Martignon: An Unwarranted Evasion of the IP Clause

Apparently attempting to save an anti-bootlegging provision from running afoul of the IP Clause, the Second Circuit has found the law unlike "other laws that are concededly 'copyright laws'." Field argues that it should be easier to imply limits than to evade their necessity.

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In 2003, Jean Martignon was arrested and indicted for violating 18 U.S.C. 2319A(a)(1) and (3), an anti-bootlegging statute based on the 1994 Uruguay Round Agreements Act. Those subsections forbid “knowingly” and for “commercial advantage or private financial gain” (1) fixing without authorization live musical performances or making copies of such a fixation, and (3) distributing such recordings.

Several challenges were lodged, but United States v. Martignon, 346 F.Supp.2d 413 (S.D.N.Y.,2004), considers only whether the statute, by conferring rights in “live performances for an unlimited period of time,” runs afoul of the well-known condition in Art. I § 8 cl. 8 (the IP Clause) and concludes that it does.

United States v. Martignon, --- F.3d ----, 2007 WL 1695089 (2d Cir. 2007), however, reverses. As related at *3, “the government concedes Congress could not have enacted Section 2319A pursuant to the [IP] Clause.” The opinion goes on to state at *9, “Section 2319A does not create and bestow property rights upon authors or inventors, or allocate those rights among claimants to them. It is a criminal statute, falling in its codification (along with Section 2319B about bootlegged films) between the law criminalizing certain copyright infringement and the law criminalizing ‘trafficking in counterfeit goods or services.’ It is, perhaps, analogous to the law of criminal trespass. Rather than creating a right in [performers], it creates a power in the government to protect the interest of performers from commercial predations.”

Finding, at *10, § 2319A not to share the "defining characteristics of other laws that are concededly 'copyright laws,'" the court finds "no need to examine whether it violates limits of [the IP] Clause." Holding the statute to be amply supported under the Commerce Clause, the court reverses and remands.

It is ironic that the opinion refers to § 2319B in the same breath as 2319A. The former criminalizes unauthorized recording in exhibition facilities and can be seen to enforce presumably universal, preexisting rights against unauthorized use of real estate (free of durational limits). But what is the equivalent source of rights protected by § 2319A? If the statute does not, itself, "create and bestow property rights" to be enforced by criminal sanctions, what does?

One possibility is 17 U.S.C. § 1101. It provides that those who commit acts identical to those forbidden by § 2319A are "subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright." It is difficult to see how either statute can evade applicability of the IP Clause or its durational limitation.

The federal law might be seen to provide only federal enforcement of state rights preserved by 17 U.S.C. §§ 301(a) and 1101(d). By explicitly preempting state authority over fixed works, the former certainly implies state power over unfixed works, and the latter explicitly acknowledges such authority over musical performances fixed without competent authority.

But consider Goldstein v. California, 412 U.S. 546 (1973). Partly because § 2 of the 1909 Act allowed state copyright jurisdiction vastly larger than is today under 17 U.S.C. 301(a), *Goldstein* upholds state protection for federally unprotected sound recordings. And it does so despite "lack of a durational limitation;" 412 U.S. at 560.

Although inapplicable in *Goldstein*, Congress had already extended federal law

to encompass subsequently published but previously unprotected sound recordings; 412 U.S. at 551-52. Particularly in light of *Martignon,* one might wonder whether Congress could have, instead of providing federal protection of sound recordings for limited times, merely supplemented state protection with federal enforcement. If so, rights in sound recordings, unlike rights in all copyright-protected subject matter, would last as long as various states might be inclined to allow. The Supreme Court has yet to speak to the issue, but it seems unlikely to approve, particularly when no state copyright law contains a durational limit. *See* Annemarie L.M. Field and Thomas G. Field, Jr., *Justice Gone Astray — Why More Lawyers Need to Understand Copyright Basics,* 8 Section Rev. 13 (Mass. Bar Assn. 2006).

That a durational limit is needed for § 2319A to survive challenge under the IP Clause is not, however, the end of the matter. When § 11 of the 1909 act afforded facially unlimited federal protection for some unpublished works, Marx v. United States, 96 F.2d 204, 206 (9th Cir. 1938), applied the equivalent duration specified in § 23 — date of *deposit* being used instead of date of *publication* for that purpose. (Provisions in issue are equivalent to §§ 12 and 24 in force when the 1976 Act was adopted.) Especially absent evidence that Congress intended anti-bootlegging rights of unlimited duration, what would interfere with measuring duration by performers' lifetimes or, if necessary, referencing performance dates?

Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186 (9th Cir. 2001), also seems potentially apt. There, the court saves 17 U.S.C. § 504(c) by disregarding congressional intent with regard to rights to juries. The penalties at stake were civil, not criminal, but they were substantial — $31,680,000. *See* Thomas G. Field, Jr., *Feltner's Pyrrhic Victory,* The Pierce Law Advocate, Summer 2002, at 8; 43 IDEA 327 (2003).