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THE CRIMINALIZATION OF BOOTLEGGING: UNNECESSARY AND UNWISE

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Abstract: In 1994 the United States extended copyright-like protection to live musical performances by adopting 17 U.S.C. §1101, which authorizes civil remedies that are the same as those for copyright infringement, and 18 U.S.C. §2319A, which subjects violators to fines and prison terms. These new statutes, referred to jointly as the “anti-bootlegging statute,” led to raids of record stores and “sting” operations aimed at persons involved in the manufacture and distribution of live concert recordings. This Comment argues that the benefit to society of having these live recordings in circulation outweighs the minimal economic damage incurred by the music industry. Furthermore, the music industry has always had the ability to address this perceived problem through non-legal measures, that is by releasing live concert recordings and thereby eliminating the incentives for unauthorized recording and distribution. Therefore, the statute should be repealed. In its place a legal regime should be created that recognizes the presumption that fans and royalty-paying independent record companies have a right to record and distribute recordings of live concert performances.

I.

INTRODUCTION

This Comment examines the legal war that the music industry has waged against “bootlegs,” or unauthorized concert recordings, and recommends a solution that properly balances the interests of both

† The author wishes to thank Professor Rochelle Cooper Dreyfuss for patience and generosity above and beyond the call of duty.

the public and the music industry. This is not the first Comment to visit the issue of bootleg recordings.¹ However, it differs from the others in many respects. First, virtually all the commentators on the subject work from the premise that wiping out the bootleg market is, in and of itself, a worthy goal of public policy. This Comment challenges that premise. Second, the other commentators generally accept at face value industry claims that purchases of bootleg recordings are substitutes for the purchase of legal recordings and, therefore, lead to huge financial losses to the industry. Conversely, this Comment argues that bootleg purchases are rarely substitutes for the purchase of authorized studio albums and, therefore, the losses range from slight to nonexistent. Finally, while a few of the commentators suggest that market-oriented responses can be a useful response to bootlegging, none of them takes this argument to its logical conclusion: that with market oriented solutions available as a complete answer to unauthorized recordings, there is no justification for leaving legal solutions, particularly those that involve the criminal justice system, on the books.

Section II defines “bootlegging” and narrows the scope of this Comment by drawing a distinction between the recording and distribution of live concert performances and other, more odious, forms of music piracy. Section III examines the state of the bootleg industry, both as it existed prior to the crackdown of the mid-1990s and as it exists today. Section IV examines the evolution of the law regarding the making and distribution of bootlegs. An analysis of the decision in

¹ E.g., 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); David Schwartz, *Strange Fixation: Bootleg Sound Recordings Enjoy The Benefits Of Improving Technology*, 47 *Fed. Comm. L.J.* 611 (1995); Brian Drobnick, *Truckin' In Style Along The Avenue: How The Grateful Dead Turned Alternative Business And Legal Strategies Into A Great American Success Story*, 2 *Vand. J. Ent. L. & Prac.* 242 (2000); Robert M. Blunt, *Bootlegs And Imports: Seeking Effective International Enforcement Of Copyright Protection For Unauthorized Musical Recordings*, 22 *Hous. J. Int'l L.* 169 (1999); Carte P. Goodwin, *Live In Concert. . . And Beyond: A New Standard Of Contributory Copyright Infringement*, 13 *Emory Int'l L. Rev.* 345 (1999); Todd D. Patterson, *The Uruguay Round's Anti-bootlegging Provision: A Victory For Musical Artists And Record Companies*, 15 *Wisc. Int'l L.J.* 371 (1997); 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 (2000); Clifford A. Congo, *Drawing A Distinction Between Bootlegs And Counterfeit Recordings And Implementing A Market Solution Towards Combating Music Piracy In Europe*, 17 *Dick. J. Int'l. L.* 383 (1999); Jerry D. Brown, *U.S. Copyright Law After GATT: Why Chapter Eleven Means Bankruptcy For Bootleggers*, 16 *Loy. L.A. Ent. L.J.* 1 (1995).

United States v. Moghadam,² which upheld the constitutionality of the anti-bootlegging statute, is included. The language of the Eleventh Circuit's decision reveals not only the shaky constitutional underpinnings of the statute itself, but also the degree to which Congress was derelict in its duty to understand both its own constitutional grant of authority and the public interest harmed by the legislation before it. Also included in this section are case studies of two bootleg record labels. Section V examines the use of the new statute's criminal provisions to suppress the activities of bootleggers, with special attention paid to raids conducted on New York City record stores and "Operation Goldmine," a successful "sting" operation coordinated by the U.S. Customs Department and the Recording Industry Association of America ("RIAA"). Section VI examines market-oriented alternatives to using the legal system against bootleggers, focusing on the strategy employed by the Seattle based rock band Pearl Jam. Finally, in section VII this Comment concludes by urging that the legal presumptions regarding the recording and distribution of live concert recordings should be reversed to ensure that these important documents of music history are readily available to interested parties.

II. DEFINITIONS

There are three types of product that fall under the general umbrella of "music piracy": counterfeit compact discs ("CD's"), *pirate* CD's, and *bootleg* CD's.³ The definitions of the three categories of piracy must be clearly articulated because each raises distinct legal issues.⁴ Failure to adhere to these distinctions is a major weakness of the literature on the topic: many of the commentators carelessly jump back and forth among the categories, sometimes within a single sentence.⁵

² *United States v. Ali Moghadam*, 175 F.3d 1269 (11th Cir. 1999), *reh'g and reh'g en banc denied*, 193 F.3d 525 (11th Cir. 1999), *cert denied* 529 U.S. 1036, 120 S.Ct. 1529, 146 L. Ed 2d 344 (2000).

³ *Dowling v. United States*, 432 U.S. 207 (1985). See also, Kurt Glemser, *A History of Bootlegs*, excerpt printed in *Hot Wacks Book Supplement* 5 4 (1997); Brown, *supra* note 1, at 4. See also, industry sources, e.g., British Phonographic Industry ("BPI") at http://www.bpi.co.uk/flash_index.html (piracy definitions). Federal statutes refer to all embodiments of music as "phonorecords" regardless of the medium used. 17 U.S.C.A § 101. However, because CDs command a dominant share of the current marketplace for "fixed" musical recordings, the term "CD" will be used throughout this Comment.

⁴ Brown, *supra* note 1, at 4. While Brown correctly notes that each type of illegal recording gives rise to different legal issues, he incorrectly describes the release of unreleased studio material ("outtakes") as "piracy" instead of "bootlegging."

⁵ See, e.g., Lee, *supra* note 1, at 327, (asserting that the number of "bootlegged" recordings has grown while citing statistics that include counterfeit and pirated discs). Some

A *counterfeit* CD mimics an official release and may deceive the consumer into thinking that she is purchasing a genuine article.⁶ To the greatest extent possible, the counterfeiter will create packaging that is identical, including trademarks and logos, to the legitimate release.⁷

A *pirate* CD appropriates copyrighted music in the same fashion as a counterfeit CD.⁸ However, no effort is made to mimic the packaging of a legitimate release.⁹ Additionally, rather than directly copy a single release, the pirate may mix music from different sources to create a "chart toppers" (various artists) or "greatest hits" (single artist) CD.¹⁰

A *bootleg* CD, properly defined, is one that contains unreleased musical recordings.¹¹ The category of bootlegs can be further divided into studio bootlegs, broadcast bootlegs, and live concert bootlegs.¹² Studio bootlegs usually contain tracks recorded in studio that were either works in progress or simply never included in an official release. These are often referred to as "outtakes." Most Beatles bootlegs are of this variety.¹³ Bob Dylan's famous "Basement Tapes"¹⁴ and Elvis Costello's "Kojak Variety"¹⁵ project also first entered the market as studio bootlegs. Broadcast bootlegs are taken from radio and television broadcasts of live performances. Bruce Springsteen, for example, broadcast many of his early concerts live over FM radio.¹⁶ Not surprisingly, they were widely bootlegged.¹⁷ In fact, almost any live broadcast by a major act will quickly find its way into the bootleg market.¹⁸ Finally, there are concert bootlegs. These are recorded through the concert hall's mixing board, a so called "soundboard" re-

critics believe that the music industry intentionally blurs the distinction between the categories. Clinton Heylin, *Bootleg: The Secret History of the Other Record Industry*, 6 (1996).

⁶ Glemser, *supra* note 3; Brown, *supra* note 1, at 4.

⁷ Glemser, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* See also Dowling, *supra* note 3, at 209.

¹² *Id.*

¹³ The Beatles are believed to be one of the 5 most bootlegged bands of all time. Heylin, *supra* note 5, at 10.

¹⁴ The "Basement Tapes" were the source of Great White Wonder, the first commercially successful rock bootleg. *Id.* at 43-51.

¹⁵ Brown, *supra* note 1, at 25. Brown uses Costello's experience to illustrate the ruthlessness of bootleggers. Ironically, Costello was recording an album composed entirely of obscure songs written by other people. See ELVIS COSTELLO, KOJAK VARIETY (Warner Bros. Records 1995). While copyrights were violated, they were not Costello's.

¹⁶ Heylin, *supra* note 5, at 135.

¹⁷ *Id.*

¹⁸ *Id.* at 258.

ording, or, more commonly, by a concertgoer who surreptitiously records the show with a compact recording device such as a digital audio tape ("DAT") recorder.¹⁹ Among the shows that established the viability of the market for live rock concert bootlegs was Bob Dylan's legendary 1966 concert at the Royal Albert Hall.²⁰ Because studio and broadcast bootlegs raise more difficult legal issues,²¹ the scope of this paper will be limited to the creation and distribution of live concert bootlegs. Therefore, all references to bootlegs or bootlegging in the remainder of this paper should be read with this limitation in mind, unless otherwise specified.

III.

THE STATE OF THE BOOTLEG INDUSTRY

As with more traditional industries, the bootleg industry has been shaped by a number of factors. They include market demand, technology, and legal environment.

A. *The Demand for Bootlegs*

The market demand for bootlegs is a reflection of the fact that live recordings are generally much more interesting than studio recordings. With a studio recording, it can be hard to tell where the skill of the musician ends and the skill of the producer takes over. Typically, the various audio tracks are added layer by layer to achieve the final product, that is, the songs are not recorded "live."²² The end result, while perfectly satisfactory for the mass market, often sounds dull and lifeless to the more demanding ears of serious music fans.²³ Conversely, a bootleg recording eliminates the studio engineering and captures an honest, unvarnished document of the artist's talent.²⁴

¹⁹ See Heylin, *supra* note 5, at 252-63 (discussing in detail the sources and technologies used in obtaining concert tapes).

²⁰ *Id.* at 73-76.

²¹ In particular, they meet the "fixation" requirement of established copyright law, 17 U.S.C. §102. Broadcasts of live concerts are simultaneously "fixed," so it is the copyrighted broadcast which is bootlegged, not the concert itself, 17 U.S.C. § 101. Studio bootlegs, unlike concert bootlegs, intrude at a point between the creative process and the reaping of profit. See *infra* Section IV-A-1 and text therein. See also Heylin, *supra* note 5, at 398.

²² Heylin, *supra* note 5, at 394.

²³ *Id.* at 399. "[I]t is only as a live act that a rock band is in its element."

²⁴ See, e.g., Graham Nash, quoted in Heylin, *supra* note 5, at 399-400 (noting that bootleggers had captured a particular show that was memorable in spite of the fact that David Crosby was battling the flu at the time).

Furthermore, bootlegs preserve important moments of musical history that would otherwise be lost forever.²⁵

For bootleg collectors, it is the live performance that is the true measure of musicianship.²⁶ Therefore, the likelihood that a given act will be bootlegged is directly proportional to the act's reputation for excellence on stage.²⁷ The superiority of live music is also reflected in the music industry's price structure. Taking, for example, a fifteen-dollar studio CD with fifteen songs, the consumer pays a dollar per song and may well bring the cost per listen per song down to one cent over time. By contrast, someone who has paid one hundred dollars for a concert ticket is expected to hear the songs, say twenty-five of them, exactly once at a cost of four dollars per listen per song. In this example the price per listen per song of the live music is 400 times that of the studio music. The economic appeal of bootlegs is that they allow listeners who prefer live music to greatly reduce their cost per listen. This may lead to the question, raised by one commentator, of whether bootleg purchases are a substitute for the purchase of concert tickets.²⁸ This seems highly unlikely given the positive correlation between ticket sales and bootlegging. Instead the relationship seems to be that bootlegs enhance the reputation of certain acts and reinforce ticket sales.²⁹ The superior artistic value of live recordings also raises the question of why bootleg collectors would continue to buy the studio releases instead of using bootlegs as substitute purchases. Bootleg collectors continue to buy the studio recordings for two reasons. First, a new studio release usually precedes a tour and the fans will buy the release so that they can learn the songs before hearing them live. More importantly, the studio version of a song is the "official version" and serves as the standard against which all other versions will be measured.

²⁵ Lenny Kaye, in Heylin *supra* note 5, at 400. "Historical documentation is a very important thing and I personally know that if it weren't for the Patti Smith Group bootlegs there would be no live album."

²⁶ Heylin, *supra* note 5, at 399.

²⁷ Of course, the correlation between bootlegging and live excellence is true with regards to concert bootlegs. Heylin, *supra* note 5, at 77 (noting the reputation that Led Zeppelin was "best heard live"). See also, Hot Wacks Supplement #6 (2001) at 27, "every Led Zeppelin concert was different. Good, bad, long, or short, each was a unique musical event." This observation applies to all the heavily bootlegged acts except the Beatles, who could "never cut it live." Heylin, *supra* note 5 at 399. Consequently, most Beatles bootlegs are of the studio variety.

²⁸ Brown, *supra* note 1, at 29.

²⁹ Drobnik, *supra* note 1, at 256 (noting that circulation of live Grateful Dead recordings stimulated ticket demand). See also Heylin, *supra* note 5, at 108-9 (observing how the bootleg *You Can Trust Your Car to the Man With the Star* was instrumental in spreading the legend of Bruce Springsteen).

The value of bootlegs in establishing a historical record is evident on many levels. For example, bootlegs allow fans to document the evolution of a particular act. Using Elvis Costello as an example, his 1977 debut album *My Aim Is True*³⁰ was recorded with the backing of a band named Clover.³¹ However, shortly after making the album, Costello formed the band that would back him until 1986 and again from 1994 to 1996: The Attractions.³² The songs from *My Aim Is True* sound much different, and arguably much better, with The Attractions, rather than Clover, playing them. Also, because Costello actually toured with The Attractions, but not with Clover, early bootlegs like *Radioactivity*³³ and *Angry Young Sod*³⁴ are far better documents of the early stage of his career than is *My Aim Is True*. By the same token, there are songs that Costello recorded with The Attractions that he later performed live with the backing of The Confederates and/or The Rude 5.³⁵ These performances are only available on bootlegs. Along the same lines, Costello is also an accomplished soloist. However, the only way to access his solo career is through bootlegs such as *I Did Talk To Bob Dylan*.³⁶ Another variation on Costello's live career has been his extensive touring in partnership with pianist Steve Nieve. In 1996 Warner Brothers released a box set with live recordings of twenty Costello/Nieve tracks.³⁷ Bootleggers, on the other hand, have put at least eighty Costello/Nieve tracks into circulation.³⁸

Bootlegs also serve to document the evolution of individual songs. Take, for example, Costello's *Green Shirt* from the 1979 release *Armed Forces*.³⁹ The official version is dark, moody, somewhat

³⁰ ELVIS COSTELLO, *MY AIM IS TRUE* (Stiff Records 1977).

³¹ According to the liner notes in a 1993 release of a remastered special edition of *My Aim Is True* "the musicians were members of the Marin County band Clover, who could not be credited at the time due to contractual reasons." ELVIS COSTELLO, *MY AIM IS TRUE* (Rykodisc 1993).

³² *It Was 20 years Ago Today*. . . , BEYOND BELIEF: THE ELVIS COSTELLO NEWSLETTER, issue #12 (Sept. 1997), at 10.

³³ ELVIS COSTELLO, *RADIOACTIVITY* (Gold Standard).

³⁴ ELVIS COSTELLO, *ANGRY YOUNG SOD* (Turtle Records 1992).

³⁵ See, e.g., ELVIS COSTELLO & THE CONFEDERATES, *DO THE RUMBA* (DGCD).

³⁶ ELVIS COSTELLO, *I DID TALK TO BOB DYLAN* (Moontunes 1996).

³⁷ COSTELLO & NIEVE, *LIVE IN AMERICA* (Warner Bros. 1996).

³⁸ For a listing of all songs played live by Elvis Costello and Steve Nieve, see BEYOND BELIEF: THE ELVIS COSTELLO NEWSLETTER, issues #7 (Aug. 1996), #BB22 (Summer 1999), #23 (Winter 1999-2000), and #24/25 (Spring 2000) <http://www.btinternet.com/%7Eperrymp/bb/bbhome.htm>. For a representative list of Elvis Costello bootlegs, including Costello/Nieve bootlegs, see the Elvis Costello Discography at <http://www.elviscostello.info/discography.html>.

³⁹ ELVIS COSTELLO, *Green Shirt*, *ARMED FORCES* (Stiff Records 1979).

restrained, and, at 2:42, somewhat short. For the traditional CD buyer the official version of *Green Shirt* is definitive. What a pity. The live version of the song captured on early bootlegs such as *I Stand Accused*⁴⁰ is far more dynamic than the studio version. Furthermore, Costello reworked the song on his 1996 tour to make it a long (5:00), slow and utterly desperate plea for mercy.⁴¹ Which version of *Green Shirt* is best is a debatable proposition. Unfortunately, one has to commit a felony to participate in the debate.

Clearly, a substantial portion of Elvis Costello's most interesting material is available only on bootleg.⁴² Furthermore, between the "official" and "underground" audio histories of his career, it is the latter that tells a more honest and complete story. Costello is not unique in this regard. Pink Floyd worked the individual pieces of *Dark Side of the Moon* for years before synthesizing them into an integrated musical suite.⁴³ Therefore, the first complete public performance of *Dark Side of the Moon* would qualify as important rock history.⁴⁴ The same could be said for any number of events that have been captured on bootlegs: the last Beatles concert,⁴⁵ The Who debuting *Tommy*⁴⁶ or *Quadrophenia*,⁴⁷ Costello's last appearance with The Attractions,⁴⁸ the list is endless. Bootlegs also capture the smaller, but historically significant "one time only" events that occur when an artist has a special guest or dusts off a rarely heard "oldie."

The role that bootlegs play as vessels of history should not be underestimated. As Allan Kozinn, a music critic for the New York Times, observed: "from a broader cultural perspective, bootleggers are doing something crucially important."⁴⁹ After discussing the role that bootleggers have played in historical preservation, he concluded that bootleggers should be "regarded as cultural heroes, not criminals."⁵⁰ Sadly, this perspective was not before Congress when it considered

⁴⁰ ELVIS COSTELLO, *Green Shirt*, I STAND ACCUSED (Great Dane Records 1990).

⁴¹ For descriptions of *Green Shirt* provided by various observers of the 1996 tour, see BEYOND BELIEF: THE ELVIS COSTELLO NEWSLETTER, issue #8/9 (Dec. 1996).

⁴² See the Elvis Costello Discography, *supra* note 38.

⁴³ For a description of the evolution of *Dark Side of the Moon*, see HOT WACKS BOOK: SUPPLEMENT 5, 11-5 (Hot Wacks Press 1997).

⁴⁴ Rainbow Theater. (Feb. 1972).

⁴⁵ Candlestick Park, San Francisco (Aug. 29, 1966).

⁴⁶ Complete *Tommy* appears on bootlegs from Sept. 29, 1969. See <http://www.thewho.net/bootlegs/>

⁴⁷ Oct. 28, 1973. See <http://www.quadrophenia.net>.

⁴⁸ ELVIS COSTELLO, NOMOREATTRACTIONS (Oliverecords 1996).

⁴⁹ Allan Kozinn, *Bootlegging as a Public service: No, This Isn't a Joke*, N.Y. Times, Oct. 8, 1997, at E2.

⁵⁰ *Id.*

the anti-bootlegging statute. Nor is it evident in the scholarly critiques of the statute.

B. *The Technology of Bootlegs*

Technology shapes the bootleg market in three ways: : acquisition, reproduction, and distribution of the product. It is worth noting that bootleggers face the same technological challenges, e.g., Napster, and compact disc-recordable (“CD-R”), as do the record companies.

1. *Acquisition Technology*

The acquisition of concert recordings has usually been accomplished through the use of a *secreted* tape recorder, though sophisticated bootleggers have on occasion used a radio transmitter to send a signal to a remote recording location.⁵¹ Bootleggers may also gain access to tapes made from a concert hall’s mixing board, a so-called “soundboard” tape.⁵² The greatest advance in acquisition technology has been the introduction of DAT.⁵³ DAT recorders are compact, easily concealed, and produce extremely high quality digital recordings subject, of course, to the acoustics of the concert hall and the skill of the bootlegger. Because DAT tapes and equipment are quite expensive, it appears that bootlegging is the only practical consumer use of the technology.⁵⁴

2. *Reproduction Technology*

The reproduction technology available to bootleggers has changed dramatically with the introduction of CD-R technology.⁵⁵ CD-R machines, commonly referred to as “burners,” may be stand-alone devices or, more commonly, are integrated into personal computers as an additional drive.⁵⁶ CD-R burners make perfect digital copies from CD’s or CD-R’s. With CD-R available, bootleggers no longer have to invest in expensive CD creation equipment. This technology has also enabled the establishment of smaller bootleg labels that fill the void in the market left by the elimination of the major

⁵¹ For a complete discussion of acquisition technology, see Heylin, *supra* note 5, at ch. 13.

⁵² *Id.* See also Schwartz, *supra* note 1, at 614.

⁵³ Heylin, *supra* note 5, at 242. “With DAT, Sony and its partners in design had created the perfect bootlegging tool.” *Id.*

⁵⁴ *Id.* at 246.

⁵⁵ Blunt, *supra* note 1, at 172 (noting that the combination of DAT and recordable CD has had revolutionary impact).

⁵⁶ Hewlett-Packard computers retailing for less than \$1000 as of May 1, 2001, have a built in CD burner. Personal visit by author to COMPUSA store.

labels in the late 1990s.⁵⁷ As the price of this technology has dropped, it has also allowed individuals to copy bootleg CD's for re-marketing or trading.⁵⁸ This last aspect of CD-R technology is worth noting. Because it puts the power to reproduce within the hands of individual collectors, CD-R's would have posed a real threat to the major bootleg labels, such as Swinging Pig, Yellow Dog, Kiss The Stone, Great Dane, etc., even if they had not been snuffed out by the harsh legal regime of the late 1990s. This is because a CD-R copy of a bootleg acquired in trade is a perfectly good substitute for the purchase of that same bootleg.

3. *Distribution Technology*

In spite of the anti-bootlegging statute, most American cities of any size have at least one independent record store with bootlegs mixed in among the wares. However, the Internet is the primary distribution channel for bootlegs. The closing of the noose around major Internet bootleg merchants like Kiss The Stone ("KTS") records has made it more difficult for collectors to find retailers. Nonetheless, they are out there. The Internet is also the ideal medium for trading bootlegs. Newsgroups such as alt.music.bootlegs allow bootleg traders to make contact with like-minded individuals. Likewise, many traders publish their own websites with lists of available items, desired items, and trading rules. While, obviously, no hard data is available, it is likely that more bootlegs currently change hands through trade than through sales. The receipt of a bootleg in trade apparently qualifies as "private financial gain"⁵⁹ under 18 U.S.C. § 2319A. If so, bootleg traders are also subject to prison terms and hefty fines.

In addition to facilitating the selling and trading of bootleg CD's, the Internet allows collectors to obtain bootleg recordings in digital form. For example, many bootleg tracks have been made available through the Napster⁶⁰ service. Because a person who makes files available to the public over the Internet does not necessarily receive consideration in return, the use of Napster for the distribution of bootlegs would probably only trigger the civil portion of the statute. Also, as with CD-R's, file-swapping technology might have posed a

⁵⁷ See discussion of Rocking Horse Records, *infra* at Sec. IV-C-2.

⁵⁸ At the newsgroup alt.music.bootlegs, CD-R trading has replaced tape trading as the method of exchange. For a discussion of the conflict between the RIAA and manufacturers of CD-R drives, see *Bootlegger Turning to Burning: RIAA Says CD-R Piracy is on the Rise*, EMEDIA Professional, June 1998 v11 n6 p11(3).

⁵⁹ 17 U.S.C.A. § 101 defines "financial gain" as "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted goods."

⁶⁰ <http://www.napster.com>.

major threat to the major bootleg labels had they survived beyond 1997.

C. *The Legal Climate for Bootlegging*

The changing legal climate has altered the bootleg marketplace in many ways. The largest, most visible, labels are now history.⁶¹ However, smaller “niche” labels continue to thrive.⁶² The number of bootlegs exchanged for cash is probably down; the number exchanged for other bootlegs is probably up. This change may have been inevitable due to the spread of CD-R. As the quantity of bootlegs in the cash market has shrunk, prices have been driven up. In many small shops they now fetch a retail price of thirty to forty dollars. This, ironically but predictably, has made bootlegging more profitable for the remaining few who continue to engage in it on a commercial basis.

IV.

THE STATE OF THE LAW

It seems intuitively “obvious” that bootlegs are illegal. Yet, surprisingly, the legal status of bootlegs has been a contentious and, until recently, unsettled issue. This section examines the legal weapons available in the fight against bootlegging both before and after the international adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”)⁶³ and the implementation of the United States’ anti-bootlegging statute.⁶⁴ Prior to the establishment of this new legal regime, the record companies had to rely on a porous web of state statutes and common law remedies to control bootlegging in the United States, and a patchwork quilt of treaties and national copyright laws to control it on an international level.

A. *The Legal Status of Bootlegging Prior to December 8, 1994*

Prior to the enactment of the anti-bootlegging statute, federal copyright law did not extend to the protection of live concerts.⁶⁵ The Sound Recording Act of 1971⁶⁶ had extended copyright protection to

⁶¹ See *infra* Sec IV-B, and text therein.

⁶² See discussion of Rocking Horse Records, *infra* at Sec. IV-C-2.

⁶³ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, VOL. 31; 33 I.L.M. 81(1994) [hereinafter TRIPs Agreement].

⁶⁴ 17 U.S.C. § 1101 (1994) and 18 U.S.C. § 2319A (1994) adopted as part of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4973 (Dec. 8, 1994).

⁶⁵ United States v. Ali Moghadam, 175 F.3d 1269, 1281 (11th Cir. 1999), *reh'g and reh'g en banc denied*, 193 F.3d 525 (11th Cir. 1999), *cert denied* 529 U.S. 1036 (2000).

⁶⁶ Sound Recording Act of 1971, Pub.L. No. 92-140, 85 Stat. 391 (1971)

works fixed under the authority of the author, but not to works that were unfixed or fixed without authorization. Therefore, legal action against bootleggers within the United States had to be based upon some principle of common law or violation of state statute.⁶⁷ Americans could also pursue their interests overseas under the copyright laws of various countries.

1. Common Law Measures Against Bootlegging

The common law has historically provided scant protection for musicians who wish to stop bootleggers. Where musicians have sought protection, it is the doctrine of unfair competition that has most frequently been invoked.⁶⁸ There is also some support for the view that the unauthorized taping of performances would be a violation of common law copyright.⁶⁹ However, neither doctrine is especially well suited to stemming the flow of bootlegs.

The courts have examined many cases implicating issues of both copyright and unfair competition. One common thread running through leading cases such as *International News Service v. Associated Press*,⁷⁰ *Metropolitan Opera Ass'n, Inc. et al. v. Wagner-Nichols Recorder Corp. et al.*,⁷¹ and *King v. Mister Maestro, Inc.*,⁷² is that in each case the defendant was copying material taken from the plaintiff and using that material to undersell the originator, that is, interfering "with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped."⁷³ In the context of bootlegging, where does that point lie? Certainly the unauthorized fixation of a concert does not in and of itself impair the profitability of that particular concert. If the fixation itself is not an act of unfair competition, at what point does the distribution of the unauthorized product interfere with profits? At the sale of the first copy? The hundredth? What if there are no sales at all, only trades? The *Metropolitan Opera* court's declaration that "the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the

⁶⁷ David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1388 (1995). "Protection for the performance in the United States typically has been conceptualized as arising under state law, rather than under federal law." *Id.*

⁶⁸ Schwartz, *supra* note 1, at 626.

⁶⁹ MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY 152 n.5 (2d ed. 1984-1992), Ch.5.1. "Common law protection may still be available for works falling outside the scope of the 1976 Act such as works that are not fixed in tangible form." *Id.*

⁷⁰ *International News Service v. Associated Press*, 248 U.S. 215 (1918).

⁷¹ *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (Sup.Ct. 1950), *aff'd* 107 N.Y.S.2d 795 (1951).

⁷² *King v. Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963).

⁷³ *International News* 248 U.S. at 240; *Metropolitan Opera* 101 N.Y.S.2d at 491.

broader principle that property rights of commercial value are to be and will be protected. . .”⁷⁴ does not negate the necessity of showing actual injury, it only allows that the injury shown may be indirect. The party directly injured in *Metropolitan Opera* was intervening co-plaintiff Columbia Records.⁷⁵ In its conclusion the court noted that the “consideration of irreparable harm to the plaintiffs must necessarily outweigh the financial loss to defendants resulting from not being able to appropriate these performances for their own commercial benefit. . . .”⁷⁶ Whether a musician whose work has been bootlegged could show “irreparable harm” is a doubtful proposition.

The application of *Metropolitan Opera* to the bootlegging context is problematic for one other reason. On the facts of the case, the plaintiff, the defendant, or both could have made the opera recordings available to the public.⁷⁷ Therefore, weighing only the interests of the litigating parties was proper. However, in the bootlegging context, the recordings will reach the public either through the bootlegger or not at all. Consequently, there would be three interested parties to a bootlegging case: the musician, the bootlegger, and the public. Applying to the bootlegging context the observation of the *International News* court that “unfair competition in business must be determined with particular reference to the character and circumstances of the business”⁷⁸ should militate in favor of allowing bootlegging. An untaped concert is lost forever, possibly at considerable expense to the common storehouse of musical history. Yet, no countervailing gain has been received by any party.

Common law copyright, often referred to as the “right of first publication,”⁷⁹ was also an ineffective tool against bootleggers. However, it is not clear that the doctrine of common law copyright could ever be used to reach bootlegging. As Michael B. Landau observed: “The issue gets a bit trickier with respect to sound recordings. Clearly, the performance of a song is not a publication. But is the recording of a “copy” and its widespread distribution a publication? Or is a recording more like a performance, albeit captured in time and

⁷⁴ *Metropolitan Opera*, 101 N.Y.S. 2d at 492.

⁷⁵ *Id.* at 498.

⁷⁶ *Id.* at 505. The *King* court also suggested that “irreparable harm” to plaintiff is the usual test for judicial intervention (though not applicable on the facts of the case). *King*, 224 F.Supp. at 108.

⁷⁷ *Metropolitan Opera*, 101 N.Y.S. 2d at 486.

⁷⁸ *International News*, 248 U.S. at 236. Specifically, the value of news was dependent on its “novelty and freshness” *Id.* at 238.

⁷⁹ *Estate of Ernest Hemingway v. Random House, Inc.*, 23 N.Y.2d. 341, 346 (1968).

in tangible form?"⁸⁰ Two other factors complicate the relationship between common law copyright and bootlegging. First, while common law copyright provides "the author with perpetual protection until first publication,"⁸¹ the music industry itself has long relied on the proposition that the distribution of records does not qualify as a "publication."⁸² The standard practice was to put records into the marketplace and then obtain copyrights on those that sold well.⁸³ If sales made by the record companies were not "publications," it would be difficult to assert that sales by bootleggers are "publications." Therefore, the bootlegger does not infringe on the right of first publication. Second, discussions of common law copyright focus on the question of whether performance of a song or play serves to "publish" the underlying song or script.⁸⁴ They do not address whether the performance itself should be protected. How, for example, would the actual performance of a concert be "published"?

Beyond protecting publication rights, common law copyright may be invoked to protect the reputational interests of an author.⁸⁵ However, the *Metropolitan Opera* court extracted its iteration of the "right of exclusive use" from the context of trade mark and trade name abuse, that is, cases where the consumer is likely to be deceived.⁸⁶ However, there is no deception in the marketing of bootlegs: the consumer who believes that she is obtaining a Bob Dylan bootleg almost always receives one. Additionally, there is no harm to the artist's reputation *per se*. Indeed, to the extent that bootlegging has any impact on the reputation of an artist, the impact is more likely to be positive than negative.⁸⁷ In other words, being bootlegged *enhances* the reputation of a musical act. More importantly, because only the most committed fans purchase bootlegs,⁸⁸ the target audience has already resolved any question of reputation in the artists' favor. Because the circulation of bootlegs causes no fraud on consumers, damage to reputation, or competitive injury, there is no underlying policy objective to be served by punishing bootleggers under this particular doctrine.

⁸⁰ Michael B. Landau, "Publication," *Musical Compositions, And The Copyright Act of 1909: Still Crazy after All These Years*, 2 VAND. J. ENT. L & PRAC. 29, 33-4 (2000).

⁸¹ *Id.* at 31.

⁸² *Id.* at 41.

⁸³ *Id.*

⁸⁴ *Id.* at 33 (observing that the principle that performance does not "publish" the underlying work is a well established point of law). See also, King at 107.

⁸⁵ *Metropolitan Opera*, 101 N.Y.S. 2d at 494. "The right of exclusive use of one's own name and reputation has long been recognized by the courts."

⁸⁶ *Id.*

⁸⁷ Heylin, *supra* note 5, at 64. "And there was still considerable prestige in being bootlegged." *Id.*

⁸⁸ *Id.* at 408.

On the whole, common law doctrines appear to be inherently weak tools to apply against bootleggers. This weakness is compounded by the fact that common law copyright actions must be brought by the “author” and separate actions, governed by separate rules, need to be brought in each state.

2. *State Anti-bootlegging Statutes*

Prior to the enactment of the Federal anti-bootlegging statute, the musicians and record companies had recourse under various state anti-bootlegging statutes.⁸⁹ State legislatures would not in their normal course of business have reason to address this “problem,” so it is likely that the state statutes are a direct result of industry lobbying rather than any anti-bootlegging plea from the general population.

Writing on the anti-bootlegging statute, Professor Lionel S. Sobel noted the limited utility of the legal responses previously available:

First, using courts and judges to punish bootleggers after the fact is cumbersome and only occasionally effective. Second, until recently, the question of whether the law prohibits bootlegging has varied from state to state and has been surprisingly uncertain. Reliance on the law, in other words, may have produced disappointing results. . . .⁹⁰

As with common law remedies, the usefulness of the state statutes is compromised by the fact that separate actions must be brought in each state where violations are alleged to have occurred.

3. *International Remedies Prior to the Enactment of the TRIPs Agreement*

The uneven legal environment in the United States prior to the anti-bootlegging statute, with bootlegs enjoying varying degrees of legality depending upon the location, was a microcosm of the situation worldwide. The world’s major copyright conventions provided protection against bootlegging that was spotty at best.⁹¹ Furthermore, bootleggers were free to base their operations in countries with the most favorable copyright laws.

⁸⁹ Lee, *supra* note 1, at 362 n.29. For a complete list of state statutes *see id.* The statutes vary in their details. For example, the Washington state statute, West’s RCWA 19.25.030 (2000), does not appear to reach the possession of bootlegs for personal use. Also, many of the state statutes have a sliding scale of penalties based on the number of recordings involved. *See, e.g.,* West’s RCWA 19.25.030 (2)(a)(ii).

⁹⁰ Lionel S. Sobel, *Bootleggers Beware: Copyright Law Now Protects Live Musical Performances, But New Law Leaves Many Questions Unanswered*, 17 NO.2 ENT. L. REP. 6 (1995).

⁹¹ For a general discussion of the international anti-bootlegging regime, see Blunt, *supra* note 1.

Until they were incorporated into the TRIPs agreement, the Berne Convention and the Rome Convention were the most important international expressions of copyright law.⁹² Neither was a very effective tool against bootlegging.

The deficiencies of the Berne Convention are easily explained. First, it “fails to even address issues of piracy, counterfeiting, and bootlegging of musical works and recordings.”⁹³ Bootlegging is simply outside the scope of the agreement.

On its surface, the Rome Convention appeared to be a much more promising vehicle for pressing the battle against bootleggers. Article 7, Section 1 of the Rome Convention expressly extends to performers the right to protection against “fixation, without their consent, of their unfixed performance (or) the reproduction, without their consent, of a fixation of the performance.”⁹⁴ However, in spite of this promising language, application of the Rome Convention proved to be problematic.

The greatest enforcement hurdle for the Rome Convention was the fact that the United States, home to a large portion of the world’s music industry, was not a signatory.⁹⁵ The significance of this fact became clear when Germany’s Federal Supreme Court was presented with an opportunity to define that country’s obligations under the Rome Convention.⁹⁶ The court ruled that a performance by a non-German national in a country that is not a party to the Rome Convention would not receive the protection of Germany’s copyright laws.⁹⁷ This description, of course, applied to almost all concerts held in the United States: the list of German rock stars is very short.⁹⁸

Beyond presenting the opportunity to exploit the geographical origin of certain concert tapes, the Rome Convention also opened a “protection gap” based upon the date of a concert. Specifically, signatories to the convention could set the term of protection at as low as twenty years.⁹⁹ That was the case in Italy, where live recordings were given only twenty years protection as opposed to the fifty years

⁹² Schwartz, *supra* note 1, at 162.

⁹³ Blunt, *supra* note 1, at 180.

⁹⁴ Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations, October 26, 1961, 496 U.N.T.S. 44, 48.

⁹⁵ Patterson, *supra* note 1, at 396.

⁹⁶ Mike Hennessey, *Superstar Sets Slip Through Protection Gap in Germany*, Billboard, Aug. 8, 1992, at 1. The test case involved a Bob Dylan concert performed in Italy and released on an Italian bootleg label. *Id.*

⁹⁷ *Id.*

⁹⁸ Heylin, *supra* note 5, at 273.

⁹⁹ Patterson, *supra* note 1, at 399.

granted for studio recordings.¹⁰⁰ Not surprisingly, Italy became a bootlegging Mecca.¹⁰¹

Bootleggers in Germany and Italy also tested the laws regarding the payment of "mechanical royalties," that is, compulsory licenses.¹⁰² In Italy, for example, bootleggers relied on Article 80 of the Italian Copyright Act to support the proposition that payment of a royalty would entitle the bootleggers to copy concert recordings regardless of the twenty year rule.¹⁰³ Bootlegs manufactured on the basis of this law carry the SIAE stamp.¹⁰⁴

On the other side of the world, the legal climate in Australia also proved to be very favorable to bootlegging.¹⁰⁵ Specifically, record companies could only claim copyright protection for concerts they had recorded and commercially released.¹⁰⁶ Lacking copyright protection, the music companies attempted, unsuccessfully, to convince the courts that they were being victimized by unfair competition.¹⁰⁷

This discussion of the international legal regime is cursory by design. Other writers have covered the topic in much greater detail. The important point is this: on many occasions the bootleggers have gone to great lengths to ensure that they were operating within the confines of the law. They litigated their rights in courts of law and were frequently successful in that litigation.¹⁰⁸ Thus, it should be remembered that the lion's share of the bootlegs now in circulation were legal at the time and place where they were made.¹⁰⁹ Therefore, it was a far from inevitable result that bootlegging would become illegal in virtually all corners of the developed world.

B. *The Current Legal Status of Bootlegging*

With the incorporation of intellectual property protection into the framework of the world's international trade regime, the loopholes and gray areas that had nurtured the bootleg trade disappeared. On the international level, all WTO member states are required to extend intellectual property protection to live musical performances.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 400.

¹⁰³ *Id.* at 399.

¹⁰⁴ *Id.* at 400.

¹⁰⁵ Glenn A. Baker, *Oz Loophole Still Open: Gov't drags feet on live CDs.* s. (piracy in the Australian record industry), *BILLBOARD*, May 7, 1994 at 57 (*discussing piracy in the Australian record industry*).

¹⁰⁶ Heylin, *supra* note 5, at 367.

¹⁰⁷ *Id.* at 367-68.

¹⁰⁸ Hennessey, *supra* note 96.

¹⁰⁹ Heylin, *supra* note 5, at 7.

Within the United States, all pockets of tolerance for bootlegging have been eliminated.

1. *The TRIPs Agreement*

The TRIPs agreement incorporates the so-called Great Conventions of international intellectual property law and, further, moves the nexus for the settlement of disputes into the realm of trade law, that is, the WTO.¹¹⁰ Of particular importance to the issue of bootlegging, the TRIPs agreement gave “teeth” to the Rome Convention by providing a concrete framework for the settlement of disputes.¹¹¹ The availability of cross-sectoral relief gives additional leverage to an aggrieved party, particularly if it happens to be the United States.¹¹² However, pressing a dispute through the WTO’s Dispute Resolution Body requires the significant expenditure of political capital.¹¹³ Therefore, the question of what scale of bootlegging activity would trigger an official action by the United States is not easily answered.

2. *The Federal Anti-bootlegging Statute*

Bootlegging became illegal as a matter of federal law on December 8, 1994, with the passage of 17 U.S.C. § 1101 and 18 U.S.C. § 2319A as part of the Uruguay Round Agreement Act (“URAA”).¹¹⁴

17 U.S.C. § 1101 provides that anyone who without authorization of the performers involved “fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation” shall be subject to the remedies provided in sections 502 through 505 to the same extent as an infringer of copyright.¹¹⁵ The law also extends to acts of unauthorized transmission to the public of performances and the distribution, sale, rental, or trafficking of unauthorized recordings.¹¹⁶

The application of the complementary criminal statute, 18 U.S.C. § 2319A, is limited to cases where the violation is committed “knowingly and for purposes of commercial advantage or private gain.”¹¹⁷ Prison terms of up to five years for a first offense, ten years for repeat

¹¹⁰ Nimmer, *supra*, note 67, at 1395–97.

¹¹¹ *Id.* at 1392.

¹¹² *Id.* at 1397, 1417. Cross-sectoral relief means that trade retaliation can take a different form than the original dispute.

¹¹³ Patterson, *supra* note 1, at 415–18.

¹¹⁴ Uruguay Rounds Agreement Act, Pub. L. No. 103-465, 108 Stat.4809 (1994).

¹¹⁵ 17 U.S.C. § 1101(a)(1).

¹¹⁶ 17 U.S.C. § 1101(a)(2),(3).

¹¹⁷ 18 U.S.C. § 2319A(a).

offenses, and the statute authorizes fines of up to \$250,000.¹¹⁸ Additionally, equipment and supplies used in the manufacture and/or distribution of the recordings are subject to forfeiture and destruction.¹¹⁹ Where the illegal recordings have been imported, they are subject to seizure and forfeiture under customs laws.¹²⁰

The constitutionality of the anti-bootlegging statute was challenged by one of the defendants snared by “Operation Goldmine,” the federal government’s most conspicuous anti-bootlegging effort. In *United States v. Moghadam*, the Eleventh Circuit upheld the statute.¹²¹ While the court might have reached the same result through a different argument, the argument that the court actually made suggests that on its own terms *Moghadam* was wrongly decided. [their decision was erroneous??] Furthermore, a reading of the decision supports the observation that the statute was a “swiftly enacted”¹²² example of “sloppy drafting.”¹²³ Congress does not seem to have been well informed on the nature of or the need for the legislation.

a. The Tenuous Constitutionality of the Anti-bootlegging Statute: Moghadam The contested issue in *Moghadam* was whether Congress had exceeded its constitutional grant of authority in passing the anti-bootlegging statute.¹²⁴ The court concluded that while Congress mistakenly believed that it was operating under Copyright Clause authority,¹²⁵ it had, in fact, drawn from the powers granted by the Commerce Clause.¹²⁶ In short, the court rescued Congress from its own misapprehension of the law.

There are two characteristics of the anti-bootlegging statute that exclude it from the grant of authority contained in the Copyright Clause: the statute does not cover “Writings” and it does not protect them for “Limited Times.”¹²⁷

The scope of the term “Writings” has been subject to gradual expansion beyond “writing in the literal sense or the lay definition of the

¹¹⁸ 18 U.S.C. § 2319A(a)(3).

¹¹⁹ 18 U.S.C. § 2319A(b).

¹²⁰ 18 U.S.C. 2319A(c).

¹²¹ *United States v. Ali Moghadam*, 175 F.3d 1269 (11th Cir. 1999), *reh’g and reh’g en banc denied*, 193 F.3d 525 (11th Cir. 1999), *cert denied* 120 S.Ct. 1529 (2000).

¹²² Deas, *supra* note 1, at 570.

¹²³ Patterson, *supra* note 1, at 411.

¹²⁴ *Id.* at 1271.

¹²⁵ *Id.* at 1275.

¹²⁶ *Id.* at 1282.

¹²⁷ 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.” *Id.*

word.”¹²⁸ The evolving interpretation of “Writings” led to the eventual inclusion in copyright of musical compositions and, in 1971, of sound recordings themselves.¹²⁹ However, the flexibility of the “Writings” requirement is not unlimited. To meet the requirement one is required to show both intellectual labor and tangible form or fixation.¹³⁰ Studio bootlegs transgress on material that has already been fixed. Broadcast bootlegs also involve the appropriation of fixed material.¹³¹ However, “no respectable interpretation of the word ‘writings’ embraces an untaped performance of someone singing at Carnegie Hall.”¹³² Thus, the extension of protection to unfixed material puts the anti-bootlegging statute outside the boundaries of the Copyright Clause.¹³³

The “Limited Times” restriction of the Copyright Clause is straightforward: Congress may not grant indefinite or perpetual protection to the fruits of intellectual labor. Yet, the anti-bootlegging statute extends protection indefinitely.¹³⁴ This produces the anomalous result that studio and broadcast bootlegs, conceptually a greater invasion of performer rights,¹³⁵ eventually become legal upon the expiration of copyright while a concert bootleg, arguably not a breach of rights,¹³⁶ stays illegal forever.

The *Moghadam* court took note of the statute’s constitutional infirmities by assuming, without deciding, that it was not promulgated under the authority of the Copyright Clause.¹³⁷ The court then turned its analysis to the Commerce Clause to see if that grant of power might salvage the anti-bootlegging statute.¹³⁸ The fact that Congress thought it was acting under the Copyright Clause made the court’s task all the more difficult:¹³⁹ “predictably there are no legislative find-

¹²⁸ *Moghadam*, 175 F.3d at 1274.

¹²⁹ Schwartz, *supra* note 1, at 624, 627–29. See also Lee, *supra* note 1, at 335.

¹³⁰ Lee, *supra* note 1, at 337.

¹³¹ See 17 U.S.C. § 101 (2001). Live broadcasts are, by definition, simultaneously “fixed.” *Id.*

¹³² *Moghadam*, 175 F.3d at 1274, citing Nimmer, *supra* note 67, at 1409.

¹³³ Nimmer, *supra* note 67, at 1409. “[I]t must be concluded that this amendment is not rooted in the Copyright Clause.” *Id.* The *Moghadam* court decided to assume, without deciding, that Congressional authority to pass the anti—bootlegging statute was not grounded in the Copyright Clause. *Moghadam*, 175 F.3d at 1274.

¹³⁴ Deas, *supra* note 1, at 579.

¹³⁵ Heylin, *supra* note 5, at 398 (observing that the means of acquiring outtakes are more intrusive than those involved in the acquisition of live recordings). Broadcast bootlegs adversely affect the rights of third parties. See generally, *Metropolitan Opera*, 101 N.Y.S.2d 483 (Sup. Ct. 1950).

¹³⁶ Heylin, *supra* note 5, at 312.

¹³⁷ *Moghadam*, 175 F.3d at 1274.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1275.

ings in the record regarding the effect of bootlegging live musical performances on interstate or foreign commerce.”¹⁴⁰ Additionally, the anti-bootlegging statute also lacks the “jurisdictional element as is commonly found in criminal statutes passed under the authority of the Commerce Clause.”¹⁴¹

While the court probably could have made a viable Commerce Clause argument on behalf of the statute, the argument that it actually chose to make does not withstand close scrutiny. Specifically, the court noted the three theories of Commerce Clause authority recognized in *United States v. Lopez*, that is, “channels of interstate commerce,” “instrumentalities” of interstate commerce and “intrastate activities that substantially effect interstate commerce.”¹⁴² The court decided that bootlegging fell into the third category.¹⁴³ This type of Commerce Clause authority was famously articulated in *Wickard v. Filburn*, where it was held that a farmer who grew wheat for home consumption would not buy wheat in the normal market, thereby depressing commerce.¹⁴⁴ Applying *Wickard* to bootleggers, the court concluded that, “[b]ootleggers depress the legitimate markets because demand is satisfied through unauthorized channels.”¹⁴⁵ Further, “[t]he very reason Congress prohibited this conduct is because of the deleterious effect on the recording industry.”¹⁴⁶ Therefore, if bootleggers do not actually “depress the legitimate markets” and there is no “deleterious effect on the recording industry,” the court’s entire Commerce Clause analysis is voided. Thus, we turn to those issues.

b. The Faulty Underlying Premise of the Moghadam Decision The underlying premise of the *Moghadam* decision is that consumers make a choice between buying bootlegs or buying authorized recordings. If true, the bootleg market would undercut the market for legitimate releases. This premise also permeated the legislative process. The RIAA asserted to a joint session of Congress that the legislation would help curtail “an illicit trade currently generating about one billion dollars annually.”¹⁴⁷ Law review commentators rarely question RIAA claims about the damage caused by the bootleg

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1277.

¹⁴⁴ *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

¹⁴⁵ *Moghadam*, 175 F3d at 1276.

¹⁴⁶ *Id.*

¹⁴⁷ Lee, *supra* note 1, at 357. Lee cites testimony regarding a statutory draft, never voted upon, with language similar to the anti-bootlegging statute.

trade.¹⁴⁸ One says bluntly, and incorrectly, that “[e]very dollar spent on bootleg recordings equals one lost to the music industry.”¹⁴⁹ Another relies on the following description of bootlegs:

[A] recording of a live performance made without the consent of the performer. It is easy to make, the costs are minimal, yet the profits can be high. All it involves is attending a live performance, surreptitiously recording it, reproducing a master tape, then marketing the copies. Without protection the performer and the recording company can suffer substantial loss. Bootleg recordings are usually cheaper because of lower overhead and are usually of lower quality and sophistication than legitimately engineered recordings. Their availability reduces sales of legitimate recordings and can harm the reputation of the performer and also of the recording company if the recording is represented as being sold under their label.¹⁵⁰

This last statement is incorrect on almost every point. First, bootlegs do not compete with authorized releases on the basis of price, they compete on the basis of content.¹⁵¹ Bootlegs do not harm the reputation of an artist: if the recording is poor the consumer will invariably blame the bootlegger, not the artist.¹⁵² Furthermore, bootlegs are almost never represented as being sold under the record company label. In fact, the bootlegging industry is highly branded; the bootleg labels endeavor to create consumer loyalty by producing high quality recordings.¹⁵³ Also, of course, judgments as to “quality” and “sophistication” are entirely subjective. Of special importance to this paper is the allegation that bootlegs reduce the sales of legitimate recordings and cause “substantial loss.” This argument is not supportable.¹⁵⁴

What Congress, the *Moghadam* court, and the law review commentators apparently fail to recognize is that the people who buy bootlegs are dedicated, hard core music fans.¹⁵⁵ They are the very

¹⁴⁸ See e.g., Lee, *supra* note 1, at 357; Congo, *supra* note 1, at 384; Brown, *supra* note 1, at 8-9; Goodwin, *supra* note 1, at 346.

¹⁴⁹ Brown, *supra* note 1, at 11.

¹⁵⁰ ALLISON COLEMAN, INTELLECTUAL PROPERTY LAW 127-28 (1994), cited in Deas, *supra* note 1, at 573.

¹⁵¹ See generally, Alireza Jay Naghavi and Günther G. Schulze, *Bootlegging in the Music Industry*, available at <http://helio.unive.it/~icare/magazine/naghavi.htm>. Bootlegs from internet retailers generally retail for between twenty and thirty dollars. *Id.*

¹⁵² See Congo, *supra* note 1, at 399.

¹⁵³ See Patterson, *supra* note 1, at 420 n.160 (discussing the high quality of KTS bootlegs and the high level brand name identification and consumer loyalty that KTS has received in return. See generally Heylin, *supra* note 5, for a discussion of the evolution of bootleg brand names.

¹⁵⁴ See Naghavi and Schulze, *supra* note 151.

¹⁵⁵ See Heylin, *supra* note 5, at 409 (noting that bootleg trade “presupposes dedication”).

people who buy *all* the legitimate releases from a particular artist.¹⁵⁶ The bootleg market presupposes this kind of dedication on the part of the fans.¹⁵⁷ As Bruce Springsteen said, “the kids who buy the bootlegs buy the real records too, so it doesn’t really bother me.”¹⁵⁸ This sentiment was reiterated years later by Pearl Jam guitarist Mike McCready: “I think people that buy bootlegs buy the records anyway. I was that way.”¹⁵⁹ This fact, that bootlegs complement rather than compete with authorized releases, completely undermines the conclusion reached by the *Moghadam* court.

While the record industry has routinely claimed massive losses due to substitution sales of bootlegs, the economic literature on the topic has been scarce. That changed with the publication in 2000 of *Bootlegging in the Music Industry*, by Alireza Jay Naghavi and Günther G. Schulze of the University of Konstanz in Germany.¹⁶⁰ They concluded that “bootlegging adds to the product mix and does not necessarily crowd out legal sales.”¹⁶¹ Further, “[t]hey (bootlegs) cater to a small market segment of ‘hardcore’ fans ignored by the record companies.”¹⁶² Industry sales figures also belie the myth that bootlegs eat into sales of official releases. If true, there would be an inverse relationship between the availability of bootlegs and the sales of “legitimate” product. In other words, there should be some empirical evidence that the record industry suffered during the golden age of CD bootlegs, roughly 1990 to 1995,¹⁶³ and rebounded thereafter. There does not appear to be any such evidence.¹⁶⁴

A final note on *Moghadam*: one commentator who was very impressed with the decision noted that “[t]he music industry received what it requested: copyright protection for live musical performances. The judicial system also received what it wanted: a decision not conflicting with two centuries of case law.”¹⁶⁵ Additionally, “[t]he Elev-

¹⁵⁶ See Congo, *supra* note 1, at 399.

¹⁵⁷ *Id.* at 409.

¹⁵⁸ *Id.* at 136. Springsteen later became an outspoken critic of the bootleggers. *Id.*

¹⁵⁹ David Bauder, *Band jams market with 25 albums*, Sydney Morning Herald (Sept. 28, 2000).

¹⁶⁰ *Supra* note 152.

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* at 9.

¹⁶³ Bob Walker, *Then 'til Now*, printed in Hot Wacks Supplement 6 (2001), at 4–5 (noting that 1990 to 1995 was the era of the CD bootleg).

¹⁶⁴ Author examined 761 items returned from a literature search on “sound industry profits” from 1990 to 2000. There was no discernable relationship between the severity of anti-bootlegging laws and the overall health of the music industry. Key factors in the prosperity of the music industry seem to be new releases from well-established acts, general economic conditions, and competition from other types of entertainment, e.g., Japanese youth spending their entertainment yen on cellular phones.

¹⁶⁵ Lee, *supra* note 1, at 362.

enth Circuit cleverly composed a decision that avoided tortuous legal brambles to a finale amenable to *both sides*.”¹⁶⁶ The fact that the RIAA and the Eleventh Circuit could be considered “both sides” in the controversy is indicative of the sad fact that the legitimate interests of music fans received absolutely no consideration from either Congress or the court.

c. Other Deficiencies in the Anti-bootlegging Statute Scholars have noted additional problems with the anti-bootlegging statute.¹⁶⁷ For example, while the Fair Use Doctrine has traditionally been used to ensure that copyright law does not run afoul of the First Amendment, there is no Fair Use defense against the anti-bootlegging statute.¹⁶⁸ Therefore, the statute might be vulnerable to a challenge on First Amendment grounds. The statute’s silence on the applicability of the Work For Hire doctrine may also prove to be a regrettable oversight.¹⁶⁹ Of course, the biggest unresolved issue in the wake of *Moghadam* is whether the Copyright Clause still acts as a meaningful limitation on Congressional power.¹⁷⁰

When the anti-bootlegging statute and the uninformed actions of Congress and the Eleventh Circuit are taken together, a disturbing picture emerges. A powerful industry that is failing to serve a small but important market has managed to criminalize the behavior of people who do serve that market. That is why the statute should be repealed. By way of analogy, consider the way the major automobile manufacturers could respond to the proliferation of motorcycles. The argument that motorcycle sales are substitutes for automobile sales is at least as strong as the argument that bootlegs are substitutes for studio releases. It might be expected that the automobile makers would either decide to compete in the motorcycle market or concede the market to motorcycle specialists. The third option would be for the industry to use its political clout to persuade a gullible Congress to ban the manufacture and use of motorcycles. That is exactly what happened to the bootleg industry. The fact that so many music industry insiders are also bootleg collectors¹⁷¹ only confirms the moral bankruptcy of the process that produced the statute.

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ See generally Sobel, *supra* note 90.

¹⁶⁸ *Id.* at 9. See also Deas, *supra* note 1, at 580; Nimmer, *supra* note 67, at 1400.

¹⁶⁹ Deas, *supra* note 1, at 599-607.

¹⁷⁰ Nimmer, *supra* note 67, at 1411-12.

¹⁷¹ See Heylin, *supra* note 5, at 62 (noting that Rolling Stones Mick Jagger and Keith Richards were avid bootleg collectors). See also Bauder, *supra* note 159 (McReady admits to owning 100 bootlegs of bands other than his own).

C. Case Studies: Two Important Bootleg Labels

Having established the contours of the market for bootlegs, we now turn our attention to an examination of the typical actors in that market. KTS Records exemplified the potential for an independent, quality-minded, royalty-paying record company to serve the market for live music. Its death knell was sounded by the passage of the anti-bootlegging statute and the subsequent crackdown known as Operation Goldmine. At the other end of the bootleg spectrum is Rocking Horse Records ("RHR"), a small niche label catering primarily to Elvis Costello collectors.

1. KTS Records

KTS Records was established in 1991 in the Republic of San Marino, Italy.¹⁷² At the time, Italy offered one of the most favorable legal environments in Europe for the production of bootlegs.¹⁷³ By obtaining high quality source tapes and releasing CD's with crystal clear sound, KTS managed to achieve a high level of brand name recognition and customer loyalty.¹⁷⁴ By the time of its demise, KTS had released close to seven hundred titles by an impressive variety of artists.¹⁷⁵ Its final catalog, published in 1996, was a full color, thirty-two page celebration of live music.¹⁷⁶ Its best marketing tool, though, was its website at <http://www.kts.it>. It allowed collectors to browse the catalog and obtain detailed information about each recording.

The scale of success enjoyed by KTS would seem to support record industry arguments that bootlegging eats into its legitimate market share. However, even an operation of KTS's size was unlikely to cut into the sales of studio releases. What casual fan would bother to track down the KTS website? Furthermore, casual listeners like their music safe and predictable.¹⁷⁷ Bootlegs are too raw for their tastes.¹⁷⁸ Additionally, bootleg runs are generally in the low thousands per title;¹⁷⁹ a veritable drop in the bucket compared to the overall size of

¹⁷² KTS Records Catalog #8 (1996), on file with author.

¹⁷³ See Heylin, *supra* note 5, at 325-37. See also Patterson, *supra* note 1, at 399-400.

¹⁷⁴ *Id.* at 420 n.160.

¹⁷⁵ KTS Records Catalog #8, *supra* note 172.

¹⁷⁶ *Id.*

¹⁷⁷ See Heylin, *supra* note 5, at 411.

¹⁷⁸ Dieter Schubert, *quoted in* Heylin, *supra* note 5, at 278.

¹⁷⁹ Kurt Glemser, *A History of Bootlegs*, excerpted in Hot Wacks Supplement #6, at 4 (estimating runs of 500 to 1000 per title in 1985). Some bootlegs are produced in larger quantities, others have smaller runs. See also Hennessey, *supra* note 96 (estimating runs of 1,000 to 3,000 per title in 1992).

the music market.¹⁸⁰ The truth is that the record companies could have coexisted peacefully with KTS. It was serving a market they considered unimportant.

The implementation of the TRIPs agreement closed the various gaps in European intellectual property law and one by one the major bootleg labels began to close their doors.¹⁸¹ KTS was one of the last survivors. Its demise became inevitable with the enforcement of the anti-bootlegging statute. Two principals of KTS, Georgio Serra and Caroline Albanese, were indicted in absentia on March 31, 1997, as part of Operation Goldmine.¹⁸² Shortly thereafter, the following notice appeared on the KTS website: "Official Notice: the End of An Era. KTS records are sorry to announce that they will be closing down from the end of April '97. This is the last chance to get the best live CDs in the world at the lowest possible prices."¹⁸³ It was indeed the end of an era. The name and back catalog were eventually sold to interests in Singapore. The new owners released a few poorly engineered titles and the label quickly sank into obscurity.

2. RHR

RHR is typical of the labels that have managed to bring high quality recordings to the market even in the strict legal environment of the late 1990s. The combination of DAT and CD-R technology has made it practical for RHR to produce small runs of each of its releases.¹⁸⁴ For example, the Elvis Costello bootlegs *Tempted to Spit*¹⁸⁵ and *Legends and History Collide*¹⁸⁶ were "strictly limited to 50 copies" and for "fan club use only."¹⁸⁷ Of course the original fifty copies of each have multiplied on CD-R burners over the years as they have been used as trading currency. The number extant worldwide is probably in the low hundreds for each release.

¹⁸⁰ See, e.g., Heylin, *supra* note 5, at 323 (comparing sales of 5,000 Springsteen bootlegs to sales of ten million copies of *Born in the U.S.A.*).

¹⁸¹ See, e.g., John Carr, *Black Friday*, Hot Wacks Supplement #5, at 23.

¹⁸² Press release from the United States Department of Justice and the Recording Industry Association of America (Mar. 31, 1997)[hereinafter Press Release], *reprinted in* Hot Wacks Supplement #5 at 27. KTS officials were targeted in the "sting" operation but were not present. *Going Underground*, ICE - THE MONTHLY CD NEWSLETTER, (May 1997), *excerpted in* Hot Wacks Supplement #5, at 28.

¹⁸³ *Going Underground*, *supra* note 182.

¹⁸⁴ Bob Walker, *Then 'til Now*, Hot Wacks Supplement #6 (2001), at 5 (noting the emergence of small labels to fill the gap left by the demise of the giants).

¹⁸⁵ ELVIS COSTELLO, *TEMPTED TO SPIT* (Rocking Horse Records 1997).

¹⁸⁶ ELVIS COSTELLO, *LEGENDS AND HISTORY COLLIDE* (Rocking Horse Records 1997).

¹⁸⁷ Artwork from *Tempted to Spit* and *Legends and History Collide*, on file with author.

RHR appears to have released twenty-four discs of live Elvis Costello concert material.¹⁸⁸ Assuming a price of twenty-five dollars per disc and fifty copies released of each one, RHR has generated \$30,000 in sales. The contribution that RHR has made to the documentary record of Costello's career is arguably worth much more than that. Furthermore, there's not much chance that RHR's activities have cost Costello or his record company a penny. Anyone who would go to the trouble of tracking down RHR material is certainly in possession of all the official material. In spite of this, anyone connected with RHR is a felon in the eyes of the law.

V.

LEGAL ACTION UNDER THE ANTI-BOOTLEGGING STATUTE

At its core, the anti-bootlegging statute is public law passed for private benefit. The recording industry has used its considerable political clout to criminalize behavior that, on balance, serves a legitimate public purpose and, furthermore, can be controlled privately by the record companies themselves. The benefits of this arrangement flow to the record companies who receive market protection beyond that contemplated by the framers of the Constitution and a supply of free labor from police, prosecutors, and Customs agents.¹⁸⁹ The costs are borne by society at large in the form of scarce law enforcement assets diverted to unnecessary anti-bootlegging operations and reduced access to historically and aesthetically important recordings of live music.

Having the criminal justice system at its disposal allowed the record industry to step up its campaign against bootleggers. In July of 1996, New York City's Greenwich Village saw large scale busts reminiscent of the Prohibition Era. "[A]t Revolver Records on 8th Street, uniformed cops and FBI agents broke down the door."¹⁹⁰ This was part of the "biggest week of bootleg seizures in history."¹⁹¹ At the conclusion of the raids, "(New York State Attorney General) Vacco

¹⁸⁸ ELVIS COSTELLO with STEVE NIEVE, JAPAN TOUR 1999 VOL.3 (Rocking Horse Records 1999) is identified as RH 023/024, presumably the 23rd and 24th discs released.

¹⁸⁹ Congo, *supra* note 1, at 394 (noting the record industry's incentive to prefer enforcement through the criminal justice system).

¹⁹⁰ Don Steinberg, *Digital Underground*, reprinted in Hot Wacks Supplement #5 (1997), at 31.

¹⁹¹ *Id.*

declared lower Manhattan safe from unauthorized concert recordings."¹⁹²

Vacco's comments at a postbust news conference revealed that New York State's top law enforcement officer was badly misinformed about the nature of the crime he was fighting. "People are being ripped off by the people running this shop. They are paying top dollar for these knockoffs, but they are not getting top quality."¹⁹³ In other words, Vacco represented, falsely, that he was acting to protect the interests of exploited, vulnerable consumers, not the interests of the RIAA.¹⁹⁴ Furthermore, describing bootlegs as "knockoffs" is simply incorrect: that label should only be used in connection with counterfeit CD's.¹⁹⁵ Finally, much of the inventory carried by Revolver Records was, indeed, top quality.¹⁹⁶

At this point two questions are worth asking. First: on whose behalf were these raids made? Second: is the battle against bootlegs a legitimate use of the criminal justice system? Of course, a third question is: why aren't the first two questions ever asked?

An even greater abuse of the criminal justice system occurred the following year. On March 14, 1997, Operation Goldmine culminated in the arrest and indictment of thirteen persons for violation of 18 U.S.C. § 2319A.¹⁹⁷ Not surprisingly, given the anti-bootlegging statute's status as a tool of private criminal justice, the RIAA and the Department of Justice issued a joint press release.¹⁹⁸ The operation was described as "a year-long undercover operation conducted by agents of the United States Customs Service, with the assistance of the RIAA. . ." and "the largest criminal bootlegging investigation of its kind."¹⁹⁹

On its own terms Operation Goldmine was clearly a success. It led to the closure of several prominent bootleg labels including KTS.²⁰⁰ Additionally, it put an entire industry "on notice." Many

¹⁹² *Id.* Shortly after Congress passed the anti-bootlegging statute, New York State made bootlegging a felony. Kozinn, *supra* note 49. Thus, the spokesperson for the raids happened to be a state, rather than federal, official.

¹⁹³ Kozinn, *supra* note 49.

¹⁹⁴ See Heylin, *supra* note 5, at 276 (noting that bootleg buyers were "always among the best informed of music fans").

¹⁹⁵ Kozinn, *supra* note 49.

¹⁹⁶ The author has one bootleg from Revolver Records. It was legally manufactured and is of the highest quality.

¹⁹⁷ See Press Release, *supra* note 182. See also, Paul Farhi, *CD Bootleggers Face the Music; Supply of Illegal Recordings Shrinks After Customs Crackdown*, The Washington Post, July 14, 1997, at A1.

¹⁹⁸ Press Release, *supra* note 182

¹⁹⁹ *Id.*

²⁰⁰ See *Going Underground*, *supra* note 182.

bootleg sellers sold their remaining stock and left the business.²⁰¹ However, even more than the busts of Greenwich Village record stores, it raises the question of how, and for whom, valuable taxpayer assets are being used. How much does a “year-long undercover operation” cost? How many hundreds of attorney hours were expended in arranging the ultimate plea-bargains? Most importantly, could not these assets have been better spent elsewhere? At that particular time, were there no greater threats to the safety and welfare of America’s citizens than those posed by bootleg CD’s?

In addition to being ethically unjustifiable, Operation Goldmine was simply unnecessary. First, the record industry could have driven the bootleggers out of business by making a conscious decision to serve the live music market.²⁰² Furthermore, the operation was conducted at exactly the point in time where the shifting sands of technology were likely to swallow up the major bootleg labels. This is because in early 1997 the CD-R was emerging as a viable copying technology. As one industry observer put it, “[m]ere months after the Florida bust appeared to put an end to Europe’s big bootleg labels and the importation of most CD’s into the country, CD-R bootlegs are booming, turning up like never before.”²⁰³ Labels like KTS would have been extremely susceptible to market destruction caused by CD-R copying. In other words, the targets of Operation Goldmine were already living on borrowed time: they probably would have been out of business by 1998 regardless of the law enforcement campaign against them.

VI.

A MARKET-ORIENTED RESPONSE TO BOOTLEGGING

As an alternative to wielding the criminal justice system against bootleggers, the music industry should pursue the far more ethical course of eliminating the incentive for the activity. This could be easily accomplished by systematically recording concerts and selling the CD’s at reasonable prices.

The music industry has historically shown only sporadic interest in preempting the market for live recordings. The first successful marketing counter attack against a bootleg was apparently Apple Record’s 1969 thrust against a Beatles bootleg entitled *Live Peace in*

²⁰¹ *Id.*

²⁰² See, e.g., Torsten Hartmann, *quoted in Hennessey, supra* note 96, “Why don’t they release live material by their artists on cheap cassettes? If they did they could put us out of business.”

²⁰³ *Going Underground*, ICE – THE MONTHLY CD NEWSLETTER (July 1997), reprinted in Hot Wacks Supplement #5, at 30.

Toronto.²⁰⁴ Frank Zappa notoriously fought back against the bootleggers by acquiring a collection of bootlegs and marketing them as a ten disc (vinyl) box set entitled *Beat the Boots!*²⁰⁵ Others have taken material that was long available in the bootleg market and released it on official record labels, usually with excellent results. Bob Dylan's 1966 Royal Albert concert delighted bootleg fans for thirty years before Columbia Records finally made an official release of the same concert.²⁰⁶ It sold well.²⁰⁷ Two successful collections of Beatles rarities, *Anthology 1 and II*, also featured material that had been long available in the bootleg market.²⁰⁸

The bootleggers themselves have long been aware that the record companies could squeeze them out of the market. As one said: "they (the record companies) could just put us out of business."²⁰⁹ Commentators have also noted that "flooding the market with live music" would rob the bootlegs labels of their *raison d'être*.

Given the availability of a strategy that does not require the breaking down of doors or lengthy, expensive undercover operations, the record companies should have the power of the criminal justice system removed from their list of available options. Furthermore, insisting on market-oriented solutions would create a win-win-win situation. Musicians would win in the form of greater sales and higher revenues. Collectors would win in the form of a wealth of concert recordings. And taxpayers would win because they would no longer be forced to subsidize private justice.

A. Case Study: Pearl Jam

The popular Seattle based rock band Pearl Jam was the first to test the limits of a comprehensive anti-bootlegging marketing strategy. The spectacular results of Pearl Jam's campaign make it obvious that the anti-bootlegging statute is unnecessary.

Pearl Jam appeared on the music scene with the release of its first album, *Ten*, in 1991.²¹⁰ *Ten* was a huge commercial success with over 9 million copies sold.²¹¹ Subsequent Pearl Jam releases also sold well. Beyond its commercial appeal, Pearl Jam also established a reputation

²⁰⁴ See Heylin, *supra* note 5, at 58.

²⁰⁵ *Id.* at 394-95.

²⁰⁶ BOB DYLAN, LIVE 1966 (Columbia Records 1998).

²⁰⁷ See, e.g., Jan DeKnock, *Bob Dylan's 1966 concert recording is the week's top-debuting CD*, The New Times Music News (Oct. 28, 1998), available at <http://www.newstimes.com?archive98/oct3098?mud.htm>.

²⁰⁸ Congo, *supra* note 1, at 401.

²⁰⁹ See *supra*, note 202.

²¹⁰ See Pearl Jam page at <http://www.wallofsound.go.com/artists/pearljam/home.html>.

²¹¹ *Id.* at 3.

for putting on scintillating live shows and quickly became a favorite of bootleggers.²¹² Indeed, almost every pre-2000 Pearl Jam show has been bootlegged.²¹³

In 2000, prior to embarking on a tour of Europe and North America, Pearl Jam made a proposal to Sony Records: Pearl Jam would record all of its concerts and release them on CD. The label reluctantly assented.²¹⁴ Kelly Curtis, the band's manager, explained the motive behind the unique marketing campaign: "[o]ur hope is to provide fans who are currently buying high-priced bootlegs with an alternative."²¹⁵

Pearl Jam was already in the habit of taping its live shows, so the "bootleg" project did not add any additional expense to the tour itself.²¹⁶ The recordings were extracted from the soundboard at each venue where the band played.²¹⁷ Also, where "live" albums released by the studios are often heavily engineered, the Pearl Jam "boots" have the raw sound associated with unofficial bootlegs.²¹⁸ In an interesting twist, the Pearl Jam releases also look like bootlegs.²¹⁹ The European leg of the tour was released in plain brown cardboard packaging with the track listings apparently stenciled in smudgy ink.²²⁰ The name of the record company does not appear on the label.²²¹ Nor are the usual copyright warnings anywhere to be found in the packaging or on the discs.²²² The North American releases have similarly rustic packaging: the only difference is that the cardboard packages (no jewel boxes) are gray in color.²²³

²¹² Polly Anthony, President of Epic Records, "breaking chart records. . . is not surprising because Pearl Jam is one of the most heavily bootlegged and best live bands of our time." quoted in SONICNET.COM, *Pearl Jam's Five Chart Debuts Set Billboard Record*, available at http://www.sonicnet.com/artists/ai_singlestory.jhtml?id=112. . . (Feb 26, 2002).

²¹³ See Robert Hilburn, *Pearl Jam releases its 'own bootlegs' at low cost*, Los Angeles Times, (Sept. 27, 2000).

²¹⁴ See Bauder, *supra* note 159.

²¹⁵ WWW.ADDICT.COM, *Pearl Jam Releasing Entire Euro Tour on CD*, formerly available at <http://www.addict.com/MNOTW/lofi/>.

²¹⁶ See Bauder, *supra* note 159.

²¹⁷ WWW.ADDICT.COM, *Pearl Jam Releasing Entire Euro Tour on CD*, formerly available at <http://www.addict.com/MNOTW/lofi/>.

²¹⁸ See Robert Hilburn, *Pearl Jam 'Jams and Jams and Jams. . .*, Los Angeles Times, (Sept. 27, 2000).

²¹⁹ See, e.g., WALLOFSOUND.COM, *Pearl Jam Domestic Bootlegs: Second Leg*, formerly available at, http://www.wallofsound.go.com/reviews/stories/pearljam_domestic_bootlegssecondleg/index.html.

²²⁰ PEARL JAM 29 6 00 (Epic Records 2000), on file with author.

²²¹ *Id.*

²²² *Id.*

²²³ PEARL JAM, SEATTLE WASHINGTON NOVEMBER 6 2000 (Epic Records 2001)

At first the “bootlegs” were offered for sale exclusively through the websites for Pearl Jam fans at <http://www.pearljam.com> and <http://www.ten.com>.²²⁴ Eventually the circle of distribution was expanded to include traditional retailers such as Tower Records.²²⁵

On October 4, 2000, Pearl Jam made rock and roll history by simultaneously debuting five albums on *Billboard Magazine's* Top 200 albums chart.²²⁶ Shows from Katowice (#103), Milan (#125), Verona (#134), London (#137) and Hamburg (#175) made the list.²²⁷ Eventually, twelve of the European shows would make it into *Billboard's* Top 200.²²⁸ In March 2001, the twenty-four North American shows were released. As of May 2001, total sales of the Pearl Jam official bootleg series had topped 2 million units.²²⁹ Perhaps the ultimate indicator of the market demand for these live recordings is the fact that mega-retailer Costco has large bins of the CD's marked at \$10.98 for a two disc set.²³⁰

At first glance, the massive success of Pearl Jam's “bootleg” project would appear to contradict the assertion that the market for bootlegs is small and specialized. However, it would be unrealistic to assume that in the absence of the Pearl Jam live releases the bootleggers would have sold 2 million units. Prior to 1995, bootleg runs were generally in the low thousands per title.²³¹ They have, of course, been even smaller since then.²³² Even assuming a favorable legal environment for bootlegging, the entire tour would probably have led to the production of less than 100 thousand two-disc sets. Thus, 2 million units is not the market that bootleggers could have exploited. Rather, 1.9 million units is the market that, under normal circumstances, *would have been suppressed*.

The major bootleg labels may not have survived the CD-R boom of the late 1990s. They certainly would not have survived the widespread adoption of Pearl Jam's marketing strategy. The Pearl Jam experience makes it clear that the bootleg “problem,” to the extent that it is a problem, is one that the music industry has brought upon itself. The most ethical and effective solution to the problem is also well

²²⁴ WWW.ADDICT.COM, *Pearl Jam Releasing Entire Euro Tour on CD, formerly available at <http://www.addict.com/MNOTW/lofi/>*

²²⁵ *Id.*

²²⁶ See SONICNET.COM, *supra* note 212.

²²⁷ *Id.*

²²⁸ WALLOFSOUND.COM, *supra* note 219

²²⁹ *Id.*

²³⁰ Issaquah, Wash. Costco, visited by author May 15, 2001.

²³¹ See *supra* note 179, and text therein.

²³² See, Walker, *supra* note 163.

within the industry's sphere of competence. The continued presence of the United States government in this field is simply unacceptable.

VII.

CONCLUSION

At its inception the anti-bootlegging statute was a corrupt and black-hearted piece of legislation. It has not been redeemed by the passage of time. Indeed, recent developments have only served to emphasize the fact that application of the statute has constituted an abuse of the criminal justice system. It should be repealed immediately. Concert tapers should be allowed to operate openly and, in the absence of marketing by a particular artist, freely distribute the fruits of their efforts subject to the proviso that commercial bootleggers would pay royalties.

It is tempting to seek a doctrinal construction that would support this new legal paradigm. For example, there is a supportable proposition that a concert performer, by the mere act of publicly performing it, puts a particular performance into the public domain. Given the historical importance of bootlegs, Fair Use doctrine could be reasonably argued as a justification for repealing the statute. A First Sale doctrine could be created that recognizes a concertgoer as a legitimate "first buyer" with rights of her own. However, since the anti-bootlegging statute itself has no doctrinal foundation, it is probably unnecessary to articulate a basis for *not* having the statute on the books.

The approach recommended by this Comment does not represent a general assault on copyright. Musical artists have important rights that should be protected by law. However, the law should strike a balance between the incentive value of the monopoly conferred and the price imposed on the public. As protection becomes both broader and tighter, it eventually crosses over the line that separates good policy from bad. The anti-bootlegging statute has crossed over that line. A skilled songwriter can reap huge financial rewards from the copyright of a song and the copyright of a studio recording of that song. There is no additional incentive created by making each additional performance of the song an independently copyrightable event. Indeed, doing so is against the public interest.

At least one observer believes it is the incentive to perform concerts themselves, rather than the incentive to produce new creative works, that justifies the existence of the anti-bootlegging statute.²³³ She wrote that "the United States stands to benefit from the enjoyment of a fuller range of musicians' and other performers' talent in

²³³ Deas, *supra* note 1, at 633-34.

live performances. . .”²³⁴ If by this she meant that artists who had avoided the United States because their live performances were not protected here would now feel free to tour, the statement is simply not supportable. There was no surge in touring activity after the passage of the statute. In fact, there is no evidence that any artist has ever declined to do concerts in the United States because of the “danger” posed by bootlegging. If, on the other hand, the commentator meant that the “enjoyment of . . . talent in live performances” is a worthwhile objective of the legislative process, the anti-bootlegging statute works against that goal rather than for it. The anti-bootlegging statute clearly *suppresses* the enjoyment of live music.

The war against bootlegs is over. As the Pearl Jam experience demonstrates, the record companies have won complete and total victory. Having triumphed, the industry should do the honorable thing and beat a gracious, orderly retreat.

²³⁴ *Id.*