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PERFORMANCE VALUES

*Sara K. Stadler**

INTRODUCTION

On February 7, 2007, a Pennsylvania woman videotaped her toddler dancing to a portion of a song performed by Prince during the halftime show of the Super Bowl.[1] Wishing family and friends to see the video, she uploaded it to YouTube, a website that enables users to

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1 Press Release, Elec. Frontier Found., Mom Sues Universal Music for DMCA Abuse (July 24, 2007), *available at* http://www.eff.org/news/archives/2007_07.php.

post and watch videos.[2] Four months later, the Universal Music Publishing Group (Universal) demanded that YouTube remove the video, claiming that the video infringed its copyright in the song.[3] YouTube complied, and the video was removed from view.[4]

Unfortunately, this was not an exceptional case.[5] Every day, copyright owners are asserting their rights to exclude performances of copyrighted works from public view, even when those performances pose no threat to profitability. These skirmishes are only part of a strategy to control each and every way in which copyrighted works are both delivered to and experienced by the public, and increasingly, this strategy depends on the exercise of the exclusive right of public performance (the "performance right," for short). For copyright owners, this right has become a particularly powerful tool: unlike the right to distribute a copyrighted work in copies, the performance right entitles copyright owners to demand a royalty nearly every time a performance finds a new audience.

Notwithstanding these developments, the scope of the exclusive right of public performance has excited almost no comment from scholars in the field. Of those few who have commented, most have proposed to *broaden* the right by extending it to owners of copyright in sound recordings,[6] whose rights are limited under existing law.[7]

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2 YouTube, http://www.youtube.com (last visited Jan. 28, 2008). Google, the owner of the service, has said that it "hopes technology will be in place in September [2007] to stop the posting of copyright-infringing videos on its YouTube site." *For YouTube, a System to Halt Copyright-Infringing Videos*, N.Y. TIMES, July 28, 2007, at C6. In the meantime, however, Viacom Inc. has sued Google for more than $1 billion, alleging "massive copyright infringement." Miguel Helft & Geraldine Fabrikant, *Viacom Sues Google over Video Clips on Its Sharing Web Site*, N.Y. TIMES, Mar. 14, 2007, at C1.

3 *See* Press Release, Elec. Frontier Found., *supra* note 1.

4 *Id.* The video since has been reposted. *See id.*

5 *See id.* (noting that Universal recently "sent a baseless copyright takedown demand to YouTube for a video podcast by political blogger Michelle Malkin" and that "[the] video was quickly reposted after Malkin fought back"). What made this case worth noting was the intervention of the Electronic Frontier Foundation, which sued Universal on July 24, 2007, for abusing its copyright under various theories of federal and state law. *Id.*

6 *See, e.g.*, Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 202 (2004); Kara M. Wolke, *Some Catching Up to Do: How the United States, in Refusing to Fully Sign on to the WPPT's Public Performance Right in Sound Recordings, Fell Behind the Protections of Artists' Rights Recognized Elsewhere in This Increasingly Global Music Community*, 7 VAND. J. ENT. L. & PRAC. 411, 414 (2005); Jonathan S. Lawson, Note, *Eight Million Performances Later, Still Not a Dime: Why It Is Time to Comprehensively Protect Sound Recording Public Performances*, 81 NOTRE DAME L. REV. 693, 718 (2006); *see also* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 713 (2003) (proposing to extend the right to owners of copyright in sound recordings

These proposals, which make regular appearances in the literature, tend to rest on principles of equity: why should owners of copyright in sound recordings be denied rights that other rightsholders, here or abroad,[8] enjoy?[9] Or, as David Nimmer has put it, why not "plug the historical anomaly?"[10] On the other side of the conversation, Mark Lemley has proposed to narrow the performance right (among other rights) by replacing it with "a new exclusive right of transmission over a computer network."[11] Unfortunately, this approach is both too narrow and too broad—too narrow because it addresses only "Net transmissions" of performances,[12] and too broad because it gives copyright owners the right to control transmissions even when the costs of control exceed its benefits.[13]

This scarcity of solutions to the problem of performance is surprising, for the right is an interesting one, often to the point of being strange. One interesting thing about the performance right, at least in terms of semantics, is that it does not protect performers or their

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only as part of a broader solution to the problems posed by copyright law as it applies to music).

7 *See infra* notes 87–93 and accompanying text.

8 *See* Wolke, *supra* note 6, at 411–12 (describing the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty which, in Article 15(1), "recognizes a right to remuneration for performers and producers from public performances of their sound recordings").

9 *But see* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 440–47 (2007) (describing how creators "have justified their demands for broader rights . . . by pointing to the rights that others enjoy and by demanding to enjoy rights 'as good,'" to the ultimate detriment of the public).

10 David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 192 (2000) (arguing that "[w]hen Congress decided to plug the historical anomaly under which sound recordings lacked any performance right, it could have acted very simply" by "add[ing] a general right of public performance in sound recordings to the preexisting rights in the Copyright Act").

11 Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 582 (1997). On the subject of transmissions, and taking an even narrower approach, David Lilenfeld has proposed to limit the performance right to "primary transmissions," thus enabling business owners to "furnish their establishments with radio or televisions and tune into programming" without engaging in copyright infringement. *See* David M. Lilenfeld, Note, *Why Congress Should Eliminate the Multiple Performance Doctrine*, 58 OHIO ST. L.J. 695, 727 (1997).

12 Lemley, *supra* note 11, at 582–84.

13 Recognizing these costs, Lemley has acknowledged that a network transmission right "would have to be accompanied by a package of amendments to §§ 107–120 [of Title 17] designed to apply certain of those existing user rights," but he has not described those amendments, instead leaving them to Congress to craft "on a case-by-case basis." *Id.* at 583.

performances.[14] Instead, when Congress granted owners of copyright in qualifying works the exclusive right "to perform the copyrighted work publicly,"[15] Congress created property rights in *precursors* to performance such as plays, songs, and more recently, choreography.[16] This grant of rights gives copyright owners the ability to condition public performances of their works on the payment of royalties, thus subjecting performers to demands for payment.[17] A century ago, copyright owners made relatively few such demands,[18] believing that the performance right was largely incidental to other, more lucrative rights like the exclusive rights of "printing, reprinting, publishing, and vending" copies of their works.[19] As technology has changed, however, so have the ways in which people experience copyrighted works, and as a result, the performance right has changed, too.

Congress appears to have created the performance right with "the paradigm image of a public performance" in mind: "an actor seen and heard by an audience assembled in his immediate presence."[20] These days, however, performances are as likely to occur in the ether as they are on the stage, as Congress has defined "performance" broadly enough to cover transmissions of data.[21] Nor do performances need to be particularly "public" anymore, at least in the usual sense: a private club can engage in a public performance simply by inviting too many people to see or hear the performance of a copyrighted work.[22] In fact, the reach of the performance right has become so broad that it now gives copyright owners the ability to charge for access to their works—not once, as with the sale of copies,[23] but at "each step in the process by which a protected work wends

14 For copyright scholars, this characteristic of the performance right likely is so familiar as to be entirely uninteresting.

15 Copyright Act of 1976 § 106(4), 17 U.S.C. § 106(4) (2000 & Supp. IV 2004).

16 *See* 17 U.S.C. § 106.

17 *Id.*

18 *See infra* notes 65–68 and accompanying text.

19 *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (extending the grant to owners of copyright in musical works); Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (extending the grant to owners of copyright in books, charts, and maps).

20 United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 876 n.4 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968), *superseded by statute* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

21 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "perform").

22 *See id.* (defining "publicly"); *infra* notes 109–12 and accompanying text.

23 17 U.S.C. § 109(a) (2000) (limiting "the provisions of section 106(3)" to provide that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord").

its way to its audience."[24] Taken together, these changes in the law are revealing of the strangest thing about the exclusive right of public performance: it is not *really* about performances at all. Instead, copyright owners are using the right as a Trojan Horse to defeat longstanding limitations on the core right in copyright law[25]: the right to distribute a work in copies (that is, to "publish" it).[26] And because those limitations are an integral part of the copyright balance,[27] the resulting benefit to copyright owners comes at the expense of the public.

In Part I of this Article, I analyze the exclusive right of public performance, along with its history, by highlighting a few of the stranger things about the right. In Part II, I examine the public interest in regulating performance, weighing the costs of the performance right against its benefits. I begin this exercise by detailing how the performance right under existing law leads to a multiplicity of claims on the public which, in turn, imposes significant costs on society. Those costs include not only the cost of complying with the right (including royalties and "clearance"[28]), but also the cost of enabling copyright owners to provide the public with ephemeral "experiences"[29] instead of tangi-

24 David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

25 *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 500–01 (2001) (describing how the "reproduction and distribution of individual Articles . . . would invade the core of the Authors' exclusive rights under § 106 [of Title 17]").

26 "Publication," in copyright terms, occurs when a copyright owner makes her work "available to members of the public regardless of who they are or what they will do with it." Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1452 (9th Cir. 1991) (citing Burke v. NBC, Inc., 598 F.2d 688, 691 (1st Cir. 1979)). There is a significant amount of overlap between publication and public "distribution," to which copyright owners have the exclusive right under § 106(3). *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "publication"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985) (observing that § 106(3) "recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works").

27 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (instructing that the limited scope of copyright "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts").

28 For an excellent description of copyright clearance, see *Eldred v. Ashcroft*, 537 U.S. 186, 249–52 (2003) (Breyer, J., dissenting).

29 Jane Ginsburg has argued that copyright law should accommodate the desire of copyright owners to charge for copyright "experiences." *See generally* Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113, 119–25 (2003) (arguing that copyright holders should be construed to have "access" rights rather than "copy" rights).

ble copies. Against these costs, I weigh the benefits of the existing right, finding those benefits to be surprisingly few. Finally, in Part III, I use these insights to redefine the right, first by changing its beneficiaries and second by changing its boundaries, in each case describing a right that is considerably more narrow than the one that exists today. The first proposal withholds the performance right entirely from most owners of copyright, thereby sacrificing breadth for clarity. The second proposal defines the right more broadly by extending a more limited right to more beneficiaries, but because those limitations might be susceptible of varying interpretations, the second proposal sacrifices clarity for breadth. Both proposals, however, would encourage rightsholders not only to perform their works, but also to distribute those works to the public in tangible form—thus requiring rightsholders to embrace the proliferation of physical copies on which the preservation of culture depends.

I. THREE STRANGE THINGS ABOUT THE PUBLIC PERFORMANCE RIGHT

A. It Doesn't Protect Performers

Section 106(4) of the Copyright Act provides owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" with the exclusive right "to perform the copyrighted work publicly."[30] The beneficiaries of this right are not performers or, strictly speaking, their performances. Instead, the exclusive right of public performance protects those who have ownership interests in the *precursors* to performance, such as songs[31] and plays.[32] Anyone who performs such a copyrighted work without permission—that is, anyone who "recite[s], render[s], play[s], dance[s], or act[s] it, either directly or by means of any device or process"[33]—engages in prima facie infringement of copyright.[34] For copyright scholars, these are perfectly ordinary facts. The right simply is one way in which the law grants an entitlement to creators in return for creating valuable works—in this case, because those works are performable.

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30 17 U.S.C. § 106(4) (2000 & Supp. IV 2004).

31 *See id.* § 102(a)(2) (2000) (extending copyright to "musical works").

32 *See id.* § 102(a)(3) (extending copyright to "dramatic works").

33 *See id.* § 101 (Supp. V 2005) (providing that to "'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible").

34 *See id.* §§ 106(4), 501(a) (2000 & Supp. IV 2004).

The performance right has a predictable impact on performers: if a performer wishes to perform any part of a copyrighted work, the law requires him to pay its owner for a license (or risk a lawsuit). In other words, the law imposes costs on performers for the benefit of those who own copyright in the raw materials of performances. Any benefits to performers are few, at least under copyright law, for even a performer who engages in a licensed performance may not enjoy much of a copyright in the result.[35] On the one hand, if a performer renders a copyrighted work so faithfully as to create a "copy" of it,[36] then the performance is copyrightably indistinct from the underlying work, which means that the performance does not qualify for its own copyright.[37] On the other hand, if the performer adds something "original"[38] to the underlying work, then he has created an adaptation, or what the law terms a "derivative work."[39] Copyright in such a derivative does not extend to the underlying work, but "extends *only* to the

35 If a performer does not take a license, he enjoys no copyright in his performance at all. *See id.* § 103(a) (providing that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully").

36 *See id.* § 101 (Supp. V 2005) (defining "copies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

37 U.S. COPYRIGHT OFFICE, LIBRARY OF CONG., CIRCULAR NO. 14, COPYRIGHT REGISTRATION FOR DERIVATIVE WORKS 1 (2006), *available at* http://www.copyright.gov/circs/circ14.html (last visited Jan. 28, 2008) ("To be copyrightable, a derivative work must be different enough from the original to be regarded as a 'new work' . . . . Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes.").

38 *See* 17 U.S.C. § 102(a) (2000) (providing that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (defining an "author" as "'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature'" (quoting JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 99 (1879))).

39 The Copyright Act defines "derivative work" as

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.

17 U.S.C. § 101 (Supp. V 2005); *see supra* note 37.

material contributed by [its] author"[40]—i.e., the performer—assuming, of course, that the terms of the license permit the performer to retain even this (thin) copyright.[41] Clearly, something other than copyright is motivating these performers to perform.

But the law need not be so hostile to performers, and indeed, it was not always so hostile as it is today. Before 1856, copyright owners did not enjoy a performance right at all, but enjoyed only publication rights, that is, the exclusive rights of "printing, reprinting, publishing, and vending" copies of their works.[42] Only in 1856, when Congress expressly extended the statutory copyright to "dramatic compositions," did it also create the performance right, granting owners of plays the exclusive right to "act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place for the whole period for which the copyright is obtained."[43] This right may not have been particularly useful at the time. "Publication" (in print) was a prerequisite to protection under the statute,[44] and as Congress later noted, the dramatist "does not usually publish his work in the ordinary acceptation of the term."[45] This fact may have led Congress to introduce a bill on March 24, 1870 that sought to provide statutory protection to proprietors of dramatic works "designed and suitable for public performance or representation only, and not for publication."[46] The bill did not pass, perhaps because Senator Morrill opined that if the works at issue were "too . . . frivolous to be published in the ordinary mode, they can scarcely be wor-

40 17 U.S.C. § 103(b) (2000) (emphasis added); *see id.* (providing, further, that the copyright in the derivative work "does not imply any exclusive right in the preexisting material").

41 *Cf.* Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (describing a "thin" copyright in a case involving a factual compilation).

42 *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436; Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

43 Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139. Congress had tried to create such a right as early as 1841, when the Senate reported a bill (S. 227) that would have given authors and translators of "dramatic entertainment" the sole right of "representing" their works "at any place of public amusement within the United States" for a period of fourteen years. S. 227, 26th Cong. (2d Sess. 1841).

44 *See* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138–39 (extending rights to owners of dramatic compositions in which "copyright hereafter [is] granted under the laws of the United States").

45 H.R. REP. No. 60-2222, at 4 (1909); *see also* Boucicault v. Fox, 3 F. Cas. 977, 981 (C.C.S.D.N.Y. 1862) (No. 1691) (holding that the mere performance of a work did not constitute "publication"); Keene v. Wheatley, 14 F. Cas. 180, 185 (C.C.E.D. Pa. 1861) (No. 7644) (observing that "[t]he intended meaning of the word 'publication,' in this and other statutory provisions concerning copyright, is publication in print").

46 S. 703, 41st Cong. (2d Sess. 1870).

thy of the extraordinary legislation proposed."[47] Even so, the performance right was of theoretical benefit, at least, to those playwrights who distributed copies of their works to the public.

What of songwriters, those primary beneficiaries of the performance right today? In granting the right to dramatists in 1856, Congress neglected to do the same for owners of copyright in musical compositions, who continued to enjoy only "the sole right of printing, copying, etc., and not of public representation."[48] For at least one court, this inequity was "much to be regretted,"[49] and Congress finally granted the performance right to proprietors of both "dramatic [and] musical compositions" in 1897.[50] Congress went on to limit the rights of songwriters, in 1909, to public performances "for profit," even as it added to the list of works that qualified for the performance right.[51] By 1976, though, Congress had thought better of the "for profit" limitation,[52] choosing instead to enact narrower (and lengthier) exceptions to a broad performance right that now includes among its beneficiaries the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works."[53]

This history of expansion is a familiar story to students of copyright law. Over time, an increase in rights creates expectations of increasing reward among creators, whose demands, in turn, stimulate the grant of yet more rights.[54] When it comes to the *performance* right, however, the story raises a more interesting question: why create such a right in the first place? To be sure, England had one before the

47 S. REP. No. 41-209, at 1 (1870) (recommending, accordingly, that the bill "do[es] not pass").

48 Carte v. Duff, 25 F. 183, 187 (C.C.S.D.N.Y. 1885).

49 *Id.*

50 *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82.

51 *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

52 *See* H.R. REP. No. 94-1476, at 62–63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676 (noting that it was "more reasonable" to omit the "for profit" limitation not only because "[m]any 'non-profit' organizations are highly subsidized and capable of paying royalties," but also because "performances . . . are continuing to supplant markets for printed copies and . . . in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write").

53 *See id.* (reporting that "[t]he approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses"). The right is found in 17 U.S.C. § 106(4) (2000 & Supp. IV 2004); the exceptions to it are found in 17 U.S.C.A. §§ 110, 111, 114(d), 116, 118, 119, 122 (West 2005 & Supp. 2007).

54 *See* Stadler, *supra* note 9, at 456–59.

United States did,[55] but in 1856, at least, American law did not, "like the English statutes, protect the . . . proprietor in all the uses to which literary property may be legitimately applied."[56] And while it may be true that some works—like plays and songs—were made to be performed, there were other ways for playwrights and songwriters to make money in 1856. Playwrights sold copies of their plays to producers and directors who wished to stage performances. Songwriters sold copies of their songs (known as "sheet music"), not only to orchestras and singers, but also to millions of ordinary Americans.

In this world, in which recording devices did not exist, there were only two ways to perform a copyrighted play or song without having a copy in hand: (1) to perform the work from memory; and (2) to record a performance by hand, that is, by taking notes. While courts tended to punish the stenographers in the second category,[57] at least one court was sympathetic to the prodigious memorizers in the first category. In *Keene v. Wheatley*,[58] the court instructed that the owner of copyright in an unpublished play[59] cannot, having performed it "before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled . . . to make from its having been retained in the memory of any of the audience."[60] That is, "the privileges of listening and of retention in the memory cannot be restrained."[61] Later courts, however, rejected these "privileges," holding that copying for the purpose of later "representation" was unlawful—"[i]n whatever mode the copy is obtained."[62] For the court in *Tompkins v. Halleck*,[63] "[t]he ticket of admission is a license to witness the play, but it cannot be treated as a

55 *See* Ferris v. Frohman, 223 U.S. 424, 432 (1912) (noting that section 20 of the British Copyright Act, 1842, 5 & 6 Vict., c. 45, conferred to playwrights the right to represent their dramatic works).

56 Carte v. Duff, 25 F. 183, 187 (C.C.S.D.N.Y. 1885).

57 *See, e.g.*, Keene v. Wheatley, 14 F. Cas. 180, 201 (C.C.E.D. Pa. 1861) (No. 7644) (observing that "the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically or otherwise").

58 14 F. Cas. 180.

59 Under the law at the time, the mere performance of a work did not constitute "publication." *See* Boucicault v. Fox, 3 F. Cas. 977, 981 (C.C.S.D.N.Y. 1862) (No. 1691). Unpublished works were protected under the common law of copyright. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834) ("That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted . . . .").

60 *Keene*, 14 F. Cas. at 201.

61 *Id.*

62 Tompkins v. Halleck, 133 Mass. 32, 42, 46 (1882).

63 133 Mass. 32.

license to the spectator to represent the drama if he can by memory recollect it."[64] The license to experience a performance is not a license to copy it.

These cases help to make an important point about the performance right: notwithstanding the existence of the right, the possession of a copy was, and continues to be, critical to the enterprise of performance. Most copyrighted works are not capable of being performed without a copy of the work in hand.[65] Copyright owners once understood this, and in the early days of the performance right, they tended to invoke the right only when the defendant had failed to purchase a copy of the work he went on to perform.[66] So long as people were buying copies of their plays or songs, copyright owners

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64 *Id.* at 46.

65 There are obvious exceptions, such as songs that even the forgetful could perform from memory. One such song is "Happy Birthday to You," in which copyright is claimed, although the online encyclopedia Wikipedia relates several theories under which the work might have fallen into the public domain decades ago. *See* Wikipedia, Happy Birthday to You, http://en.wikipedia.org/wiki/Happy_Birthday_to_You (last visited Jan. 28, 2008).

66 *See Argument on H.R. 11943, To Amend Title 60, Chapter 3, of Revised Statutes of the United States, Relating to Copyrights: Hearing Before the H. Comm. on Patents*, 59th Cong. 7 (1906) [hereinafter *Arguments on H.R. 11943*] (statement of J.L. Tindale) (testifying that "[n]o [music] publisher has ever objected" to those who perform works from purchased copies, adding, "[w]e object to their renting it to others"); *id.* at 11 (statement of Tindale) (stating that "no publisher within my knowledge requires a purchaser of copies . . . to keep on buying fresh copies for any future performance he may wish to give," but that "he is free to give any number of performances from the copies once purchased"); *id.* at 14 (statement of Tindale) (testifying that "we do part with the title to the physical copies . . . and we also throw in the right of performance to the purchaser"); *see also Arguments (Cont'd) on H.R. 11943, To Amend Title 60, Chapter 3, of the Revised Statutes of the United States, Relating to Copyrights: Hearing Before the H. Comm. on Patents*, 59th Cong. 8–9 (1906) [hereinafter *Arguments (Cont'd) on H.R. 11943*] (statement of A.R. Serven) (adding that "we have never brought any suit at all").

The fact that music publishers admitted to having "slept on [their] rights" under the statute, *Arguments on H.R. 11943*, *supra*, at 15 (statement of Tindale), did raise issues of reliance. As Herman Froemne informed a House Committee in 1906:

> A copy of each score was bought for the past fifteen years by Mr. Tams. The publishers knew he was renting it out. It has only been a few months ago they wanted to make a stop of it . . . . [W]e have bought thousands of books, and these music publishers have received from Mr. Tams from $3,000 to $4,000 a year for the past fifteen years. Where is the justice now, when he has his place stocked up, in preventing him from making any profit on it?

Arguments (Cont'd) on H.R. 11943, *supra*, at 14 (statement of Herman Froemne); *see also Arguments on H.R. 11943*, *supra*, at 11 (statement of Arthur W. Tams) (responding, "[t]hey permitted me to do it going on twenty years" when asked whether he acquired the right to rent purchased copies of works for public performance).

were happy to ignore the resulting performances. It was, in practice if not in law, as if the purchase of a copy included an implied license to perform the work.[67] Performers were not targets of the new performance right except to the extent they failed to respect the existing rights to "print[ ], reprint[ ], publish[ ], and vend[ ]."[68] As a result, the performance right was unnecessary as a reward for most copyright owners, who already enjoyed the right to publish copies of their works—along with the right to charge a compensatory sum for those copies. *Copies* were the raw materials of performance.

Shortly before the turn of the twentieth century, however, advances in technology began to change the relationship between copyright owners and performers. By 1890, the pioneers among the phonograph companies had made their "talking machines" available for purchase, and by 1897, player pianos had hit the market, too.[69] Demand skyrocketed, and soon companies were manufacturing and distributing thousands of recordings, mostly songs, on phonograph records and perforated rolls of paper ("piano rolls").[70] These record-

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67 This license was specific to the purchaser.

> Mr. GILL. Do I understand you to say that in the sale of these publications by the publishers the right of performance goes with the sale of the book?
> Mr. SERVEN. To the purchaser.
> The CHAIRMAN. To the original purchaser only?
> Mr. TINDALE. To the original purchaser; and he can not pass that on to another.
> Mr. BONYNGE. But the original purchaser can perform it as often as he pleases?
> Mr. TINDALE. We are delighted to have him do so.
> Mr. SULZER. As I understand it, the only distinction is this, that the purchaser can not transfer his rights.
> Mr. TINDALE. He can not give the right of performance, because he never had the right of performance except as we gave it to him.

Arguments on H.R. 11943, *supra* note 66, at 13 (statement of J.L. Tindale); *see supra* note 66 and accompanying text; *infra* notes 168–71, 229 and accompanying text.

68 Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124, *amended by* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436.

69 Thomas Edison devised a functioning type of phonograph in 1877, but it was not until 1890 that the "first commercial [phonograph] recordings went on the market." WILLIAM HOWLAND KENNEY, RECORDED MUSIC IN AMERICAN LIFE xii, 23 (1999). Shortly thereafter, phonograph companies devised the idea of creating "phonograph parlors" where people could purchase the option of playing more than one song. *Id.* at 26. The player piano hit the market in 1897, although there is a dispute as to who made the first device. *See* CRAIG H. ROELL, THE PIANO IN AMERICA, 1890–1940, at 39–40 (1989).

70 *See* ROELL, *supra* note 69, at 60 (stating that by 1904, the Aeolian company had invested some $10 million in the production of perforated rolls, comprising 12,978 recorded compostions).

ings were mostly unauthorized—not because manufacturing companies had decided to ignore the law, but because they believed that the law did not apply.[71] To their way of thinking, they were not "publicly performing or representing" a copyrighted work;[72] they simply were enabling consumers to perform those works in the privacy of their own homes. Nor, to their minds, were they vending "copies" of copyrighted works; they simply were vending pieces of etched zinc or paper that, when inserted into a patented device, were capable of producing music. The Supreme Court itself credited this argument in 1908, when it held that piano rolls were not "copies," and therefore not infringing, because they were not "in intelligible notation"—that is, they did not exist in a "form which others can see and read."[73] For the first time, technology (together with the law) had enabled the populace to enjoy performances of copyrighted works without purchasing authorized, "intelligible" copies. To copyright owners, performances had come to seem like piracy.

Copyright owners were quick to complain to Congress,[74] and Congress was quick to respond. In section 1(d) of the Copyright Act of 1909, Congress gave owners of copyright in dramatic works the exclusive right not only to "perform or represent the copyrighted work publicly," but also to "vend any manuscript or any record whatsoever thereof" and to make any such record "from which . . . it may in any manner or by any method be exhibited, performed, represented,

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71 *See id.* at 59 ("[T]hese manufacturers [of perforated rolls and discs] were not required by law to pay royalties to composers upon the sale of a recording. Manufacturers, music publishers, and even many composers viewed the mechanical reproduction of copyrighted music as an aid to sales, a form of advertising").

72 *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82.

73 White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17 (1908). As to the performance right, the Court noted, "There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers." *Id.* at 16.

74 Typical of the arguments made before Congress is this one by composer John Philip Sousa in 1906: "These talking machines are going to ruin the artistic development of music in this country." *Arguments on the Bills S. 6330 and H.R. 19853, To Amend and Consolidate the Acts Respecting Copyright: Hearing Before the S. Comm. and H. Comm. on Patents*, 59th Cong. 24 (1906) [hereinafter *Arguments on S. 6330 and H.R. 19853*] (statement of John Philip Sousa); *see also Copyrights: Hearings on H.R. 6250 and H.R. 9137 Before the H. Comm. on Patents*, 68th Cong. 110 (1924) (statement of Gene Buck, President, American Society of Composers, Authors, and Publishers) ("That [player] piano was one of the most treacherous parts of mechanical reproduction, and radio in this country, gentlemen. It is destroying the initiative in the youth of this country to contribute to music . . . .").

produced, or reproduced."[75] Similarly, section 1(e) provided owners of copyright in musical works with the exclusive right not only to "perform their work publicly" ("for profit"),[76] but also to "make any arrangement . . . of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."[77] For songwriters, however, the right had its limits: fearing a monopoly in the market for mechanical reproductions of musical works, Congress required songwriters (and their assigns) to submit to a compulsory license of "two cents on each such part [i.e., record or piano roll] manufactured."[78] The manufacturing companies could continue to sell what had become "copies" of copyrighted works, but now they had to pay. Copyright owners had regained the right to control (or at least to profit from) the distribution of copies of their works.

Still, something had changed. Although the episode had begun with manufacturers, not performers, reaping where they had not sown,[79] copyright owners now seemed more inclined to view performers as pirates than as potential customers. The law gave copyright owners the tool they needed to demand payment. The problem was one of enforcement: even the most successful songwriter lacked the resources to investigate whether third parties were engaging in public performances of his works. The answer, of course, was for songwriters to band together. On February 13, 1914, a group of musicians met at the Hotel Claridge in New York City to found the American Society of

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75 Copyright Act of 1909, ch. 320, § 1(d), 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

76 Copyright Act of 1909 § 1(e); *see supra* note 51 and accompanying text.

77 Copyright Act of 1909 § 1(e).

78 *See id.* § 1(e); *see also* H.R. REP. No. 60-2222, at 6 (1909) ("How to protect [the composer] in these rights without establishing a great music monopoly was the practical question the committee had to deal with. The only way . . . was, after giving the composer the exclusive right to prohibit the use of his music by the mechanical reproducers, to provide that if he used or permitted the use of his music for such purpose then, upon the payment of a reasonable royalty, all who desired might reproduce the music.").

79 *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908) ("It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative . . . branch of the Government."); *cf.* Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918) (recounting, famously, that in "taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, [the] defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown").

Composers, Authors and Publishers.[80] The Society (known as "ASCAP") describes this "monumental event" as one that "would forever change music history"[81]—and indeed it did. The Society took as its "primary purpose" the enforcement of the public performance right,[82] a purpose it accomplished by sending investigators throughout the United States to determine whether local playhouses and shops were playing songs within hearing of the public without paying for a license.[83] When the Society found such a target, it brought suit and increasingly, it won.[84] In practice, as in law, unlicensed public performances had become infringements of copyright—regardless of whether someone behind the performance had purchased a licensed copy of the work.[85] And copyright owners were no longer content to ignore those infringements.

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80 *See* History of ASCAP, http://www.ascap.com/about/history/ (last visited Jan. 28, 2008).

81 *Id.*

82 *Id.* The Society also lobbied Congress for greater rights for its members, most memorably through its counsel, Nathan Burkan. Burkan was a zealous advocate. Consider this exchange between Burkan and Representative Reid, in 1925:

> Mr. REID. Could you have made this thing with any more selfish slant in your interest?
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> Mr. BURKAN. I certainly could. But we accept it without the slightest criticism, because [the bill] possesses that absolutely equality and fairness to all affected thereby, so essential for any measure intended to protect the creator of literary property against despoliation and to secure to him the full fruits of his literary efforts.

Copyrights: Hearings on H.R. 11258 Before the H. Comm. on Patents, 68th Cong. 148 (1925) (statement of Nathan Burkan). Burkan tried to persuade Congress to repeal the compulsory license of musical works—known as the "mechanical license"—but he did not succeed. *Id.* He was, however, very successful in persuading Congress to increase the rights of songwriters in particular and copyright owners in general.

83 *See, e.g.*, Buck v. Robinson, 42 F. Supp. 697, 697 (S.D. W.Va. 1942).

84 In the early years of the Society, it filed few lawsuits, and some courts, at least, were suspicious of its methods. *See, e.g., id.* at 698 (noting that "[t]he evidence shows that the memory of plaintiffs' two investigators was not so good as to some matters that occurred [at the Shady Rest] that night" and holding that "the plaintiffs have failed to prove the performance of the composition by a preponderance of the evidence"). No longer. *See* Kristi Heim, *Music Suit Creates Discord*, SEATTLE TIMES, Aug. 1, 2007, at C1 (noting that the Society recently had filed twenty-six lawsuits against establishments in seventeen states, and stating that "[w]hile many business owners may not be aware of it, such legal action is becoming common").

85 *See* Interstate Hotel Co. v. Remick Music Corp., 157 F.2d 744, 745 (8th Cir. 1946) ("The right to publish and sell copies of the copyrighted musical work and the right publicly to perform the work for profit are separate and distinct rights separately granted by the Copyright Act. . . . There is nothing in the Act which makes the exercise of one right dependent upon the abandonment of the other. The copyright owner may exercise either right or both as its interest may dictate.").

Thus does the performance right today exist to protect the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works"[86] from the predations of performers. This is not to say that the copyright statute leaves performers entirely out in the cold. Those who perform musical or literary works (or, more likely, their publishers) enjoy certain exclusive rights in their recorded performances—known as "sound recordings."[87] Ironically, however, the performance right is not among those rights;[88] for the most part, owners of copyright in sound recordings cannot deny others the right to perform those works in public.[89] Instead, born of the "widespread unauthorized reproduction of phonograph records and tapes,"[90] the sound recording copyright is a publication right, giving its owners the exclusive right to reproduce and distribute the work in copies.[91] And even those rights are limited. First, copyright owners have a remedy against only those defendants who distribute copies that "directly or indirectly recapture the actual sounds fixed in the recording"—which means that others are perfectly free to simulate a copyrighted performance, so long as they engage in an "independent fixation" of sound.[92] Second, because "protection for a work . . . does not extend to any part of the work in which [copyrighted] material has been used unlawfully,"[93] the very existence of copyright in a sound recording depends on whether the performer secured a license to perform the underlying copyrighted work. That is, the mere possibility of qualifying for a copyright herself does not free a performer from the obligation to satisfy the beneficiaries of the performance right.

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86 17 U.S.C. § 106(4) (2000 & Supp. IV 2004).

87 Section 101 of the Copyright Act defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* § 101 (Supp. V 2005).

88 *See id.* § 114(a) (2000) (providing that "[t]he exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under section 106(4)").

89 Owners of copyrights in sound recordings do enjoy the exclusive right to "perform the copyrighted work publicly by means of a digital audio transmission," i.e., via Internet or satellite radio. *See id.* § 106(6); *infra* Part III.C.

90 H.R. REP. NO. 92-487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567.

91 *See* 17 U.S.C. § 106(1), (3) (2000 & Supp IV. 2004). Owners of copyright in sound recordings also enjoy the exclusive right to "prepare derivative works based upon the copyrighted work." *Id.* § 106(2).

92 *Id.* § 114(b); *see also id.* (placing the same limitation on the adaptation right in § 106(2)).

93 *See id.* § 103(a).

Interestingly enough, the law that seems best designed to protect performers is not a copyright law at all, but a misappropriation statute known as the "anti-bootlegging" section of the Uruguay Round Agreements Act.[94] The statute, which Congress enacted solely to satisfy its treaty obligations,[95] prohibits third parties from: (1) "fix[ing] the . . . sounds and images of a live musical performance in a copy or phonorecord" without permission; (2) making further copies of it; and (3) "distribut[ing] or offer[ing] to distribute" those copies.[96] The tort does not qualify as copyright infringement because copyright law refuses to protect things, like live performances, that do not exist in tangible ("fixed") form.[97] As a result, the right described by the statute is known as a "neighboring right"—one that resides just outside the boundaries of copyright.[98] The right has a great deal in common with another neighboring right, the European conception of "le droit moral," under which artists have the privilege of deciding when and how to release their works to the public.[99] It also may be the form of protection that most performers really want—that is, the ability to say when their works are made tangible, and by whom. Unfortunately, the right is available only to those who engage in "live musical performance[s]";[100] other performers need not apply. It also is valuable to performers only until their performances are fixed. Once a performance is fixed ("by . . . authority of the author"),[101] it becomes copyrightable, and in the music business, at least, those who reap the greatest benefits from copyright are not performers, but their producers and publishers.[102]

B. It's Not Limited to Public Conduct

The performance right does have its limits. Unlike some of the rights enumerated in § 106, the performance right is expressly limited

94 Pub. L. No. 103-465, § 512, 108 Stat. 4809, 4974 (codified as amended at 17 U.S.C.A. § 1101 (West 2005 & Supp. 2007)).

95 *See* H.R. REP. No. 103-826(I) (1995), *reprinted in* 1994 U.S.C.C.A.N. 3773 (reporting that "Title V Implements the Agreement on Trade-Related Aspects of Intellectual Property Rights").

96 17 U.S.C. § 1101(a) (2000).

97 *See id.* § 102(a) (providing that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression").

98 *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8E.01[B], at 8E-5 (2006).

99 *See id.* § 8D.01[A], at 8D-3 to -6.

100 *See* 17 U.S.C. § 1101(a).

101 *See id.* § 101 (Supp. V 2005) (defining "fixed").

102 *See supra* notes 86–93 and accompanying text.

to public acts, placing private performances beyond the reach of the statute.[103] But what constitutes a public act? Despite evidence that Congress originally intended to prohibit only those performances "in such public places as concert halls, theaters, restaurants, and cabarets,"[104] courts consistently have construed the word "public" to include more private places and more select groups of people.

Under the Copyright Act of 1909, for example, courts regularly found infringement if performances managed to reach members of "the public" even in the privacy of their hotel rooms or private homes.[105] It was irrelevant that listeners could not communicate with one another, as they could in a more public space. As the Sixth Circuit Court of Appeals wrote in 1925,

> Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.[106]

In fact, under the old law, performances did not need to be even "theoretically accessible to the . . . general public" in order to be public.[107] As one court observed, "[A] performance infringement could occur 'where there is only a segment of the public involved, such as those people considered together because of common interest or purpose'"[108]—a definition that included almost any group, large or small.

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103 *See* 17 U.S.C. § 106(4) (2000 & Supp. IV 2004) (giving copyright owners the exclusive right "to perform the copyrighted work publicly").

104 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975) (citing H.R. REP. No. 60-2222 (1909)); *see also* H.R. REP. No. 60-2222, at 4 (stating that section (d) of the Copyright Act of 1909 was "intended to give adequate protection to the proprietor of a dramatic work" whose "compensation comes solely from public representation of the work").

105 *See* Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir. 1925) (finding that radio broadcasts to private homes constitute public performance); Soc'y of European Stage Authors & Composers, Inc. v. N.Y. Hotel Statler Co., 19 F. Supp. 1, 4–5 (S.D.N.Y. 1937) (finding public performance when a hotel made radio broadcasts available to guests in their rooms via "two central receiving sets").

106 *Jerome H. Remick & Co.*, 5 F.2d at 412; *see also Soc'y of European Stage Authors*, 19 F. Supp. at 5 ("Clearly broadcasting within the hotel walls to the cross-section of the public . . . must be as much a public performance as would be broadcasting in a theatre.").

107 *See* Lerner v. Schectman, 228 F. Supp. 354, 355 (D. Minn. 1964) (holding performances in a social club with private membership to be "public" for the purposes of the statute).

108 Encyc. Britannica Educ. Corp. v. Crooks, 558 F. Supp. 1247, 1254 (W.D.N.Y. 1983) (quoting *Lerner*, 228 F. Supp. at 355).

In the Copyright Act of 1976, Congress embraced these principles, providing (in § 101) that to perform a work "publicly" is:

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[109]

Under this statutory definition, a public performance can happen either in a public place (such as a concert hall or theater) or in a "semi-public place"[110] at which "a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered"[111]—and one can have only so many social acquaintances.[112] A public performance also can happen when a person transmits a performance to one of the places described above or to a group known simply as "the public."[113]

Not surprisingly, the foregoing definition has provided courts with a significant amount of flexibility in finding performances to be "public." In *Columbia Pictures Industries v. Redd Horne, Inc.*,[114] the Third Circuit Court of Appeals was asked to decide whether a video store engaged in public performances by enabling its customers to

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109 17 U.S.C. § 101 (Supp. V 2005) (defining "publicly").

110 *See* Columbia Pictures Indus. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989) (observing that "[o]ne of the principal purposes of the definition [in § 101] was to make clear that . . . performances in 'semi-public' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control" (quoting H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678)). Whether a place is "semi-public" is a factual question the answer to which depends on "the size and composition of the audience." Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984).

111 17 U.S.C. § 101 (Supp. V 2005) (defining "publicly").

112 In *Fermata International Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257 (S.D. Tex. 1989), for example, the court found a public performance on the ground that "twenty-one members plus guests [was] a 'substantial number of persons outside of a normal circle of a family.'" *Id.* at 1260. Presumably, the court meant to include the statutory language "and its social acquaintances" as well.

113 17 U.S.C. § 101 (defining "publicly"). The object of that transmission must be a *performance*, however, not simply the transmission of data. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) ("The statutory language itself . . . makes clear that *the transmission of a performance*, rather than just the transmission of data constituting a media file, is required in order to implicate the public performance right in a copyrighted work.").

114 749 F.2d 154.

watch videos in private screening rooms.[115] Employees played the videos for customers by placing videotapes into "machines in the front of the store," thus transmitting the pictures to the individual rooms.[116] The court held these performances to be public because the video store was "open to the public" under definition (1), even though the screening rooms themselves were private and were used by people who knew each other.[117] In dictum, the court also observed that the performance satisfied definition (2) because the viewers were members of "the public": "[T]he transmission of a performance to members of the public, even in private settings such as [the screening] rooms, constitutes a public performance."[118]

When the same court was asked to revisit the issue two years later in *Columbia Pictures Industries v. Aveco, Inc.*,[119] it had no difficulty finding more public performances, notwithstanding the fact that in *this* video store, customers in private screening rooms played the videos themselves on separate equipment.[120] Like the one in *Redd Horne*, the video store was "open to the public" under definition (1).[121] "The Copyright Act speaks of performances at a place open to the public," wrote the court.[122] "It does not require that the public place be actually crowded with people. A telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public,' even though they are usually occupied only by one party at a time."[123] Indeed, under the statute (as under the old cases), the same might be said of rooms in hotels: hotel rooms are "indisputably" private when occupied,[124] but hotels, like video stores, are "open to the public"[125] and their guests are members of that group known as "the public."

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115 *Id.* at 156.

116 *Id.* at 157.

117 *Id.* at 159.

118 *Id.*

119 800 F.2d 59 (3d Cir. 1986).

120 *Id.* at 61.

121 *Id.* at 63.

122 *Id.*

123 *Id.*

124 On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 789 (N.D. Cal. 1991) (observing that "hotel guest rooms are indisputably not public places for copyright purposes"); *see also* Columbia Pictures Indus. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989) (stating that "[w]hile the hotel may indeed be 'open to the public,' a guest's hotel room, once rented, is not").

125 Courts have disagreed on this point. *Compare* Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7th Cir. 1991) (finding private video booths to be "open to the public" because, as in *Redd Horne* and *Aveco*, "the proper inquiry is directed to the nature of the place in which the private video booths are located, and whether it is a place where the public is openly invited"), *with On Command Video*, 777 F. Supp. at 789

If courts can reach performances in even the most private of spaces, what of private homes? One might think that performances cannot be public there; "a performance occurs where it is received,"[126] and under Fourth Amendment jurisprudence, at least, the expectation of privacy inside the home has its "roots deep in the common law."[127] When it comes to copyright jurisprudence, however, the law has never encouraged such an expectation, and the statute reflects that fact. As a result, while a private home probably cannot be described as "open to the public," the second half of definition (1) provides that homeowners can violate the exclusive right of public performance by, say, renting a copyrighted motion picture and showing it to "a substantial number of persons outside of a normal circle of a family and its social acquaintances."[128] Granted, it would be difficult to identify those homeowners, much less sue them, so copyright owners have another alternative in definition (2), under which they can target those who "transmit or otherwise communicate a performance . . . of [a] work . . . to the public."[129] How does the public receive such a transmission? It does so through the wires that connect to its cable boxes and its televisions and its computers—in other words, through the wires that connect it to the rest of the world.[130] In other words, definition (2) gives copyright owners the means to control the information that private individuals receive in their homes, and it does so in ways that definition (1) never could. For copyright owners, this is precisely the point.

In the nineteenth century, people often experienced copyrighted works in public, whether "in . . . concert halls, theaters, restaurants, and cabarets"[131] or in the public square. Nowadays, people tend to experience copyrighted works in the privacy of their homes or cars—alone or with a few family members, in front of radios or televisions or

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(finding the defendant's argument that "the relevant place of performance is not the individual hotel rooms but the entire hotel unavailing" because "[a]t least for the purposes of public place analysis, a performance of a work does not occur every place a wire carrying the performance passes through," but instead, "a performance occurs where it is received," i.e., in individual rooms). The court in *On Command Video* went on to find a public performance via transmission under definition (2). *See id.* at 790.

126 *On Command Video*, 777 F. Supp. at 789.

127 Kyllo v. United States, 533 U.S. 27, 34 (2001).

128 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "publicly").

129 *See id.*

130 *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (finding public performance under definition (2) when the defendant transmitted video clips to individual computer users over the Internet).

131 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975) (citing H.R. REP. NO. 60-2222 (1909)).

computers. Congress and the courts have recognized this shift, and they have defined "publicly" to reach the sorts of conduct that once occurred in public places.[132] But in defining the "public" part of public performance so broadly, lawmakers also have managed to reach the sort of conduct that *always* occurred in private. Why? The answer may be that performance is replacing distribution as the means by which people experience copyrighted works,[133] and lawmakers simply are trying to reach these experiences. In doing so, however, lawmakers have given copyright owners the ability to exact a fee at "each step in the process by which a protected work wends its way to its audience."[134] The result is so broad as to reveal something interesting about the performance right: it is not really about performances at all.

C. It's Not Really About Performances at All

Once playwrights and songwriters began enforcing their rights, courts soon were asked to decide what constituted a "performance"—a term that Congress had failed to define in 1909.[135] This question proved to be thornier than one might expect. In the early twentieth century, as now, "the paradigm image of a public performance" was "an actor seen and heard by an audience assembled in his immediate presence."[136] But it was the age of radio; surely the statutory language could be made to capture more conduct than this. At first it seemed as if the answer might be "no." In *Buck v. Debaum*,[137] decided in 1929, the court refused to find that the defendant had performed a copyrighted song merely by playing it over the radio in his cafe. "The performance in such case takes place in the studio of the broadcasting

132 17 U.S.C. § 101 (Supp. V 2005).

133 This answer begs several questions, including whether this is a good thing, *see infra* Part II, and whether the performance right should share at least some of the limitations on the distribution right, including the "first sale" doctrine, *see* 17 U.S.C. § 109(a) (2000); *infra* note 253 and accompanying text.

134 *See* David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

135 *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 876 n.4 (2d Cir. 1967) (chronicling statutes granting performance rights and observing that "[o]n none of these occasions did Congress attempt to delineate the boundaries of the right," even in the legislative history), *rev'd*, 392 U.S. 390 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

136 *See United Artists*, 377 F.2d at 876 n.4 (citing Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925)) (other citation omitted).

137 40 F.2d 734 (S.D. Cal. 1929).

station," the court observed, "and the operator of the receiving set in effect does nothing more than one would do who opened a window and permitted the strains of music of a passing band to come within the inclosure in which he was located."[138]

Two years later, however, the Supreme Court disagreed. In *Buck v. Jewell-LaSalle Realty Co.*,[139] the same plaintiff, Gene Buck, charged the LaSalle Hotel with "maintain[ing] a master radio receiving set . . . wired to each of the public and private rooms" in a hotel.[140] (Buck was the President of ASCAP.[141]) The defendant argued that it was merely receiving radio signals, to which the Copyright Act could "not reasonably be construed as applicable,"[142] but the Court believed otherwise. Noting that the hotel, like an orchestra, produced music "by instrumentalities under its control,"[143] the Court declared itself "satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program."[144] It was, instead, "essentially a reproduction."[145]

In fact, the reception of a radio broadcast was nothing like a reproduction, at least in copyright terms. Under the "first sale" doctrine, located in section 41 of the Copyright Act of 1909, the exclusive right to vend copies of a copyrighted work did not include the right to restrict the later transfer of those copies.[146] The copyright owner was limited to one payment per copy sold. The performance right was

138 *Id.* at 735; *see also id.* (holding that "[o]ne who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law").

139 283 U.S. 191 (1931).

140 *Id.* at 195.

141 *Id.*

142 *Id.* at 196.

143 *Id.* at 201.

144 *Id.* at 199–200.

145 *Id.* at 200.

146 *See* Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (providing that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained"); *see also* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908) (holding that "the copyright statutes . . . do not create the right to impose, by notice, such as is disclosed in this case, a limitation [on the price] at which the book shall be sold at retail by future purchasers"). Interestingly, in *Bobbs-Merrill*, the Court limited the application of the doctrine to those future vendors "with whom there [was] no privity of contract" with the copyright owner. *Id.*; *cf.* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (stating that "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general").

subject to no such limitation. Although the defendant in *Jewell-LaSalle* "urg[ed] that it did not perform, because there can be but one actual performance each time a copyrighted selection is rendered,"[147] the Court found no support for such an argument in the statute. It wrote, instead, that "nothing in the act . . . prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit."[148] In other words, a singer could perform a song in the studio of a radio station; the radio could perform the song again by transmitting it as a radio signal; and a hotel could perform the song yet again by receiving that signal and making it audible to guests. The "development of radio broadcasting" had transformed a single act of song into three acts of copyright significance for which the songwriter could demand payment.[149] Multiply three acts times the quantity of radio stations (and hotels) and the infringing acts could number in the hundreds of thousands.

By 1968, however, the Supreme Court appeared to have changed its mind. In *Fortnightly Corp. v. United Artists Television, Inc.*,[150] the defendant operated a community antenna television (CATV) station that captured and relayed the signals of copyrighted motion pictures to its rural subscribers, who were unable to receive the signals otherwise.[151] The Court began by noting that the station operator had "not 'perform[ed]' the . . . copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909."[152] The issue, therefore, was "the function that CATV plays in the total process of television broadcasting and reception."[153] Comparing the station operator to "the exhibitor of a motion picture or stage play," the Court found their roles to be quite different: "Broadcasters perform. Viewers do not perform . . . . One is treated as active performer; the other, as passive beneficiary."[154] The station

147 *Jewell-LaSalle*, 283 U.S. at 197–98.

148 *Id.* at 198.

149 *See id.* (observing that "[w]hile this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer").

150 392 U.S. 390 (1968).

151 *Id.* at 391–93.

152 *Id.* at 395; *see also id.* at 395 n.15 (observing that "[t]he legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript" (citing H.R. REP. No. 60-2222, at 4 (1909))).

153 *Id.* at 397.

154 *Id.* at 398–99.

operator, for its part, had done "no more than enhance[ ] the viewer's capacity to receive the broadcaster's signals," and as a "viewer," it had not engaged in a performance under the statute.[155] In dissent, Justice Fortas accused the majority of ignoring *Jewell-LaSalle*,[156] but the majority found a way to distinguish the case.[157] It seemed clear that the ground had shifted.

The Court confirmed this shift in *Twentieth Century Music Corp. v. Aiken*,[158] in which it refused, once again, to find a performance—in this case by the proprietor of George Aiken's Chicken, who was sued for playing the radio through "four speakers in the ceiling" of his restaurant.[159] For the Court, finding a performance on these facts "would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work,"[160] and it refused to do so. The courts thus had ended where they began: in 1975, as in 1929, a restaurant owner who played the radio for his customers was a member of the audience, not a performer.[161] As the *Aiken* Court put it:

> If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition.[162]

Viewed with the benefit of hindsight, the fight over the meaning of "performance" was a fight about philosophy. The *Aiken* Court, in particular, took the utilitarian view, finding that a multiplicity of royalties not only was unnecessary to encourage creation, but also "would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1(e)."[163] As the Court famously wrote, the limited scope of copyright "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[164] The greater the

155 *Id.* at 399–401.

156 *Id.* at 404–05 (Fortas, J., dissenting).

157 *See id.* at 396 n.18 (majority opinion) (noting that in *Jewell-LaSalle* the original broadcast had been unlicensed).

158 422 U.S. 151 (1975).

159 *Id.* at 152.

160 *Id.* at 162–63.

161 *See* Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929).

162 *Aiken*, 422 U.S. at 159.

163 *Id.* at 163.

164 *Id.* at 156.

potential audience, the greater the benefit to society (and, secondarily, to copyright owners). By contrast, the dissenters in *Fortnightly* and *Aiken* were of the view that Congress had given playwrights and songwriters the right to capture the value they had created—not some of it, but all of it. It was a question of freeriding: concurring in *Aiken*, Justice Blackmun emphasized that Aiken played the radio "for the entertainment and edification of his customers," thus adding to "the atmosphere and attraction of his establishment."[165] Having enjoyed that benefit without paying for it, Aiken was "something more than a mere listener" and therefore was guilty of infringement.[166] Oddly, under this way of thinking, the greater the audience for a copyrighted work, the greater the harm. As the Second Circuit Court of Appeals wrote in *Fortnightly*, "A television broadcast of a copyrighted work harms the copyright holder not because a handful or a roomful of persons sees the work performed at the studio, but because thousands of viewers watch it in their homes."[167]

Between the two poles, there was room for compromise. One such compromise was to define "performance" broadly but to use other doctrines, such as implied license, to limit liability. There was precedent for this approach. In *Debaum*, the court had suggested that by licensing a radio station to broadcast a copyrighted song, the plaintiffs had "impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception."[168] Even in *Jewell-LaSalle*, Justice Brandeis had been willing to entertain this theory, writing for the Court that "[i]f the copyrighted composition had been [originally] broadcast . . . with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied."[169] (Unfortunately for the LaSalle Hotel, the original broadcast had been unlicensed.[170]) The defendant in *Fortnightly* pressed this argument before the Second Circuit Court of Appeals, causing the court to wonder whether Justice Brandeis had meant a

165 *Id.* at 164–65 (Blackmun, J., concurring).

166 *Id.* at 165; *see also* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 406 (1968) (Fortas, J., dissenting) ("[T]he use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a 'performance' of the material originally broadcast."), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

167 United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 879 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

168 Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929).

169 Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 199 n.5 (1931) (citing *Debaum*, 40 F.2d 734).

170 *See id.*; *supra* note 157 and accompanying text.

license implied in fact or in law.[171] In the end, however, the court rejected the theory.[172] Licenses implied in fact had become problematic, given that groups like ASCAP had begun to include express limitations in their contracts with broadcasters.[173] And whatever the philosophical merits of finding a license implied in law,[174] provision for such a thing was notably absent from the statute.[175]

If, by 1975, the law seemed to side with the utilitarians, everything changed by the end of 1976, when Congress enacted the new Copyright Act.[176] Taking the side of the dissenters in *Fortnightly* and *Aiken*, Congress defined "performance" broadly,[177] explicitly stating that a multiplicity of royalties was no more than copyright owners were due.[178] In the report accompanying the bill that became the Copyright Act of 1976, House members described the performance right as follows:

> Under the definitions of "perform," . . . "publicly," and "transmit" in section 101, the concept[ ] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying

171 *Fortnightly*, 377 F.2d at 880.

172 *Id.* at 883.

173 *Id.* at 880–81.

174 For the defendant in *Fortnightly*, the (utilitarian) argument "proceed[ed] from the principle that the primary purpose of the Copyright Act is to encourage authors and artists to release their works to the public, and that reward to the copyright holder is a secondary aim incidental to this general purpose." *Id.* at 881 (collecting cases); *see also id.* (noting the defendant's contention that "[t]he secondary aim of reward to the copyright holder is satisfied . . . when the holder has been induced to license the original television broadcast," whereupon "the Copyright Act's primary policy then requires that . . . [the] defendant[ ] be allowed to transmit the broadcast signals without further payment to the copyright holder").

175 *Id.* at 882 ("'[A] monopoly is expressly granted of all public performances for profit.'" (quoting *Jewell-LaSalle*, 283 U.S. at 197)).

176 *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2000 & Supp. V 2005).

177 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "perform").

178 H.R. REP. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676–77.

> the performance or communicates the performance by turning on a receiving set.[179]

Today, only the addition of the word "publicly" to the performance right in § 106 prevents copyright owners from pursuing the individual in this story, and only, as we have seen, if she plays the phonorecord in a space open only to "a normal circle of a family and its social acquaintances."[180] The list of unregulated acts has shrunk considerably.

Dissenting in *Fortnightly* in 1968, Justice Fortas would have held that "the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a 'performance' of the material originally broadcast."[181] He was confident that such a ruling would not unduly burden the public because, according to "leading authority" Melville Nimmer, groups like ASCAP "'do not choose to enforce the *Jewell-LaSalle* doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers.'"[182] Unfortunately, Nimmer was wrong. Having awakened to the benefits of the performance right, the Society and others have stopped trying to draw the line at enforcing it.[183] What is more, now that Congress has enabled this tendency by metering every path that a copyrighted work might take to the consumer, the performance right no longer exists to capture the value of performances in the usual sense. Instead, it exists to identify and control what I term the "conduits" to the marketplace—those who deliver copyrighted works to those who experience them. In other words, the performance right exists to stop licensing opportunities from leaking out the gaps in the publication right (also known as the "distribution right," found in § 106(3)).[184]

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179 *Id.*

180 *See* 17 U.S.C. § 101 (defining "publicly"); *supra* Part I.B.

181 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 406 (1968) (Fortas, J., dissenting), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

182 *Id.* at 405 n.3 (quoting MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 107.41 n.204 (1968)).

183 *Cf. Registration of Designs: Hearing on H.R. 6458 Before the H. Comm. on Patents*, 64th Cong. 23 (1916) (statement of C.R. Clifford) (advocating property rights in industrial designs but acknowledging that in granting rights, it was "difficult to define exactly how far to go," as "[w]e know where to begin, but we do not know exactly where to stop").

184 In this Article, I use the phrase "publication right" because I mean to include not only the modern doctrine of "distribution," *see* 17 U.S.C. § 106(3) (2000 & Supp. IV 2004), but also its historical antecedent, "publication," which included acts of copy-

By giving copyright owners the ability to go after conduits that are two, three, or four degrees of separation away from the copyright owner, Congress has given copyright owners the power to control distributions in a way that the distribution right itself forbids.

How does this work? As we have seen, playwrights, songwriters, and others like them long have enjoyed the exclusive right to publish

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ing only as predicates to acts of distribution, *see* L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249, 262 (1992) (describing the right to copy as a "predicate right"); *supra* note 26.

Historically, the publication right had several components, namely, "printing, reprinting, publishing, and vending" copies of a copyrighted work, and those components were exercised as one right. *See* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 12 (1987) (arguing that in 1909, Congress "unwittingly enlarged the copyright owner's rights in printed works to include—in addition to the rights to print, reprint, publish, and vend the copyrighted work—the exclusive right to copy the copyrighted work"); *see also* Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 933 n.180 (2007) ("Professor Patterson believed that Congress inserted the word 'copying' intending it to apply only to works of the fine arts . . . ."). Today, those rights reside in two divisible parts of § 106: in subsection (1), the exclusive right "to reproduce the copyrighted work in copies" (i.e., to print and reprint); and in subsection (3), the exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending" (i.e., to publish and vend). *See* 17 U.S.C. § 106(1), (3) (2000 & Supp. IV 2004). That is, unlike copyright owners of old, copyright owners today can exercise these rights separately, and indeed they often do—punishing copying in the absence of any act of public distribution, or indeed, any public act at all. *See id.* § 201(d)(2) (2000) ("Any . . . subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately.").

In correspondence, Mark Lemley has expressed his skepticism that withholding the performance right would "do any good" because on the Internet, at least, everything that qualifies as a performance also qualifies as a copy, thus infringing both § 106(1) and § 106(4). *See* Lemley, *supra* note 11, at 579 ("In the Net cases, . . . it is *the same act* that is both an authorized reproduction and an unauthorized performance . . . ."); *see also* Loren, *supra* note 6, at 689–91 (describing the overlap between the reproduction and performance right in the context of digital deliveries of music); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 249–65 (2001) (same). Lemley is right, of course. I would solve this problem by withholding both rights (or, in the case of the performance right, by withholding or limiting it). As I have argued elsewhere, copyright owners suffer "competitive harm" not when their works are copied, but when their works are distributed in copies to the public, and therefore, "granting creators the exclusive right of reproduction provides them with a greater benefit than they are entitled to expect." Stadler, *supra*, at 939. I therefore have argued that Congress should remove § 106(1) from the Copyright Act entirely, withholding from copyright owners the right to prevent others from copying their works, but granting them the right to exclude those unauthorized copies from the marketplace. *See id.*

(i.e., to "print[ ], reprint[ ], publish[ ], and vend[ ]")[185] copies of their works. For almost as long, however, this publication right has been subject to a very important limitation. Pursuant to that limitation, known as the "first sale" doctrine, the first (authorized) sale of a copy of a copyrighted work forever exhausts the publication right as to that copy.[186] That is, once a songwriter has authorized the printing and sale of a compact disc containing one of her songs, she cannot demand a royalty from those who succeed to ownership of that compact disc. The songwriter has a right as against the first conduit to the marketplace, but not as against the second, third, or fourth.

These gaps in the distribution right are no accident; Congress intended them to exist.[187] Moreover, Congress did not create the performance right to give copyright owners an end run around the first sale doctrine, but to provide them with a means of punishing third parties who would avoid the first sale entirely—e.g., by treating a license to experience a performance into a license to copy it.[188] So conceived, the early performance right benefited two types of proprietors: first, those whose "compensation [came] solely from public representation of the work,"[189] and second, those who *did* publish copies of their works, but were unable to stop third parties from making unauthorized copies.[190] If anything, the performance right was created in service of the distribution right, not in derogation of its limitations.

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185 Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436; Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

186 *See* 17 U.S.C. § 109(a) (2000) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."); *supra* note 146 and accompanying text.

187 *See* H.R. REP. No. 60-2222, at 19 (1909) ("Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.").

188 *See* Tompkins v. Halleck, 133 Mass. 32, 46 (1882) ("The ticket of admission is a license to witness the play, but it cannot be treated as a license to the spectator to represent the drama if he can by memory recollect it . . . .").

189 *See* H.R. REP. No. 60-2222, at 4.

190 *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 n.15 (1968) ("The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript." (citing H.R. REP. No. 60-2222, at 4)), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

The performance right shifted as technology made the exploitation of copyrighted works increasingly profitable (for the conduits) after the copyright owner had surrendered title to her copies. So far as copyright owners were concerned, some means of sharing in these profits had to be found. The publication right was inadequate to the task because the conduits were free to profit from public demand for copyrighted works after purchasing licensed copies, so long as they did not "print" and "vend" copies themselves. Once a radio station had purchased a phonograph record, for example, it could play that record over the radio without violating this core right. The performance right, for its part, provided copyright owners with some ability to capture this value, but at its inception, at least, the right seemed designed to target those "paradigm" performances at which both performer and audience were present, together, in a public place.[191] Courts needed to be convinced to construe the right more broadly. Once copyright owners had succeeded in persuading courts to define "perform" and "publicly" so as to capture those engaging in transmissions (here, the radio station), they focused their efforts on those *receiving* transmissions, such as the LaSalle Hotel and George Aiken's Chicken. Copyright owners suffered a few losses in the process, but what they failed to win in the courts, they later won in Congress. The stage was set for the performance right—that understudy to the distribution right—to play the leading role in securing to copyright owners the profits they believed themselves to deserve.

The irony is that people today experience many of the same types of copyrighted works as they once did; only the technology of experience has changed. People act favorite scenes from plays for the benefit of their friends, only now they might do so by posting the video on YouTube. People play music at parties: once, this experience involved a pianist, a piano, and a set of sheet music; now it might involve a radio station and a receiver. People watch episodes of television shows they missed, not by taping the episode and watching it later, at home,[192] but by watching the episode on their iPods. The difference between then and now, of course, is that the increasing reach of the performance right has turned ordinary experiences into acts with cop-

191 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975) (observing that Congress originally intended to prohibit only those performances "in such public places as concert halls, theaters, restaurants, and cabarets"); United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 876 n.4 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

192 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447–56 (1984) (finding such uses to be "fair" under 17 U.S.C. § 107 (2000)).

yright significance. If every means of experiencing a copyrighted work involves either a distribution, a performance, or both, then the law has given copyright owners the power to reach the private enjoyment of copyrighted works. Not only is this power unprecedented, but it also comes at a heavy cost. The question that Congress (and scholars) should be asking is whether society should be required to pay it. What, precisely, is the public interest in regulating performances of copyrighted works?[193] I address this question in Part II.

II. THE PUBLIC INTEREST IN REGULATING PERFORMANCE

In the United States, at least, copyright law has a primarily utilitarian purpose. To quote the Supreme Court in *Aiken*, copyright "reflects a balance of competing claims upon the public interest";[194] private reward is justified only if, on balance, that reward works a net benefit to society.[195] In order to determine whether the performance right achieves this balance, one must begin by identifying the costs and benefits of the right. Toward that end, let us consider the path that a typical song might take to the marketplace.

A songwriter writes the music and lyrics of a popular song; a group of performers performs it; and a record company furnishes a producer and a set of sound engineers, who shape and record the performance in a studio, creating a "master recording." Absent the inevitable assignments of copyright, several people now share in the ownership of two separate copyrights in the result: (1) the songwriter owns the first copyright in the song, known as the "musical work"; (2) the performers own the second copyright in the sound recording, but only to the extent of their original authorship; and (3) the producer almost certainly has a share in the second copyright, too.[196] Indeed,

193 *See* Stadler, *supra* note 184, at 909–27 (describing the strands of the public interest in copyright law).

194 *Aiken*, 422 U.S. at 156; *see also id.* ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

195 *See generally* Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 667–69 (2006) (discussing the history of the utilitarian concept in American copyright law, using forgery as an analytical tool).

196 *See* H.R. REP. NO. 94-1476, at 56 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5669 (describing the "authorship" in a sound recording "both on the part of the performers . . . and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording"); *see also* JCW Invs., Inc. v. Novelty, Inc., 289 F. Supp. 2d 1023, 1032 (N.D. Ill. 2003) ("The author of a sound recording is the performer(s) or record producer or both." (citing 1 MELVIN B. NIMMER, NIMMER ON COPYRIGHT § 2.10[A][2][b], at 2-172.5 to 172.6 (2001))).

under this theory, even the sound engineers might enjoy a slice of the pie.

The record company cannot press and sell compact discs containing the master recording without first clearing the rights to the copyrights embodied in it. What licenses must the company secure? It probably does not need to negotiate a license to the sound recording because the record company probably required the performers, the producer, and the sound engineers to execute an assignment of copyright in the sound recording in return for a complicated schedule of royalty payments.[197] Even so, the record company must license the rights to reproduce and distribute copies of the musical work. These rights reside in the songwriter or, more likely, in the music publishing company to which she assigned her reproduction and distribution rights (again, in return for royalties).[198] The record company is free to negotiate with the music publishing company, and indeed it often does. If, however, those negotiations prove difficult, the record company need not negotiate at all. Since 1909, songwriters who authorize the distribution of their works on phonorecords have been subject to a compulsory license (the "mechanical license"),[199] which pays them the government rate per copy (currently "9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever is greater").[200] In order to claim this license, the record company must give the songwriter (or her publisher) notice of its intent to secure a mechanical license for every musical work on the disc before distributing those discs to the public.[201]

Yet neither a negotiated license of the reproduction and distribution rights nor a mechanical license gives its holder the right to *perform* the song. The publication right[202] and the performance right[203] are legally "divisible," which means that each one may be subdivided,

197 *See* DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 715, 720–22 (5th ed. 2007) (describing a typical recording agreement between a record company and a recording artist).

198 DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 206–23 (6th ed. 2006) (describing from whom publishers collect royalties and the contractual clauses that determine how such royalties will be distributed).

199 *See* 17 U.S.C. § 115(a)(1) (2000) (describing the terms of the license); *supra* note 78 and accompanying text.

200 *See* U.S. Copyright Office, Licensing and Copyright Arbitration Royalty Panel Information, http://www.copyright.gov/carp/#mechanical (last visited Jan. 28, 2008).

201 *See* 17 U.S.C. § 115(b) (2000).

202 *See id.* § 106(3) (2000 & Supp. IV 2004).

203 *See id.* § 106(4).

transferred, and "owned separately."[204] As a consequence, if the record company wishes to perform the popular song, it must secure a second license (i.e., a performance license) from the songwriter or, more likely, from the performing rights society to which she assigned a portion of the performance right[205]—ASCAP, say. Others who wish to perform the song bear the same burden; everyone from the owner of a radio station to the owner of a chicken restaurant must secure a performance license if he wishes to "perform" the song "publicly," as Congress has (broadly) defined those terms.[206]

To complicate things further, the foregoing performance licenses only cover the musical work itself. The sound recording—the actual performance—is the subject of a separate copyright, owned and licensed separately.[207] As we have seen, that copyright is limited; owners of copyright in sound recordings (here, the record company) do not enjoy the performance right in § 106(4).[208] Under the terms of § 106(6), however, they do enjoy the exclusive right to "perform the copyrighted work publicly by means of a digital audio transmission,"[209] i.e., over satellite radio or the Internet. Anyone who wishes to perform the sound recording in these media must secure yet another license, this time from the record company (or its representative).[210] The explanation for this distinction between analog and digital media is primarily political,[211] and as a result many scholars have argued that owners of copyright in sound recordings should enjoy the performance right in analog media as well as digital ones.[212] To date, Congress has not extended the right accordingly. If ever such a thing were to happen, however, then more licensing would be required. In

204 *Id.* § 201(d).

205 PASSMAN, *supra* note 198, at 224–27.

206 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "perform" and "publicly").

207 PASSMAN, *supra* note 198, at 310.

208 *See supra* notes 87–88 and accompanying text.

209 17 U.S.C. § 106(6) (2000 & Supp. IV 2004).

210 *See* PASSMAN, *supra* note 198, at 292–97.

211 *See infra* notes 306–12 and accompanying text.

212 *See supra* note 6 and accompanying text. Owners of copyright in musical works, for their part, have opposed such a proposal because they suspect that: (a) conduits would resist paying substantially higher royalties; and (b) existing royalty streams would be shared among more claimants, giving each claimant a reduced portion of the royalty "pie." *See* Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives,"* 78 VA. L. REV. 413, 414 (1992) (stating that if Congress granted a broad performance right in sound recordings, "[o]ne outcome might be that total royalties from performance rights would remain the same," and thus the performing rights societies "would have to battle the recording industry over the slice of the pie that each obtains").

this example, both the owner of the radio station and the owner of the chicken shack would be on the hook for two royalty payments for each song they happened to perform: one payment to the songwriter, and one payment to the record company. Multiply these payments by the number of radio stations (and chicken restaurants) in America, and the number starts to look like real money.

Now suppose that the recorded song reaches the ears of a movie producer, who decides to play it in the background of her new movie and include it on the soundtrack. The movie producer cannot include the recorded song in her film without securing several licenses of her own. First, if she wishes to include the song as recorded, she must license the rights to both the musical work and the sound recording: the former is known as a "synchronization license" because it enables the licensee to synchronize the song with the moving pictures of the film; and the latter is known as a "master license" because it does the same with respect to the master recording (in copyright terms, the sound recording).[213] As one might expect, however, neither of these licenses includes the right to use the song on a soundtrack. For that, the movie producer would need two (and possibly three) more licenses: (1) from the songwriter (or her publisher), either a negotiated license or a mechanical license giving the movie producer the right to reproduce and distribute the musical work on compact discs;[214] (2) from the recording company, a license to "duplicate the sound recording in the form of phonorecords . . . that . . . recapture the actual sounds fixed in the recording";[215] and (3) from the performing rights society, a performance license, if the movie producer plans to perform the song in public (except as part of the film).[216] What began as a musical work has become a musical work wrapped in a sound recording wrapped in an audiovisual work.[217] More layers mean more licenses, which mean more payments (and more lawyers).

At this point, the songwriter is receiving five payments for the use of her musical work: two under the terms of negotiated or mechanical licenses (through the agency of her publisher); two under performance licenses (through the agency of ASCAP); and one under a synchronization license. The recording company, for its part, is receiving

213 *See* PASSMAN, *supra* note 198, at 231–33, 416–17.

214 *See supra* notes 199–201 and accompanying text.

215 *See* 17 U.S.C. § 114(b) (2000).

216 *See* PASSMAN, *supra* note 198, at 224–27 (stating that performance rights societies are unable to collect "public performance-monies" for films shown in American movie theaters).

217 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "audiovisual works").

up to three payments for the use of its sound recording: one under the terms of the master license; one under the license enabling the reproduction and distribution of the soundtrack; and one for any public performances of its work "by means of a digital audio transmission."[218] Not surprisingly, the movie producer, too, has the right to demand payments from those who seek to make protected uses of her film.[219] These payments may not amount to much, particularly when calculated as a percentage of the revenues that each party expects the project to generate. Taken together, however, they form a web of entitlement that imposes significant transaction costs on those who have the inclination and resources to bear them.

Given the existence of this web, is it any wonder that the future of such freewheeling virtual spaces as YouTube seems to be in doubt? Consider the fortunes of an ordinary person who posts a video on YouTube: even if she could determine who owns which copyright in the video, she could not afford to pay the royalties that copyright owners are likely to demand. Instead, she simply posts the video, which is prima facie infringing,[220] and that video resides on the YouTube servers only until a rightsholder in the video complains and the video is removed. Unless the video is available for purchase—and many video clips are not—it simply disappears (except from the hard drives of a few enthusiasts).

One might think that if an infringing video on YouTube does not compete with anything rightsholders are marketing, then rightsholders would be uninterested in enforcing their rights as against the

218 17 U.S.C. § 106(6) (2000 & Supp. IV 2004).

219 *Id.* § 102(a)(6) (2000) (listing "motion pictures" among the categories of copyrightable works).

220 A person posting a video to YouTube probably has reproduced it first, likely by copying it to the hard drive of her computer, thus violating § 106(1). *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "copies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"); *id.* § 106(1) (2000 & Supp. IV 2004) (giving copyright owners the exclusive right "to reproduce the copyrighted work in copies"). In addition, posting the video might qualify as a public distribution under § 106(3). *See id.* § 101 (Supp. V 2005) (defining "publication," in part, as "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985) (observing that § 106(3) "recognized for the first time a distinct statutory right of first publication"). *But see* Stadler, *supra* note 184, at 941 n.217 ("[U]nder this definition, an offer to distribute copies of a work to the public for purposes of *reproduction* would not constitute publication—and arguably would not constitute distribution, either."). As we have seen, the posting qualifies as a public performance under § 106(4). *See supra* Part I.B–C.

ordinary person who posted it. For copyright owners, however, an unlicensed use represents a loss of profit, even in the absence of a substitutive harm.[221] Indeed, for many rightsholders, profits are secondary; the primary goal is not profit, but control over copyrighted content. For those who share this goal, rights are both the tools and the justification for their use. And as legal tools go, the performance right is a particularly powerful one: in return for a single act of creation (most likely by somebody else), the right gives copyright owners the ability to demand a royalty payment nearly every time the physical manifestation of a performance leaps from mouth to ear, from stage to eye, from radio station to car, and from dish to coaxial cable to television set. At the rate of (literally) millions of leaps per year, the benefits to copyright owners are obvious—which means, in turn, that some of the costs should be obvious, too.

Among the obvious costs are the ones that can be measured in actual dollars, such as the royalty payments themselves, which likely were passed along to consumers in the form of higher prices.[222] Another hard cost is the amount of money spent on copyright clearance—that is, the process of identifying and obtaining licenses to use copyrighted works.[223] As in the foregoing hypothetical, it can be extraordinarily complicated (and therefore expensive) to negotiate with multiple owners of overlapping rights. Indeed, it can be even more costly to identify those owners in the first place, particularly with respect to works created decades ago. As Justice Breyer observed in his dissent in *Eldred v. Ashcroft*,[224] the need to clear rights even "can

221 *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (rejecting the fair use defense because "a viable market for licensing these rights" existed, and the defendant failed to take such a license, despite having the ability to do so); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (explaining how the "practice of unneeded licensing feeds back into doctrine," creating "a steady, incremental, unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users").

222 The royalty percentage of each dollar spent on the purchase of a sound recording varies by artist. For a new artist, the figure is thirteen to sixteen percent; for midlevel artists, the figure is fifteen to seventeen percent; and for superstars, it is eighteen to twenty percent. PASSMAN, *supra* note 198, at 86. Deducted from these royalties are costs such as producer royalties, packaging, free goods, and reserves. *See* M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, THIS BUSINESS OF MUSIC 20–21 (10th ed. 2007).

223 *See* Eldred v. Ashcroft, 537 U.S. 186, 250–52 (2003) (Breyer, J., dissenting).

224 537 U.S. 186.

inhibit or prevent the use of old works . . . because the [copyright] holder may prove impossible to find."[225]

Even these costs might be worth bearing if the existence of the performance right gave creators the marginal incentive to provide society with a wealth of performable works. Although effects like these are almost impossible to quantify, one suspects that even here, the costs of the performance right outweigh its benefits. Earlier, I hinted at the costs to giving copyright owners the ability to control how people experience copyrighted works in private spaces.[226] These costs have not escaped the notice of copyright scholars, a number of whom, like Julie Cohen, have grown increasingly uncomfortable with a system under which "all conduct is public and most justice is private."[227] Not only does such a system threaten privacy interests,[228] but it also breeds a nation of passive consumers. Once the public understands that the law reserves to copyright owners the right to control the content that reaches private homes, then the public looks to the media alone for its entertainment and enrichment.[229] This dependence on the media, in turn, affects the quality and diversity of works available to the public: as media companies strive to produce predictable hits, they find themselves "[s]eeking the common denominator among a wider audience."[230] In the end, much of the available con-

225 *Id.* at 250 (Breyer, J., dissenting).

226 *See supra* Part I.B.

227 Julie E. Cohen, *Copyright's Public-Private Distinction*, 55 CASE W. RES. L. REV. 963, 965 (2005); *see also id.* ("This result . . . is one with which most thoughtful commentators do not seem entirely comfortable."); *id.* at 967 ("[W]e need a theory of the ordinary user: a theory of what conduct is private."); Stadler, *supra* note 184, at 937–42 (arguing that copyright owners should not enjoy the exclusive right to reproduction, in part because it implicates private conduct).

228 *See* Cohen, *supra* note 227, at 969 (urging the maintenance of a "breathing space for intellectual consumption, exploration, and development"). Also threatening this breathing space is "[t]he collection of information about what we see, hear, and read," *id.*, which has become disturbingly commonplace as copyright owners seek to manage their rights using digital technology.

229 *See* Stadler, *supra* note 184, at 947 ("To the extent that the law today requires members of the public to be 'consumers' instead of 'users,' copyright owners can train the public to satisfy its demand for expression by looking to the copyright industries alone."); *see also* Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81, 97–98 (2002) (using Disney as an example, asserting that "increased prevalence of Mickeys should lead to increased investment in forming preferences for their products," which in turn "should increase relative demand for their products").

230 Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 888 (2001); *see also id.* at 889 ("As a result, striving for popularity may produce not a wonderful, cacophonous

tent looks and sounds the same.[231] "Users"[232] can (and do) challenge this "wearying homogeneity"[233] at the margins, but the threat of copyright infringement keeps most of the populace from engaging too actively with the content they consume.[234]

Perhaps the most significant way in which the performance right imposes costs on society, however, is by encouraging copyright owners to provide the public with experiences without also providing the public with tangible copies. As we have seen, a copyright owner exhausts her right to control the distribution of her work in copies once she has made the first sale.[235] By contrast, her right to control (and charge for) public performances is limited only by a handful of technical defenses.[236] Knowing this, rightsholders have learned to deliver their copyrighted works accordingly, favoring mechanisms by which electronic content is either streamed or (if downloaded) subject to a host of technological access controls.[237] Whither physical copies? Suddenly, the name of the game is evanescence: if consumers cannot *possess* a copyrighted work, then rightsholders can charge consumers a royalty each time consumers experience it.

One consequence of this emphasis on performance over publication is scarcity, at least in archival terms. Those who own copyright in performances can prevent copies from being made, even of works that otherwise would not be available in tangible form—thus giving copyright law the ability to determine the content of our cultural heritage.[238] A second consequence is a gradual shift in the ways in which consumers prefer to experience copyrighted works, from a preference for ownership to a preference for "convenience." If, say, rental companies like Blockbuster and Netflix are the delivery mechanisms of

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variety, but a dulling, repetitive sameness as works include over and over the same elements intended to cater to popular tastes.").

231 *See* Stadler, *supra* note 184, at 923–24.

232 Yochai Benkler has defined "users" as those "individuals who are sometimes consumers, sometimes producers, and who are substantially more engaged participants, both in defining the terms of their productive activity and in defining what they consume and how they consume it." Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1268 (2003).

233 *See* Stadler, *supra* note 184, at 923.

234 *See id.* at 924.

235 *See supra* notes 23, 146 and accompanying text.

236 *See* 17 U.S.C.A. §§ 110, 111, 114, 116, 118, 119, 122 (West 2005 & Supp. 2007).

237 *See* Stadler, *supra* note 184, at 949–54.

238 *Cf.* Dana Gioia, *The Impoverishment of American Culture*, WALL ST. J., July 19, 2007, at D7, *available at* http://www.opinionjournal.com/la/?id=110010352 (discussing the decline of culture and education in America as the focus of society has shifted away from arts and sciences towards a culture based purely on entertainment).

today, then many in the industry hope that "on demand" services will be the mechanisms of tomorrow.[239] A consumer simply would contact a subscription service to request and watch a movie through streaming video technology. That technology would leave the consumer with no need to store a tangible copy—but it also would prevent her from watching the movie again without paying another fee. Once technology permits, songs could be streamed in the same way. ("Pay per listen," perhaps.)

Unfortunately, this convenience would come at the expense of freedoms that consumers once took for granted. One such freedom is the ability to experience a work unlimited times. In the music industry, rightsholders have partnered with technology companies to convince consumers to purchase music that can only be used in specified ways. Apple, for example, openly places a number of technology controls on songs purchased through its popular iTunes service, including limits on the number of times consumers can burn a song to physical media, even after purchasing it.[240] Another such freedom is the ability to use copyrighted works to engage in the cultural conversation. People can interact more readily with tangible copies; digital signals, encrypted and streamed over a network, are there one second and gone the next. And then there is the question of privacy: in a "pay per" world, a corporation necessarily would be monitoring each use on the way to exacting payment for it. Sony—both a rightsholder *and* a technology company—recently experimented with compact discs containing "spyware," thus enabling Sony to gather information, in secret, from customers when they played those discs with their own computers.[241] So far, consumers have reacted to efforts like these with varying degrees of outrage,[242] suggesting that, for the time being, at least some percentage of the public values the ability to enjoy physical possession of copyrighted works. But for copyright owners who have the patience to wait, this is the promise of the performance right:

239 *See* Randall Stross, *Pass the Popcorn. But Where's the Movie?*, N.Y. TIMES, Aug. 19, 2007, § 3, at 3. *But see id.* (noting the "preternatural[ ] suspicio[n]" of the movie studios, who wish to "be certain that DVD sales are not hurt by immediate availability of video-on-demand" before releasing their content to the format).

240 *See* Apple Inc., I-Tunes Store Terms of Service, http://www.apple.com/legal/itunes/us/service.html (last visited Jan. 28, 2008).

241 *See* Ted Bridis, *Sony to Suspend Making Anti-Piracy CDs*, WASH. POST, Nov. 11, 2005.

242 *See* Dan Mitchell, *The Rootkit of All Evil*, N.Y. TIMES, Nov. 19, 2005, at C5 (criticizing Sony); Randall Stross, *Want an iPhone? Beware the iHandcuffs*, N.Y. TIMES, Jan. 14, 2007, § 3, at 3 (criticizing Apple).

in time, its use promises to make consumers accept their dependence on the content industry for each and every copyrighted experience.

These cultural changes are a direct result of the way in which Congress has shaped the copyright law and, within it, the exclusive right to public performance. This means, in turn, that the only way to reverse these changes is to amend the law. While it may seem paternalistic to force consumers to sacrifice the "convenience" of evanescence, the Constitution charges Congress with legislating "'to stimulate artistic creativity for the general public good'"[243]—not only in the short term, but in the long term as well. In the long term, it simply does not make sense to create a society in which the public enjoys nothing more than the right to rent an inventory of copyrighted works from a handful of media conglomerates.

In Part III, I propose two ways in which Congress might craft a new performance right, in each case describing a right that is considerably more narrow than the one that exists today. The first proposal withholds the performance right entirely from most owners of copyright, thus sacrificing breadth for clarity. The second proposal defines the right more broadly by extending a more limited right to more beneficiaries, but because those limitations might be susceptible of varying interpretations—e.g., the "for profit" limitation—the second proposal sacrifices clarity for breadth. Despite their differences, both proposals satisfy a handful of requirements: First, any new performance right should strike a "balance of competing claims upon the public interest"[244] by granting rights sufficient to encourage people to publish, in tangible copies, the raw materials of performances, but withholding rights when encouragement is unnecessary. At the same time, the law should encourage performers to perform—or at least should not discourage them from doing so. Second, the public should have the opportunity to interact with tangible copies of performable works, and to do so at a reasonable cost. Because part of keeping costs "reasonable" is minimizing the cost of copyright clearance, any new right should be defined so as to avoid entangling users in a web of overlapping rights and multiple payments. Finally, the public should have the opportunity to interact with tangible copies of performable works at *no* cost, for at least some purposes, even if copy-

243 Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)); *accord* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

244 *Aiken*, 422 U.S. at 156; *see also id.* ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

right owners would prefer to charge for access.[245] This means, in turn, that at least some performances should be private or otherwise beyond the reach of the law. My proposals follow.

III. FINDING THE BOUNDARIES OF THE EXCLUSIVE RIGHT TO PERFORM

A performance right that "balance[d] . . . competing claims upon the public interest"[246] would grant only that entitlement necessary to encourage people to create and publish the raw materials of performances. Is the foregoing web of overlapping rights and royalties necessary, in this sense? It does not answer the question to observe that creators now expect to enjoy these rights and royalties, and therefore that the law must continue to satisfy them. As I have argued elsewhere, the fact that creators expect to continue to enjoy an existing entitlement does not mean they have a right to expect it.[247] Copyright law does not exist to satisfy expectations of increasing reward, but to benefit the public at large by "promot[ing] the Progress of Science."[248] This benefit is best achieved by asking not what rights creators have come to expect, but what rights creators are entitled to expect given the nature of the public interest in copyright. When it comes to the performance right, have creators formed reasonable expectations of reward? In answering this question, Congress might craft a new performance right in several ways. In this Part, I discuss two of those: First, Congress might withhold the performance right entirely from most owners of copyright, thus creating a significantly narrower right than the existing one. Second, and probably more palatably to most, Congress might define a performance right that extends to existing beneficiaries, but that is subject to a host of limitations. I consider these options in turn.

A. Clarity at the Expense of Breadth

1. Musical Works

Consider, first, the case of musical works: today, most people acquire the ability to hear a particular song either by purchasing a compact disc or by downloading a computer file (with or without per-

245 *See* Stadler, *supra* note 184, at 926.

246 *Aiken*, 422 U.S. at 156.

247 *See* Stadler, *supra* note 9, at 438–39, 473–77.

248 *See* U.S. CONST. art. I, § 8, cl. 8 (granting to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

mission).[249] As both compact discs and computer files are "copies" under § 101 of the Copyright Act,[250] copyright law should safeguard incentives to create by providing songwriters with *at least* the ability to demand payment when others vend copies of performances of their songs, either in physical or electronic form. In other words, it seems reasonable, at least, to provide songwriters (and their assigns) with the exclusive right to distribute copies of their works under § 106(3)—the right now served by the mechanical license.[251]

At present, however, songwriters also expect the ability to demand payment when others either perform their works or deliver those performances to new audiences.[252] Is such an expectation reasonable? Surprisingly, the answer may be "no." If most people express their desire to hear songs repeatedly by acquiring copies of those songs, then the performance right is duplicative as to those people, which is another way of saying that songwriters would get paid—through sales of copies—with or without the exclusive right of public performance. Of course, granting songwriters the performance right would pay them *more*, but higher payments to songwriters mean higher costs to society. If Congress were serious about balancing these marginal costs against the marginal benefits that a duplicative right provides songwriters, Congress might reasonably withhold the performance right entirely where the publication right alone (i.e., the right to distribute a work in copies) is sufficient to induce creation.[253]

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249 *But see infra* Part III.B (discussing the emergence of technologies capable of streaming copyrighted works "on demand").

250 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "copies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

251 *See* 17 U.S.C.A. § 115 (2005) (West 2005 & Supp. 2007) (stating that for "nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106 . . . are subject to compulsory licensing under the conditions specified by this section").

252 *See supra* notes 30–41 and accompanying text.

253 Alternatively, Congress could take its cue from Justice Brandeis in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), and create an implied license to perform. *See id.* at 199 n.5 ("If the copyrighted composition had been [originally] broadcast . . . with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." (citing Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929))). That is, after granting songwriters the performance right, Congress could limit that right to provide that anyone who owned an authorized copy of a song would be entitled to perform that song in public. The display right, in § 106(5), already comes with a limitation like this. In the words of § 109(c):

> [T]he owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copy-

This arguably is true in the case of songwriters, who achieved the greatest of their victories not by acquiring the performance right in 1897, but by convincing Congress, in 1909, to define "copies" so as to include the sorts of artifacts through which music overwhelmingly is experienced today.[254]

If songwriters did not enjoy the exclusive right to perform their works publicly, then radio stations could play songs without securing a performance license. Yet songwriters hardly would go unpaid. Radio stations would have to acquire copies of the songs they play, for which copies songwriters would receive compensation (from record companies) under the terms of negotiated or mechanical licenses. If, at present, negotiated licenses are drafted so as to deny royalties to the vast majority of songwriters,[255] then one would expect songwriters to

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> right owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

17 U.S.C. § 109(c) (2000). The wording of the limitation is technical, but the idea behind it makes perfect sense to ordinary people: having bought a copy of a "displayable" work like a painting, the owner has the right to display that copy in at least some ways. In copyright terms, the purchase of a copy includes the equivalent of an implied license to display it. If those who purchased authorized copies of performable works had the right to perform those works in public, then many of the overlapping rights in the web simply would disappear.

Unfortunately, when it comes to music, at least, writing such a limitation into the statute might do more harm than simply eliminating the performance right entirely. In a world in which, perversely, many rightsholders are eager to keep physical copies of their works out of the hands of consumers, the law should not give rightsholders any encouragement to avoid distributing their works in tangible form. If the statute were to provide songwriters with a performance right only as against people who lacked an authorized copy, then songwriters might do what they could to prevent people from obtaining authorized copies—thus enabling songwriters to rely solely on the performance right for compensation. Again, whither physical copies? *See supra* Part II.

254 *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (overruling White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) and granting owners of copyright in musical works the exclusive right to "make any arrangement . . . of [their works] in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced"), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

255 In correspondence, Michael Carroll has informed me that songwriters rarely receive royalties from record sales because under standard recording contracts, record companies must recoup their costs before disbursing any royalties on sales of compact discs, and roughly 90% of albums made do not record enough sales to permit the disbursement of royalties. (Thus, songwriters are accepting lesser royalties than the ones to which they are entitled under the mechanical license.) This means, in turn, that performance royalties may be the primary source of income for most songwriters. This may be particularly true for composers of hit songs, but according

demand more favorable terms, knowing that their incomes flowed from the sales of compact discs, not from radio play. Songwriters may lack bargaining power to accomplish this result today, but a repeal of the mechanical license would go a long way toward remedying that imbalance.[256] To be sure, songwriters might receive less compensation than they do now, simply because one purchase of a compact disc enables repeated performances of the songs on that disc. But those performances would continue to benefit songwriters in other ways. The practice of payola,[257] for example, suggests that those in the recording industry view radio play as a significant promotional tool, and no wonder: listeners hear a new song on the radio, and if they like it, they purchase a copy. Sales of copies flow directly from favorable experiences. This is the secret behind such services as the Internet radio station Pandora, which encourages listeners to "Listen to Free Internet Radio, Find New Music."[258]

Some listeners, of course, might choose to acquire unlicensed copies of performed songs—as when, for example, one records a song during an Internet radio broadcast. For people like these, the performance right might not be duplicative of the publication right, and indeed, the performance itself might threaten the sale of copies. Even in the nineteenth century, courts perceived this threat; as one court observed, in *Keene*, a copyright owner should be able to prevent "a reporter from noting the words of [his] play phonographically or stenographically or otherwise."[259] So far as songs are concerned, however, this threat is overstated. First, it is harder than it sounds to make unauthorized copies of performances that rival authorized copies in terms of quality. Quality recordings of live performances are few, and

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to Carroll, even minor songwriters attach a symbolic significance to performance royalties, which "should not be overlooked in the incentive calculus." Of course, if songwriters knew that the publication right was the primary source of their incomes, then they likely would demand more favorable terms. Further, it may not make sense for society to incur the costs of the performance right simply because songwriters find it significant as a symbol of their worth.

256 Indeed, it seems reasonable to make that license voluntary, as opposed to compulsory, for a single company likely could not control the market for published copies of songs today (as was the case in 1909). *See supra* note 78 and accompanying text; *see also* Loren, *supra* note 6, at 709–11 (proposing to eliminate the compulsory mechanical license as part of a broader solution to the problems posed by copyright law as it applies to music).

257 *See* Lorne Manly, *How Payola Went Corporate*, N.Y. TIMES, July 31, 2005, § 4, at 1 (defining "payola" as "the illegal trading of secret payments in exchange for airplay" and describing modern incarnations of the practice).

258 *See* Pandora Radio, http://www.pandora.com (last visited Jan. 28, 2008).

259 Keene v. Wheatley, 14 F. Cas. 180, 201 (C.C.E.D. Pa. 1861) (No. 7644).

on the radio, disc jockeys regularly talk over portions of the songs they broadcast, making those songs less appealing as archival copies. Second, the guy who saves a song from Internet radio to his computer so he can hear that song again is distinguishable from the "reporter" in *Keene*; the radio listener is making a personal copy, while the reporter is making a copy for the purposes of engaging in a public performance of his own (if not a public distribution). As I have argued elsewhere, the benefits of personal copying, standing alone, likely outweigh any harm to copyright owners in the form of lost revenues.[260] (Mark Lemley has termed these lost revenues "uncompensated positive externalities," and has argued, persuasively, that intellectual property law should seek to promote them, not eradicate them.[261])

If anything, the argument for giving the performance right to songwriters is even less compelling when it comes to the use of songs in movies and television programs. If songwriters did not enjoy the exclusive right of public performance, then producers could include songs in their films without securing the performance portion of a synchronization license. Again, however, songwriters would not go unpaid. First, songwriters would receive royalties for the use of their songs on soundtracks, which are sold in the form of compact discs. Second, songwriters whose songs were synchronized to film would enjoy a right to payment each time a movie or television program was distributed in copies under § 106(3).[262] Copies of the most popular movies and television programs are routinely sold in retail stores, so this compensation could be significant. The promotional value of having a song included in a popular film is significant as well.

If the publication right (and the market) arguably are providing plenty of incentive for songwriters to create and license recorded performances, then what about live performances? In creating the performance right, Congress was mindful of performances "in . . . concert halls, theaters, restaurants, and cabarets,"[263] so one might expect Congress to grant songwriters at least the exclusive right to performances in those venues. As technology has changed, however, so have the

260 *See* Stadler, *supra* note 184, at 946–49, 952–54, 957–58.

261 *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1052 (2005) ("[P]art of the point of intellectual property law is to *promote* uncompensated positive externalities, by ensuring that ideas and works that might otherwise be kept secret are widely disseminated.").

262 Those payments would not be governed by mechanical licenses, which are limited to "nondramatic musical works." *See* 17 U.S.C. § 115(a)(1) (2000).

263 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975) (citing H.R. REP. No. 60-2222 (1909)).

ways in which people experience music. Before the public had access to machines like the phonograph (and technologies like radio), music reached the public primarily through live performance in public spaces. Today, people are much more likely to enjoy recorded music, either by listening to recordings of their own or by listening to recordings owned by broadcast services like radio. Thus, unlike in 1897, most people who listen to music today can trace their experiences to tangible copies, the distribution of which is reserved to copyright owners under § 106(3)—again, making the performance right duplicative. This is not to say that live performances are not unique; they are. But if the public values live performances more than recorded ones, that increased value is created almost entirely by performers who, being present with their audiences, are able to create an intimacy that recordings lack. Moreover, as with radio, sales of copies flow directly from favorable experiences—including those experiences involving live performances.

2. Audiovisual Works

Given the ways in which movies and television programs are distributed, many of the foregoing arguments apply to audiovisual works as well. Movies, like songs, increasingly are enjoyed in private (as indeed television always has been), and increasingly, people experience both movies and television programs by purchasing or renting a copy, whether physical or digital.[264] Thus, if Congress were to withhold the performance right from owners of copyright in audiovisual works, those owners would not go unpaid. In some ways, of course, this payment is less certain than it is in the case of musical works: both movies and television programs are characterized by a higher ratio of personal experiences to purchased copies than are songs. Movies, for one, can be (and often are) experienced in public spaces, enabling the owner of a cinema to use one copy of a film to reach thousands of paying customers. Through the magic of transmission, television stations can use one copy of a program to reach millions more. Unlike songwriters, however, owners of copyright in movies and television programs have recourse to market mechanisms that make it possible to earn an adequate reward by exercising the publication right alone.

One of those mechanisms is price discrimination, by which rightsholders could charge varying prices to cinemas, television networks, and video stores to reflect the varying numbers of experiences they

264 *See, e.g.*, Edward Jay Epstein, *Gross Misunderstanding: Forget About the Box Office*, SLATE, May 16, 2005, http://www.slate.com/id/2118819/ (noting that "home entertainment provided 82 percent of . . . [studios'] 2003 revenues").

enable. While producers almost never can discriminate among purchasers without experiencing some leakage, the mechanism likely would function reasonably well in the markets for audiovisual works. There are several reasons for this. First, most of the works in this category enjoy relatively short lives. Most people who experience movies in cinemas, at least, wish to see "first run" movies, which linger in distribution for only a few weeks or months. Most television shows have similarly short runs (except for the chosen few, which live on in syndication). Knowing this, a movie producer who wishes to engage in discriminatory pricing can release her work to cinemas (charging a higher price per copy), then wait a few months to release her work to video stores (charging a lower price per copy). Second, because those copies exist in technologically distinct media, price discrimination as between those media is likely to be more effective. Cinema owners, for example, rent copies of movies stored either on photographic film stock or, more recently, entire hard drives. Neither format is likely to be of much interest to ordinary consumers, who purchase or rent copies of movies on more portable video discs. Finally, the movie and television industries are highly concentrated, which means that producers and purchasers are likely to engage in repeated exchanges with one another. The terms of those exchanges are dictated to a large extent by industry custom. Few networks would air "aftermarket" television programs, purchased on the cheap, if to do so would mean alienating the very studios that might produce the next blockbuster.

Of course, many television shows, in particular, are not sold to the public in tangible form, suggesting that owners of copyright in those shows do not profit by distributing copies of their works to the public. The works in this category, however, might be the very works for which the inducement of copyright is unnecessary. Newscasts, talk shows, and televised awards ceremonies probably should be included here: each is designed either to provide information (which is unprotectible) or to provide the most fleeting of entertainment for which there is no lasting demand. One suspects that such works would continue to exist if there were no performance right, and indeed, if there were no copyright protection at all. And if this is true, then granting an exclusive right here would burden society without providing a corresponding benefit.

3. Dramatic Works

When it comes to dramatic works, the foregoing arguments are not nearly so persuasive. Unlike songs, plays primarily are experienced in person, at least outside the classroom. As a consequence,

people express their preference for plays not by buying copies of them, but by attending ephemeral performances of them in public spaces (or by watching recordings of those performances on television). This difference is significant. If Congress were to withhold the performance right from playwrights, then playwrights would get paid solely by exercising the distribution right in 106(3)—that is, by publishing copies in return for money. One producer who bought a copy of *Glengarry Glen Ross* could stage that play for thousands of paying guests, who likely would *not* go on to purchase copies of the play for themselves. The ratio of personal experiences to purchased copies would have exploded, and with it, perhaps, the incentive of playwrights to spend their days writing plays. And unlike owners of copyright in audiovisual works, playwrights would not find price discrimination to be nearly so effective a tool.

In theory, at least, if owners of copyright in dramatic works knew that their rights under copyright law would end with the publication of copies, then they would price those copies accordingly, depending on the intensity of the uses that purchasers proposed to make. For playwrights, however, pricing access per copy poses challenges that pricing per performance does not. First, plays have much longer shelf lives than movies and television programs do. Theatergoers are as likely to buy tickets for old plays as new ones; a play released on Broadway in 1984[265] can be the subject of a freshman English course in 1994, only to be revived on Broadway in 2004. Second, plays tend to exist in a single (and affordable) format—i.e., paper—which means that a theater owner can stage a play with a used book bought in a college bookstore for $2.99. Without the performance right, these market realities would make it difficult, if not impossible, for somebody like David Mamet to keep theater owners from staging *Glengarry Glen Ross* using aftermarket copies purchased on the cheap. Under the first sale doctrine,[266] the first distribution of each authorized copy (to the book publisher)[267] would extinguish any claim of exclusivity

265 *Glengarry Glen Ross*, by David Mamet, was released on Broadway on March 25, 1984. Carol Lawson, *Mamet's New Play About Real Estate to Open in March*, N.Y. TIMES, Feb. 24, 1984, at C2. It went on to win the Pulitzer Prize that year. Samuel G. Freedman, *The Cast That Put Mamet on the Board*, N.Y. TIMES, Apr. 18, 1984, at C21.

266 *See* 17 U.S.C. § 109(a) (2000) (outlining the respective rights of copyright owners and owners of subsequent copies).

267 The sale to the textbook publisher likely would qualify as a distribution because: (a) there is substantial identity between the concepts of "distribution" and "publication"; and (b) § 101 defines "publication" as *either* (1) "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending"; or (2) "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public perform-

over those who succeeded to ownership of those copies—even for $2.99.

One response to the foregoing challenges is simply to require the playwright to charge the right price the first time. For those who engage in the distribution of copies, this is a familiar obligation and, insofar as the public is concerned, a salutary one: in enacting the first sale doctrine, Congress clearly believed that the benefits of encouraging competition in secondary markets (like used bookstores) exceeded any costs flowing from threats to inducement—including the cost of having to charge the right price the first time.[268] With plays, though, the risk of mispricing is far greater than it is with songs, for example, simply because the ratio of personal experiences to purchased copies is higher. The higher this ratio, the harder it is to calculate and demand a high enough price per copy to justify the sale that extinguishes the publication right. As a consequence, it might not make sense to require playwrights to bear the risk of mispricing copies of their works if, as I suspect, that risk is great enough to significantly impair the incentive of playwrights to write plays. In other words, so far as playwrights are concerned, the societal benefits of the performance right might, on balance, exceed its costs.

How, then, might Congress achieve this first solution, in which rights are narrowly but clearly defined? It simply would amend § 106(4) to provide that "the owner of copyright . . . has the exclusive right[ ] . . . in the case of dramatic works, to perform the copyrighted

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ance, or public display." *Id.* § 101 (Supp. V 2005) (defining "publication"); *see also supra* note 26 (discussing the meaning of "publication"). A playwright who sells her play to a textbook publisher certainly is "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution." *See* 17 U.S.C. § 101.

268 Consider the following exchange:

> Mr. Walker. According to this bill as you understand it, would it be competent for an author to print under his copyright notice a reservation prohibiting people from doing anything with that book except reading it themselves? Would it be competent for the author to prohibit the sale of that book by the purchaser?
>
> Mr. Steuart. Yes, sir . . . . [U]nder the absolute right of the author, he could make any reservation he pleased. In other words, this so-called sale would be nothing but a license to read.
>
> Mr. Mckinney. May I ask a question, Mr. Steuart? Was it the object of the draftsmen of this bill to break up the second-hand book business?
>
> Mr. Steuart. Not at all.

Arguments on S. 6330 and H.R. 19853, *supra* note 74, at 164 (statements of William M. McKinney, Arthur Steuart, and Albert H. Walker).

work publicly."[269] For good measure, Congress might choose to throw in "choreographic works" and "pantomimes," which resemble dramatic works in almost every respect. As for owners of copyright in "musical . . . and motion pictures and other audiovisual works,"[270] however, they would be left to exercise those exclusive rights found elsewhere in § 106.

B. Breadth at the Expense of Clarity

While withholding the performance right from most copyright owners might seem radical to some, it arguably would benefit society, at least in a world in which tangible copies "continue to play an important role."[271] As we have seen, however, technology is in the process of enabling the widespread use of "on demand" services for which the provision and retention of copies is beside the point. What if, in the future, broadcasters could buy libraries of compact discs and stream songs, on demand, to customers with handheld wireless devices capable of sending and receiving digital signals? For customers, those devices would be like iPods without hard drives, playing songs without storing copies of them. Customers simply would create "play lists" that their devices would use to request the streaming of music from broadcasters, song by song. If songwriters did not enjoy the exclusive right of public performance, broadcasters who used such technology would not be guilty of infringement because they would not be engaging in public distribution under § 106(3)—that is, they would not be enabling (or even offering to enable) the transfer of copies.[272] If uses like this one were lawful, might they threaten the inducement of creation on which copyright law depends?

The answer is an unsatisfying "maybe." If enough of the public developed a preference for subscription services over the purchase of physical copies, then the publication right in § 106(3) might decrease in value enough to significantly diminish the incentives of songwriters and others to create. Arguably, this shift in preferences is much more likely to occur *with* the support of rightsholders than without it. A

269 *Cf.* 17 U.S.C. § 106(4) (2000 & Supp. IV 2004) (granting the right to owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works").

270 *Id.*

271 *See* Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1061 (1998) ("Books and other information in physical form, however, continue to play an important role."); *see also* F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L.J. 293, 300 (2001) (noting that this was the case "in the past").

272 *See supra* note 267.

century ago, copyright owners were slow to react to changes in technology, but today, copyright owners are much more adept at using technological change to secure greater rights for themselves.[273] Secure in the existing performance right in § 106(4), rightsholders in the movie industry, for example, are actively investing in the technologies necessary to enable "on demand" services, knowing that they will reap the benefits of that investment.[274] If Congress were to advance the public interest in copyright by withholding the performance right, then rightsholders might not be so eager to invest. Indeed, if most rightsholders got paid *only* by distributing copies of their works, then one would expect them to embrace the idea of the tangible copy, not to enable technologies that promise to make tangible copies increasingly rare.

There are, however, other, less radical ways in which Congress could encourage people both to create performable works and to publish those works in tangible copies. One obvious solution is to extend the performance right in § 106(4) to most of its existing beneficiaries,[275] but to limit that right so as not to undermine incentives to exploit the publication right in § 106(3). In crafting those limitations, Congress also could pursue other worthy goals, such as placing performances that seem "less" public beyond the reach of the law, thereby reducing the number of exactions per work performed—and thereby giving the public more of an opportunity to interact with performable works. As it happens, there is precedent for such an approach; it resides in the history of the performance right itself.

Consider, first, the place analysis in the first half of the definition of "publicly" in § 101: as we have seen, Congress created the performance right intending to capture only those performances "in such public places as concert halls, theaters, restaurants, and cabarets."[276]

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273 *See generally* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 343–57 (2004) (examining the interaction between copyright holders and advances in technology).

274 *See* Stross, *supra* note 239 ("For the studios, digital delivery of a rental eliminates the problem of a physical product being resold, cutting into the sales of new copies without generating additional royalties. And studios are paid every time an on-demand video is viewed.").

275 If, as I have written elsewhere, "most authors write books so that others might pay to read them," it is unreasonable for owners of copyright in literary works to expect the right to exclude others from performing those works, making it unnecessary to include those copyright owners among the beneficiaries of § 106(4). *See* Stadler, *supra* note 184, at 937. Computer programs, which also qualify as "literary works," are beyond the scope of this Article.

276 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975); *see also* H.R. REP. NO. 60-2222, at 4 (1909) (stating that section (d) of the Copyright Act of

Under existing law, by contrast, a public place is either "a place open to the public or . . . any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[277] A performer can violate the exclusive right of public performance either by performing a copyrighted work in such a place or by "transmit[ting] or otherwise communicat[ing] a performance" to such a place.[278] The result is an unnecessarily broad conception of place—capturing everything from Carnegie Hall to a chicken shack. If Congress wished to narrow this conception, it simply could return to "the paradigm image of a public performance[:] an actor [singer, dancer, etc.] seen and heard by an audience assembled in his immediate presence."[279] A play would be performed publicly, for example, only when actors played it before a live audience, i.e., in the physical presence of an audience assembled in a place (like a theater) that was open to the public.

To accomplish this result, Congress likely would have to tinker with the definition of "perform," making clear that to perform a work means to sing, play, act, or dance it *directly*—not "by means of any device or process,"[280] such as a movie projector or computer. (This would have obvious implications for proprietors of audiovisual works.) Congress also would have to amend the definition of "publicly," providing that to perform a copyrighted work "publicly" is "to perform . . . it at a place open to the public in which both performer and audience are physically present." Under these definitions, a singer in Carnegie Hall would have to license the right to perform the songs in her repertoire, but the proprietor of a tiny chicken restaurant who wished to play the radio for the benefit of his patrons would neither be "performing" songs nor doing so "publicly," and therefore would not need a license. Songwriters and playwrights would get paid when their works were performed live in the most public of venues, but not when performances of their works were delivered to more private venues via technologies like radio, television, and the Internet. To capture the value in later deliveries of performances, songwriters, playwrights, and movie and television producers would have to exploit the publication

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1909 was "intended to give adequate protection to the proprietor of a dramatic work" whose "compensation comes solely from public representation of the work").

277 17 U.S.C. § 101 (Supp. V 2005) (defining "publicly").

278 *Id.*

279 United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 876 n.4 (2d Cir. 1967) (citing Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925)), *rev'd*, 392 U.S. 390 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

280 *See* 17 U.S.C. § 101 (defining "perform").

right by distributing tangible copies of performances to the public. And why not? Most people enjoy songs, movies, and television shows in private, and to the extent people wish to enjoy those works repeatedly, they do so by acquiring copies of them. Plays, however, are mostly enjoyed in public spaces before live audiences, thus giving playwrights the need for protection in the form of an exclusive right to public performance.

The problem with this proposal, of course, is that the foregoing amendments would not address the challenges posed by "on demand" services that in the future might supplant the distribution of copies, at least in some industries. To meet those challenges, Congress would have to turn to the transmission analysis in the second half of the definition of "publicly" in § 101. Under existing law, that definition is extremely broad, covering any acts that

> transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[281]

The addition of the words "or to the public" gives copyright owners the ability to reach into private venues, regardless of whether the transmission competes with their own systems of distribution or, indeed, with anything they happen to be selling.

If Congress wished the performance right to reach only competitive transmissions, it could return to the sort of limitation that an earlier Congress imposed on songwriters in 1909, confining the right to public performances "for profit."[282] Given the expansive definition courts have given to those words over the years,[283] however, Congress

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281 *Id.*

282 *See supra* note 51 and accompanying text.

283 Few phrases in copyright history have been construed more expansively than the phrase "for profit." One might expect those words to include only those acts by which a third party trades performances of copyrighted works for payment, as when a subscription service provides access to a library of performable works for a monthly fee. Yet courts consistently have construed the term more broadly. In *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), the Supreme Court was asked to decide whether a hotel and a restaurant had performed musical works for profit when they engaged musicians to play those works for patrons, live, "without charge for admission to hear [them]." *Id.* at 593. While Justice Holmes, writing for the Court, acknowledged that "the music is not the sole object," he added, "neither is the food, which probably could be got cheaper elsewhere." *Id.* at 595. The music, he noted, was "part of a total for which the public pays," that total being "a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal." *Id.* at 594–95. In a flourish of

likely would have to choose another phrase: according to the Supreme Court in *Herbert v. Shanley Co.*,[284] the "for profit" limitation is satisfied merely if an enterprise earns a profit from any source; the transmission itself need not be the source of that profit.[285] Because almost every transmission is made for the purpose of achieving either "direct payment for the performance . . . or indirect payment . . . or a general commercial advantage . . . [in the] expectation and hope of making profits through the sale of [other] products [or services],"[286] radio stations, hotels, restaurants, stores, and even bloggers would be held to have violated the exclusive right to transmit any copyrighted works for profit—for like YouTube, each one benefits in some financial way, as bloggers do when they trade advertising space for money. The clearest way for Congress to avoid this result would be to amend § 106(4) itself, giving existing beneficiaries "the exclusive right[ ] . . . to perform the copyrighted work publicly *and to transmit any performance of the work to the public in exchange for payment.*"[287] To be sure, both "in exchange" and "payment" are capable of varying interpretations in the courts. Even so, Congress could guide interpretation by clarifying that the transmission right includes only the right to exclude what courts in the past have termed "direct payment for . . . performance."[288]

In sum, I have proposed two changes to the performance right: one, giving copyright owners the right to exclude only those performances in truly public places in which "both performer and audience

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stunning breadth, Justice Holmes concluded, "If music did not pay, it would be given up. . . . [But w]hether it pays or not, the purpose of employing it is profit and that is enough." *Id.* at 595. Under this construction of "for profit," only performances by "eleemosynary" actors managed to escape the reach of the statute. *Id.* at 594; *see also Jerome H. Remick & Co.*, 5 F.2d at 412 ("[I]t is against a commercial, as distinguished from a purely philanthropic, public use . . . [that] the statute is directed."); M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776, 779 (D.N.J. 1923) (holding a department store to have performed musical works for profit when it played the radio in its stores; observing that "[a] department store is conducted for profit, which leads us to the very significant fact that the cost of the broadcasting was charged against the general expenses of the business").

284 242 U.S. 591.

285 *Id.* at 595; *see supra* note 283.

286 *Jerome H. Remick & Co.*, 5 F.2d at 412.

287 This change to § 106(4) would render unnecessary the second half of the existing definition of "publicly" in § 101, because a transmission necessarily requires the use of a "device or process," and it necessarily contemplates a public whose members "receive [the transmission] in the same place or in separate places and at the same time or at different times." *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "publicly").

288 *See Jerome H. Remick & Co.*, 5 F.2d at 412.

are physically present"; and two, giving copyright owners the right to exclude only those transmissions in which others deliver performances in return for payment. While this right would not be as broad as the one in existing § 106(4), the proposal would strike a "balance of competing claims upon the public interest,"[289] and it would achieve this balance in several ways: First, the proposal would grant a quantum of exclusivity that gives a leading role to the publication right in § 106(3), thus encouraging copyright owners to distribute their works in tangible form. Second, it would give the performance right a supporting role in cases in which withholding that right might threaten the inducement to create performable works in the first place. Third, this structure would sweep away much of the web of overlapping rights that so characterizes copyright law today. And fourth, in placing some performances (and deliveries of performances) beyond the reach of the law, it would give the public more of an opportunity to interact with performable works at no cost—including, perhaps, by becoming creators or even performers themselves.

C. What About Performers?

Since 1972, performers (or their assigns) have enjoyed the right to prevent others from reproducing and distributing works known as "sound recordings" in copies that "directly or indirectly recapture[ ] the actual sounds fixed in the recording."[290] Since 1996, owners of copyright in sound recordings also have enjoyed the exclusive right to "perform [those works] publicly by means of a digital audio transmission."[291] In recent years, however, many scholars have argued that these rights are too narrow—that like owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works,"[292] rightsholders in

289 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see also id.* ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

290 Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(a), 85 Stat. 391, 391 (codified as amended at 17 U.S.C. § 114(b) (2000)); *see also id.* § 3, 85 Stat. at 392 (providing protection for works fixed on or after February 15, 1972). Owners of copyright in sound recordings also enjoy the exclusive right to "prepare derivative works based upon the copyrighted work," subject to the same limitation. 17 U.S.C. §§ 106(2), 114(b) (2000 & Supp. IV 2004).

291 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, §§ 2–3, 109 Stat. 336, 336–37 (codified as amended at 17 U.S.C. §§ 106, 114(d) (2000)); *see also id.* § 6, 109 Stat. at 349 (providing for an effective date of February 1, 1996).

292 17 U.S.C. § 106(4) (2000 & Supp. IV 2004).

sound recordings deserve the performance right in § 106(4), too.[293] Are they right?

If the performance right imposes costs on performers for the benefit of rightsholders in the precursors to performance, then eliminating or limiting the performance right would reduce those costs, thus providing performers with more encouragement to engage in performances. Regardless, scholars might believe that performers "deserve" to enjoy the performance right themselves, but for utilitarians, at least, claims of desert are beside the point, except to the extent any deserved rewards "serve the cause of promoting broad public availability of literature, music, and the other arts."[294] That is, performers "deserve" rights under copyright law only insofar as those rights are necessary to induce performers to create "original works of authorship fixed in any tangible medium of expression."[295] What sorts of inducement do performers require? Like the other characters in this story, performers likely engage in recorded performances so that they might deliver those performances to the public in return for money. They also engage in live performances, for which they likely expect to charge admission. The question, of course, is whether it is reasonable for performers to expect *copyright* law to provide those inducements.

Of recorded and live performances, live performances present the easier case. Copyright only subsists in works that exist in tangible form,[296] and as a consequence, while it may seem perfectly reasonable to grant performers exclusive rights in their live performances, copyright law cannot be the source of that grant. This does not mean that live performers go unpaid. Performers regularly engage in live performances, in return for money, and they do so because other laws stand in the breach: the law of trespass enables performers to exclude freeloaders from performance venues, and the "anti-bootlegging" provisions in § 1101 of Title 17 give performers a remedy against those who "fix," copy, and distribute "the . . . sounds and images of a live musical performance in a copy or phonorecord" without permission.[297] If Congress wished to strengthen the protections that performers enjoy in their live performances, thus providing a "liberal

293 *See supra* note 6 and accompanying text.

294 *See Aiken*, 422 U.S. at 156 (citing H.R. REP. No. 60-2222, at 4 (1909)).

295 *See* 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").

296 *See id.*

297 17 U.S.C. § 1101(a) (2000).

encouragement,"[298] then it could expand the coverage of § 1101 to include *any* unauthorized fixation or publication of a live performance, musical or not.

Recorded performances—i.e., those fixed "by or under the authority of the author"[299]—present the harder case. On the one hand, the relative infancy of copyright protection for sound recordings arguably is evidence that no copyright protection is necessary, for American performers have been performing without that protection for hundreds of years. Then again, in the eighteenth and nineteenth centuries, performances were ephemeral, for there was no technology with which to record them—much less "print[ ], reprint[ ], publish[ ], and vend[ ]"[300] copies of them. Songwriters, by contrast, have used printing technology to vend copies of their songs (in the form of sheet music) since Congress extended protection to musical works in 1831.[301]

Given this sea change in technology, it might indeed be reasonable for performers to expect copyright law to provide them with some reward when copies of their performances change hands. The analogy to songwriters is particularly instructive here: while the first half of the definition of "sound recordings" is phrased broadly, the second half makes clear that the phrase is intended to refer primarily to the recorded performances of songs.[302] And as with songs, most people acquire the ability to hear a musical performance by acquiring a physical or electronic copy of it. Given this reality, Congress might reasonably seek to encourage performances by providing owners of copyright in sound recordings with the ability to prevent others from distributing copies of those performances, either in physical or electronic form. Because the goal is to protect the expression contained in the performance—not the song—it also makes sense to limit the publica-

298 *Cf.* Letter from Thomas Jefferson to Oliver Evans (May 2, 1807), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 200, 201–02 (Albert Ellery Bergh ed., 1907) ("Certainly an inventor ought to be allowed a right to the benefit of his invention for a certain time. . . . Nobody wishes more than I do that ingenuity should receive a liberal encouragement.").

299 *See* 17 U.S.C. § 101 (Supp. V 2005) (defining "fixed").

300 *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436; Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

301 *See* § 1, 4 Stat. at 436 (extending grant to owners of copyright in musical works).

302 *See* 17 U.S.C. § 101 (defining "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied").

tion right to "the actual sounds fixed in the recording."[303] Congress already has done both of these things, granting the reproduction and distribution rights in § 106(1) and (3) and limiting those rights in § 114(b).

Just because it is reasonable for performers to expect compensation in return for delivering performances, however, does not mean that Congress is bound to satisfy that expectation by granting the *performance* right. To the contrary, it should do so only if the publication right is insufficient to induce performers to perform. This clearly is not the case. To date, Congress has chosen not to extend the performance right (in § 106(4)) to sound recordings;[304] as the Senate observed in 1995, "[sound recording copyright owners] were not granted the right of public performance, on the presumption that the granted rights [under section (1), (2), and (3)] would suffice to protect against record piracy."[305] Notwithstanding this gap in protection, thousands of performers continue to engage in (and record) performances. Again, extending the performance right to those in the music industry would enable them to earn *more*, but it is hard to argue that those higher payments would represent anything more than a wealth transfer to people who obviously would create in any event.

The Digital Performance Right in Sound Recordings Act of 1995[306] is a perfect illustration of what happens when rightsholders convince Congress to ask what society *can* pay instead of asking whether society should have to pay in the first place. For rightsholders, securing the digital performance right was simply a question of deserved reward—or, according to the Senate Report in support of the legislation, a question of fairness and "justice." Quoting Marybeth Peters, the Register of Copyrights, the Committee reported that "'[j]ustice requires that performers and producers of sound recordings be accorded a public performance right.'"[307] After all, other copyright owners enjoy the performance right; why should owners of sound recordings be left in the cold?[308] In enacting the legislation,

303 *See* 17 U.S.C. § 114(b) (2000).

304 *See id.*

305 S. REP. No. 104-128, at 10 (1995), *reprinted in*, 1995 U.S.C.C.A.N. 356, 357.

306 Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

307 S. REP. No. 104-128, at 13 (quoting *The Performance Rights in Sound Recordings Act of 1995: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. 43 (1996) [hereinafter *Hearing on S. 227*] (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services)).

308 *See id.* (stating the belief of the Senate that "'the time has come to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other works'" (quoting *Hearing on S. 227*, *supra* note

Congress also may have been persuaded to benefit the analog radio industry, which sought protection against competition from digital radio stations.[309] Either way, the results have been predictable: SoundExchange, an organization that represents rightsholders in sound recordings, persuaded the Copyright Royalty Board not only to increase statutory royalty rates by more than 100% by 2010, but also to require Internet radio stations to pay a $500 administrative fee for each channel they offer—a "major problem for large Internet radio sites, such as Pandora, Live365 and Yahoo Inc., which offer thousands of channels."[310] The Board also eliminated caps on royalties for small Internet radio stations, some of which already have closed their doors because "they would owe much more in royalties than their stations earn."[311] Thus has the digital performance right begun to produce what Yochai Benkler has termed the "commercialization, concentration, and homogenization of information production."[312] Nor are these costs remotely outweighed by the benefits of the legislation, which are enjoyed by a privileged few.

This legislative victory has emboldened rightsholders in sound recordings to demand the performance right in § 106(4), for performers (like songwriters) now feel entitled to performance royalties even from those who purchase authorized copies. According to the Senate, the "digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded

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307, at 31 (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks))); *supra* note 9.

309 *See* S. REP. No. 104-128, at 13 ("Notwithstanding the views of the Copyright Office and the Patent and Trademark Office . . . , the Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

310 Jim Puzzanghera, *Internet Music Stations Receive a Reprieve*, L.A. TIMES, July 17, 2007, at C2; *accord* Kendra Marr, *Webcasters' Fates Still Uncertain*, WASH. POST, July 17, 2007, at D2.

311 Puzzanghera, *supra* note 310.

312 *See* Benkler, *supra* note 229, at 93 ("The differential effects of increases in intellectual property protection on divergent strategies suggest that such increases lead to commercialization, concentration, and homogenization of information production." (footnote omitted)); *see also* Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN 121, 142 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) ("[T]he greater cultural standardization likely to occur under conditions of pervasive commodification is cause for substantial concern." (citing Benkler, *supra* note 229, at 81–99)).

music in the near future"[313]—and copyright owners feel they should be the ones to control it. As with songwriters, however, the evidence suggests that at present, performers find adequate protection in the publication right in § 106(3), which means that Congress should not be so quick to relinquish control over such an "important outlet for . . . performance."[314] In the end, it is a question of the public interest in copyright: musical performances worth distributing in tangible copies deserve legal protection; and society may reasonably decline to spend its resources enabling performers to charge for access to the rest.

CONCLUSION

In this Article, I have sought to determine whether the exclusive right of public performance has "serve[d] the cause of promoting broad public availability of literature, music, and the other arts"[315] as well as it has satisfied the needs and wants of copyright owners. Viewed in the light of its history, the right is interesting, even strange: First, the right does not protect performers (or their performances), but instead creates exclusive rights in the *precursors* to performance such as plays and songs—thereby giving playwrights, songwriters, and others the ability to subject performers to demands for payment. Second, notwithstanding the wording of the right, the right reaches private acts along with public ones, for lawmakers have defined "publicly" to include a host of behaviors that begin and end in private spaces. Third, the definition of "performances" includes not only paradigmatic performances in public spaces like concert halls, but it also includes electronic transmissions, which definition, in turn, enables copyright owners to profit from the delivery of their works at "each step in the process by which a protected work wends its way to its audience."[316] In this respect, the performance right is not really about performances at all. Instead, copyright owners are using the right to avoid the statutory limitations on the publication right (i.e., the right to distribute a work in copies), under which copyright owners can

313 S. REP. No. 104-128, at 14.

314 Indeed, if Congress were to take any action, that action should be limited to giving owners of copyright in sound recordings the right to exclude *only* (1) those performances in truly public places in which "both performer and audience are physically present"; and (2) those transmissions in which others deliver performances in return for payment. *See supra* Part III.B.

315 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975) (citing H.R. REP. No. 60-2222, at 4 (1909)).

316 David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

profit only from the first sale of each tangible copy. In short, the exclusive right of public performance has become a powerful tool in the hands of copyright owners, who are using it to control how the public acquires and experiences copyrighted works.

This tool imposes significant costs on society. Among the more quantifiable of these are the costs of complying with the right, including the time and money spent in clearing rights and the money spent in payment of royalties. Other, less quantifiable costs may be even more significant, among them the scarcity of tangible copies that results when copyright owners seek to maximize their profits by providing the public with ephemeral experiences instead of works in physical form. Against these costs, the societal benefits of the existing right are surprisingly few. So far as musical works are concerned, most people express their desire to hear songs repeatedly by acquiring copies of those songs and playing them in private. Because songwriters (like all copyright owners) enjoy the exclusive right to public distribution, songwriters already have the right to demand adequate compensation under copyright law—even without the performance right. The same is true of audiovisual works, for many of the same reasons. Only dramatic works continue to reach audiences primarily through ephemeral performances in public places, and so, for playwrights, at least, the exclusive right to distribute their plays in copies might not provide enough of an inducement to create. That is, only for playwrights might the performance right be truly necessary.

If Congress were to withhold or limit the exclusive right of public performance, then rightsholders in the music, movie, and television industries would face a number of changes, the greatest of which would be a shift in philosophy: no longer would the law encourage rightsholders to deliver their works using technologies that leave the public with no tangible copies—and no ability to experience those works again without paying another fee. Instead, the law would encourage the proliferation of tangible copies, which ordinary people could use to perform copyrighted works in public without fear of liability. Those performances, in turn, might encourage the creation of yet more "original works of authorship," fixed in yet more "tangible [media],"[317] which not only would benefit copyright owners but also would "serve the cause of promoting broad public availability of literature, music, and the other arts."[318]

A change in the law would work other changes as well. So far as the music industry is concerned, the greatest of these changes might

317 *See* 17 U.S.C. § 102(a) (2000).
318 *Aiken*, 422 U.S. at 156.

be the near obsolescence of organizations like ASCAP and SoundExchange, which exist solely to demand and collect performance royalties from the public on behalf of their clients—rightsholders in musical works and sound recordings, respectively. In the face of any threat to their existence, these organizations are likely to make a great deal of noise, and with good reason: any change to existing entitlements under copyright law would disturb the expectations of copyright owners, whose demands for greater reward have been satisfied with each new piece of copyright legislation. But this is no reason for Congress not to act. As I have argued elsewhere, respecting the expectations of existing rightsholders by maintaining the status quo would require Congress to sit on its hands indefinitely,[319] or, as Yochai Benkler put it, to "lock an economy into sub-optimal arrangements."[320] To be sure, changes may produce winners and losers, making those changes "redistributive," but the use of this loaded term simply begs the question whether rightsholders were entitled to their existing rewards in the first place.[321] The importance of that question is far greater than any changes to a single organization or even to a single industry. If rightsholders are not entitled to expect the rewards that the law now provides, then now is the time to confine a right that is beginning to transform society for the worse.

319 *See* Stadler, *supra* note 9, at 475–76.

320 *See* Benkler, *supra* note 229, at 98–99 ("[T]hese adverse effects may be difficult to reverse. . . . [T]he process begun by a change in law may be path determining, and may lock an economy into sub-optimal arrangements indefinitely.").

321 *See* Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 511 (1998) ("Redistribution cannot be defined with reference to initial entitlements, and it is nearly always the scope of those entitlements that is contested.").