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RECENT DEVELOPMENT
UNITED STATES V. MARTIGNON

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On September 24, 2004, the District Court for the Southern District of New York held that 18 U.S.C. § 2319A, the federal anti-bootlegging statute, was unconstitutional.[1] Judge Baer found that the statute violated the "limited Times" provision of the Copyright Clause,[2] and that the statute was not a valid exercise of Congress' power to regulate interstate commerce pursuant to the Commerce Clause.[3]

18 U.S.C. § 2319A states:

> Whoever, without the consent or the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—
>
> (1) 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;
>
> (2) transmits or otherwise communicates to the

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[1] United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004).

[2] U.S. CONST. art I. § 8, cl. 8. states:

> The Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries.

[3] *Id.* cl. 3 states that "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ."

> public the sounds or sounds and images of a live musical performance; or
>
> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the Untied States;
>
> shall be imprisoned for not more than 5 years or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense, shall be imprisoned for no more than 10 years or fined in the amount set forth in this title, or both.[4]

Jean Martignon operates "Midnight Records," a small record store on 23rd Street in Manhattan.[5] In addition, Martignon runs a catalogue service and Internet website under the name "Midnight Records."[6] In September of 2003, Martignon was arrested for selling copies of live musical performances, recorded and reproduced without the artists' consent.[7] Martignon moved to dismiss the one count indictment on three grounds.[8] First, he argued that the statute violated the "limited Times" provision of the Copyright Clause.[9] Second, Martignon argued that the statute violated the free speech protections of the First Amendment.[10] Finally, Martignon argued that

[4] 18 U.S.C. § 2319A (2005).

[5] *Martignon*, 346 F. Supp. 2d at 417.

[6] *Id.*

[7] *Id*.

[8] *Id.* "On October 27, 2003 Martignon was indicted by a federal grand jury for violating § 2319A, for selling 'unauthorized recordings of live performances by certain musical artists through his business Midnight Records. The one count Indictment provides no further details as to, e.g., the artists that Martignon allegedly bootlegged, the scope of the bootlegging, or the distribution of the bootlegged works." *Id.*

[9] *Id.* at 415-16.

[10] *Martignon,* 346 F. Supp. 2d at 415-16.

the statute violated the basic tenents of federalism.[11]

The district court found that the statute was a copyright law, not a commercial regulation.[12] In classifying the statute, Judge Baer relied on legislative context—the statute grew out of the Trade Negotiations on Intellectual Property ("TRIPS")[13]—legislative intent—when enacted, the purpose of the statute was to encourage artists to create[14] —and statutory construction—the statute incorporates the definitions set forth in Title 17 of the U.S. Code, which is the title reserved for copyright law,[15] and concluded that the statute was "copyright-like" legislation.[16] Judge Baer held that because the legislation was "copyright-like," it was limited by the constitutional restrictions placed on copyright legislation.[17] Furthermore, Judge Baer rejected the argument that because the statute has "commercial consequences" it loses its identity as a copyright statute.[18]

According to Judge Baer, the statute violated the Copyright

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[11] *Id.*

[12] *Id.* at 419 ("In order to establish whether the anti-bootlegging statute is constitutional, it is necessary to determine whether the statute is a copyright law or a commercial regulation."). Congress never indicated what power it was acting under when it enacted § 2319A. *Id.* at 419.

[13] *Id.* at 419-21.

[14] *Id.* at 421.

[15] *Martignon,* 346 F. Supp. 2d at 421-22 ("Therefore, the anti-bootlegging statute's positioning as an offshoot of the Copyright Act supports an interpretation of the statute as one directed at protecting the interests of *artists*, rather than *commerce*, and further sustains the view that the statute is copyright-like in nature.").

[16] *Id.* at 422 ("Based on the anti-bootlegging statute's language, history, and placement, it is clearly a copyright-like legislation.").

[17] *Id.* at 422; *id.* at 425 ("Congress' power to act in the copyright field is limited by the confines of the Copyright Clause.").

[18] *Id.* ("But, this Court does not believe that simply because a piece of legislation has commercial consequences, advantages or even intention, the legislation loses its 'Copyright' identity and becomes a 'Commercial' statute—not subject to the strictures of the Copyright

Clause on two grounds. First, by enacting § 2319A, Congress granted copyright protection to subject matter which was not within the scope of the Copyright Clause.[19] The Copyright Clause specifically protects "writings," and, according to the court, live musical performances were not "writings" because they were not "fixed" within the meaning of the Copyright Clause.[20] Second, even assuming that the works were "fixed" pursuant to the Copyright Clause, the anti-bootlegging statute clearly lacked a time restriction and therefore granted "seemingly perpetual protection for performers."[21] The district court held that the "limited Times" provision of the Constitution explicitly prohibits Congress from granting perpetual copyright protection, and therefore the statute was unconstitutional.[22]

In its decision, the district court rejected the government's argument that if the anti-bootlegging statute was not valid under the Copyright Clause, it nevertheless was valid under the Commerce Clause.[23] The district court held that Congress could not avoid the express limitations of one enumerated power—the Copyright Clause—with another enumerated power—the Commerce Clause.[24]

The government appealed the district court's decision,

Clause.").

[19] *Id.* at 424.

[20] *Martignon*, 346 F. Supp. 2d at 424 ("[B]y virtue of the fact that [the anti-bootlegging statute] regulates unfixed live performances, the anti-bootlegging statute is not within the purview of Congress' Copyright Clause power.").

[21] *Id.* at 425.

[22] *Id.*

[23] *Id.*

[24] *Id.* ("Congress may not enact copyright-like legislation, such as the anti-bootlegging statute, under the commerce clause.").

arguing that the district court erred in holding that the anti-bootlegging statute was unconstitutional. In its appeal, the government argued that the anti-bootlegging statute is not copyright legislation; therefore, Congress remains free to regulate bootlegging, which has a major economic affect on interstate commerce, pursuant to the Commerce Clause and the Necessary and Proper Clause.

Other courts have weighed in on the constitutionality of the anti-bootlegging statute. The Eleventh Circuit Court of Appeals in *United States v. Moghadam* upheld the constitutionality of the anti-bootlegging statute on the basis that the statute was a valid exercise of Congress' authority to regulate commerce.[25] However, the Eleventh Circuit expressly declined to address whether the statute could be a valid exercise of Congress' authority under the Copyright Clause.[26]

In addition, the District Court for the Central District of California in *Kiss Catalog Ltd. v. Passport International Productions* held that 17 U.S.C. § 1101, the civil anti-bootlegging statute, was constitutional.[27] Judge Fischer of the Central District of California

[25] United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999).

[26] *Id.* at 1274 (11th Cir. 1999) ("Because we affirm the conviction in the instant case on the basis of an alternative source of Congressional power, we decline to decide in this case whether the fixation concept of Copyright Clause can be expended so as to encompass live performances that are merely capable of being reduced to the form, but have not been. For purposes of this case, we assume, arguendo, without deciding, that the above described problems with the fixation requirement could preclude the use of the Copyright Clause as a source of Congressional power for the anti-bootlegging statute."). The court goes on to note in a footnote that the statute may be faced with another constitutional challenge, namely whether the statute, if considered copyright legislation, would withstand constitutional scrutiny because it lacks a time restriction. *Id.* at n.9.

[27] 405 F. Supp. 2d 1169 (C.D. Cal. 2005); 17 U.S.C. § 1101(a) (2005).

> Anyone who, without the consent of the performer or performers involved—

upheld the statute on the ground that the statute was a valid exercise of Congress' broadly defined Commerce Clause power.[28] In finding that the statute was a valid exercise of Congress' Commerce Clause power, the court relied on the *Moghadam* court's finding that the "link between bootleg compact discs and interstate commerce and commerce with foreign nations [was] self-evident."[29] Thus, because the activity of bootlegging "sufficiently affected interstate commerce," the statute was within Congress' authority to regulate under the Commerce Clause.[30] Unlike Judge Baer's conclusion in *Martignon*, the district court went on to find that extending copyright-like protection to unfixed live musical performances was *not* inconsistent with the Copyright Clause.[31] However, according to

> > (1) 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,
> >
> > (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or
> >
> > (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixes as described in paragraph (1), regardless of whether the fixations occurred in the United States;
>
> shall be subject to the remedies provided in sections 502 through 505 of the same extent as an infringer of copyright.

Id. Section 1101 is the civil counterpart to the criminal anti-bootlegging statute and contains language almost identical to the criminal anti-bootlegging statute at issue in *Martignon.*

[28] *Kiss Catalog,* 405 F. Supp. 2d at 1173 (citing Gonzales v. Raich, 125 S. Ct. 2195 (2005)).

[29] *Id.* (quoting United States v. Moghadam, 175 F.3d 1269 (1274) (11th Cir. 1999)) ("Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels.") (quoting *Moghadam*, 175 F.3d at 1275).

[30] *Id.*; *see also* United States v. Lopez, 514 U.S. 549 (1995).

[31] *Kiss Catalog,* 405 F. Supp. 2d at 1175. Judge Fischer went on to state,

> The Statute merely proscribes conduct not otherwise addressed, prohibited or protected by the Copyright Clause: the non-consensual recording of a live performance. Stated differently, what Congress regulates here is an unauthorized and (by this statute) unlawful recording

Judge Fischer, an evaluation of whether the statute was inconsistent with the Copyright Clause was unnecessary because § 1101 simply addresses subject matter not protected under the Copyright Clause, i.e., unfixed, live musical performances. Therefore, Judge Fischer maintained that "the Statute *complements*, rather than *violates*, the Copyright Clause by addressing similar subject matter, not previously protected-or [sic] protectible-under [sic] the Copyright Clause."[32]

Oral argument was heard in the Second Circuit in July of 2005 and the case is still pending before the court. If the Second Circuit upholds the district court's determination that the statute is unconstitutional, then there would be a split in the circuits, which could leave this question open for determination by the Supreme Court.

> of a live performance, not an unauthorized, protected, and constitutionally-encouraged fixation of an author's original work.

Id. at 1176. *Contra* United States v. Martignon, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004) ("It is undeniable that the anti-bootlegging statute grants seemingly perpetual protection to live musical performances, and therefore would run afoul of the Copyright Clause.").

[32] *Kiss Catalog,* 405 F. Supp. 2d at 1176 (emphasis added).