause powers alone. *Id.* at 422.

117. *See supra* notes 63-65 and accompanying text.

protection.[118]

Unlike the defendant in *Moghadam*, Jean Martignon raised the duration argument as a second attack on § 2319A's constitutionality.[119] In response, the *Martignon* court decisively held that § 2319A's grant of "seemingly perpetual protection" impermissibly conflicts with the text and purpose of the Copyright Clause.[120] Not long before the *Martignon* decision was rendered, the Supreme Court held that the "limited Times" restriction in the Copyright Clause prevents Congress from granting everlasting protection, but that protection for the "life of the author plus 70 years" is constitutionally acceptable.[121] Therefore, while precisely just how "limited" copyright protection must be to pass constitutional muster is debatable, it is clear that perpetual protection violates any fair reading of the duration requirement.[122] Additionally, the *Martignon* court bolstered its argument by noting that the grant of perpetual protection in § 2319A frustrates the balance between authors' and the public's interests that the duration limitation is meant to achieve.[123] Instead of providing for eventual, and unfettered, access to the public, the anti-bootlegging statute creates a monopoly whereby protected works never reach the public domain.[124] Thus, *Martignon* held that § 2319A's grant of perpetual protection to unfixed works renders the statute unconstitutional under the Copyright Clause's duration and fixation limitations.[125]

C. Martignon *Denies a Resort to Commerce Clause Authority After Holding § 2319A Unconstitutional Under the Copyright Clause*

The fact that *Martignon* found § 2319A unconstitutional under the Copyright Clause was not entirely surprising, in part because *Moghadam* had assumed this much five years earlier.[126] However, *Martignon* signaled a new direction in copyright law by departing from the approach *Moghadam* employed to resolve the tension between the Copyright Clause and the Commerce Clause. When faced with the two somewhat

118. *Martignon*, 346 F. Supp. 2d at 423-24.

119. *Id.* at 416-17.

120. *Id.* at 424.

121. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003) (ruling on the constitutionality of the Copyright Term Extension Act).

122. *See id.*; *Martignon*, 346 F. Supp. 2d at 424.

123. *Martignon*, 346 F. Supp 2d at 424; *accord* Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 255-56 (1945) ("[T]he means adopted by Congress of promoting the progress of science and the arts is the limited grant of the patent monopoly in return for the full disclosure of the patented invention and its dedication to the public upon the expiration of the patent.").

124. *See* 18 U.S.C. § 2319A (2000).

125. *Martignon*, 346 F. Supp. 2d at 423 ("[I]t runs doubly afoul of Congress' authority to regulate under the Copyright Clause.").

126. *See supra* notes 63-65 and accompanying text.

divergent lines of Supreme Court precedent dealing with the interplay of congressional powers across multiple provisions of the Constitution,[127] the *Moghadam* court followed the line of cases exemplified by *Heart of Atlanta Motel*[128] to find § 2319A sustainable under the Commerce Clause.[129] In contrast, the *Martignon* court found *Gibbons*[130] more applicable in weighing the constitutionality of the anti-bootlegging statute.[131] In *Gibbons*, the Supreme Court explained that the uniformity requirement of the Bankruptcy Clause[132] is an affirmative limitation on congressional power that Congress cannot bypass or evade by resorting to the Commerce Clause.[133] The *Martignon* court reasoned that just as the Bankruptcy Clause imposes the affirmative restriction of uniformity, the Copyright Clause imposes the affirmative restrictions of fixation and duration.[134] In the same way that Congress could not bypass affirmative limitations in the Bankruptcy Clause by resorting to the Commerce Clause, the court held it was also impermissible to do so with respect to the Copyright Clause.[135] Specifically, the court held:

> In order to give meaning to the express limitations provided in the Copyright Clause, when enacting copyright-like legislation, such as the anti-bootlegging statute . . . Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when that separate grant provides proper authority.[136]

In this respect, the *Martignon* decision is in line with the reasoning of *Gibbons*: If Congress can circumvent express limitations found in the Constitution, entire provisions therein could be rendered meaningless.[137]

In justifying its reliance on the *Gibbons* case rather than *Heart of Atlanta*, *Martignon* contrasted the nature of the Copyright and Bank-

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127. *See supra* notes 78-88 and accompanying text.

128. 379 U.S. 241 (1964).

129. United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999). The Court analogized the Copyright Clause to § 5 of the Fourteenth Amendment, in that, just as Congress could use the Commerce Clause to legislate beyond the reach of § 5 by passing the Civil Rights Act of 1964, they could also go beyond the Copyright Clause to enact § 2319A under Commerce Clause powers. *See supra* note 93 and accompanying text.

130. 455 U.S. 457 (1982).

131. United States v. Martignon, 346 F. Supp. 2d 413, 426 (S.D.N.Y. 2004) ("The similarities between [*Gibbons*] and this case are obvious.").

132. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to establish uniform bankruptcy laws).

133. *Gibbons*, 455 U.S. 457, 468-69.

134. *Martignon*, 346 F. Supp. 2d at 426.

135. *Id.*

136. *Id.* at 424-25.

137. *Gibbons* , 455 U.S. at 468-69 ("[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.").

ruptcy Clauses with that of the Fourteenth Amendment at issue in *Heart of Atlanta*.[138] *Martignon* declared that while the Fourteenth Amendment grants Congress the power to prohibit discrimination,[139] it is devoid of any affirmative limitations.[140] Therefore, when legislating pursuant to this mandate, Congress is not directly constrained by any limitations within the Fourteenth Amendment and is empowered to enact legislation supported by other grants of power within the Constitution.[141] Because the Copyright Clause does contain affirmative limitations, Congress's freedom to enact copyright legislation is not analogous to its power to prohibit discrimination.[142] Thus, the *Martignon* decision distinguishes the *Gibbons* and *Heart of Atlanta* precedents, with the former applying to grants of power that include affirmative limitations, and the latter to grants without such limitations.[143] Accordingly, *Martignon* denied any attempt to sustain § 2319A under the Commerce Clause after finding that it failed to satisfy the affirmative Copyright Clause limitations.[144]

IV. *MARTIGNON'S* DOCTRINAL DEPARTURE FROM *MOGHADAM* WAS CONSTITUTIONALLY REQUIRED

When the Eleventh Circuit handed down *United States v. Moghadam* in 1999, its critics were wary that it might signal the extinction of copyright law,[145] and even its supporters were skeptical of the court's reasoning.[146] However, most commentators acknowledged that the decision rested on uncertain legal footing, and that courts might han-

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138. *Martignon*, 346 F. Supp. 2d at 426-28 n.19.

139. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

140. *Martignon*, 346 F. Supp. 2d at 428 n.19.

141. *Id.* ("The Fourteenth Amendment, unlike the Copyright Clause, is solely an affirmative grant of power – without any express limitations. Therefore, when enacting legislation to prohibit discrimination, Congress need not look solely to the Fourteenth Amendment, but may utilize other grants of power to achieve such an end.").

142. *See id.*

143. *See id.* at 426-28.

144. *See id.*

145. *E.g.*, Joseph C. Merschman, Note, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress's Copyright Power*, 34 CONN. L. REV. 661, 662-63 ("If Congress can avoid pesky limitations on its copyright power simply by waiving the banner of interstate commerce, the result would be complete decimation of our system of copyright."); David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1412 (1995) (asserting that copyright law may already be irrelevant because it has been transformed from a mechanism intended to promote progress in the science and arts into an instrumentality Congress can use for other goals).

146. *E.g.*, Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 287 (2004) (noting that the opinion avoids the key issue concerning the constitutionality of intellectual property legislation enacted pursuant to the Commerce Clause and criticizing the decision for being "just a little too pat").

dle the issues differently in the future.[147] This consensus regarding *Moghadam's* uncertain future was validated five years later by *Martignon.*

Martignon wisely confronted and decided the important copyright issues that *Moghadam's* analysis avoided five years earlier. Moreover, *Martignon* correctly departed from *Moghadam's* flawed reasoning in regard to the interplay of overlapping constitutional provisions, and instead employed an approach that is more faithful to a fair reading of the Constitution.[148] However, without direct Supreme Court case law to settle § 2319A's constitutional validity, it is useful to critically examine the differences in the two cases.

A. *Copyright Laws That Fail To Comply with the Duration Limitation Are Unconstitutional:* Martignon *and* Moghadam *Agree*

First, it is undeniable that, just as Jean Martignon successfully challenged the anti-bootlegging statute on both fixation and duration grounds, the *Moghadam* court also would have struck down § 2319A had it been faced with the same, dual challenge. While the "fundamental inconsistency" approach taken in *Moghadam* was able to sustain the statute against the fixation challenge,[149] the court expressed great doubt as to whether § 2319A could survive a duration challenge under this same standard.[150] Indeed, the court expressly limited its fundamental consistency-based holding to the fixation issue alone.[151] Instead of concluding the opinion after deciding the fixation challenge before it, the

147. *E.g.*, Merschman, *supra* note 145, at 693 ("Eventually the Supreme Court will have to decide the constitutionality of the anti-bootlegging statute. When it does, it undoubtedly will strike down the law as a violation of the Copyright Clause's fixation requirement, which cannot be abrogated by Congress's commerce authority."); Nachbar, *supra* note 146, at 296-97; Lee, *supra* note 102, at 362.

148. *See* Merschman, *supra* note 145, at 662-63 (asserting that, according to the basic tenets of constitutional construction, the fixation requirement of the Copyright Clause must limit Congress's other Article I powers as well); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000) (asserting that just as the Supreme Court has held that the Bankruptcy Clause, the Tenth and Eleventh Amendments, and Article III limit Congress's exercise of its general legislative power, the Copyright Clause should be read to impose similar limits); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 360-61 (1999) (declaring that copyright legislation should be invalidated where Congress ignores the limits on its enumerated intellectual property powers); Brief Amici Curiae of Intellectual Property Law Professors in Support of Petitioner, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (No. 02-428) (supporting the view, later adopted in *Martignon*, that Copyright Clause restrictions apply to all Article I, Section 8 congressional powers).

149. *See* United States v. Moghadam, 175 F.3d 1269, 1280-82 (11th Cir. 1999); *see also supra* notes 89-96 and accompanying text.

150. *See Moghadam*, 175 F.3d at 1281.

151. *Id.* at 1281 n.14.

Moghadam court went on to note that "[o]n its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit . . . ."[152] Finally, *Moghadam* cites *Goldstein v. California*[153] for the proposition that copyright of unlimited duration would run counter to the goals of the Copyright Clause,[154] further suggesting that § 2319A's perpetual protection would have rendered it "fundamentally inconsistent" with the purpose of the duration limitation. Thus, as the *Martignon* court ruled,[155] and the *Moghadam* court essentially conceded,[156] copyright legislation that grants perpetual protection is unconstitutional.[157] Thus, the Martignon court would have held that § 2319A is unconstitutional for contravening the duration requirement even if it had applied the *Moghadam* approach.

B. *Copyright Laws That Contravene Any One of the Copyright Clause's Affirmative Limitations Are Automatically Unconstitutional:* Martignon *Agrees;* Moghadam *Does Not*

Post-*Martignon*, the primary focus should be on whether the court's approach, rather than its final result, is sound. If faced with similar challenges, both the *Moghadam* and *Martignon* courts would have found § 2319A unconstitutional as violative of the duration limitation. However, the differences between the courts' approaches are most recognizable in how the fixation challenges common to both cases were handled. In *Moghadam*, the court held that although § 2319A protected unfixed works in contravention of the Copyright Clause, the statute was nonetheless constitutional under the Commerce Clause because it was not fundamentally inconsistent with the Copyright Clause.[158] In *Martignon*, the court's approach would have rendered the anti-bootlegging statute unconstitutional, even in the face of a fixation challenge alone.[159] This different treatment of the fixation requirement shows that, while both the *Martignon* and *Moghadam* approaches would correctly lead to the invalidation of a copyright statute providing perpetual protection, their differ-

152. *Id.* at 1281.

153. 412 U.S. 546, 560-61 (1973).

154. *Moghadam*, 175 F.3d at 1281.

155. United States v. Martignon, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004).

156. *Moghadam*, 175 F.3d at 1281.

157. This conclusion is not very controversial given the dearth of legal authority supporting a copyright regime that prevents works from ever reaching the public domain. Any argument that supports perpetual copyright protection would be even harder to sustain legally, given the recent Supreme Court case holding that the Copyright Term Extension Act did not violate the duration requirement of the Copyright Clause because it did not create perpetual copyrights. *See* Eldred v. Ashcroft, 537 U.S. 186, 209-10 (2003).

158. *Moghadam*, 175 F.3d at 1280.

159. *See Martignon*, 346 F. Supp. 2d at 424-25.

ent treatment of the fixation requirement leads to very different conclusions when other Copyright Clause limitations are contravened.[160]

C. *The* Martignon *Approach Is More Consistent with the Constitution*

Martignon not only reached the correct result, but also laid forth an approach that invariably leads to the proper result when examining legislative attempts at Copyright Clause circumvention. The approach taken in *Martignon* is in harmony with the text and structure of the Constitution and is true to its ideals of a federal government limited to the powers enumerated therein.[161] Moreover, the overwhelming majority of scholars agree with *Martignon's* central premise that Congress is bound by the Copyright Clause's limitations and therefore cannot avoid them by resorting to the Commerce Clause when enacting copyright laws.[162]

Included in the majority who support the *Martignon* approach are Professors Heald and Sherry, who analogize inter-clause conflicts to the Supreme Court's Tenth Amendment jurisprudence.[163] With respect to the Tenth Amendment, the Supreme Court has routinely held that the real check on the federal government's usurpation of state powers is not the text of the Tenth Amendment, "but rather a combination of the system of dual sovereignty established by the Constitution and the nature of the federal government as a government of enumerated powers."[164] Heald and Sherry argue that the Framers would not have carefully established a federal system if state power could be so easily intruded upon.[165] These same structural considerations lead to the conclusion that the Copyright Clause limits Congress's power under the Commerce Clause, since it is unlikely that the Framers would have included superfluous limitations in the Copyright Clause that could be so easily circumvented through reliance on the Commerce Clause.[166]

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160. By "other" Copyright Clause limitations, I am referring to the fixation and originality requirements.

161. *See supra* note 148 and accompanying text.

162. Nachbar, *supra* note 146, at 274 ("The prevailing wisdom is that the limits in the [Copyright] Clause, for instance that exclusive rights be granted only to 'Writings' and 'Discoveries' or that they be for 'limited Times,' must be read as applying to all of Congress's powers . . . ."). However, Professor Nachbar does not subscribe to this view, and his article aims to dispel this "prevailing wisdom." *Id.* at 276.

163. *See* Heald & Sherry, *supra* note 148, at 1123-24.

164. Nachbar, *supra* note 146, at 288.

165. *See* Heald & Sherry, *supra* note 148, at 1138.

166. *See* Patry, *supra* note 148, at 374 (arguing that restrictions in one clause of the Constitution must be taken into account when congressional power under a different clause is analyzed). *But see* Nachbar, *supra* note 146, at 291-92 (arguing that the limits in the Copyright Clause were not the result of great deliberation by the Framers and are insignificant compared to the Tenth Amendment's maintenance of state sovereignty).

Furthermore, *Martignon* is consistent with prevailing characterization of the Constitution as "an organic scheme of government to be dealt with as an entirety,"[167] and with the view of scholars who focus on the fact that the Copyright Clause imposes affirmative limitations on congressional power.[168] Significantly, *Martignon* aligned with *Gibbons* instead of *Heart of Atlanta Motel* based on the finding that the Copyright Clause contains affirmative limitations and is not simply a positive grant of power.[169] If the Constitution is to be read as a whole, as Laurence Tribe suggests, Congress must abide by such affirmative limitations found within the enumerated powers at all times, including when legislating pursuant to another grant of power.[170] When affirmative limitations are not heeded, and congressional circumvention is permitted, entire provisions can be rendered meaningless. The *Martignon* approach prevents such constitutional sidestepping.

D. *The Current Supreme Court Would Likely Agree with* Martignon

The United States has appealed the *Martignon* decision to the United States Second Circuit Court of Appeals.[171] If *Martignon* is affirmed, there will be a circuit split with the Eleventh Circuit's *Moghadam* ruling, and therefore, an increased likelihood that the Supreme Court will grant certiorari to evaluate § 2319A's constitutionality. Recent Supreme Court precedent suggests that the Court would resolve a *Moghadam-Martignon* split in favor of *Martignon*.

Feist Publications, Inc. v. Rural Telephone Service Co.[172] is one

167. Reid v. Covert, 354 U.S. 1, 44 (1957). Despite the fact that *Martignon* is consistent with prevailing constitutional norms, there is legal scholarship espousing more functionalist approaches to the Consitution, and suggesting that *Martignon* is incorrect. *See* Nachbar, *supra* note 146, at 276 (arguing that not all of the limits on Article I powers are of equal constitutional weight, and that one must consider the significance of the constitutional restriction before applying it indiscriminately); Lee, *supra* note 102, at 361-62 (praising *Moghadam* for reaching a decision in line with public policy); Andrew M. Hetherington, Comment, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH. L. REV. 457, 460 (2003) (favoring a case-by-case approach of "judicial weighing of the rival purposive goals [of the two clauses]" when a conflict exists).

168. *See* Heald & Sherry, *supra* note 148, at 1124; Merschman, *supra* note 145, at 692.

169. *See supra* notes 136-42 and accompanying text. As Merschman observed, "*Heart of Atlanta Motel* is a case where the Court found that 'Congress's power just runs out, rather than runs into barriers,' whereas *Moghadam* involved [such] barriers . . . ." Merschman, *supra* note 145, at 685 (quoting Heald and Sherry, *supra* note 148, at 1124). Obviously, this statement can be applied to *Martignon* as well, given that *Moghadam* dealt with the same statute and clauses of the Constitution.

170. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249 (1995) ("[E]ach of the Constitution's numerous grants of power must be interpreted in light of the others.").

171. Notice of Appeal, United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) (1:03CR01287).

172. 499 U.S. 340 (1991).

highly relevant Supreme Court decision that might impact the Court's decision on the constitutionality of § 2319A. In *Feist*, Rural Telephone Service Company initiated a copyright infringement action against Feist Publications for publishing a phone book using Rural's local white pages listings.[173] The Supreme Court held that Rural's listings were not subject to copyright protection because they did not satisfy the Copyright Clause's originality requirement.[174] Like the fixation requirement, the originality requirement is not expressly stated in the Copyright Clause, but has been implied from the terms "Authors" and "Writings."[175] Therefore, the Supreme Court's attribution of serious weight to the Copyright Clause's originality requirement indicates that the fixation requirement might be equally weighted in evaluating § 2319A.[176] *Feist* acknowledged that while the phone-book publisher did appropriate the results of an enormous amount of effort and information from the phone utility, such free-riding is not copyright infringement where the originality limitation prevents copyright protection from attaching in the first place.[177] By way of analogy, in the context of bootlegging, although recording live music at a concert may appropriate the fruits of performers' labor, it does not constitute copyright infringement where the music is never fixed and, thus, never protected. In sum, the Supreme Court's treatment of the Copyright Clause's originality limitation in *Feist* suggests that the Supreme Court will not allow circumvention of the Copyright Clause's originality, fixation, or duration requirements, thereby negating any need for Commerce Clause analysis.

Even if the Supreme Court were to reach a Commerce Clause analysis of § 2319A, its recent Commerce Clause jurisprudence suggests that it might still invalidate the anti-bootlegging statute.[178] For decades, the Supreme Court had shown great deference to Congress's commerce power.[179] However, in *United States v. Lopez* the Court struck down the Gun-Free School Zone Act, holding that the statute exceeded Congress's commerce authority by regulating economic activity that did not substantially affect interstate commerce.[180] This modern, more restrictive

173. *Id.* at 342-44.

174. *Id.* at 364.

175. *Id.* at 346.

176. *See id.* at 351 ("[O]riginality is a constitutionally mandated prerequisite for copyright protection."); *see also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (attributing serious weight to the Copyright Clause's "limited Times" requirement).

177. *Feist*, 499 U.S. at 364.

178. *See supra* notes 67-69 and accompanying text; United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

179. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

180. *Lopez*, 514 U.S. at 565.

approach by the Supreme Court suggests that it would, at the very least, closely examine whether bootlegging "substantially affects" interstate commerce.[181] Consequently, it is doubtful that the *Moghadam* approach of simply inferring a substantial relationship between bootlegging and interstate commerce would pass muster under the Supreme Court's more demanding Commerce Clause standard post-*Lopez*.[182] Therefore, even if the Supreme Court reaches the Commerce Clause analysis, its recent decisions suggest that the Court would not be as deferential as the *Moghadam* court.

E. Martignon *Signals a Trend*

In *KISS Catalog v. Passport International Products*[183] a California district court decided the first case since *Martignon* and addressed the federal criminalization of bootlegging. The *KISS* court faced the same dual constitutional challenge on fixation and duration grounds, but the statute at issue was 17 U.S.C. § 1101 — the civil equivalent of § 2319A.[184] The court held the anti-bootlegging statute unconstitutional, echoing *Martignon's* reliance on *Gibbons*, and forbidding congressional circumvention of affirmative constitutional limitations.[185] In further repudiating *Moghadam*, the California court expressed its inability to reconcile *Moghadam's* "fundamentally inconsistent" test with *Gibbons*.[186]

It is important to note that the California district court could have chosen to follow either *Martignon* or *Moghadam* to reach its conclusion that the anti-bootlegging statute was unconstitutional. *Martignon* would have invalidated § 1101 for violating the Copyright Clause's fixation and duration limitations, while *Moghadam* would have found the perpetual protection provided by the statute "fundamentally inconsistent" with the Constitution. However, this district court was persuaded by *Martignon's* reasoning, reaching its conclusion on essentially the same grounds.[187] California's holding suggests that *Martignon's* importance may be as a trailblazing case in this realm of copyright jurisprudence. Furthermore, if additional jurisdictions decide to follow *Martignon*, a

181. Given that the anti-bootlegging statute has no requirement that the bootlegs cross state borders, § 2319A can only be sustained if it substantially affects interstate commerce. *See supra* note 68 and accompanying text.

182. *See supra* notes 71-72 and accompanying text.

183. 350 F. Supp. 2d 823 (C.D. Cal. 2004).

184. *Id.* at 825.

185. *Id.* at 836-37.

186. *Id.* at 837 n.11.

187. *Id.* at 836-37.

circuit split with *Moghadam* could arise regardless of the outcome of *Martignon's* pending appeal in the Second Circuit.

F. *Final Thoughts*

If *Martignon* and *KISS Records* are correct, and higher courts agree that § 2319A is unconstitutional, the important issue then becomes what options Congress has if it wants to continue criminalizing bootlegging.[188] At the very least, *Martignon* requires that an anti-bootlegging statute, like all copyright laws, include a time-limit on the protection it provides authors.[189] Furthermore, a revised version of § 2319A would comply with the fixation requirement if it extended protection only to works that are performed and fixed simultaneously.[190] Individuals could then prevent the bootlegging of their live music by taking simple steps to record while performing.[191]

Any legislation prohibiting bootlegging might also pass the test of constitutionality by congressional indication in the language, history, and placement of the statute that it is commercial, rather than copyright, legislation. The *Martignon* court placed importance on first classifying the anti-bootlegging statute as a copyright-like law before subjecting it to the Copyright Clause limitations.[192] It might be possible for Congress to draft an anti-bootlegging statute that embodies an overarching commercial purpose, and is not copyright-like in nature. Such a statute would be subject only to the much broader limits of the Commerce Clause, and shielded from copyright analysis altogether.[193]

Clearly, *Martignon's* holding does not leave Congress impotent

188. There is disagreement over whether bootlegging, as distinct from counterfeiting and piracy, helps or harms the legitimate music industry, and therefore the necessity of another attempt at legislation is unclear. *See, e.g.*, Lee H. Rousso, *supra* note 75; Maynor, *supra* note 16.

189. United States v. Martignon, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004).

190. *See* 17 U.S.C. § 101 (2000); United States v. Moghadam, 175 F.3d 1269, 1280-81 (11th Cir. 1999).

191. Critics of *Martignon* could argue that, if the fixation requirement is so easy to circumvent, then clearly it should not be considered as mandatory as other Copyright Clause requirements. However, this view is not supported by any precedent, as courts have always required some form of fixation. The fact that the term "Writings" has been interpreted increasingly broadly does not warrant the leap that fixation is completely unnecessary. *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (holding that, while "[W]ritings" has come to include much more than its literal meaning, it has not been expanded beyond a "physical rendering of the fruits of creative intellectual or aesthetic labor").

192. *See Martignon*, 346 F. Supp. 2d at 419-22.

193. This possibility reveals the biggest flaw with the *Martignon* approach. While § 2319A unambiguously is a copyright statute, future statutes may be much harder to classify as either commercial or copyright legislation. For these borderline cases, the *Martignon* approach does not indicate how to proceed without first classifying the statute. However, the classification of a statute is no harder or more ambiguous than employing the "fundamental consistency" test provided in *Moghadam*.

against the bootlegging of live music.[194] Rather, *Martignon* merely reaffirms the traditional duration and fixation parameters of the Copyright Clause, leaving it to Congress to either make the necessary changes to § 2319A or draft a new anti-bootlegging statute. However, as *Martignon* decided and *Moghadam* implied, the anti-bootlegging statute in its current form is unconstitutional copyright legislation.

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194. Indeed, if the Constitution forbids Congress from criminalizing bootlegging, U.S. domestic law would be in serious conflict with the United States' international treaty obligations found in the TRIPS agreement. *See supra* note 46 and accompanying text. Therefore, changes should be made to § 2319A with an eye to harmonizing U.S. domestic law with international copyright law. *See* Angela T. Howe, United States v. Martignon *and* KISS Catalog v. Passport International Products*: The Anti-Bootlegging Statute and the Collision of International Intellectual Property Law and the United States Constitution*, 20 BERKELEY TECH. L.J. 829, 852-55 (2005).

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