Introduction: Music Bootlegging and the Constitution

Worldwide, the recording industry generated $32 billion in revenues last year, with billions more contributed by other activities including live concerts. Yet despite its apparent robustness, the music industry finds itself under siege. Recording revenues have fallen twenty percent from their peak, which is partly a result of intellectual property theft enabled by modern technology. Music bootlegging, the unauthorized recording and sale of live performances, alone accounts for approximately $300 million in lost and displaced revenues. In an effort to combat this activity, Congress enacted 18 U.S.C. § 2319A (the “anti-bootlegging statute”), thereby criminalizing commercial bootlegging.

Following its enactment, the anti-bootlegging statute attracted criticism, including from Professor Lawrence Lessig of Stanford Law School. Having failed to persuade the Supreme Court in *Eldred v. Ashcroft* regarding a different copyright law, Professor Lessig found success against the anti-bootlegging statute as a pro-bono advisor in *United States v. Martignon*. In that opinion, the Southern District of New York held the anti-bootlegging statute to be unconstitutional under the Copyright Clause. This result threatens federal efforts to combat music bootlegging.

Despite being copyright-related, the authority for the anti-bootlegging statute...
flows from the Commerce Clause. Though the statute lacks key elements of copyright law, this does not evidence a constitutional failing. Rather, it reflects the peculiar challenge posed by bootlegging. Properly construed, the anti-bootlegging statute serves as a complement to copyright regulation, rather than a derogation from it. It thus protects artists’ commercial, copyright, and free speech interests. For these reasons, on appeal before the Second Circuit, as well as before any other court that considers the issue, the anti-bootlegging statute should be upheld as constitutional.

I. The Federal Anti-bootlegging Statute and its Origins

While “bootlegging” might be interchanged colloquially with terms such as “piracy,” as a matter of law it constitutes a distinct activity. Specifically, bootlegging may be broken down into four elements: the (1) unauthorized, i.e. by someone other than the artist, (2) fixation, i.e. recording, (3) of a live musical performance (4) for the purpose of commercial gain.

Prior to 1994, “[n]o protection at the federal level extended directly to unrecorded live musical performances.” As a consequence, “a bootlegger could surreptitiously record a live musical performance and engage in unauthorized distribution” without violating federal law. In that year, Congress closed this loophole as a result of the United States’ participation in the Agreement on Trade Related Aspects of Intellectual Property, part of the multilateral Uruguay Round of the General Agreement on Tariffs and Trade (the “Uruguay Round”), which also gave rise to the World Trade Organization.

In conformance with the Uruguay Round agreements, the United States enacted 18 U.S.C. § 2319A, the anti-bootlegging statute. Following the definitional outline inherent to the term bootlegging, the statute criminally sanctions one who (1) “without the consent of the performer or performers involved” (2) “fixes,” “transmits” or “distributes” (3) “the sounds or sounds and images of a live musical performance” (4) “knowingly and for purposes of commercial advantage or private financial gain.”

II. Copyright or Commerce: United States v. Martignon and the Anti-bootlegging Statute

A. Martignon Held the Anti-bootlegging Statute to be Unconstitutional

In September 2004, the Southern District of New York held “that the anti-bootlegging statute, 18 U.S.C. § 2319A, is unconstitutional under the Copyright Clause.” Only the Eleventh Circuit had previously addressed the statute’s constitutionality, holding that “the statute was a constitutional exercise of Congress’s Commerce Clause authority,” though not its Copyright Clause powers. The Martignon decision distinguished itself by examining the conflict between the Copyright and Commerce Clauses, especially as it relates to copyright’s limited times requirement. In doing so, it found that, while perhaps otherwise permissible under Commerce Clause power, the anti-bootlegging statute nonetheless failed because it constituted an end run around the specific limitations contained in the Copyright Clause.

To reach this conclusion, the Martignon court determined that “[b]ased on the anti-bootlegging statute’s language, history, and placement, it is clearly a copyright-like regulation.” “Copyright-like” constituted the key phrase since all parties, including the government, agreed that Congress lacked the authority to “enact the anti-bootlegging statute under its Copyright Clause [proper] powers.”

B. The Anti-bootlegging Statute as an Exercise of Congress’s Commerce Clause Power

The Martignon decision turned on finding that §2319A not only existed outside the Copyright Clause, but actually undercut its express limitations. Otherwise, the statute could be supported within the broad ambit of Congress’s Commerce Clause powers.

The Commerce Clause grants Congress the authority “to regulate Commerce with foreign Nations, and among the several States.” The anti-bootlegging statute itself references
conduct undertaken for “commercial advantage or private financial gain,” reflecting its origins in the Uruguay Round. The statute “clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations.” The Moghadam court described the “link between bootleg compact discs and interstate commerce and commerce with foreign nations” as “self-evident.”

C. Martignon finds the Anti-bootlegging Statute “Copyright-like” and thus Unconstitutional

Given that the Commerce Clause could support the anti-bootlegging statute, only by tying the statute to the Copyright Clause, did Martignon ultimately find it unconstitutional. As the court reasoned:

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.

Alternatively, the court argued that, “even if Congress may enact copyright-like legislation under [separate] grants...when it lacks the power under the Copyright Clause, such legislation may not be ‘fundamentally inconsistent’ with the fixation and durational limitations imposed by the Copyright Clause.”

III. The Anti-bootlegging Statute Provides Copyright-related, not Copyright-like Protections that Complement the Copyright Clause

A. The Anti-bootlegging Statute Complements the Copyright Clause

Critics generally concur with the analysis in Martignon, identifying the statute’s Achilles heel with its grant of perpetual protection.

“The Martignon decision distinguished itself by examining the conflict between the Copyright and Commerce Clauses, especially as it relates to copyright’s limited times requirement.”
The argument goes that this renders the anti-bootlegging statute unconstitutional because it conflicts directly with the Copyright Clause. However, such analysis mistakes a copyright-related statute for one that is copyright-like.

Alternatively sourced within the Commerce Clause, the anti-bootlegging statute does not undermine the express limitations of the Copyright Clause. Instead, it constitutes a safeguard apart from, but related to, copyright law. As the Eleventh Circuit found,

Extending quasi-copyright protection to un-fixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection. Quite the contrary, extending such protection actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause.

Recognizing the anti-bootlegging statute as complementary undercuts the argument that the statute is “fundamentally inconsistent” with the Copyright Clause. However, this still leaves the question of whether the particular approach taken, namely the lack of a durational limitation, may also be compatible with the Copyright Clause.

B. The Unique Characteristics of Bootlegging make it an Inappropriate Subject for Regulation under the Copyright Clause, Including the Limited Times Requirement

The Copyright Clause allows Congress to secure “for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” By contrast, bootlegging concerns the actions of non-artists (i.e., non-“Authors”), using technology to capture a live performance (i.e., a non-“Writing”). The resulting product cannot be subject to copyright protection because the bootlegger is not the author, and the bootleg itself arises from a non-fixed performance; moreover, a bootleg comes into existence regardless of the author having independently recorded the performance.

The unauthorized bootlegging of live musical performances thus constitutes a threat to the copyright system that cannot be remedied directly through the Copyright Clause itself. The Martignon court recognized that the anti-bootlegging statute falls outside the bounds of the Copyright Clause since it lacks both fixation and durational elements. However, the court misinterpreted this as a constitutional failing. Rather, by operating outside the Copyright Clause, this statute’s form merely reflects the peculiar nature of a criminal enterprise, i.e., bootlegging, that preys upon intellectual property by operating just outside the copyright’s boundaries.

As described by one authority, “[t]he rights created by the anti-bootlegging statute are hybrid rights that in some ways resemble the protections of copyright law but in other ways are distinct.” In this sense the anti-bootlegging statute occupies a constitutional status akin to trademark law. As the Eleventh Circuit concluded in Moghadam, “the Supreme Court’s analysis in The Trade Mark Cases stands for the proposition that legislation which would not be permitted under the Copyright Clause could nonetheless be permitted under the Commerce Clause, provided that the independ...
dent requirements of the latter are met.”34 Since the anti-bootlegging statue constitutes a valid exercise of the Commerce Clause power, as with trademarks, that should be sufficient.35

C. The Anti-bootlegging Statue Provides Protection of Indefinite Duration Without Violating the Limited Times Element of the Copyright Clause

The anti-bootlegging statute addresses the particular problem posed by bootlegging. Other forms of copyright infringement duplicate already existing works; by contrast, a bootlegger captures live performances that may not otherwise be recorded. As a treatise on the subject notes, the “arguably perpetual protection [provided by § 2319A] for the non-copyright interest against bootlegging musical performance (albeit codified adjacent to copyright protection) implicates separate concerns” from those of copyright.3

Under the Copyright Clause, the decision to create carries with it indefinite repercussions. Once a work enters the realm of copyright, the artist’s rights become fixed for a limited time, after which the work shall exist in the public domain for all time. The decision not to fix a particular work should be understood as similarly forward looking. In such a case, the artist has chosen not to have their work available in a fixed format now or ever, foregoing the copyright’s benefits to assure that the work remains private and ephemeral. Though authorized by the Commerce Clause, the anti-bootlegging statute’s indefinite time bar thus complements this copyright interest.

IV. The Anti-bootlegging Statute Guarantees Artists’ First Amendment Rights

In addition to protecting an artist’s right to decide whether to create a copyrightable recording, the anti-bootlegging statute also safeguards their First Amendment rights. The First Amendment “securely protects the freedom to make – or decline to make – one’s own speech; a right which bears less heavily when speakers assert the right to make other people’s speeches.”37 Commercial bootlegging threatens this right, since it “usurps one of the most basic rights of artists and record companies, namely the decision of whether or not to record and distribute to the public a particular performance or song.”38 Such a right extends beyond copyright and commerce law to encompass free speech. Thus, beyond issues of copyright and commerce law, the anti-bootlegging law’s perpetual protection supports the artist’s ability to engage the creative process, without having the ability “to make – or decline to make – one’s own speech” handed over to bootleggers.

While protecting the rights of artists, the anti-bootlegging statute does not impermissibly encroach on others’ First Amendment rights. By targeting commercial activity, it excludes those who might engage in non-commercial bootlegging, for example in historical or critical analysis.39 Most fans who admire and enjoy musical performances recognize the distinction between sincere music appreciation and unauthorized misappropriation. The anti-bootlegging statute covers only the latter category, which imposes financial harm, deters live performance, and jeopardizes artists’ First Amendment rights.

V. Conclusion: The Anti-bootlegging Statute Represents a Constitutional Exercise of the Commerce Clause Power that does not Undercut the Copyright Clause

From a constitutional perspective, bootlegging may not be of the Copyright Clause, but it certainly harms interests protected by it. Properly understood, the federal anti-bootlegging statute protects copyright, commerce, and free speech concerns by complementing, rather than undermining, the Copyright Clause. Analysis in Martignon, along with dicta in Moghadam, finds that the anti-bootlegging statute conflicts with the Copyright Clause’s limited times requirement.40 This misses the mark by confusing a copyright-related statute, such as this one, for one that is sufficiently copyright-like to be subject to copyright limitations.

Whether next addressed on appeal before the Second Circuit or before another court, the anti-bootlegging statute should be upheld as a constitutional enactment that creatively employs the Commerce Clause power to con-
front the peculiar challenges posed by bootlegging. In this way, the interests of both artists and the public, as well as the integrity of the Constitution, may be preserved.

ENDNOTES

* New York University School of Law. As a legal intern, the Author assisted the government in United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004). This essay represents work independent of the Author’s participation in that case.


2 Id.


6 United States v. Martignon, 346 F. Supp. 2d 413, 430 (S.D.N.Y. 2004); see also Lessig, supra note 4.

7 Martignon, 346 F. Supp. 2d at 430.

8 See 18 U.S.C. § 2319A; see also United States v. Moghadam, 175 F.3d 1269, 1272 n.3 (11th Cir. 1999) (citing Dowling v. United States, 473 U.S. 207, 209 n.2 (1985)). Unless otherwise indicated, references in this essay to ‘bootlegging’ shall be limited to the commercial context.

9 Moghadam, 175 F.3d at 1272.

10 Id.


14 Id. at 419 (citing Moghadam, 175 F.3d at 1274, 1282).

15 See Moghadam, 175 F.3d at 1281 (noting that the court did decide whether “the anti-bootlegging statute might be fundamentally inconsistent with the ‘Limited Times’ requirement”).

16 Martignon, 346 F. Supp. 2d at 417 (finding that “Congress may not evade the limitations imposed on its power...through resort to a separate grant of authority”).

17 Id. at 422.

18 Id.

19 U.S. CONST. art. 1, § 8, cl. 3. Though 18 U.S.C. § 2319A lacks legislative findings or a jurisdictional element, they are not required. See Moghadam, 175 F.3d at 1274–77; see also United States v. Lopez, 514 U.S. 549, 561–63 (1995). Though neither Moghadam nor Martignon found it necessary to address the issue, § 2319A might also be valid under the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18.


21 Moghadam, 175 F.3d at 1276.

22 Id. (noting that “[b]ootleggers depress the legitimate markets [sic.] because demand is satisfied through unauthorized channels,” contrasting Wickard v. Filburn, 317 U.S. 111, 127–28 (1942)).


24 Id. at 428.


Steal this Concert?

27 See id. at 423 (noting that “[b]ecause 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”).


29 United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (emphasis added).

30 Martignon, 346 F. Supp. 2d at 428. But see Moghadam, 175 F.3d at 1277 (noting 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,” citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).

31 U.S. Const. art. I, § 8, cl. 8.


34 Moghadam, 175 F.3d at 1277 (citing The Trade-Mark Cases, 100 U.S. 82 (1879)). But see Martignon, 346 F. Supp. 2d at 427.

35 See Martignon, 346 F. Supp. 2d at 427 (admitting that under The Trade-Mark Cases “when Congress does not regulate in the field covered by the Copyright Clause, it may look to an alternative grant of power”).

36 Nimmer, supra note 20, at § 1.05(A)(1) n.1.


38 Brief of Amicus Curiae Recording Industry Association of America, Inc. at 5, Moghadam 175 F.3d 1269 (11th Cir. 1999) (No. 98-2180).

39 While 18 U.S.C. § 2319A does not include an explicit fair use exemption, at least one authority concludes that defendants enjoy a common law fair use defense. See Nimmer, supra note 20, at §8E.03(B)(2)(b). This comports with what is known of the relevant legislative intent. See S. Rep. No. 103-412, at 225 (1994) (“It is intended that the legislation will not apply in cases where First Amendment principles are implicated”).

40 Martignon, 346 F. Supp. 2d at 429; Moghadam, 175 F.3d at 1281.