Copyright and the Value of Performance, 1770–1911

Derek Miller
Harvard University

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Introduction

Copyright, Commodification, and Performance

Everyone wanted to see the ballerinas in their flesh-colored tights. Indeed, the partially undressed women, along with a few well-executed scenery transformations, were the only reasons to see *The Black Crook*, an otherwise absurd and over-long imitation of a romantic opera, complete with sorcerers, demons, and a fairy queen named Stalacta. Audiences in New York in 1866 thought those reasons sufficient to turn the play into one of the most successful of its era, earning a small fortune for its playwright, Charles Barras, and the producers. So renowned did the play become that in March of 1867, Thomas Maguire, who managed an eponymous Opera House in San Francisco, purchased the rights to perform it there.[1] He planned an elaborate (and appropriately titillating) production.

That same month, *The Daily Dramatic Chronicle*, a San Francisco newspaper, advertised that the local Metropolitan Theater sought "80 YOUNG LADIES" for a production of *The Black Crook*.[2] But Maguire did not own or operate the Metropolitan Theater; the Martinetti Troupe did. Maguire was not pleased.

Maguire soon found himself in court with the Martinettis, trying what an 1856 law, a law that granted authors of "dramatic compositions" a right not only to print but also to perform their works, could do to protect his claim.[3] Before the marvelously named Judge Deady, Maguire demonstrated his license to produce the play and paraded witnesses who testified to the fundamental similarity between the two productions. Martinetti's *The Black Rook* (the company changed their production's title shortly before performances began) blatantly imitated *The Black Crook* and therefore violated Maguire's performance right. Performances of *The Black Rook*, Maguire urged, should be stopped.

[1] Bill of Complaint, *Maguire* v. *Martinetti*, Equity Case No. 357, Circuit Court Northern District of California, 1867, National Archives and Records Administration, San Francisco.
[2] Classified Ad, *The Daily Dramatic Chronicle*, San Francisco, CA, March 12, 1867, p. 2.
[3] The lawsuits in fact involved an original suit by Martinetti and a countersuit by Maguire.

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The decision that Judge Deady issued in response to Maguire's lawsuit against the Martinettis significantly clarified the definition of drama in American jurisprudence. Scrutizining the two plays carefully, Deady determined that *The Black Crook*, being such an obvious hodgepodge of hackneyed plots, lacked original dramatic elements and thus was not legally a "dramatic composition." What original elements the play did feature – namely, alluringly attired ballerinas and their erotic tableaux – may have been spectacular and attractive, but they were not drama. As Deady wrote, "to call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama."[4] By refusing to grant Maguire a property right in the play, Deady insisted that drama, for the purposes of copyright jurisprudence, must offer more than simply the display of the female form.

The 1867 case of *Martinetti* v. *Maguire* was merely one among dozens of cases in American and English law that struggled to define drama and music for the purposes of claiming a performance right. Established by legislation in 1833 in the United Kingdom and 1856 in the United States, the performance right expanded intellectual property law beyond the copying of printed material – the true copy right – to include protections against unauthorized performances of dramatic and, under later legislation, musical works. Having gained statutory protection for performances, playwrights and composers (or, usually, managers and producers) could sue competitors for performing their works without permission. Plaintiffs who demonstrated that (1) they had a valid performance right, and (2) the offending performances were sufficiently similar to their own, received either monetary compensation or, more often, an injunction preventing the unauthorized performances. But in the first decades of performance rights law, litigants also found themselves demanding from courts ever more precise definitions of the rights legislators had granted them. Did the performance right cover staged action as well as dialogue? For the purposes of copyright law, was an opera arranged for piano the same as the original work? What protections, if any, did an actor's interpolated gags merit? These questions and more appeared in courts throughout the late nineteenth century, each dispute inspiring a spirited debate about the nature of dramatic and musical art, and each resulting in a legal definition of what, precisely, drama and music were insofar as each medium received protection under performance rights laws.

That crucial definitional period lasted until the end of the nineteenth century, at which point the law, relying on established definitions,

[4] *Martinetti* v. *Maguire*, 16 F. Cas. 920 (1867), p. 922.

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turned its attention from aesthetic to economic concerns. That is, those nineteenth-century legal definitions were necessary not for their own sake but to secure the property rights – and attendant economic rewards – that are the purpose of copyright law. Copyright law grants owners the authority to control exclusively a work's use and dissemination for a limited period of time. That exclusive right creates artificial scarcity in the marketplace, thus increasing the monetary value of the work. Those property rights, not aesthetic theories, are the function of copyright law. That is why, having accumulated a set of complex theories of drama and music in performance rights jurisprudence, the law then occluded those laboriously constructed theories and instead began to treat dramatic and musical works as though their artistic content were irrelevant entirely to the operation of copyright. In other words, nineteenth-century jurists defined drama and music so that they and their legal descendants could regard dramatic or musical works solely as recognized property to be bought and sold like any other. The performance right itself therefore becomes a commodity – an abstract, evanescent commodity, to be sure, but a commodity nonetheless. Owners can buy and sell copyrights or license others to use a copyrighted work; courts recognize and protect valid copyright claims; and the market treats copyrights much like wool or coats or dresses. Every copyright is commensurable with any other copyright (or any other commodity for that matter) insofar as they all participate in the circulation of commodities. Once judges knew confidently *what* a copyrighted work was, they could address themselves only to the work's position in the marketplace.

Justice Oliver Wendell Holmes stated this position in exemplary form in 1903 when deciding a case involving illustrated advertisements:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits … [I]f they command the interest of any public, they have a commercial value – it would be bold to say that they have not an aesthetic and educational value – and the taste of any public is not to be treated with contempt.[5]

Holmes argues here for a purely economic legal definition of copyrightable works. The defendants had argued that the plaintiff's circus advertisements, which the defendants reproduced exactly, lacked sufficient aesthetic merit to warrant copyright law's protection. Holmes rejects this position absolutely. He rejects it not because he accepts the aesthetic merit of the posters, but rather because jurists should not involve themselves in evaluating the "worth" of such images. Economic value, as measured

[5] *Bleistein* v. *Donaldson*, 188 US 239 (1903), p. 251.

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by the "interest of any public," should triumph over any judge's taste. Rephrased in the language of modern economics, Holmes asserts that the existence of demand for an artistic work in the marketplace means, by definition, that the work merits the status of intellectual property and the protections of copyright law.

Even Holmes acknowledges, however, that some non-economic principles lurk beneath his strong economism. Jurists do need to set "the narrowest and most obvious limits" on definitions of copyrightable works, he concedes. A close look at nineteenth-century litigation over definitions of drama and music, litigation such as that involving *The Black Crook*, reveals the true complexity of defining the "limits" of what copyright protected, limits that were neither as narrow nor as obvious as Holmes would have us believe. To establish those limits, courts undertook precisely the kinds of analyses that Holmes, writing after the majority of such definitions had been settled, called "dangerous": evaluations of the "worth" of dramatic and musical performances. In order to approach drama and music as purely economic entities, valuable solely because they generate audience demand, jurists first criticized drama and music as artistic media, defined by certain formal characteristics and valued for specific effects. For example, in an 1868 lawsuit involving a spectacular melodramatic action sequence, one judge defined a "dramatic composition" as "a work in which the narrative is not related, but is represented by dialogue and action."[6] By accepting both dialogue *and* action as part of performance rights law's definition of drama, the judge granted a property right in the spectacular scene that the scene's owner could – and did – assert in the marketplace. That performance right, the economically valuable commodity, only earned its shape as property after the judge accepted a definition of drama as the representation of action. Although Holmes and other jurists eventually treated such definitions as axiomatic, the definitions were in fact the product of extensive debate throughout the late nineteenth century. Performance rights laws and litigation developed those purportedly axiomatic theories of drama and music, in the process defining what I call the "performance-commodity."

This book explains the development of the performance-commodity and argues for its crucial role in the emergent capitalist political economy of performance in the nineteenth century. The performance-commodity is the legal theory of dramatic and/or musical performance, consisting of those elements of performance that courts deemed protected by the performance right, and excluding those elements they left unprotected. It is a propositional aesthetics, an affirmative aesthetic theory of performances

[6] *Daly* v. *Palmer*, 6 F. Cas. 1132 (1868), p. 1135. See Chapter 2 for a discussion of this case.

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within the law, to serve legal purposes.[7] The performance-commodity, while making possible the relatively smooth circulation of performance rights in the marketplace, is not isomorphic with dramatic or musical performances generally. Many aspects of drama and music did not merit the protection of copyright law, according to courts. Plaintiffs throughout the nineteenth century urged courts to accept that some of these marginal elements were central to the success of their performances. Actress and manager Laura Keene, for example, claimed that an actor's interpolated jokes were essential to her production of Tom Taylor's comedy *Our American Cousin* in the late 1850s. Courts refused to include such jokes as part of the performance-commodity. Defining performance-commodities in this fashion, jurists engaged in a form of criticism, a set of aesthetic evaluations asserted as legal rules. And the result of that judicial criticism was a property right, the performance right, for a legally defined aesthetic object, the dramatic or musical performance commodity. That property right then permitted owners to realize the monetary value of performance in the marketplace.

Performance rights litigation, therefore, ultimately aimed to define the right to perform a dramatic or musical work as an economically valuable thing. But performances, like all types of art, are valuable for many reasons that are not purely economic. Even Holmes recognizes as much when he suggests that judges should not assume that the circus posters lack "aesthetic and educational value." Following economist David Throsby, we might recognize an expanded range of "cultural value characteristics" present in performances, including clusters of values such as aesthetic, spiritual, social, historical, symbolic, and authentic value.[8] For example, I might value a performance because it authentically represents my adolescent experience. Or I might value a play such as *A Raisin in the Sun* both for its formal achievements in dramatic realism and for its history as the first play by a black woman (Lorraine Hansberry) produced on Broadway. People value national anthems for their symbolism, hymns for their spiritual uplift, and pop songs because they make us want to dance. These valuable aspects of performance generate the audience interest that economic theory – and copyright law – reads as demand. But to accept that such values inspire economic demand, one must recognize these values as important aspects of an artistic work in the first place. That recognition (or refusal of recognition) took place when

[7] Paul Kearns recognizes a similar process at work in multiple contemporary spheres of law, including defamation, trust law, and international trade, as well as copyright. Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998).

[8] David Throsby, *Economics and Culture* (Cambridge: Cambridge University Press, 2001), pp. 28–9.

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courts defined the performance-commodity. Thus although Holmes, in the passage from *Bleistein* quoted above, disavows juridical concern for non-economic value, defining the performance right required the very legal considerations that Holmes rejects, criticism of cultural values. Holmes' tidy economism was possible only because courts had already completed, over the previous decades, the criticism of "aesthetic and educational value," not to mention other values, that was necessary in order to define drawings (and performances) under copyright law. The law constructed the performance-commodity by analyzing the forms and values of drama and music, so that they could adjudicate performance rights disputes based solely on the economic values at stake.

Economic and Other Values

The triumph of economic over other values in nineteenth-century performance rights law mirrors the general trajectory of value within economic and cultural discourse during the period. Reading the history of performance rights law offers a unique perspective on how value came to mean primarily economic value. To understand how performance rights litigation fits into this larger story, we must step back to consider that general history of value. For the moment, let us collect Throsby's "cultural value characteristics" as variations on a "use value." Use value (or utility) is one of three fundamental flavors of value in a commodity, per the simple schema familiar from political economists such as Adam Smith, David Ricardo, and Karl Marx. Under that schema, value appears as: (1) labor value, produced by the work of a craftsman, author, etc. in transforming one commodity, such as wool, into another commodity, such as a coat; (2) use value, the ability of a commodity to satisfy basic human needs or complex desires; and (3) exchange value, the amount of commodity X one receives for commodity Y, usually measured as a commodity's price. In Marx's analysis of the eighteenth- and nineteenth-century rise of industrial capitalism, the true source of value is labor. Capitalism, however, alienates workers from their commodities and prevents them from realizing the value they produce. Instead of labor value or use value, the only value relevant in capitalism is exchange value, which Marx calls the "form of appearance" of value.[9] Exchange value is simply a form containing labor value and use value.

Yet despite containing labor and use value, exchange value, the price of a commodity, seems incapable of representing these other values. The problem feels most acute when comparing price to Throsby's cultural

[9] Karl Marx, *Capital*, trans. Ben Fowkes, Vol. 1 (New York: Penguin, 1990), pp. 125ff.

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values. Does a commodity's price truly account for its aesthetic, historical, symbolic, or sacred value? This incommensurability of exchange and use value – or, more generally, of economic and cultural discourses of value – captures one of the major tensions of capitalist society. Thus do political and moral critiques of twenty-first-century capitalism often converge on economic value's reductivism and the way in which the desire to measure everything by money discounts the "truly meaningful" things in life. Even authors who think carefully about the intersections of art and economics, such as Jacques Attali in his influential *Noise: The Political Economy of Music*, complain of capitalism as a corrupting influence on art. Attali relates a history of music's commodification that follows "the slow degradation of use into exchange, or representation into repetition," a clear decline-and-fall narrative, even as he nominates music the herald of a salvific economic order.[10] This common separation of economic and cultural values into two distinct spheres is the result of a long process that began with the eighteenth-century birth of political economy. John Guillory, drawing on work by Howard Caygill, argues that the "value-concept" in general originates "in the struggle to distinguish the work of art from the commodity."[11] "The problem of 'aesthetic value' is not in fact a perennial problem," Guillory writes,

> but can be posed as such only after the divergence of aesthetics and political economy, and as a consequence of the repression of their convergent origin … [T]he practice of judging works of art need make no reference at all to the concept of value before the emergence of political economy … [T]he problem of aesthetic judgment was as essential to the formation of political economy as the problem of political economy was to the formation of aesthetics.[12]

In Guillory's telling, far from being an afterthought in Adam Smith's earliest theories of political economy, aesthetic value represented value beyond utility. Aesthetics named for Smith the desire to consume a commodity, desire that exceeds the utility of the commodity itself. Smith recognized, in other words, that we desire our commodities not only to gratify our needs but also to do so beautifully. This value in excess of the most basic utility was the surplus value that created wealth. That is, for the early Smith writing his *Theory of Moral Sentiments*, *"the aesthetic disposition itself"* drove the engine of capitalism, argues Guillory.[13]

[10] Jacques Attali, *Noise: The Political Economy of Music*, trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1985), p. 19.
[11] John Guillory, *Cultural Capital: The Problem of Literary Canon Formation* (Chicago: University of Chicago Press, 1993), p. xiii.
[12] Ibid., p. 303.
[13] Ibid., p. 311.

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Aesthetic value's centrality within political economy was short-lived, however. In *The Wealth of Nations*, Smith sought to measure the commodity's exchange value. Seeking to calibrate his measurements, Smith found he lacked sufficient means to measure aesthetic value – he had no way to account for desire when calculating prices. So Smith settled on a revised value-theory rooted entirely in production, which he could measure, and thus codified the labor theory of value. "Whatever happened in the realm of consumption," Guillory summarizes, "was thus bracketed as irrelevant to the determination of price."[14] Yet the realm of consumption is precisely the place where we encounter cultural values, aesthetic value included. All of the values *not* adequately accounted for by exchange value are, according to the earlier Smith, precisely what make a commodity worth acquiring in the first place.

At that early moment in the development of political economy, economic value set itself over and above all other forms of value. This process achieved its fullest realization through the so-called marginal revolution in economics, which incorporated an economic theory of demand that accounted for different degrees of desire for a commodity, thus converting even demand into something measurable for its effects on prices.[15] As David Throsby and Michael Hutter summarize this trend, "the economic theory that emerged at the end of the nineteenth century was built on exchange-value as the equilibrium of a self-coordinating mechanism, relegating use-values to a fuzzy penumbra of subjective 'preferences.' At the same time as these developments were occurring, aesthetic theory began to separate itself from the nonartistic world."[16] That is, in response to the dominance of economics and exchange value, other discourses of value retreated from engaging with economic value and with each other, choosing instead to assert their own autonomy.

The separation of economic from aesthetic values is thus central to the development of eighteenth- and nineteenth-century political economy. In Guillory's and Throsby and Hutter's descriptions, these changes were intellectual – alterations in how political economists theorized value. Of course, the nineteenth century also inaugurated new material relationships between art and economics – how artists earn money, where their audiences come from, etc. Thus, even as economic and aesthetic theories

[14] Ibid., p. 314.

[15] Regenia Gagnier has drawn attention to the historical confluence of the marginal economic revolution and the rise of aestheticism, both of which discarded normativity in favor of formalism. See Regenia Gagnier, "On the Insatiability of Human Wants: Economic and Aesthetic Man," *Victorian Studies* 36, no. 2 (1993).

[16] Michael Hutter and David Throsby, "Value and Valuation in Art and Culture: Introduction and Overview" in *Beyond Price: Value in Culture, Economics, and the Arts* (Cambridge: Cambridge University Press, 2008), p. 2.

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distinguished themselves from each other, the economic practices of artistic production and consumption underwent a profound shift. The conceptual and material changes in theories of economics and aesthetics in fact go hand in hand. As Raymond Williams observes,

> it is clear, historically, that the definition of "aesthetic" response is an affirmation … of certain human meanings and values which a dominant social system [i.e., capitalism] reduced and even tried to exclude. Its history is in large part a protest against the forcing of all experience into instrumentality ("utility"), and of all things into commodities. This must be remembered even as we add, necessarily, that the form of this protest, within definite social and historical conditions, led almost inevitably to new kinds of privileged instrumentality and specialized commodity.[17]

Williams summarizes well the interaction of aesthetics and economics: aesthetics distinguishes itself as opposed to instrumentality and commerce, but also becomes subject, in its particular forms, to "new" commercial uses. Performance rights laws played a major role among the "definite social and historical conditions" that constituted the emergent economy of performance. Specifically, those laws created a legally viable commodity that theatrical and musical artists could use in their industrializing markets. By reading the history of performance rights law in the nineteenth century we can witness the theoretical separation of economic and aesthetic value theories taking place within the legal construction of a performance-commodity. For the performance-commodity itself embodies the distinction between economic and cultural value discourses: everything deemed part of the performance-commodity earned recognition and representation as exchange value (i.e., had a price), and everything excluded from the legal definition of performance was left to assert itself on aesthetic or other terms. The development of performance rights law reveals how, within the slowly evolving practices of the nineteenth century theater and music industries, economic value (particularly exchange value) and other values parted ways.

To summarize: attending to performance rights litigation over the long nineteenth century illuminates how the legal attempt to construct an industrial commodity out of dramatic and musical performances required first that courts engage critically with the forms and aesthetic principles of those arts, and then either inscribe those forms and their values as part of the performance-commodity, henceforth analyzed only for its exchange value, or exclude those forms and values from the realm

[17] Raymond Williams, *Marxism and Literature* (Oxford: Oxford University Press, 1977), p. 151. Williams uses "utility" here in a narrowly instrumental sense, similar to "productivity."

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of financial capital, leaving them to the separate discourses of cultural values. In other words, the legal creation of the performance-commodity created both a new economic entity and a set of surplus values, acknowledged as valuable only within cultural discourses. Inverting this formula, we get an equation that defines the relationship between aesthetic or cultural value and economic value: *the cultural capital of performance is the surplus value from the production of the performance-commodity.* This book explains how this equation arose through the development of nineteenth-century performance rights law and examines the law's effects on the development of dramatic and musical art.

Copyright History: From Laboring Authors to Valuable Commodities

Copyright history is essential to understanding how we value the arts because copyright mediates between economic and other discourses of value. When scholars of literature or other arts read that history, they often recognize the interplay of copyright and value discourses. Their analyses, however, usually focus on how copyright defines authorship and authors, thus emphasizing the importance of labor value. By attending to the commodity and its definition, instead of to the author and his or her legal status, this book strengthens humanist critiques of copyright so that they account more thoroughly for the values of art in all their diversity and complexity. To copyright histories that emphasize the laboring author, I add this history of the consumed commodity, the copyrighted work.

Humanist copyright studies developed rapidly within literary studies during the 1980s.[18] Writers such as Mark Rose, Martha Woodmansee, and Peter Jaszi connected the invention of copyright in the eighteenth and early nineteenth centuries to the emergence of Romantic ideals of authorship. As Rose's influential book put it, authors are fundamentally owners. This work on authorship and copyright owes much to the "death of the author" tropes that emerged in France in the 1960s, both in the Roland Barthes essay of that name and in writings by Michel Foucault.[19]

[18] Book historians have a longer-standing interest in copyright history, but their analyses tend more toward positive history than critique. For instance, see Lyman R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) and Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* (Oxford: Clarendon Press, 1968).

[19] Roland Barthes, "The Death of the Author," in *Image – Music – Text*, trans. Richard Howard (New York: Hill & Wang, 1977); Michel Foucault, "What Is an Author?," in *The Critical Tradition: Classic Texts and Contemporary Trends*, ed. David H. Richter, trans. Jonathan Harari (London: Bedford/St. Martin's, 1998).

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Rose and like-minded writers located the "birth" of the now-deceased author in the advent of copyright law. "The notion of the author is a relatively recent formation, and, as a cultural formation, it is inseparable from the commodification of literature," Rose writes. "The distinguishing characteristic of the modern author, I propose, is proprietorship; the author is conceived as the originator and therefore the owner of a special kind of commodity, the work."[20] Copyrights vest initially in these creators, creators that the state, by means of copyright law, interpellates as property-owning subjects.

Numerous other scholars have extended this exploration of how property relates to subjectivity and interpellates the state's subjects. In theater and performance studies, for instance, Anthea Kraut's *Choreographing Copyright* considers "the raced and gendered politics of ownership in dance."[21] Kraut examines how copyright claims helped choreographers "position themselves as possessive individuals and rights-bearing subjects rather than as commodities and objects of exchange."[22] In literary studies, Melissa Homestead recognized the same dynamic at work among nineteenth-century women authors, for whom coverture constrained their authority as copyright owners.[23] Stephen M. Best's *The Fugitive's Properties* pursues the entanglement of property and subjectivity in slave and intellectual property laws. For Best, these twinned areas of jurisprudence helped construct the relationship between people and property in American law. As "eccentric" areas of law, concerned with "fugitive" personhood – literally, in the case of fugitive slave law, figuratively, in the images of photography or sounds of phonography – they enabled the modern legal construction of the commodity-form.[24] Best's approach recalls in many respects Jane M. Gaines' exploration of copyright in photography, sound, and film. She highlights "the relevance to intellectual property doctrine of poststructuralist interest in the *work*, in the *subject* who utters the *work*, and in the discourses that utter that *subject*."[25] Even as Best and Gaines turn toward the commodity and thus embrace wider questions of value, they fixate on creative forms in which intellectual

[20] Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), p. 1.
[21] Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (New York: Oxford University Press, 2015), p. x.
[22] Ibid., p. xiii.
[23] Melissa J. Homestead, *American Women Authors and Literary Property, 1822–1869* (Cambridge: Cambridge University Press, 2005).
[24] Stephen M. Best, *The Fugitive's Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004), pp. 16–18.
[25] Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), p. 1; original emphasis.

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property asserts a right over aspects of personal identity (i.e., of the subject) such as the voice in phonography or the image in photography. And the forms themselves, which entailed new theories of creativity that included machines (the camera, the microphone), reignited debates about the nature of authorship – in what sense is a photographer a creator? – that again locate the true source of value in labor. Meeting at the intersection of subject and object in copyright law, these rich analyses lay the foundation for this book's attempt to disentangle authors and works, and thus to articulate more fully how intellectual property law influences the formal, relatively autonomous existence of artworks themselves.

Paul K. Saint-Amour's readings of copyright law, of the importance of commodities, and of the significance of value discourses come closest to anticipating the concerns of this book. Writing on the state-interpellated subject in copyright law, Saint-Amour notes that it

> is a biopolitical subject, one that can be compelled to live and create in particular ways through the regulation of the fields and systems it shares with its population. And if the subject that copyright comes to imagine is a biopolitical one, the work that copyright protects is, oddly, its doppelgänger – a property form endowed with the lineaments of a life form.[26]

In other words, copyright law gives life to property. The copyright-constructed commodity's life-force is not, however, the same labor value that inspires the author-laborer with subjectivity. Rather, aesthetic value animates the commodity. Saint-Amour argues that the commodity's vitality becomes possible only at a particular moment in the history of economics. The marginal revolution in political economy that began in the 1870s "renewed the long-dormant ties between economics and aesthetics by grounding value in individual sensations," namely, the consumer's desires, rather than the producer's labor.[27] The "value" of the copyrighted commodity is thus, for Saint-Amour, not merely economic value, but arises from the same processes of individual desire that define aesthetic appreciation.

Pursuing rigorously Saint-Amour's reading of copyright and value, this book moves emphatically away from authorship. This shift puts me in greatest sympathy with critics of copyright who write about the twentieth century rather than the eighteenth, scholars who, in looking at the

[26] Paul K. Saint-Amour, "Introduction: Modernism and the Lives of Copyright," in *Modernism and Copyright*, ed. Paul K. Saint-Amour (Oxford: Oxford University Press, 2010), p. 27.

[27] Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca: Cornell University Press, 2003), p. 35. Saint-Amour also draws on Guillory and Caygill's history of value in economics and aesthetics. His analysis, however, remains focused on authorship, rather than commodities.

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modern world, often recognize how thoroughly copyright divorces commodities from subjects. For instance, Joanna Demers has traced how the music industry struggles to distinguish piracy and plagiarism from "transformative appropriation" in any given musical work.[28] And Peter Decherney's study of copyright in the commercial film industry emphasizes that authorship in Hollywood expands well beyond any one individual to embrace the entire studio system.[29] Thus, while the rhetoric of modern copyright debates might call attention to beleaguered authors, copyright is organized today far more around property than authorship. This movement from the author to the work took place in the nineteenth century, as courts developed their theories of the abstract things that are the object of copyright law. As legal historian Isabella Alexander summarizes, during the nineteenth century "the physical artefact of the 'book' as locus of protection had begun to be replaced by the more abstract, and economically constructed, 'work.'"[30] This book focuses on those copyrighted things, those commodities, and how copyright law values the commodities it creates and protects.

We can see the law itself adjust its concern away from authors and to works in the archives of performance rights litigation. For example, an affidavit from an 1859 US lawsuit avows that an unauthorized production's alterations to the play "reflect discredit on the ~~fame and~~ reputation of ~~Tom Taylor as a dramatic author~~ the said comedy as a meritorious and successful and popular drama."[31] The crossed-out phrases mark the obsolescence of pleas to authorial status, leaving in its place the reputation of the work itself. But even the work as an artistic thing eventually cedes the stage to the market object, the commodity, as in an 1867 memorandum from Dion Boucicault to his solicitor. Boucicault first proclaims his personal prowess as an author, but quickly pivots to arguing that unauthorized productions diminished the economic value of his plays:

> I have expended 26 years hard labour in obtaining the experience and perfecting the art of making Dramas – which have become therefore productions of great value and popularity. Their value to a manager of a provincial theatre consists in his being able to ~~produce them~~ have the *exclusive* use of them.[32]

[28] Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens: University of Georgia Press, 2006), p. 7.

[29] Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (New York: Columbia University Press, 2012).

[30] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford: Hart, 2010), p. 16.

[31] Affidavit of Samuel Lane Wheeler, March 1, 1859, *Keene* v. *Kimball*, Equity Case No. 410 (Supreme Court of Massachusetts 1860), words struck through in original.

[32] Dion Boucicault, Mr. Boucicault's Memorandum (1867), *Boucicault* v. *Egan*, Boucicault Collection, Templeman Library, Box UKC.BOUC.BIO.0648726, Folder 1.

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Boucicualt professes initially the years of effort ("hard labour") and "experience" that accrue to his name. The phrase suggests that his work's "great value and popularity" derives from this accumulated knowledge, a lifetime of theatrical know-how, encapsulated in his person and wrought into his plays. But the next sentence offers an entirely different definition of his plays' value, a monopoly right of production, "the exclusive use" of his plays. The crossed-out words "produce them" suggest that Boucicault's conception of value moved even from the production itself to the production's scarcity as intellectual property, a fully abstract economic model.

These passages – which efface authors, their fame and their labor, and shine a spotlight instead on the work and its value as a commodity – affirm Marx's analysis of the commodity's triumph in the nineteenth century, as outlined above. For Marx, the commodity, not the laborer, plays the central role in the drama of nineteenth-century industrial capitalism that he explained and critiqued. Labor itself even becomes merely another commodity, while the commodity assumes the form of all types of value, the form *par excellence*. As Marx observed in a striking theatrical metaphor, under industrial capitalism "persons exist for one another merely as representatives and hence owners, of commodities … [T]he characters who appear on the economic stage are merely personifications of economic relations."[33] In other words, authors and other laborers ceased to be meaningful market participants in their own right. Rather, people entered the market only to represent their commodities, the fate of which dominates the industrial capitalist stage. Thus the drama of performance rights law in the nineteenth century casts the performance-commodity, the commodity constructed by laws and litigation, in the starring role.

Performance Theories, Material and Immaterial

While this book emphasizes commodities over authors, it also differs from much extant copyright scholarship in its focus on the performing arts rather than the literary or visual arts. In contesting performances instead of books or photographs, the lawsuits discussed here negotiate an even more vague and complex set of ideas about art and value than most copyright litigation. The confusion generated by performance rights begins with the complex relationship between works and performances. Contemporary philosophers identify copyright law as an important mechanism for creating the work-concept within aesthetic theory. In Lydia Goehr's telling, "Developments in copyright laws and publication

[33] Marx, *Capital*, p. 178.

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helped 'institutionalize' works as commodities separable from their performances."[34] James R. Hamilton argues that the rise of Modern Drama – a process contemporaneous with the consolidation of performance rights – "revealed theatrical performance to be a form of art in its own right, independent of literature."[35] In the cases that follow, jurists meander back and forth across the porous border between works and performances. Sometimes judges simply define drama and music, other times they make ontological claims about dramatic and musical works, and sometimes they offer ontologies of dramatic and musical performances. This text will, like that of courts, sometimes discuss works, sometimes performances.

Works are the object of performance rights; you secure a right to perform *a work*. Julia A. Walker's reading of nineteenth-century copyright law emphasizes rightly the slow emergence of a work-concept in American law. Only with a work-concept in place could courts recognize "performance as a right invested in the play."[36] Walker goes on to argue that courts acknowledged performance "as a fully separate entity from any written composition" only in 1909, after the advent of recording technologies.[37] While I concur that performance's status shifted in 1909 in the United States (and in 1911 in the United Kingdom), Walker's focus on performance's independent legal status underestimates how much thinking courts did about performance even absent a fully articulated work-concept. Jurists had to theorize performance to define dramatic and musical works because the performance right only applied, in the nineteenth century, to works that could be performed.[38] That work often comes before the court as a form of writing (playscripts, sheet music) but the court assesses its value as something to be performed. That means courts ask questions such as: What is the nature of drama as opposed to poetry? What elements of a musical work are essential to its identity? These questions try to extrapo-

[34] Lydia Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (Oxford: Oxford University Press, 1994), p. 229.

[35] James R. Hamilton, *The Art of Theater* (Malden, MA: Blackwell Publishing, 2007), p. 15. See also Roman Ingarden, *The Literary Work of Art: An Investigation on the Borderlines of Ontology, Logic, and Theory of Literature*, ed. Jean Gabbert Harrell, trans. Adam Czerniawski (Evanston, IL: Northwestern University Press, 1974) and Roman Ingarden, *The Work of Music and the Problem of Its Identity*, ed. Jean Gabbert Harrell, trans. Adam Czerniawski (Berkeley: University of California Press, 1986).

[36] Julia A. Walker, *Expressionism and Modernism in the American Theatre: Bodies, Voices, Words* (Cambridge: Cambridge University Press, 2005), p. 95.

[37] Ibid., p. 108.

[38] Performance rights now cover works in any genre, and thus one can speak today of a performance right as applied to a novel or a painting. In such cases, an adaptation usually intervenes between the intrinsically unperformable form of a novel and the performance of that novel.

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late the necessary and sufficient elements of any given musical or dramatic work or performance from the much larger set of contingent elements. For example, as I argue in Chapter 2, courts think about drama as a genre that represents characters in action, rather than merely narrates events. Thus even when courts seem to focus on defining drama and music in terms of underlying works, performances are always the implicit ends of those works. A definition of the dramatic or musical work includes a definition of drama or music as something-to-be-performed. Those ontologies of drama or music therefore imply a performance ontology.

Interestingly, the law's performance ontologies show little interest in evanescence or ephemerality, elements central to many contemporary, nonlegal ontologies of performance. Yet precisely this aspect of performance, the way in which a performance, even as it is happening, becomes a thing of the past, makes performance a particularly acute problem within copyright law. Copyright law operates on fixed forms – hence the necessary mediation of playscripts or scores when courts compare two competing dramatic or musical performances. Performances in and of themselves, however, are never fixed but always disappearing. Furthermore, performance's evanescence as a medium mirrors the ephemerality of the value of commodities generally. As theater theorist Alice Rayner argues, Marx's

> notion of the commodity-fetish … is specifically theatrical because, he says, the commodity exceeds its visible, objective character and accrues an illusionary value by a mysterious operation. Immaterial and ineffable, the commodity appears in the world like a character on stage, transfigured by the material actor into the illusion of a person, an identity, a subject.[39]

Rayner goes on to suggest that theater, which "practices just this kind of transfiguration where materiality is haunted by the immaterial," thus provides a conceptual "model for the commodity-fetish."[40] This conjunction of the commodity and the theater extends to performance generally insofar as all performances exceed their "visible, objective character" and create something "immaterial and ineffable," whether through the representational "illusion" of theater or not. Copyright law wrestles with how the immaterial intellectual property exceeds any given instantiation

[39] Alice Rayner, "Rude Mechanicals and the *Specters of Marx*," *Theatre Journal* 54, no. 4 (2002), p. 541.

[40] Michael Shane Boyle offers an alternative reading of Marx's relationship to theater and capitalism. Boyle argues that, for Marx, theater becomes capitalist only when the social relationship between performers and producers creates surplus value. Labor value thus remains central to Boyle's analysis. Michael Shane Boyle, "Performance and Value: The Work of Theatre in Karl Marx's *Critique of Political Economy*," *Theatre Survey* 58, no. 1 (2017).

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of that property in the material world, whether as words on a page or as bodies in motion on the stage. As such, performance rights law, far from an obscure, unrepresentative corner of copyright, amplifies copyright law's dissonances.[41] When jurists wrestle with performance rights, they attempt to commodify an immaterial property from something itself immaterial. The performance-commodity doubles the immateriality of every (always already immaterial) copyrighted commodity.

If performance's immateriality can shed new light on the immateriality of copyrighted commodities, the material history of copyright law in turn illuminates a crucial moment in the history of performance's immateriality. Indeed, the lessons from the development of performance rights law should revise how Performance Studies theorizes the immateriality of its subject. My intervention here repeats with a difference the influential debate in Performance Studies about the ontology of performance as a live, always-disappearing medium and about that ontology's relationship to the history of reproductive media. Peggy Phelan asserts performance's liveness in memorable terms:

> Performance's only life is in the present. Performance cannot be saved, recorded, documented, or otherwise participate in the circulation of representations *of* representations: once it does so, it becomes something other than performance. To the degree that performance attempts to enter the economy of reproduction it betrays and lessens the promise of its own ontology.[42]

Phelan figures performance as fundamentally opposed to "the economy of reproduction." Ontologically, performance is only performance here and now, when you make it or watch it.

Philip Auslander critiques this ontology, offering that performance's "liveness" can only appear essential after the invention of non-live media such as television and sound recording.

> [H]istorically, the live is actually an effect of mediatization, not the other way around. It was the development of recording technologies that made it possible to perceive existing representations as "live." Prior to the advent of those technologies (e.g., sound recording and motion pictures), there was no such thing as "live" performance, for that category has meaning only in relation to an opposing possibility.[43]

[41] And, in some ways, those of the law itself. As Justice Joseph Story famously observed, intellectual property questions approach a "metaphysics of the law," regardless of the medium under consideration. *Folsom* v. *Marsh*, 9 F. Cas. 342 (1841), p. 344. Performance's metaphysical strangeness enhances the metaphysical stakes of performance rights lawsuits.

[42] Peggy Phelan, *Unmarked: The Politics of Performance* (New York: Routledge, 1993), p. 146.

[43] Philip Auslander, *Liveness: Performance in a Mediatized Culture*, 2nd edn. (New York: Routledge, 2008), p. 56.

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Having posited liveness as a historical byproduct of recording's invention, Auslander goes on to explore how recorded and broadcast media emphasize their relationship to the live and how "live" performance has come to look increasingly like the mediatized cultural forms around it.

This book imitates the form of Auslander's argument but focuses on a second prong in Phelan's theory of performance, namely what she views as the antagonistic relationship between performance and capitalism. "Performance clogs the smooth machinery of reproductive representation necessary to the circulation of capital," she writes. "Performance resists the balanced circulations of finance. It saves nothing; it only spends."[44] I agree with Phelan that performance, in the sense she defines it, indeed eludes capital's grasp. Insofar as performance is that always-disappearing here-and-now, performance does not fit well with capitalism. But as historical and material fact, rather than as theory, actual *performances* are part of the system of capital. Even if one maintains that performance as such remains outside a capitalist economy, many aspects of any given performance are part of the capitalist economy. Furthermore, performance's purportedly ontological resistance to capitalism presumes its embeddedness within a capitalist economy. We can only understand performance as outside capitalism because, through the eighteenth and nineteenth centuries, capitalism consolidated itself as the economic situation around performance. Just as Auslander historicizes performance's ontology as a function of changes in the "cultural economy," I historicize performance's ontology within the changing economy of culture. The commodification of performance through performance rights law marked a shift in performance's relationship to capitalism. That process determined how we imagine performance today as thoroughly as did the invention of sound recording and film.

This is, I realize, an aggressively historicist and materialist argument to offer in response to Phelan's theory of performance, with its deep roots in Lacanian psychoanalysis and its sensitivity to performance as the medium of death and mourning. But as a historical fact, performance occupies not a single, necessary relationship to the economy but a complex, contingent relationship, built from a specific series of choices made by politicians, jurists, and theater-makers. In that history, the nineteenth century is, as noted above, a particularly important period, one in which the theater and music industries adapted themselves to accommodate the industrialized capitalist economy. Tracy C. Davis' *The Economics of the British Stage, 1800–1914* provides the exemplary overview of this

[44] Phelan, *Unmarked*, p. 148.

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history.[45] Davis investigates "the performance of capital itself, a double entendre of money put to work and the ideology that animated the apparatus of [the theater] industry."[46] In discussions of shifting theatrical finances, new health and safety codes, and other industrial changes, Davis traces theater's – and thus theatrical performance's – position within the industrial economy. Her perspective uncovers "what is at stake culturally in the economics of theatre."[47] That is, Davis recognizes how changing economic forms in the theater shape performances themselves. It is impossible to imagine a theatrical or musical performance in the late-nineteenth-century without some real, material relationship to industrial capitalism.[48] (The late twentieth and early twenty-first-century seems to entail a different political economy of performance within so-called late capitalism. Oliver Gerland and Auslander have sketched compellingly this contemporary landscape.[49]) The theater and music industry's transformations in the nineteenth century defined how capitalism would value performance and influenced the law's shaping of the performance-commodity, even as the performance-commodity itself made possible new industrial circulations of theater and music.

This historicization does not imply that performance was not economically (or otherwise) valuable before the nineteenth century. James H. Forse's *Art Imitates Business* heralds a swath of economic studies of the Early Modern stage.[50] And there was an eighteenth-century political economy of performance that Robert D. Hume and Judith Milhous,

[45] Tracy C. Davis, *The Economics of the British Stage, 1800–1914* (Cambridge: Cambridge University Press, 2000). No equally comprehensive economic discussion of the American theater exists, though Jack Poggi, *Theater in America: The Impact of Economic Forces, 1870–1967* (Ithaca, NY: Cornell University Press, 1968) and Alfred L. Bernheim and Sarah Harding, *The Business of the Theatre* (New York: Benjamin Blom, Inc., 1932) explain the general trends. John Russell Stephens, *The Profession of the Playwright: British Theatre, 1800–1900* (Cambridge: Cambridge University Press, 1992) complements Davis' work, focusing exclusively on playwrights.

[46] Davis, *The Economics of the British Stage*, p. 13.

[47] Ibid., p. 6.

[48] Derek Miller, "On Material Music Histories," *Musicology Australia* 34, no. 2 (2012) describes research on the economic history of music.

[49] Oliver Gerland, "From Playhouse to P2P Network: The History and Theory of Performance under Copyright Law in the United States," *Theatre Journal* 59, no. 1 (2007); Auslander, *Liveness*. See also Kimon Keramidas, "The Pay's the Thing: Intellectual Property and the Political Economy of Contemporary American Theatrical Production" (PhD diss., City University of New York, 2008) on contemporary copyright and Broadway, as well as George Pate, "Reinventing Performance, Reproducing Ideologies" (PhD diss., University of Georgia, 2014).

[50] James H. Forse, *Art Imitates Business* (Bowling Green, OH: Bowling Green State University Popular Press, 1993). On proto-copyright in the period see James J. Marino, *Owning William Shakespeare: The King's Men and Their Intellectual Property* (Philadelphia: University of Pennsylvania Press, 2011).

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in particular, have exhumed in painstaking detail.[51] But there was no industrial economy of performance as a fungible commodity before the nineteenth-century because there was no performance rights law. The advent of those laws in the nineteenth century reshaped performance and its value around the commodity, the performance right. Even if one accepts Phelan's argument that performance exists in "an economy of cultural capital independent of object commodification," that anti-capitalist economy is itself a product of copyright law's commodification of performance.[52]

One might extend this critique of scholarship on performance and capitalism to include even the way in which theater and music historiography regard the nineteenth century. As Jacky Bratton summarizes, "Worth and value and cultural significance were said to have disappeared from" the British theater after 1800.[53] Bratton refers here to the so-called Decline of the Drama and to theater historiography that denigrates the nineteenth-century stage and its melodramas, burlettas, and other marginal genres. Musicologists, meanwhile, still struggle to come to terms with the abundance of piano reductions and excerpted arrangements through which even the highest of high art actually circulated among audiences.[54] Historians of the nineteenth-century performing arts have difficulty evaluating the dominant forms of the nineteenth century in part because

[51] For instance, see Judith Milhous and Robert D. Hume, *The Publication of Plays in London 1660–1800: Playwrights, Publishers, and the Market* (London: The British Library, 2015); Judith Milhous, "Opera Finances in London, 1674–1738," *Journal of the American Musicological Society* 37, no. 3 (1984); Judith Milhous, "The Economics of Theatrical Dance in Eighteenth-Century London," *Theatre Journal* 55, no. 3 (2003); Judith Milhous and Robert D. Hume, "John Rich's Covent Garden Account Books for 1735–36," *Theatre Survey* 31 (1990); Judith Milhous and Robert D. Hume, "Opera Salaries in Eighteenth-Century London," *Journal of the American Musicological Society* 46, no. 1 (1993); Judith Milhous and Robert D. Hume, "Librettist versus Composer: The Property Rights to Arne's 'Henry and Emma' and 'Don Saverio,'" *Journal of the Royal Musical Association* 122, no. 1 (1997). On eighteenth-century theater and plagiarism, see Paulina Kewes, *Authorship and Appropriation: Writing for the Stage in England, 1660–1710* (Oxford: Clarendon Press, 1998).

[52] Peggy Phelan and Marquand Smith, "Performance, Live Culture and Things of the Heart," *Journal of Visual Culture* 2, no. 3 (2003), p. 294.

[53] Jacky Bratton, *New Readings in Theatre History* (Cambridge: Cambridge University Press, 2003), pp. 14–15.

[54] Some exceptions to this scholarly lacuna include Thomas Christensen, "Four-Hand Piano Transcription and Geographies of Nineteenth-Century Musical Reception," *Journal of the American Musicological Society* 52, no. 2 (1999), Thomas Christensen, "Public Music in Private Spaces: Piano-Vocal Scores and the Domestication of Opera," in *Music and the Cultures of Print*, ed. Kate van Orden (New York: Garland, 2000), William Lockhart, "Trial by Ear: Legal Attitudes to Keyboard Arrangement in Nineteenth-Century Britain," *Music & Letters* 93, no. 2 (2012), and Adrian Daub, *Four-Handed Monsters: Four-Hand Piano Playing and Nineteenth-Century Culture* (Oxford: Oxford University Press, 2014).

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during the nineteenth century the performing arts underwent their own crisis of value within capitalism, a crisis enacted in copyright law debates. This book thus tracks two simultaneous crises of value: the theoretical crisis in which the economic value of commodities grew to dominate other discourses of value including authorship or aesthetics, and the aesthetic crisis within theater and music, as these forms responded to industrial capitalism. The history of performance rights illustrates how these crises, which appear merely contemporaneous and parallel, in fact spurred each other throughout the long nineteenth century.

Reading Copyright Lawsuits for the Discourse of Value

How precisely do courts go from assessing the similarity between two playscripts to making claims about the commodifiability of performance? In the process of defining the performance-commodity, courts attended closely both to drama and music as artistic forms and to that which made specific plays or songs good or bad. That is, courts evaluated performances both positively, defining what drama and music are or are not, and normatively, assessing what aspects of a play had special merit – and therefore attracted audience attention. Some of those aspects then warranted inclusion within the performance-commodity, others did not. As noted above, assessing the value of a performance is an extremely complex task; performances are valuable in an almost infinite number of ways. A star actress's turn in *Hedda Gabler* might be valued for its aesthetic refinement. A concert by the latest one-hit pop artist might be less valuable for its artistic achievement and more treasured for its social capital. I can value a children's band concert if my child plays in it as much as or more than I value a Broadway show, though the latter costs more than the former to attend. Young actors might recall with fondness a particularly valuable rehearsal process even if the audience found little to admire in the production. When governments censor or private groups censure, they acknowledge (even while suppressing) the value of performance as a medium for political expression. All of these kinds of value permeate and radiate from performances. Their relative strength in any given performance is a function both of the performance itself and of the audience that views it. Copyright lawsuits force many of these values into the courtroom and ask judges to determine which ones merit performance rights protection, that is, which values should be granted economic value within the performance-commodity.

A specific example from the copyright debates in the period illustrates both how copyright litigation works and how courts think about ontology and a performance's value. *Fuller* v. *Bemis* (1892) pitted choreographer

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and dancer Loïe Fuller against her former producers.[55] Fuller had devised and was performing her *Serpentine Dance* around New York. The proto-modernist act involved colorful lighting and the twirling of overflowing fabrics but related no story. Fuller submitted for copyright registration a written description of the piece's three tableaux. After a contract dispute with one producer, Fuller quit. The producer hired another dancer, Minnie Renwood Bemis, to perform the dance in Fuller's place. Fuller sued for an injunction, asking the courts to forbid Bemis to dance the *Serpentine Dance* in which Fuller held the performance right.

Judge Lacombe had to answer a number of questions, all of which require some ontological thinking and some sense of how audience members value the performance and the underlying work. For instance, was Bemis actually dancing the *Serpentine Dance*, or was her version sufficiently dissimilar from Fuller's to moot the comparison? Comparing two things requires that one determine the meaningful elements for comparison. Just because two dances have flowing fabrics does not mean that both are Fuller's *Serpentine Dance*; one could be the *Dance of the Seven Veils*, for instance. By contrast, the performances were obviously dissimilar in that Bemis danced one version and Fuller the other. But if the identity of the dancer were sufficient to differentiate two dance performances, a performance right for dance would be effectively meaningless. The aspects of the dance that the performance right covers must be limited somehow; courts determine those limits. And the sum of all those limits defines the performance-commodity.

In this lawsuit, Judge Lacombe did not actually worry about such a comparison because he found an even larger flaw in Fuller's argument. In 1892 there existed no copyright for choreography.[56] Fuller could claim instead only a dramatic performance right. But for the dramatic performance right to apply, a work must *be* dramatic, and Lacombe did not see drama in Fuller's dance. He describes the *Serpentine Dance* as a sequence of effects, "a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion."[57] This description extracts some aspects of Fuller's dance as "attractive" and presumably of some aesthetic value ("graceful movements," "drapery, lights, and

[55] *Fuller* v. *Bemis*, 50 F. 926 (1892). On this case see also Kraut, *Choreographing Copyright*, chapter 1.

[56] Choreographic works had no explicit protection in US law until the 1976 Copyright Act went into effect in 1978. *An Act for the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes*, Public Law 94–553, *U.S. Statutes at Large* 90 (1976): 2541–602. The 1911 Imperial Copyright Act in the UK subsumed choreographic works under the category of dramatic works. 1 & 2 Geo. 5, c. 46, s. 35 (1).

[57] *Fuller* v. *Bemis*, 50 F. 926 (1892), p. 929.

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shadows"), but ignores other elements, such as the sequence of tableaux or the specific movements themselves. Lacombe then declares that those valuable elements failed to amount to something dramatic. As Lacombe put it in his terse opinion, a dramatic work's plot "must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary."[58] Only the pure movement in the dance had value, in Lacombe's reading. Thus the *Serpentine Dance* was not a dramatic work and was ineligible for protection under the dramatic performance right. One could meaningfully argue whether Fuller's dance imitated, say, a sequence of emotions, despite its abstraction. But Lacombe failed to recognize emotion as something Fuller's dancing might arouse in her audience. Instead, he read her work purely as form. In excluding Fuller's dance from performance rights protection, Lacombe thus offered a definition of drama. Drama must represent something; Fuller's dance (according to Lacombe's interpretation of it) included no such representation; therefore her dance was not dramatic; therefore Fuller could not have a dramatic performance right. Bemis's show could go on.

In these lawsuits, then, the work of courts is ontological (what is drama?) but also critical (what elements of this performance are valuable and, therefore, the performance's defining characteristics?). Out of this judicial work arises the abstract legal entity covered by the performance right, the performance-commodity. That commodity then circulates in the marketplace as exchange-value, paying little heed to the many other values it contains. The right to perform is pure potential, the values captured by it – whether included in the right or excluded – potential energy. When you perform, you unleash the values stored up within the right as kinetic energy, channeling protected values into profits and storing up surplus values as the cultural capital of performance.

During the nineteenth century, copyright law defined a performance-commodity. That process of legal definition, in which the law articulated the boundaries of performance as property, elicited debates about the nature of dramatic and musical art and about the wide range of values in performance. This book argues that copyright law's commodification of performance transformed our theories of performance and how we value performances as both economic and artistic phenomena. The chapters that follow trace a general outline of the legal development of performance rights. They focus, however, not on the articulation of legal rules but on the definitions and values at stake in debates

[58] Ibid.

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about theatrical and musical performances.[59] While copyright litigation brought value-discourse to the fore, only some of performance's value would be part of performance's commodity-form. Even as litigants and jurists recognized the multiple values in performance, they fiercely debated which elements of performance deserved to be bundled into the performance right itself.

The first chapter considers the broad value-discourse that preperformance rights copyright disputes aroused. Before the United Kingdom and United States passed statutes granting performance rights, some artists wielded copyright law to assert control over their plays. Those litigants particularly sought to secure performance's value for individual authors and to use performance to exercise political authority. In two lawsuits, involving Charles Macklin and Robert Elliston, respectively, then again in Parliamentary debates that led to the passage of performance rights statutes, advocates argued that performance was valuable primarily for its ability to affirm the socio-political order. Pre-statutory performance rights cases and legislative efforts thus focused not on crafting a modern, alienable property right, but on upholding social and political propriety.

After the invention of statutory performance rights in the United States and United Kingdom, courts considered dramatic and musical performances with an eye to defining those performances as commodities. Such definitions focus first on formal properties, constructing ontologies that identify works and performances as members of the class of copyrightable works. That is, courts sought to name the elements of theater and music that define a work *as* theater or music. Chapter 2 parses those lawsuits, discovering that embodied human action proved essential to the legal definition of drama while music was, in jurists' ears, primarily a melodic thing. Because the formally essential elements of drama and music differed so widely, the law struggled immensely to accommodate music dramas, a problem exemplified by a series of lawsuits involving Gilbert and Sullivan. Courts ultimately refused to recognize a single, amalgamated form that defined music drama, preferring to assert a hierarchy

[59] On copyright law's internal legal development see for example Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999); Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)* (Oxford: Hart, 2004); Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909* (Cambridge: Cambridge University Press, 2016); Ronan Deazley, Martin Kretschmer, and Lionel Bently, *Privilege and Property: Essays on the History of Copyright* (Cambridge: OpenBook, 2010); Alexander, *Copyright Law and the Public Interest*; Jessica Litman, "The Invention of Common Law Play Right," *Berkeley Technology Law Journal* 25 (2010).

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between the theatrical and musical elements of an operetta. The separate formal elements of theater and music thus determined both the legal and the critical interpretation of Gilbert and Sullivan's work. Cumulatively, these cases defined the essential properties of the dramatic and musical performance-commodities that performance rights laws had created.

The third chapter attends to values at the periphery of the performance-commodity. Courts recognized that a performance's success depended upon its value as perceived by parties outside the dramatic or musical work, particularly performers and audiences. Although such valuations are ontologically part of all performances, the precise elements that performers and audiences valued in any given performance might not be part of the performance-commodity as a legal object. For instance, an audience's affective relationship to a performance, creative labor by non-authors, and adaptation to suit specific audiences all clearly made performances more or less useful and valuable. But just because they were valuable, this did not mean copyright law recognized those values as relevant to the performance-commodity. They might not be essential to the identity of a performance-commodity, but rather merely "accessorial," as the judge in one case put it. The chapter's final section examines how the nature of audiences as gatherings of the public challenged the very foundations of performance rights into the 1880s. These cases show the legal system struggling to limit the set of values over which copyright law exerted jurisdiction. In the conclusion to Chapter 3, I consider a case that enacted the triumph of economic value and the suppression of non-economic values. As courts grew more confident in the definition of the performance-commodity, jurists began to dismiss the diverse values used to define that commodity and focused instead solely on economic value. By the end of the nineteenth century, the law admitted only the importance of exchange value and insisted that the performance-commodity, shaped through decades of intense arguments about many values, was otherwise value-neutral.

The fourth chapter examines the effects of these new laws on the operation of the theater and music industries in the nineteenth century. I emphasize here the interchange between the elements and values prized in the emergent performance-commodity and the performance industries' own shifting values. First, I consider how the music industry's primary income stream, sheet music, prevented any real interest in musical performance rights. The commercial potential of musical performances became clear only late in the century with the advent of economically valuable sound-reproduction and recording technologies. By then, the industry had tied musical value so closely to the printed page that an entirely new category of intellectual property right, the mechanical

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reproduction right, was required to accommodate a theory of musical performance as valuable. In the theater, performance earned substantial incomes throughout the century and the development of performance rights laws encouraged new practices to collect performance rights fees. Even as the business of theater adapted, so too did play publishing and production. I argue that the contemporary production-commodity – in which not only the script or score, but also scenery, costumes, and staging are packaged for sale – grew out of production practices anxious about unstable performance rights. Chapter 4 concludes with two unusual outcomes of the period's copyright disputes: the copyright performance, a British performance genre that existed entirely to satisfy purported legal requirements, and an unwieldy exemption for the performing arts from an otherwise strictly protectionist US manufacturing law. These strange blips in the legal history of performance reveal the simultaneous precision and vacuity of theater's value as imagined by copyright law. An epilogue uses lawsuits over *Jesus Christ Superstar* to consider the persistence of value debates in performance rights litigation into the twentieth and twenty-first centuries.

With the exception of a brief section in Chapter 4, the analyses here address solely Anglo-American law, for three reasons. First, although events on the European continent affected the artistic and legal practices in both the United States and the United Kingdom, continental Europe's *droit moral* gave their copyright law a different momentum and focus. Anglo-American law, by contrast, developed not from the moral rights of authors but from Lockean theories of labor and political economic arguments about monopolies.[60] Second, the common law, under which both the United Kingdom and the United States were governed in the nineteenth century, depends on the slow accumulation of precedent for much of its force. That process of statutory and extra-statutory interpretation, which constructs the performance-commodity, is much less central to civil law. Third, the legal systems in the United States and United Kingdom each referenced the others' important cases and statutes throughout the nineteenth century. Thus, not only are the British and American theater and music industries in close conversation during the century, so too are the legal systems that defined performance rights in

[60] See Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (Copenhagen: Djøf Publishing, 2009) and Jane C. Ginsburg, "Une Chose Publique? The Author's Domain and the Public Domain in Early British, French and US Copyright Law," *The Cambridge Law Journal* 65, no. 3 (2006) for discussions of the differences between Anglo-American and French law. On copyright's rationale, see Deazley, *On the Origin of the Right to Copy*; Rose, *Authors and Owners*; and Seville, *Literary Copyright Reform in Early Victorian England*.

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those countries. My analysis traverses almost 150 years of theater history in the United States and the United Kingdom. It begins with important litigation before performance rights laws, focuses on the development of performance rights precedents, and ends with the reconsolidation of the nineteenth century's patchwork legislation into a single, more rationalized law in both the United States and the United Kingdom on the eve of the First World War.[61] The latter laws (1909 in the United States; 1911 in the United Kingdom) also codified copyright for sound recordings, thus inaugurating a new legal discourse of performance that included the concept of performance-as-reproduction.

By tracing Anglo-American law's developing concept of performance in the nineteenth century, this book describes a crucial moment in the history of performance's political economy. I endeavor to unpack how copyright law taught us to value performance, both as a thing to be bought and sold and as something the very essence of which is to disappear and refuse essentializing. The marketplace – and this historical fact is my central focus – has constructed ways to value performance as a commodity through performance rights laws. The market's determinations by means of copyright law in turn shape how we think about performance, even if we theorize performance as something fundamentally outside the market.

In the cases discussed throughout the book, courts are invited not only to set a price, as it were, but also to determine what kinds of things the copyright system was designed to protect. For evanescent intellectual property rights, copyright law provided the essential mechanism whereby insubstantial intellectual products could transform themselves into commodities. The law effects this transformation not by ignoring performance's multiple value-discourses, but rather by engaging those discourses to construct a commodity. Only once that commodity has been defined does the law pretend that value exists solely in the economic realm and that copyrighted commodities are products of nature that exist a priori, rather than manufactures of law, created a posteriori. Copyright law makes performances commodities by thinking through the form and the value of performance.

My approach is historical insofar as the events under investigation here are events in the history of theatrical and musical law. The work of legislating, litigating, and negotiating performance rights was a historical process that generated an archive of case files, judicial opinions, treatises, newspaper columns, and correspondence, all of which document

[61] See the Appendix for a table of major copyright legislation and lawsuits that affected theater and music, most of which receive attention in the text.

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the law's slow change. I am not primarily concerned, however, with legal history as such. Rather in this legal history reside important theories of dramatic and musical art. I read the law to discover the historical development of performance as an economically valuable thing and how that development shaped our perception of performance's other values. Copyright laws describe the commodity-form of copyrightable artistic works; that commodity-form bears a shifting, contingent relationship to the artistic form it attempts to capture.

The pages that follow examine the period in Anglo-American law when jurists did this hard definitional work, a moment when the nature of performance and the discourses of performance's value were open to dissection by the legal profession and, as a result of those operations, to new configurations in the theater and music industries. By animating the performance-commodity, the law also inspired a new, socially determined relationship between all of a performance's value and its value as a commodity, that is, its price. Performance rights laws grant performances their own forms of appearance in the market as performance-commodities. They are still for sale.

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