

04-5649-cr

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellant,

-v.-

JEAN MARTIGNON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICI CURIAE* INTERNET ARCHIVE, AMERICAN ASSOCIATION OF
LAW LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES AND SPECIAL
LIBRARIES ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE AND
AFFIRMANCE**

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INTEREST OF *AMICI CURIAE* AND AUTHORITY TO FILE

Amici are organizations representing thousands of librarians, researchers, scholars, scientists, historians, and artists worldwide, sharing the common goal of preserving, and providing access to, public knowledge. 18 U.S.C § 2319A jeopardizes the limitations of copyright, and consequently, the ability of *Amici* to provide access to knowledge and ideas. *Amici* urge that the court affirm the district court's opinion finding Section 2319A unconstitutional. Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29.

The **American Association of Law Libraries**¹ (AALL) was founded in 1906 to enhance the value of law libraries to both the legal community and the public by fostering the profession of law librarianship and providing leadership in the field of legal information. With over 5,000 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: law firms; law schools; corporate legal departments; courts; and local, state and federal government agencies.

The **Association of Research Libraries**² (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to

¹ For more information about the American Association of Law Libraries, see <http://www.aallnet.org/about/>.

² For more information on the Association of Research Libraries, see <http://www.arl.org/arl/arlfacts.html>.

influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve. ARL programs and services promote barrier-free access to and effective uses of recorded knowledge in support of teaching, learning, research, and community service.

The **Internet Archive**³ (IA) is a public non-profit organization established to build an “Internet Library” with the purpose of offering permanent access to historical collections via the Internet. Complementing the mission of traditional libraries, digital archives such as the IA possess the ability to locate, acquire, and store information previously beyond the reach of traditional libraries, such as web pages and other media only available in digital formats. The IA provides access to researchers, historians, scholars, artists, and the public at large. Since 1996, the IA has collected donations from various sources, including libraries, educational institutions, and private companies. The IA strives daily to meet its goal of creating a repository of all human knowledge and endeavor: an archive which provides universal access to all human knowledge.⁴

³ For more information on the Internet Archive, *see* <http://www.archive.org/about/about.php>.

⁴ *See* Brewster Kahle, *Public Access to Digital Materials*, Library of Congress Luminary Lecture *available at*: <http://www.loc.gov/rr/program/lectures/kahle.html> (last visited March 25, 2005).

Founded in New York in 1909, the **Special Libraries Association**⁵ (SLA) today represents the interests of thousands of information professionals in over eighty countries worldwide. Special librarians are information resource experts who collect, analyze, evaluate, package, and disseminate information to facilitate accurate decision-making in corporate, academic, and government settings. The SLA provides opportunities for its members to meet, communicate, collaborate, and partner within the information industry and the business community.

Libraries and archives exist not just to preserve cultural artifacts, but to provide access to them, as well. To facilitate their mission of access, archives and libraries depend on the limits of art. I, § 8, cl. 8 of the Constitution. *Amici* respectfully submit this brief to increase the Court’s understanding of the true cost of 18 U.S.C. § 2319A’s lack of constitutionally-required limitations, and what the true cost of the precedent sought by the Government and supporting *amici*, a precedent that would undermine the limitations of the IP Clause, would be to American education, innovation, and culture.

⁵ For more information about the Special Libraries Association, see <http://www.sla.org/content/SLA/AssnProfile/index.cfm>.

SUMMARY OF ARGUMENT

“[C]opyright is intended to increase and not to impede the harvest of knowledge.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985). As this statement recognizes, the constitutional limits of art. I, § 8, cl. 8 of the Constitution (hereinafter, “the IP Clause”), serve to increase knowledge and “promote the Progress of Science and useful Arts.” The Supreme Court has repeatedly rejected attempts to eviscerate the limitations of the IP Clause. The District Court in this case correctly recognized that the statute at issue in this case, 18 U.S.C. § 2319A, fails under constitutional scrutiny because it regulates non-writings and lacks the required durational limit. In an attempt to save this unconstitutional statute, the government argues that Section 2319A is a valid exercise of Commerce Clause Power even though it conflicts with copyright. (Appellant Br. at p.8.) This argument ignores the purpose and importance of the limitations of the IP Clause. If, as the government suggests, Congress may avoid the limitations of the IP Clause by using its Commerce Power, then those limitations no longer have meaning or effect. “If unfixed works can be protected perpetually with something akin to copyright, then what conceivable implementation lies beyond Congress's powers?” David Nimmer, *The End of Copyright*, 48 Vand. L. Rev. 1385, 1411 (1995).

The fixation of musical performances allows them to both be preserved for future generations and disseminated widely, thereby inspiring new creativity and new creative works. As such, fixation clearly serves the goal of “Progress” set forth in the IP Clause. And with today’s technologies, we no longer need to fear the loss of the early recordings of the next Mozart, Maria Callas, or Muddy Waters because these recordings can easily be preserved to inspire future generations—in fact, inexpensive portable recording devices enable artists themselves to make high quality recordings of their performances. Section 2319A, though, provides no incentive for artists to preserve their performances because the statute grants protection regardless of whether the artist chooses to record the performance. Moreover, by imposing criminal liability, Section 2319A prevents preservation by anyone else. These attributes of Section 2319A frustrate progress.

Fixation and preservation are thus required for further progress, yet they are insufficient on their own. Preservation must be combined with access in order to truly fulfill the promise of copyright law. The limitations of the IP Clause step in here and enable libraries and archives to provide access to live recordings; for example, by requiring durational limitations to copyright protection. 18 U.S.C. § 2319A forestalls this access, however, by unconstitutionally creating a perpetual right in live recordings that prevents them from ever entering the public domain. Even assuming *arguendo* that Congress could regulate non-writings under its

Commerce Clause Power, the recordings at issue for Mr. Martignon were fixed writings, which clearly must be regulated under the IP Clause and cannot constitutionally be regulated by a statute with no durational limitation, such as Section 2319A(a)(3).

While this case deals specifically with recordings of live performances, the precedent sought by the government and its supporting *amici* would cause harms far beyond this context by enabling legislation that removes facts from the public domain, increases costs for consumers, and inhibits the abilities of libraries and archives to provide access to knowledge and culture. *Amici* submit this brief in part to provide the Court with a better understanding of the true costs to the public of such a precedent.

Amici believe that (1) the district court correctly found Section 2319A unconstitutional due to its irreconcilable conflict with the IP Clause; and (2) precedent allowing Section 2319A to stand could eviscerate the limitations of the IP Clause, shifting the careful IP balance, diminishing our cultural record and stifling progress. Accordingly, *Amici* ask that the District Court decision be affirmed, leaving the balanced intellectual property policy required by the IP Clause undisturbed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT SECTION 2319A IS UNCONSTITUTIONAL

“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written...The distinction, between a government with limited and unlimited powers, is abolished...if acts prohibited and acts allowed, are of equal obligation.” *Marbury v. Madison*, 5 U.S. 137, 176 -177 (1803). The limitations required by the IP Clause and reflected in copyright law enable progress. Congress may not supplant these limitations without rendering the IP Clause “mere surplusage.” *Id.* at 174.

A. Courts Have Long Affirmed the Limitations Inherent in the IP Clause

It is well-established that the IP Clause is "both a grant of power and a limitation," *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). Copyright law requires a delicate balance between offering incentives to authors and inventors to engage in “creative activity,” while providing the public with access to the advances of such activity. *Harper & Row*, 471 U.S. at 546; *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). As the Supreme Court has emphasized, “[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly

as possible” in order to achieve this desired benefit to the public. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

For example, the IP Clause “empowers Congress to prescribe ‘limited Times’ for copyright protection.” *Eldred v. Ashcroft*, 537 U.S. 186, 199-205 (2003). “At the time of the Framing, [‘limited’] meant what it means today: ‘confine[d] within certain bounds,’ ‘restrain[ed],’ or ‘circumscribe[d].” *Id.*, 537 U.S. at 199 (citing three eighteenth-century dictionaries). Accordingly, Congress cannot enact perpetual copyrights. *See id.* at 208-10; *see also KISS Catalog v. Passport Int’l Prods., Inc.*, 350 F. Supp. 2d 823, 832-33 (C.D. Cal. 2004) (“the current version of the statute creates perpetual copyright-like protection in violation of the “for limited Times” restriction of the Copyright Clause.”). In *KISS Catalog*, a recent case with similar facts, the plaintiffs sued to prevent the release of a recording made 30 years prior. The Central District of California noted that the civil analog to Section 2319A, 17 U.S.C. § 1101 purported to cover even recordings made before the statute’s 1994 enactment, and to cover them into perpetuity. The court found Section 1101 unconstitutional because it lacked any durational limitation. Section 2319A, the criminal analogue of 17 U.S.C. § 1101 also lacks the constitutionally required durational limitation and also impermissibly creates a perpetual right, in violation of the IP Clause.

As the district court in this case correctly noted, the Constitution also requires fixation before a copyright is granted to ensure that a copyrighted work may “be perceived, reproduced, or otherwise communicated.” 17 U.S.C. § 102(a) (2005). Fixation is more than a limitation: it is a goal in itself. Copyright exists to encourage the dissemination of information. *Harper & Row*, 471 U.S. at 545. Inextricably intertwined with this is the concept of fixation. *See* H.R. Rep. No. 94-1476, at 52-53 (1976) (discussing “two fundamental criteria of copyright protection - originality and fixation”). Without fixation, the public cannot draw on that work for future creations, thereby frustrating the ultimate aim of copyright law. “Fixation in tangible form is not merely a statutory condition to copyright. It is also a constitutional necessity.” 1 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 2.03(B) (2005).

B. Congress May Not Use the Commerce Clause to Skirt the Limitations of the Intellectual Property Clause

The Supreme Court has also long affirmed that Congress cannot evade the limitations required by the IP Clause. “Congress may not create patent monopolies of unlimited duration, nor may it ‘authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); *see also Eldred*, 537 U.S. at 212 (the IP Clause is “both a grant of power and a limitation”); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499

U.S. 340, 348 (1991) (“This protection is subject to an important limitation...copyright protection may extend only to those components of a work that are original”); *Sony*, 464 U.S. at 429 (“the limited grant is a means by which an important public purpose may be achieved”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“the limited copyright duration required by the Constitution, reflects a balance”); *Goldstein v. California*, 412 U.S. 546, 560 (1973) (discussing limitations as limits on congressional action); *Graham*, 383 U.S. at 5.

While conceding that Congress could not enact Section 2319A pursuant to the IP Clause, the Government and its *amici* nonetheless claim that Congress could enact it under its Commerce Power. They contend that the district court’s refusal to recognize Congress’s power under the Commerce Clause conflicts with the relevant precedent. In fact, the district court’s decision follows the relevant precedent. The Supreme Court in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982) held that the limitation—that bankruptcy laws be uniform—found in art. I, § 8, cl. 4, precluded Congress from enacting non-uniform laws related to bankruptcy under its Commerce Power. *Accord*, *KISS Catalog*, 350 F. Supp. 2d at 836-37 (“[T]his Court finds *Railway Labor* to be the most instructive case on this issue. The *Railway Labor* Court examined a clause, like

the Copyright Clause, that both provides a positive grant of power and contains an express limit.”).

The precedent that the Government and *amici* do cite does not address Commerce Clause legislation conflicting with IP Clause limitations. *In re Trade-Mark Cases*, 100 U.S. 82 (U.S. 1879), merely held that Congress had insufficient power under the IP Clause—and for that matter, under the Commerce Clause as well—to enact trademark legislation. Similarly, *Authors League of America, Inc. v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986) does not address whether the Manufacturing Clause conflicted with an IP Clause limitation. The court in *United States v. Moghadam*, which did consider the IP Clause fixation limitation under Section 2319A, also recognized that some of the grants in art. I, § 8 contain “significant limitations that can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision.” *United States v. Moghadam*, 175 F.3d 1269, 1279 (11th Cir. 1999). The court in *Moghadam*, however, distinguished *Railway Labor*, relying on an interpretation that the IP Clause’s protection of “Writings” is “stated in positive terms, and does not imply any negative pregnant that suggests that the term ‘Writings’ operates as a ceiling on Congress' ability to legislate.” *Moghadam*, 175 F.3d at 1280. As the *Kiss Catalog* court noted, however, “[t]his statement is difficult to reconcile with *Railway Labor* since the

uniformity ‘requirement’ is similarly a positive statement and does not necessarily imply a negative pregnant, i.e., the Bankruptcy Clause does not state that Congress may not enact non-uniform bankruptcy laws.” *KISS Catalog*, 350 F. Supp. 2d at 837. Further, the Eleventh Circuit in *Moghadam*, in refusing to find Section 2319A unconstitutional, reached an explicitly “narrow conclusion” that did not consider Section 2319A’s lack of durational limitations; it may have reached a different conclusion if it had considered them. *Moghadam*, 175 F.3d at 1280-81.

Further, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), a recent case ignored by the Government and supporting *amici*, a unanimous Supreme Court¹ refused to interpret the Lanham Act in a way that would conflict with the limitations of copyright law.² In ruling that the Lanham Trade-Mark Act, § 43(a), 15 U.S.C. § 1125(a), does not prevent the unaccredited copying of an uncopyrightable work, the Court noted that “in construing the Lanham Act, we have been ‘careful to caution against misuse or over-extension’ of trademark and related protections into areas traditionally occupied by patent or

¹ The opinion was 8-0; Justice Breyer took no part in consideration or decision of the case.

² In *Dastar*, Respondent Fox produced a television documentary and let the copyright lapse without renewal, allowing it to fall into the public domain. Petitioner Dastar repackaged the documentary as a videotape, selling the work under its own name. Fox, denied a copyright claim, sued Dastar under a “reverse passing off” theory: Dastar allegedly passed off the Fox product as its own. The Supreme Court rejected this claim by finding that Dastar was the source of the videotape cassettes sold to consumers.

copyright.” *Dastar*, 539 U.S. at 34. The Supreme Court stressed that any reading of the Lanham Act must be done “in accordance with the Act's common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were*)...To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.” *Dastar*, 539 U.S. at 37 (citing *Eldred*, 537 U.S. at 208) (emphasis in original). The *Dastar* Court was clear that courts must tread carefully where trademark may conflict with copyright, or risk creating “a species of mutant copyright law that limits the public's ‘federal right to copy and to use, expired copyrights.’” *Dastar*, 539 U.S. at 34. Although the Court's holding in *Dastar* involved statutory construction of the Lanham Act, the Court's reliance on its constitutional analysis in *Eldred* to reject an interpretation that created a “species of mutant copyright” suggests that the Court would reject on constitutional grounds a statute enacted under the Commerce Power that explicitly created such a “mutant” copyright right. *Id.*

Congress cannot make an end-run around the limitations of the IP Clause simply by claiming power under the Commerce Clause, as the government and their supporting *amici* imply. While the law may be “well settled that Congress can *act* pursuant to the Commerce Clause to provide protections beyond the scope

of” the IP Clause, (Appellant Br. at p. 13), such Commerce Power regulation cannot *conflict* with the limitations of copyright.³

We also agree with Appellee’s offered alternate grounds for affirmance. The government indicted Mr. Martignon under Section 2319A(a)(3), for selling fixed copies. (Appellee Br. at p. 8, 44-46.) Assuming *arguendo* that the “right to fix” aspect of Section 2319A(a)(1) can be granted pursuant to Congress’ Commerce Clause Power, Section 2319A(a)(3), under which Mr. Martignon was charged, still does not pass constitutional scrutiny. Section 2319A(a)(3) regulates copies of fixations of the performance, putting it squarely under the IP Clause, even under the Government’s reasoning. Yet it contains no durational limitation as required by the Constitution and most recently restated in *Eldred*, 537 U.S. at 208. *Accord*, *KISS Catalog*, 350 F. Supp. 2d at 832 (finding conflict with the durational limit of copyright because Section 1101(a)(3) “prohibits the unauthorized distribution of an unauthorized recording of a live performance... Since the allegedly unauthorized recording *has already been made*, that existing recording may satisfy the fixation requirement”); *see also* William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*,

³ Significantly, when Congress acts pursuant to the Commerce Clause to provide protections beyond the scope of the IP Clause, Congress advances an objective other than securing an author’s exclusive rights. The Lanham Act’s goal is preventing consumer confusion. *See Dastar*, 539 U.S. at 34. Similarly, trade secret law as embodied in the Economic Espionage Act protects privacy and the breach of confidential relationships.

67 Geo. Wash. L. Rev. 359, 376 (1999) (the “limited Times” restriction applies “regardless of whether Congress legislates under Article I, Section 8, Clause 8 or under Clause 3, because the evil the restriction is designed to guard against, a perpetual monopoly, is the same in both instances.”). Consequently, Section 2319A(a)(3) flouts at least the constitutional “limited Times” requirement and cannot withstand this court’s scrutiny. As previously noted, the *Moghadam* court did not consider this conflict with the “limited Times” requirement. 175 F.3d at 1281.

Congress’ powers under the IP Clause are limited. Accordingly, Congress cannot reconcile unlimited regulation of live recordings with the limitations of the IP Clause without rendering these Constitutional limitations meaningless. As the district court observed, “[i]n order to give meaning to the express limitations provided in the Copyright Clause...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.” *United States v. Martignon*, 346 F. Supp. 2d 413, 424-25 (S.D.N.Y. 2004).

II. REMOVING THE CONSTITUTIONAL LIMITATIONS OF INTELLECTUAL PROPERTY WOULD HARM THE PUBLIC AND INHIBIT LIBRARIES’ AND ARCHIVES’ MISSION OF PROVIDING ACCESS TO OUR CULTURAL HERITAGE

Few experiences compare to hearing live music. Whether Rachmaninoff played on a Steinway or the Grateful Dead in the midst of a 22-minute, improvised

jam, every live performance is a unique cultural artifact. Until recently, the inspiration provided by these moments of creativity reached only a limited audience and then was lost forever. The promise of digital technology today is preservation on an unprecedented scale: inexpensive digital storage can preserve *all* of these fleeting moments of cultural history in a format that eliminates deterioration and makes public access inexpensive and easy. Copyright, through its incentives to fix performances and its limitations, facilitates access to knowledge. Libraries and digital archives, guardians of public knowledge, depend, in part, on copyright's constitutional limitations to provide this access to all. Dismantling these limitations would harm *amici* and prevent them from serving the public by facilitating access to many recordings of live performances.

A. Encouraging Fixation Leads to the Preservation and Dissemination of Our Cultural Heritage, thereby Promoting Progress

Live musical performances are a vital yet ephemeral aspect of culture. Libraries and archives want to ensure that this cultural heritage is available to future generations. The IP Clause requirement of fixation before protection encourages preservation of these performances, many of which would not otherwise be kept, so that they may provide public access to knowledge and culture. In addition to its constitutional flaws on this point, Section 2319A harms

libraries and archives—and the public generally—by discouraging the fixation otherwise promoted by copyright.

The American Folklife Center illustrates the importance of recording ephemeral performances to the preservation and growth of our culture. The Folklife Center, housed in the Library of Congress,⁴ features rare materials from the WPA California Folk Music Project Collection ranging from Great Depression-era California to recordings of blues and gospel songs from folk festivals around the country. *See* American Folklife Center, Collections and Special Presentations *available at:* <http://www.loc.gov/folklife/ndl.html> (last visited April 17, 2005). The Center recently celebrated its landmark acquisition of the Alan Lomax collection, an “unparalleled ethnographic documentation collected by the legendary folklorist over a period of sixty years.” *Id.* The cultural value of these live recordings is undeniable, including “sound recordings of traditional singers, instrumentalists, and storytellers made by Lomax during numerous field trips to the American South, the Caribbean, Britain, Scotland, Ireland, Spain, and Italy,” *Id.*, as well as early recordings of artists such as Leadbelly, Woody Guthrie, Jelly Roll Morton, and Muddy Waters. *See All Things Considered*, “Library of Congress

⁴ “The American Folklife Center was created in 1976 by the U.S. Congress to ‘preserve and present’ this great heritage of American folklife....The American Folklife Center...is now one of the largest collections of ethnographic material from the United States and around the world.” About the American Folklife Center, *at:* <http://www.loc.gov/folklife/aboutafc.html> (last visited April 17, 2005).

Unites Work of Alan Lomax: Legendary Folklorist Recorded Music and Stories of the World,” March 24, 2004, at:

<http://www.npr.org/templates/story/story.php?storyId=1788825> (last visited April 17, 2005).⁵

The enthusiastic reaction to the Alan Lomax collection alone demonstrates the cultural value of live performance recordings to the future of American art: from Nora Guthrie, (“Alan reminded us...[that] our finest national treasures are in the arts...He did everything he could do to inspire other's (sic) to see and hear in new ways,”) to today’s stars such as platinum recording artist Moby, (“The music that Alan Lomax chronicled and documented is invaluable and deserves to be given the respect for which the American Folklife Center is legendary”), musicians themselves note the value of these recordings to American culture. American Folklife Center, *Quotes About Alan Lomax*, at:

<http://www.loc.gov/folklife/lomax/quotes/quotes.html> (last visited May 3, 2005).

The art produced on stage varies greatly from that produced in a recording studio—and indeed, from every other live performance by that particular artist.

Live recordings “give a broader perspective on a musician's work than can be had by listening solely to commercially released recordings...from classic rock to the

⁵ Notably, the Central District of California held that 17 U.S.C. § 1101, the civil counterpart, applied retroactively to pre-1994 recordings. *See KISS Catalog*, 350 F. Supp. 2d at 829. The court continued on to find Section 1101 unconstitutional, in agreement with and citation to Judge Baer’s opinion. *Id.* at 837.

latest bands, from jazz to symphony and opera.” Allan Kozinn, *Bootlegging as a Public Service: No, This Isn't a Joke*, N.Y. Times, Oct. 8, 1997, at E2.

Accordingly, fans of such live recordings “shun poorly recorded discs and passionately debate the merits of recordings of the same show made by different people.” Matthew Mirapaul, *They Buy All the Albums, but Trade Concert Bootlegs*, N.Y. Times, Jan. 6, 2003, at E2. Section 2319A, however, does not encourage fixation by performers, who receive protection with or without fixation; further, it actively discourages fixations by others such as musicologists, who may fear potential sanctions for preserving culture. Further, the lack of durational requirements in Section 2319A prevents recordings from *ever* being made available to the public, even if they represent the *only* recording ever created of a musical performance.

B. Section 2319A Harms Libraries and Archives’ Ability to Preserve and Protect Fleeting Cultural Moments

As *Amici* UMG Recordings, *et al*, admit, the “protection” created by Section 2319A is “perpetual.” (Br. *Amici Curiae* UMG Recordings, *et al*, at p. 20). Contrary to *Amici* UMG Recordings, *et. al.*’s contentions, however, Section 2319A *does* “constrict the spectrum of useful *public* knowledge,” and “substantially restrict[] the public’s ability to exploit an [unprotected work] in *general circulation*.” *Id.* (emphasis in original). Section 2319A seeks to prevent the copying and distribution of live performance recordings indefinitely, preventing

the public from ever benefiting from these works.

Ideally, all artists would preserve their own live performances, a reality which modern technology enables without excessive burden or expense.⁶ In doing so, artists benefit the public by preserving their performances, *within the limitations of the IP Clause*. If artists do not preserve their own performances, preservationists should at least have the ability to preserve performances of public domain material and to reproduce and distribute recordings unearthed long after the artists have passed away; this would support the intent of copyright. Section 2319A frustrates this result, however, 1) by not encouraging fixation by artists, as it grants protection regardless of whether artists fix their performances; and 2) by discouraging fixation by preservationists by subjecting them to potential criminal liability. Section 2319A turns recordings of cultural heritage into illegal contraband, preventing libraries and archives from acquiring such valuable

⁶ For example, *Amici UMG Recordings, et. al.* applaud the introduction of “quickie” concert CD’s and downloadable digital song files of concert performances which some musicians now sell at the very concert preserved on the recording. While they create a new revenue stream for the performer,

the main allure of on-the-spot concert CD's is their authenticity... ‘It's a documentary of the night, so whatever happens, happens.’...[as another fan expressed,] ‘That's the main thing: the connection to the actual disc you're getting,’ he said. ‘I wouldn't be interested in tomorrow night's CD.’

Chris Nelson, *Rock's Best New Souvenir*, N.Y. Times, May 2, 2004, at 2-2.

recordings for their collections.⁷ As a result, libraries and archives will be stymied in their efforts to provide access to this heritage to the broadest possible audience over time.

Fans and musicologists alike mourn the resulting loss of unpreserved live performance recordings, on which they place great value. "Just preserving that legacy, that 40 years of music, that's the most important thing to us." Matthew Mirapaul, *They Buy All the Albums, but Trade Concert Bootlegs*, N.Y. Times, Jan. 6, 2003, at E2. A prime example of what is at stake for preservationists is a 10-CD box set released in 1997: "New York Philharmonic: The Historic Broadcasts 1923 to 1987," which sold for \$185, and consisted solely of amateur live recordings by devoted collectors. Allan Kozinn, *Bootlegging as a Public Service: No, This Isn't a Joke*, N.Y. Times, Oct. 8, 1997, at E2. Because the New York Philharmonic did not establish its own archive until 1960, these amateur recordings are all that remained of the live performances of some of this century's greatest conductors,

⁷ The threshold for Section 2319A's "commercial advantage or private financial gain" requirement is so low as to chill the behavior of *Amici*. See USSG, § 2B5.3, 18 U.S.C.A., cmt. n. 1 (2004) (defining "[c]ommercial advantage or private financial gain" as it pertains to criminal copyright infringement as "the receipt, or expectation of receipt, of anything of value, including other protected works."). Anyone who sells such recordings would be subject to felony criminal prosecution, making acquisition by libraries and archives all but impossible. Although not before the court, the civil analog, 17 U.S.C. § 1101, which has no "commercial" requirement as a threshold for civil liability, also lacks constitutional safeguards. *KISS Catalog*, 350 F. Supp. 2d at 832-33.

including Toscanini, Stravinsky and Bernstein. *Id.* These priceless live recordings “capture an electricity that more pristine studio recordings lack. They also let a listener track changes in taste and performance style over the decades and changes in the orchestra's response to different conductors.” *Id.* The Library of Congress recently discovered recordings of a 1957 Carnegie Hall concert featuring one of only recordings ever made of Thelonious Monk performing with John Coltrane. Ben Ratliff, *A Jazz Discovery Adds a New Note to the Historical Record*, N.Y. Times, Apr. 25, 2005, at E1. The concert, originally recorded by the Voice of America, never aired in the U.S. According to a recording engineer and jazz specialist at the Library of Congress, “[a] significant discovery like this reminds us why it’s so important to preserve these unique materials.” *Rare Jazz Tapes Uncovered*, News from The Library of Congress, April 6, 2005, at: <http://www.loc.gov/today/pr/2005/05-090.html> (last visited May 5, 2005).

Section 2319A, however, would prevent many of these recordings from entering the public domain and being freely accessible to the public. When musicologist Paul Jackson contemplated a book detailing the weekly Metropolitan Opera performances broadcast from 1931 to 1950, he discovered that recordings of only twenty percent of the broadcasts still existed, many of which were bootlegs preserved by fans. Paul Jackson, *Saturday Afternoons at the Old Met: The Metropolitan Opera Broadcasts, 1931-1950* (Amadeus 2003). Similarly, when the

BBC sought to create a program compiling Beatles recordings made in the BBC's studios, the BBC discovered it had long since discarded the original tapes, forcing it to rely on amateur live recordings of the performances, drawing "freely from bootlegs, as did EMI when it released its official 'Beatles at the Beeb' set in 1994." Allan Kozinn, *Bootlegging as a Public Service: No, This Isn't a Joke*, N.Y. Times, Oct. 8, 1997, at E2.

Under Section 2319A, even if a recording is the only recording in existence, the mere fact that it constitutes an unauthorized live recording deprives the public of the benefit of hearing that recording, forever. Had a dedicated fan in the audience of Clear Lake Iowa's Surf Ballroom on the evening of February 2, 1959 had a tape recorder, Section 2319A would *permanently* prohibit *Amici* from providing access to the last concert of Buddy Holly, Ritchie Valens, and the Big Bopper.

The story of American pianist William Kapell provides an actual example. Before dying in a tragic plane crash while on tour in Australia in 1953, Kapell was "revered by pianists of all stripes, and his death hit the classical-music world with the force of the plane crash that killed the pop musicians Ric[t]hie Valens and Buddy Holly." Daniel J. Wakin, *The Found Treasures Of a Great Pianist*, N.Y. Times, Nov. 10, 2004, at E1. Despite being "considered the greatest pianist of his generation," at his death, less than ten hours of professional recordings existed.

Leigh Sales, *Sounds of Summer: William Kapell*, PM Magazine, Australian Broadcasting Corp., Dec. 29, 2004. In late 2004, however, a music collector discovered a cache of private recordings from the 1953 Australian concert tour: Kapell's last. The recordings were preserved by a department store salesman who "obsessively recorded concerts transmitted by the Australian Broadcasting Corporation on the radio, using a home recording machine with a needle that cut grooves into acetate discs." *Wakin*, at E1. The recordings include "works never heard in Kapell recordings...Prokofiev's Sonata No. 7, Debussy's 'Suite Bergamasque,' Mozart's entire Sonata in B flat, [and] a spectacular version of Rachmaninoff's Concerto No. 3." *Id.* "It's as if somebody were to find a dozen new paintings by Rembrandt or a lost film of Charlie Chaplin,' said Daniel Guss, director of the classical catalog for BMG Music, the successor to RCA, for which Kapell recorded." *Id.* Though originally broadcast, the performances were never archived by the ABC. According to one expert, "[s]o often with great cultural art[i]facts, they hang by a mere thread, that in this case, if one person who is listening...hadn't been motivated to get these programs privately recorded, they would have been lost." Sales, *Sounds of Summer: William Kapell*, PM Magazine, Australian Broadcasting Corp., Dec. 29, 2004.

Long after a musician's life, long after the copyrights in their musical compositions expire, under Section 2319A, their musical performances remain

locked up, out of the reach of the public, fans, scholars, biographers, and musicologists seeking to preserve culture. Perhaps worse is the chilling effect created by the statute's threat of criminal liability. Under Section 2319A, Woodstock might never have been preserved by an Academy Award-winning documentary—even the many performances of public-domain songs, such as “The Star-Spangled Banner” and “America,” “Amazing Grace,” “Swing Low, Sweet Chariot,” and “We Shall Overcome.” *See* 1969 Woodstock Performers List, *at*: <http://www.geocities.com/~music-festival/wsonglist.htm> (last visited May 3, 2005).⁸

C. Contrary to Arguments by *Amici* UMG Recordings, *et. al*, Finding Section 2319A Unconstitutional Would Not Cause Undue Harm to Performers

Amici UMG Recordings, *et al*, writing on behalf of the Government, contend that Section 2319A is necessary to prevent economic harm to performers but then admit that “[r]ecording artists typically grant their record companies the exclusive right to record the artist’s performances and to reproduce those recordings.” (Br.

⁸ Moreover, under Section 1101, “the omission of any express rules on the incidents of ownership presumably implies that consent must be obtained from every performer whose work is to be fixed—even if this means obtaining permission from every member of an orchestra whose performance contributes to the content of a concert...a broadcast station that carries the half-time performance of a university band will, unless it obtains consent from each individual performer, face the full battery of copyright remedies.” 3 Paul Goldstein, Copyright § 15.6.1 (2d ed. 2005).

Amici UMG Recordings, *et al.*, at p. 7.) For many performances, the already-fixed work that is performed is still under copyright, and recordings of it are protected under 17 U.S.C. §§ 102(a)(7), 106 (2005), with no need for recourse to any “extra” protection provided by Section 2319A.

Amici believe in copyright and the information dissemination it creates through incentives and limitations. Given that no evidence has been offered demonstrating that “bootlegs” compete with or replace record company releases, however, *Amici* UMG Recordings, *et. al.* fail to demonstrate the economic need for a separate statute granting a right “to fix,” (2319A(a)(1)) and regulating those fixations in perpetuity. Any harms claimed by *Amici* UMG Recordings, *et. al.* are not likely to be better deterred by Section 2319A than they already are under the stronger protection of Title 17. The only reasons to demand the additional protections of Section 2319A are to “claw back” works that are in the public domain or to control the dissemination of either public domain or copyrighted recordings in perpetuity. These monopolies, Congress may not create. *See Graham*, 383 U.S. at 6 (“Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain”); *see also Dastar*, 539 U.S. at 37; *Eldred*, 537 U.S. at 208 (forbidding perpetual copyright).

III. IGNORING THE LIMITS OF THE IP CLAUSE WOULD STIFLE INNOVATION AND THE GROWTH OF PUBLIC KNOWLEDGE

A. Limiting Access to Information Harms the Public by Increasing Costs and Stifling Innovation

Amici Libraries and archives do not condone copyright infringement.

Rather, they depend upon the protections of intellectual property to encourage the creation of new works to fill their collections. From originality to fair use to fixation to durational limitations, libraries and archives also depend upon the limitations of intellectual property to enable them to preserve and protect the cultural record and bring public knowledge into schools, libraries, and homes worldwide. The system is self-propagating: by providing access to such knowledge and culture, libraries and archives facilitate copyright's mission of encouraging progress and creation. In the absence of limitations, material cannot enter the public domain and instead remains perpetually locked away from the public. Without public access to such artistic works, "Progress" fails, stifling innovation and public knowledge.

Section 2319A limits access without any corresponding incentive to fix and disseminate performances; as such, it impedes the recordation and preservation of our culture, and we are all the poorer for it. The lack of limitations in Section 2319A threaten the preservation of our musical heritage. The precedent sought in

this case, however—that the limitations of the IP Clause are meaningless in the face of the Commerce Clause—would have a far broader impact.

B. Efforts to Limit Access to Information Threaten Progress

Section 2319A deals specifically with live musical performances, but this case presents implications that reach far beyond the world of music. If, as *Amici AAP, et. al.* contend, the limitations of the IP Clause do not limit Congress’ power to enact intellectual property laws pursuant to its Commerce Power, (Br. *Amici Curiae AAP, et. al.* at p. 6), then Congress may not only enact legislation under the Commerce Clause that limits fixation of musical performances and regulates those fixations in perpetuity; it may disregard the limitations of the IP Clause entirely.

Such legislation would betray the Constitution’s intent, yet many wish to skirt intellectual property limitations in order to accrue short-term economic gains to the detriment of “Progress” and culture. It is no accident that *Amici AAP, et. al.* include Reed Elsevier, a major database merchant; CoStar Group, an international supplier of real estate databases; and the National Association of Realtors, an association whose members operate multiple listing service (“MLS”) databases and seek to control public real estate information used in their proprietary home listing databases. These organizations have long advocated⁹ database legislation that

⁹ See, e.g., *Collections of Information Antipiracy Act: Hearing on H.R. 354 Before the House Judiciary Subcomm. On Courts and Intellectual Prop.*, 106th Cong. 148 (1999) (statement of Terry McDermott, Chief Executive Officer and Executive

would overturn the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340 (1991), that copyright did not protect the facts in a database, but only the selection and arrangement of those facts. The *Feist* Court concluded that the IP Clause's originality requirement precluded copyright protection for raw facts. *Id.* at 348. Accordingly, these publishers can obtain the legislation they seek only if Congress can rely on the Commerce Clause to circumvent a limitation in the IP Clause.

Legislation that would remove facts from the public domain has been before Congress since 1996.¹⁰ Because of the conflict with the IP Clause that this legislation would require, numerous members of Congress have questioned the constitutionality of such legislation,¹¹ as has the Department of Justice.¹² Scholars have also expressed concerns with attempts to enact database protection under the Commerce Clause. See Paul J. Heald, *The Extraction/Duplication Dichotomy: Constitutional Line Drawing in the Database Debate*, 62 Ohio St. L.J. 933, 949

Vice President, Nat'l Ass'n of Realtors); *Collections of Information Antipiracy Act: Hearing on H.R. 2652 Before the House Judiciary Subcomm. On Courts and Intellectual Prop.*, 105th Cong. (1997) (statement of Laura D'Andrea Tyson, Consultant to Reed-Elsevier, Inc. and The Thomson Corporation).

¹⁰ Jonathan Band, *The Database Debate in the 108th Congress: Deja Vu All Over Again*, 22 The Computer & Internet Lawyer No. 7 at 1 (Jan. 2005).

¹¹ See H.R. Rep. No. 108-421, pt. 1, at 77 and 81 (2004), discussed in detail in Band, *supra* n. 10, at 5-6.

¹² William M. Trenor, DOJ Memo on Constitutionality of H.R. 2652 (Jul. 28, 1998), available at: <http://www.acm.org/usacm/copyright/doj-hr2652-memo.html> (last visited March 3, 2005).

(2001) (lamenting Congressional attempts to enact “unprecedented and historically anomalous legislation granting private parties the right to control facts”); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. 535, 587 (2000) (database legislation “cannot be passed under the Commerce Clause, and is unconstitutional under the Supreme Court's interpretation of the Intellectual Property Clause”); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Restrain on Congress*, 2000 U. Ill. L. Rev. 1119, 1178 (2000) (“To the extent that the bill creates exclusive rights in facts themselves, the history and structure of the Intellectual Property Clause militate against Congress's power to grant such a right”); Patry, 67 Geo. Wash. L. Rev. at 361 (“Congress may not avoid...limitations by legislating under another clause”); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 Cardozo Arts & Ent. L.J. 47, 60 (1999) (“Congress may not do an end run around a limitation in one clause of the Constitution by invoking a more general clause”); see also Jonathan Band, *Response to the Coalition Against Database Privacy Memorandum*, 21 The Computer & Internet Lawyer No. 5 at 7 (May 2004).

The legislation supported by the database publishers in the 108th Congress, H.R. 3261, was opposed by a broad array of companies and associations, including the U.S. Chamber of Commerce; Internet interests such as Amazon.com., Google, Yahoo!, and NetCoalition; financial services firms such as Bloomberg, Charles Schwab, and CheckFree; communications firms such as Verizon, Comcast, and SBC; information technology association such as the Information Technology Association of America and the Computer & Communications Industry Association; consumer and civil liberties groups such as the American Civil Liberties Union and the Consumer Project on Technology; scientific and learned societies such as the National Academy of Sciences, the National Academy of Engineering, and the American Historical Association; and the library associations on this brief.¹³ Additionally, the House Energy and Commerce Committee took the unusual step of reporting unfavorably on H.R. 3261. The Committee stated that

[i]nformation is the foundation to advances in medicine and other scientific research. It is also a fundamental element in innovation in products and services. Allowing scientists and businesses to access and use factual information propels society forward¹⁴

The Committee found that H.R. 3261 would frustrate this objective.¹⁵

¹³ Band, *supra* n. 10, at 9 n. 44.

¹⁴ H.R. Rep. No. 108-421, pt. 2, at 7 (2004).

¹⁵ When the U.S. Copyright Office considered previous database legislation, it noted, “government science agencies have raised concerns about the impact of any

Copyright depends on a delicate balance “between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors.” *Stewart v. Abend*, 495 U.S. 207, 228-229 (1990). Allowing Congress to resort to its Commerce Clause Power whenever it chose to avoid the limitations of the IP Clause would dislodge this balance with disastrous effects, depriving the public of access to live recordings, facts, or other valuable materials.

“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499 U.S. at 349-350, (1991) (citations omitted). The Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215, 234 (U.S. 1918), held that it cannot be “that the framers of the Constitution, when they empowered Congress ‘to promote the progress of science and useful arts’...intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it...” A lack of care in policing the boundaries of the IP Clause could produce this result.

new protection in this area on the policy of full and open access to data.” *See* U.S. Copyright Office, Report on Legal Protection for Databases (August 1997).

“Our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’ leaves no room for a statutory monopoly over information and ideas.” *Harper & Row*, 471 U.S. at 582 (citations omitted). Section 2319A, however, creates unwarranted monopolies over our cultural heritage and unconstitutionally conflicts with the limits dictated by the Constitution in the IP Clause.

CONCLUSION

For the foregoing reasons *Amici Curiae* respectfully request that the district court’s opinion be *affirmed*.

Respectfully submitted,

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March 11, 2005

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on May 12, 2005, I caused true and correct copies of the foregoing to be sent overnight courier via United Parcel Service of America, Inc. for next-business-day delivery:

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