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By David Patton*

INTRODUCTION

When United States District Judge Harold Baer, Jr., struck down the federal anti-bootlegging act[1] last year in *United States v. Martignon*,[2] he repeatedly employed a term to describe the law—"copyright-like"—that has provoked much criticism. Commentators have criticized the phrasing as either imprecise,[3] nonsensical,[4] or merely insufficient as a basis for striking down the statute.[5] And a federal court in California, in disagreeing with the holding of *Martignon*, specifically noted that use of the term was "not particularly helpful."[6]

Judge Baer, however, was not the first to use the term "copyright-like," and he will likely not be the last. Seemingly vague descriptions of laws as "copyright-like" or "quasi-copyright" are sure to appear in future opinions as courts evaluate congressional authority to pass a new generation of untraditional intellectual property statutes. In addition to the bootlegging

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1 18 U.S.C. § 2319A (2000).

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

3 Brief of Amici Curiae Ass'n of Am. Publishers, et al. at 20, United States. v. Martignon, 175 F.3d 1269 (2d Cir. May 12, 2005) (No. 04-5649-cr).

4 Hugh Hansen et al., *Panel III: United States v. Martignon—Case in Controversy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1223 (2006) (William Patry, panelist).

5 *See* Brian Danitz, *Martignon and KISS Catalog: Can Live Performances Be Protected?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1181 (2005).

6 Kiss Catalog, Ltd. v. Passport Int'l Prods., 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

context, the terms have also recently appeared in opinions weighing the constitutionality of the Digital Millennium Copyright Act ("DMCA").[7] The anti-bootlegging statute and the DMCA, share important features that precipitated the use of the terminology: they both regulate in the field of intellectual property, but do so in ways novel to traditional American intellectual property legislation, and they were both passed in response to world trade agreements entered into by the United States. The new laws move the United States closer to embracing a "neighboring rights" view of intellectual property heretofore more closely associated with European law. But along with this trend, have come questions about the scope of congressional authority in creating these new rights.

When Judge Baer struck down the federal anti-bootlegging statute as unconstitutional, the decision sparked heated debate about the scope of the Copyright Clause and the enumerated powers of Congress. The primary questions presented in *Martignon* were (1) whether the statute violated the Copyright Clause by its vesting of exclusive rights in non-"Writings," *i.e.*, live musical performances; (2) whether it violated the Copyright Clause by granting those rights in perpetuity; and (3) if so, whether Congress could nonetheless enact such legislation pursuant to the Commerce Clause, irrespective of the Copyright Clause's limitations.

The Government took the position that the bootlegging statute falls entirely outside the scope of the Copyright Clause precisely because it regulates non-writings, and that when Congress grants exclusive rights to performers it does so within its authority under the Commerce Clause, free of any conflict with the Copyright Clause. In so arguing, the Government relied heavily on the differences between the anti-bootlegging statute and the rights conferred by the Copyright Act. Its basic premise was that the bootlegging statute is separate and distinct from copyright law; instead, it is a commercial regulation passed to comply with the United States' treaty obligations.

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[7] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 512 (2000)).

Mr. Martignon, on the other hand, contended that the statute falls squarely within the scope of the Copyright Clause since it regulates "the fruits of creative intellectual or aesthetic labor,"[8] and that it violates the proscriptions of the clause by granting exclusive rights to authors of non-"Writings" and for time immemorial. He further argued that Congress may not avoid those proscriptions by reliance on the Commerce Clause. Here, Mr. Martignon relied heavily on the ways in which the statute is similar to traditional copyright legislation in the rights it provides to authors, but different in its failure to provide the same traditional safeguards to the beneficiaries of the public domain.

In his opinion holding for Mr. Martignon, Judge Baer repeatedly referred to the statute as "copyright-like legislation,"[9] and he concluded that "Congress may not enact copyright-like legislation, such as the anti-bootlegging statute, under the commerce clause (or any other clause) when the legislation conflicts with the limitation[s] imposed by the Copyright Clause."[10] This phraseology incited considerable criticism. Indeed, one of the leading experts on copyright law and the author of the statute, William Patry, said of it: "The idea that it could be 'copyright-like' I don't quite get either. You are pregnant or you are not pregnant. Either it is a Copyright Clause or it is not a Copyright Clause. It can't be 'copyright-like.'"[11] While I confess to being a bigger fan of Judge Baer's opinion than Mr. Patry, I find his criticism on this score valid—to a certain extent.

Below, I discuss the terms "copyright-like" and "quasi-copyright" and demonstrate that prior to *Martignon*, courts had typically used the terms in reference to a law's similarity (or dissimilarity) to the Copyright Act; whereas in *Martignon* the term was also used in reference to the Copyright Clause. While this usage in *Martignon* may have been somewhat imprecise, I suggest that the classification of a law as "copyright-like" is ultimately unimportant to the determination of whether the bootlegging statute is constitutional. The constitutionality of the statute

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8 Goldstein v. California, 412 U.S. 546, 561 (1973).

9 United States v. Martignon, 346 F. Supp. 2d 413 *passim* (S.D.N.Y. 2004).

10 *Id.* at 425.

11 Hansen, *supra* note 4 (William Patry, panelist).

depends not on how it is broadly categorized but on its actual effects, i.e., the rights it confers and the subject matter of those rights. The Copyright Clause itself does not mention the word "copyright;" instead it speaks of "exclusive rights" granted "for limited times" to "Authors" for their "Writings."[12] When analyzing how those terms have been interpreted by the Supreme Court, it becomes clear that the bootlegging statute falls squarely within the scope of the Copyright Clause and that Judge Baer's conclusion is well supported despite his terminology. While "copyright-like" and "quasi-copyright" may provide useful shorthands for describing the increasing number of non-traditional laws regulating intellectual property, the terms themselves do not answer any of the fundamental questions at issue; they merely beg them.

I. *MOGHADAM*, *RAILWAY LABOR* AND *MARTIGNON*

In 1994, Congress passed legislation prohibiting the unauthorized recording and transmission of live musical performances and the subsequent copying or distribution of such "bootleg" recordings.[13] Prior to this legislation, prohibitions on "bootlegging"[14] had been left to individual states, the majority of

[12] U.S. CONST. art. I, § 8, cl. 8 ("Congress has the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.").

[13] 18 U.S.C. § 2319A (2000).

[14] A bootleg album or compact disc is an unauthorized recording of a live musical performance that is not generally commercially available. Bootlegs are distinguishable from counterfeit or pirated albums, which contain copyrighted content that has been previously recorded and distributed. *See* Lee H. Russo, *The Criminalization of Bootlegging: Unnecessary and Unwise*, 1 BUFF. INTELL. PROP. L.J. 169, 172 (2002). A "counterfeit" recording mimics an official release in its entirety, down to its packaging and trademarks and are "duplicates of commercially released albums intended to look like the original." Dawn R. Maynor, *Just Let the Music Play: How Classic Bootlegging Can Buoy the Drowning Music Industry*, 10 J. INTELL. PROP. L. 173, 175 (2002). A "pirated" recording also contains commercially released material but without mimicking the entire content or packaging of the official product. *See* The Recording Industry Association of America ("RIAA"), Anti-Piracy News and Issues page, http://www.riaa.com/issues/piracy/default.asp (last visited Aug. 16, 2006) (definitions for bootleg, counterfeit, and piracy promulgated by RIAA).

which prohibited unauthorized recordings.[15] The federal statute was passed in response to the Uruguay Round of Multilateral Trade negotiations, which included the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS"), to which the United States was a signatory.[16] There is almost a complete dearth of legislative history related to the passage of the statute because it was passed using "fast-track" procedures which did not allow for amendment or debate.[17]

The statute went unchallenged until 1997 when Ali Moghadam was charged in the Middle District of Florida with distributing bootleg compact discs.[18] He challenged the statute as violating the Copyright Clause because it granted exclusive rights to the authors of non-"Writings." The Eleventh Circuit disagreed with Mr. Moghadam, ultimately finding that Congress maintained authority to pass the statute under its Commerce Clause powers even assuming that the statute fell outside the scope of congressional authority under the Copyright Clause (a point the government had conceded). In so doing, however, the Court was required to resolve "the tension"[19] between its holding and that in *Railway Labor Executives' Association v. Gibbons*.[20]

In *Railway Labor*, the Supreme Court addressed the uniformity requirement of the Bankruptcy Clause and whether Congress could pass a non-uniform bankruptcy law under its Commerce Clause powers.[21] The issue arose in 1980 when Congress enacted the Rock Island Railroad Transition and Employee Assist Act ("RITA") requiring a debtor railroad company in bankruptcy proceedings to pay $75 million to its former employees.[22] The

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15 *See* 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, n.29 (2000) (finding that 30 states and the District of Columbia have anti-bootlegging statutes).

16 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, Art. 14, Sec. 5, 33 I.L.M. 1125 (1994); *see also*, Maynor, *supra* note 14, at 187 (2002).

17 *Id.*

18 *See* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999).

19 *Id.* at 1279.

20 455 U.S. 457 (1982).

21 *Id.*

22 *Id*. at 459–62.

trustee sued, arguing that RITA violated the Bankruptcy Clause's uniformity requirement by giving preferential treatment to the debtor's former employees.[23]

Defenders of the statute asserted that RITA was a type of labor law authorized by the Commerce Clause and "not a law on the subject of bankruptcies."[24] Therefore, they argued, the law was not subject to the limitations of the Bankruptcy Clause, namely the "uniformity" requirement, and that Congress was free to exercise its authority under the Commerce Clause. The Court rejected that characterization, found that the law in question was indeed a "bankruptcy" law within the scope of the Bankruptcy Clause, and struck down the statute.[25] The holding turned on whether the law principally governed Congress' regulation of the labor rights of workers employed in the field of interstate transportation, or whether it instead primarily regulated the rights and obligations of creditors and debtors. In finding the latter, the Court emphasized that the rights created by RITA lay at the core of bankruptcy law and fell within the subject matter of the Bankruptcy Clause.[26]

The *Moghadam* court acknowledged that *Railway Labor* constrained congressional power to act pursuant to a general grant of authority (the Commerce Clause) where another more specific grant of authority (the Bankruptcy Clause) contained limitations. In *Moghadam*, however, the court found that this was the case only in "some circumstances" and that "the instant case is not one such circumstance."[27] In the context of the anti-bootlegging statute, the court found that the statute was "not fundamentally inconsistent" with the fixation requirement of the Copyright Clause.[28] Rather, according to *Moghadam*, "the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-

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[23] *Id.* at 463; *see also* U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States").

[24] Brief of Respondent-Appellee, Ry. Labor Executives Ass'n v. Gibbons, 645 F.2d 74 (1980) (Nos. 80-415, 80-1239), 1981 WL 390398.

[25] *Railway Labor*, 455 U.S. at 466–72.

[26] *Id.*

[27] United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999).

[28] *Id.*

like protection under other constitutional clauses, such as the Commerce Clause. . . ."[29]

Throughout the opinion, the *Moghadam* court variously referred to the anti-bootlegging statute as "quasi-copyright"[30] and "copyright-like"[31] owing to its creation of "hybrid rights that in some ways resemble the protections of copyright law but in other ways are distinct from them."[32] In so categorizing the statute, the court noted that the bootlegging statute did not confer the same exclusive rights granted by the Copyright Act and that it was unclear whether many of copyright law's related doctrines such as fair use and work-for-hire applied to the bootlegging context.[33] The court ultimately concluded that "extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection."[34]

Notably, however, the *Moghadam* court explicitly reserved judgment on whether the statute was fundamentally inconsistent with the "Limited Times" requirement of the Copyright Clause because Mr. Moghadam failed to preserve the issue for appeal. Though not ruling on it, the Court nonetheless gave its opinion that the issue was, at the very least, problematic: "On its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore phonorecords of live musical performances would presumably never fall into the public domain."[35]

Four years after the Eleventh Circuit's decision, in *United States v. Martignon*,[36] Judge Baer was presented with the issue left undecided in *Moghadam*. In 2003, Jean Martignon was charged with violating the anti-bootlegging statute by selling bootleg compact discs from his record store in New York City. He

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29 *Id.*
30 *Id.* at 1273.
31 *Id.* at 1280.
32 *Id.* at 1272.
33 *Id.*
34 *Id.* at 1280.
35 *Id.* at 1281.
36 346 F. Supp. 2d 413 (S.D.N.Y. 2004).

challenged the constitutionality of the statute as violating both the "Writings" and "Limited Times" requirements of the Copyright Clause.[37] Judge Baer seized upon the "copyright-like" language in *Moghadam* and expanded upon its importance in determining whether the statute was constitutional by stating that the first step in his analysis was to categorize the statute as either "a copyright law or a commercial regulation."[38] He concluded the first part of his analysis by finding that, "[b]ased on the anti-bootlegging statute's language, history, and placement, it is clearly a copyright-like regulation."[39] He then determined that the Copyright Clause did not empower Congress to pass the statute because it failed to meet both the "Writings" and "Limited Times" requirements.[40] Lastly, he found that the limitations of the Copyright Clause constrained congressional authority generally such that Congress could not enact the statute pursuant to some other grant of authority like the Commerce Clause.[41] Here, Judge Baer elevated the importance of the "copyright-like" terminology, by holding, "Congress may not enact copyright-like legislation, such as the anti-bootlegging, under the commerce clause (or any other clause), when the legislation conflicts with the limitation[s] imposed by the Copyright Clause."

Critics of the decision in *Martignon* have consistently attacked Judge Baer's use of the term "copyright-like." The Government in its appeal to the Second Circuit argued that by comparing the bootlegging statute to the bankruptcy statute in *Railway Labor* the *Martignon* court was making a fundamental error because RITA was not a "bankruptcy-like" statute.[42] Rather, the statute "directly created rules for a specific bankruptcy case."[43] In their amicus curiae for the Government's position, the Association of American Publishers, et al., charged that "the court below does not explain what is meant by the phrase 'copyright-like.' Insofar as the

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37 *Id.* at 417–18.
38 *Id.* at 419.
39 *Id.* at 422.
40 *Id.* at 424.
41 *Id.* at 428.
42 Brief of Petitioner-Appellant, United States v. Martignon, 346 F. Supp. 2d 413 (2d Cir. May 12, 2005) (No. 04-5649-cr).
43 *Id.*

decision below turns on the 'copyright-like' character of anti-bootlegging protection, the imprecision of that term is an additional reason for rejecting that court's decision."[44] As noted above, the author of the statute, William Patry, stated in this panel discussion that "[t]he idea that it could be 'copyright-like' I don't quite get either. You are pregnant or you are not pregnant. Either it is a Copyright Clause or it is not a Copyright Clause. It can't be 'copyright-like.'"[45] Also, at least one member of the Second Circuit panel sitting at the oral argument, asked the Government whether there was any precedent for the use of the term, to which the Government responded in the negative.[46]

More recently, a court in the Central District of California disagreed with *Martignon* in upholding the civil analogue to the anti-bootlegging statute. In *KISS Catalog v. Passport International Productions*,[47] the court, upon reconsideration after intervention by the United States, found the reasoning of *Moghadam* persuasive, and with respect to the copyright-like language of *Martignon*, found that "this characterization, even if valid, is not particularly helpful. As the United States points out, nothing prohibits Congress from protecting similar things in different ways—so long as some provision of the United States Constitution allows it to do so."[48]

II. "COPYRIGHT-LIKE"

Debate over the bootlegging statute is not the only arena in which the term "copyright-like" has been employed. Most frequently, it has arisen in the context of federal preemption of state laws which have features of copyright law. Section 301(a) of the Copyright Act preempts any "legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106 in works of

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[44] Brief of Amici Curiae Ass'n of Am. Publishers et al., *supra* note 3.

[45] Hansen, *supra* note 4 (William Patry, panelist).

[46] Transcript of Oral Argument, *Martignon*, 346 F. Supp. 2d 413 (2d Cir. July 12, 2005) (No. 04-5649-cr).

[47] 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

[48] *Id.* at 1174.

authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by §§ 102 and 103."[49] Section 301 has resulted in a number of challenges to various state laws governing unfair competition and rights of publicity. In one such case, *Pivot Point v. Charlene Products*, Judge Easterbrook (sitting by designation as a district court judge), found that a state law unfair competition claim was preempted by the Copyright Act but also acknowledged that under different circumstances some "copyright-like" state claims might stand.[50]

The term has also been used in evaluating the Digital Millennium Copyright Act ("DMCA").[51] The DMCA was passed in 1998 in response to the United States' adoption of the World Intellectual Property Organization Copyright Treaty. The DMCA prohibits, *inter alia*, the distribution of certain "anti-circumvention" technologies, i.e., technologies that allow persons to circumvent restrictions encrypted on digital copyrighted materials. In 2001, Elcom, a company that sold software making it possible for consumers to lift restrictions placed on books sold in digital format, was indicted under the criminal provisions of the DMCA. In *United States v. Elcom Ltd.*,[52] the court addressed a variety of constitutional challenges raised by Elcom, including a Fifth Amendment vagueness challenge, First Amendment challenges to the statute's restrictions on speech and expression, and a Copyright Clause challenge to congressional authority to enact the statute. While the court dismissed all of Elcom's challenges, it relied heavily on, and quoted liberally from, *Moghadam* in addressing the copyright challenge. Employing *Moghadam*'s "fundamentally inconsistent" test, the *Elcom* court upheld the DMCA, rejecting, among other arguments, Elcom's contention "that Congress' ban on the sale of circumvention tools

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49 17 U.S.C. § 301(a) (2006).

50 170 F. Supp. 2d 828 (N.D. Ill. 2001); *see also* Toney v. L'Oreal USA, Inc., 406 F.3d 905 (7th Cir. 2005) (holding that Illinois' right of publicity statute was not preempted by the Copyright Act but noting that states may not create "copyright-like" protections that conflict with federal copyright law).

51 17 U.S.C. § 1201 (2006).

52 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

has the effect of allowing publishers to claim copyright-like protection in public domain works . . ."[53]

The common thread running throughout these pre-*Martignon* opinions, is their use of the term "copyright-like" in reference to a statute's similarities and differences with the Copyright Act. The preemption cases do so explicitly by referring to Section 301 of the Copyright Act, which asserts federal supremacy over all things "equivalent" to copyright. The court in *Elcom* did so by its heavy reliance on *Moghadam* and its ultimate conclusion that the DMCA's anti-circumvention provisions did not extend any of the rights granted by the Copyright Act, i.e., the "exclusive rights to reproduce, and distribute copies of an original work of authorship, to make derivative works, and to perform the work publicly, for a limited time."[54]

And finally, the court in *Moghadam* explained in detail what it meant when describing the anti-bootlegging statute as conferring "hybrid rights" that were best described as "quasi-copyright or *sui generis* protections."[55] The court listed the rights granted by § 106 of the Copyright Act and noted that the anti-bootlegging statute did not confer all of those same rights.[56] It also noted the uncertainty of whether copyright concepts like fair use, work-for-hire, limited duration, and the statute of limitations were applicable to the anti-bootlegging statute.[57]

In *Martignon*, however, the court, at times, used the term "copyright-like" in a decidedly different manner, and it is this usage that has fueled many of the opinion's critics. In addition to using the term "copyright-like" to describe the anti-bootlegging statute's relationship to the rights conferred by the Copyright Act, the *Martignon* court also used the term to describe the statute in relation to the subject matter of the Copyright Clause.

Whether the bootlegging statute falls within the scope of the Copyright Clause is virtually determinative of whether the statute

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[53] *Id.* at 1141; *see also* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (citing *Elcom*, 203 F. Supp. 2d at 1117–18).

[54] *Elcom*, 203 F. Supp. 2d at 1121.

[55] United States v. Moghadam, 175 F.3d 1269, 1273 (11th Cir. 1999).

[56] *Id.*

[57] *Id.*

is constitutional.[58] If, as the United States argues, the statute falls outside the scope of the Copyright Clause because it regulates non-"Writings," then it is easy to see why Congress could validly exercise its Commerce Clause powers to enact it. If the regulation of live performances and the resulting recordings of those performances is something separate and apart from the subject matter regulated by the Copyright Clause, then nothing in the Copyright Clause would restrain congressional action; and if another clause, such as the Commerce Clause, provides Congress with the power to regulate performances, then Congress may do so, uninhibited by the limitations of the Copyright Clause.

If, however, the anti-bootlegging statute regulates subject matter that falls within the scope of the Copyright Clause, it is easy to see why Congress would be constrained by the limitations imposed therein, regardless of additional grants of power such as the Commerce Clause that might otherwise provide Congress with the authority to enact the law. Here, *Railway Labor* is dispositive: Congress may not resort to other more general grants of authority to do what is forbidden by a more specific constitutional limitation.

The *Martignon* court, by classifying the statute as "copyright-like," largely by reference to its similarity to the Copyright Act, while also using the term "copyright-like" to refer to that which falls within the scope of the Copyright Clause, gave near dispositive weight to the classification. While the classification can be instructive, it should not be dispositive, and here, the critics are right to question the terminology. The holding in *Martignon*, however, remains sound because the bootlegging statute does indeed fall within the scope of the Copyright Clause.

III. MARTIGNON WAS RIGHTLY DECIDED

The bootlegging statute prohibits a variety of conduct, including the unauthorized copying of live musical performances and the subsequent copying or distribution of those recordings.

[58] *But see* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) (writer argues that the constraints of the Copyright Clause should not prohibit Congress from acting pursuant to its other grants of authority).

Mr. Martignon challenged the statute as violating the Copyright Clause in two ways: (1) by violating the "Writings" requirement; and (2) by violating the "Limited Times" requirement.

The first challenge is perhaps the more difficult of the two to resolve as it relies not purely on the text of the Copyright Clause but also on its history and accepted meaning. Prior to the enactment of the bootlegging statute, Congress had never granted exclusive intellectual property rights to something not fixed in some sort of tangible form. "Writings" has been interpreted to cover a host of tangible items, including photographs,[59] graphic and sculptural art[60] and audiovisual works,[61] but never to live performances.[62] Any regulation of performances had always been left to the States, the majority of which prohibited bootlegging.[63]

The United States, relying on the fact that performances are not "Writings," argued that the bootlegging statute simply falls outside the realm of the Copyright Clause and thus Congress is free to use its Commerce Clause powers free of the Copyright Clause restraints. Mr. Martignon's response was that "Writings" does not mark the subject matter of the Copyright Clause; rather it imposes a limitation on congressional authority when it regulates within the scope of the Copyright Clause. And Congress acts within the scope of the Clause whenever it grants exclusive rights to the Authors of original works that are the fruits of creative or intellectual labor[64]—whether in tangible form or not.

The second challenge to the statute—the "Limited Times" challenge—is more straightforward. Here, the United States can no longer rely on its argument that because the statute regulates non-"Writings," it falls outside the scope of the Copyright Clause. The

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[59] Burrow-Giles Lithograph Co. v. Sarony, 111 U.S. 53 (1883).

[60] *See, e.g.*, Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983) (distinguishing between useful and artistic goods); Norris Indus., Inc. v. Int'l Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983) (same).

[61] *See, e.g.*, WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 628 (7th Cir. 1982).

[62] *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1409 (1995) ("No respectable interpretation of the word 'writings' embraces an untaped performance of someone singing at Carnegie Hall.").

[63] Lee, *supra* note 15, at n.29.

[64] *See* Goldstein v. California, 412 U.S. 546, 561 (1973).

statute, in addition to regulating non-"Writings" by prohibiting the recording of heretofore unrecorded performances, also regulates the subsequent copying and distribution of those recordings. Those tangible recordings are certainly "Writings" by any definition of the term.[65] And the bootlegging statute's perpetual prohibition on the distribution of those recordings without the performer's consent is fatal.[66]

The *Martignon* court was correct to follow the example of *Railway Labor* when it looked to a variety of sources in determining whether the statute fell within the scope of the Copyright Clause. In *Railway Labor*, the Supreme Court examined the nature of the statute at issue, RITA, and its legislative history in determining that it was indeed a law that fell within the subject matter of the Bankruptcy Clause. Judge Baer, in noting the anti-bootlegging statute's language, its similarity to the Copyright Act, and its legislative history grounded in a treaty on intellectual property matters, did the same when he examined what sort of rights were being created by the anti-bootlegging statute.

His ultimate conclusion that "Congress may not enact copyright-like legislation, such as the anti-bootlegging statute, under the commerce clause (or any other clause) when the legislation conflicts with the limitation[s] imposed by the Copyright Clause," is well-supported when one understands that by "copyright-like" he is referring to that which falls within the scope of the Copyright Clause.

The holding and the terminology are further supported by the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*[67] In *Dastar*, the Court held that a provision of the

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[65] Some have argued that the recordings are not "Writings" because they were created without authorization, noting that the definition of fixation in the Copyright Act requires the "authority of the author." 17 U.S.C. § 101 (2000). The argument fails because it conflates the Copyright Act's definition of fixation with the constitutional definition of "Writings" which has never been so constrained. *See Goldstein*, 412 U.S. at 561 (defining a Writing as "any physical rendering of the fruits of creative intellectual or aesthetic labor").

[66] *See* Eldred v. Ashcroft, 537 U.S. 187, 196, 198, 208 (2003) (variously referring to the Copyright Clause's "Limited Times" language as a "restriction," "limitation," and "constraint" on congressional authority).

[67] 539 U.S. 23 (2003).

Lanham Act did not, and more importantly, could not, prevent the unaccredited copying of an uncopyrightable work. Dastar, a production company, released a video in which it repackaged an old television documentary which had fallen into the public domain after the lapsing of its original copyright. Dastar's re-release changed the ordering of the footage and listed itself as the producer. The original producer of the documentary sued Dastar under Section 43(a) of the Lanham Act which creates a cause of action against anyone who uses in commerce either "a false designation of origin, or any false description or representation" in connection with "any goods or services."[68] In dismissing the claim, the Supreme Court went beyond mere statutory interpretation of the Lanham Act: it held that allowing such a claim would "create a species of mutant copyright law,"[69] and was something that Congress "may not do."[70]

Whether one refers to the anti-bootlegging statute as "copyright-like," "quasi-copyright," or the more sinister "mutant copyright law," it falls squarely within the bounds of the Copyright Clause and the *Martignon* court was right to strike it down.

IV. NEIGHBORING RIGHTS AND FUTURE IMPLICATIONS

Intellectual property rights in the United States have historically been positive rights handed down by Congress pursuant to its Copyright Clause powers.[71] The rights conferred by Congress have been broad, covering a variety of works whose only common attribute is that they are "original" and have some "minimal degree of creativity."[72] The American system stood in contrast to the traditional European model of natural rights (*droit d'auteur*) in which authors enjoy protection only for works of "high authorship."[73] The European model reserves a separate

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68 *Id.* at 29.

69 *Id.* at 34.

70 *Id.* at 37 ("To hold otherwise, would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.").

71 *See* Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 8E.01 (2004).

72 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

73 Nimmer & Nimmer, *supra* note 71.

place for those so-called "neighboring rights" (*droit voisins*) which are "similar to those protected by copyright laws . . . but are not necessarily protected under a nation's copyright law."[74] These neighboring rights most commonly refer "to the rights of performers, producers of sound recordings, and broadcasters."[75]

In 1994, when Congress implemented the anti-bootlegging statute in response to the TRIPS accord, the United States for the first time entered the world of "neighboring rights." Given this fundamental break with traditional American intellectual property jurisprudence, it is no surprise that significant constitutional questions have arisen. And as the United States continues to enter into international treaties and agreements on intellectual property, those same questions will undoubtedly continue to arise.

Equally likely will be the use of various terms such as "copyright-like" and "quasi-copyright" to describe the newly created hybrid rights. But the mere description of the newly created rights as such will not resolve the question of their constitutional validity. Not all "copyright-like" legislation (in the *Moghadam* sense of the term) will necessary fall within the scope of the Copyright Clause. The related area of trademarks demonstrates this. The Lanham Act could certainly be viewed as conferring "copyright-like" protections to the owners of trademarks in that it grants the owners exclusive rights to use certain symbols or words. The Supreme Court has held, however, that trademarks do not fall within the scope of the Copyright Clause because they do not meet the requirement of originality; instead they arise out of use or "priority of appropriation" in relation to a product's branding.[76] Trademarks thus stand in contrast to the recordings of live musical performances which are certainly creative and original under the Supreme Court's definition of those terms.

As the bootlegging context shows, the term "copyright-like" can be used to either support or criticize a statute depending on

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[74] Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 768 (1997).

[75] Nimmer & Nimmer, *supra* note 71.

[76] The Trademark Cases, 100 U.S. 82, 94 (1879); *see also Feist*, 499 U.S. at 346.

whether one emphasizes the similarities or differences between the new law and traditional notions of copyright. As Congress continues to pass untraditional intellectual property laws that grant similar but not identical rights to those found in the Copyright Act, it will be incumbent upon courts to clarify what is meant by "copyright-like." Recognition that a law creates hybrid rights is only the first step in assessing its constitutional validity.