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## **A Pre-History of Performing Rights in Anglo-American Copyright Law**

Derek Miller  
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“It is not courteous, it is hardly even gentlemanly, to persist in this appropriation of a man’s writings to their mountebanks.”<sup>1</sup>

For its first century, Anglo-American copyright law did not include a performing right. Copyright was literally that, a copy right, the right to produce and sell physical copies of a work, and as such remained closely tied to print technologies and to the commerce of print. Despite copyright’s restriction to a printing right, theater received some protection, namely as printed matter. In the era’s small set of copyright lawsuits regarding theater, however, theatrical performances emerged as a significant subject of legal discussion. Prior to the statutory commodification of theatrical performances—in 1833 in the UK and in 1856 in the US—the law considered performance’s status as property. In Britain, however, these pre-statutory debates over performing rights never embraced performance as an alienable commodity, the value of which arises through use, exchange, and labor, as post-statutory litigation would.

Instead, before performance’s commodification, three older ideologies of performance-as-property occluded any emergent sense of performance as an intangible intellectual property. The first, evinced in the first case discussed below, closely associates performance with the physical manuscript, a fixation on a text’s objecthood that persisted in copyright law throughout the eighteenth and early-nineteenth century. The second ideology revolved around the social capital of authorship or ownership of a work. Mark Rose calls this association an entanglement of property and propriety, writing of one mid-eighteenth-century lawsuit, that “a commercial regulatory statute was being employed to pursue matters that had as much to do with propriety as with commerce.”<sup>2</sup> In this view, evident in the first and second cases addressed here, a

performance's value not only accrues to, but also derives from the ways in which a text's owner is seen to be the owner by his peers. The third ideology, apparent in suits involving Robert Elliston as manager of the Drury Lane Theatre, derives performance's value from the monarchy. This ideology mimics the second, in which social structures create value, but the source of all value rests not in society at large, but in the head of the social structure, the monarch. As Tracy Davis notes, a pervading view in the period regarded theater "as *a category exempt from the usual rules governing private property because it extends the work of the state.*"<sup>3</sup> Elliston understood how performing the monarchy's work accrued to his own benefit, using performance to buttress the monarchy's political power, which, having been thus increased, raised the value of Elliston's patent privilege, his royally sanctioned right to perform theatrical works. In contrast to these three older ideologies, in the US, a lone performing rights lawsuit before 1856 highlighted a competitive capitalist marketplace for theater, an environment in which commentators theorized competition as a boon to performance's economic and aesthetic value. I discuss elsewhere how the legal intersection of those two forms of value shaped performance once performance itself became an alienable commodity. This article argues that, prior to performance's legal commodification, economic and aesthetic value yielded to different value systems.

### **Manuscripts, Honor, and Monarchs**

Three British suits demonstrate the failure to pursue latent questions about performance's economic and aesthetic value, in favor of objecthood, honor, and royal deference. Although the relevant British statutes in the late-eighteenth and early-nineteenth century explicitly protected only printed "books," litigants still offered claims about performances.<sup>4</sup> In these suits, they

persistently theorized not commodified performance, but performance as a property rooted in those older forms of ownership. Theatrical performance's use value, in other words, was more important than its exchange value. As a result, although many of these cases hint at the ontological aesthetic questions that faced performance after its commodification, courts failed to take up these issues. Instead, these legal battles situate value not in economics or aesthetics, but in objecthood, propriety, and the monarchy. An explanation of the theatrical environment in which these cases appeared helps elucidate this distinction.

### Property and Patent Theatres

In the Elizabethan and Jacobean eras, theater companies owned a play because they performed a play. Joseph Marino, surveying the period's attitudes towards intellectual property, argues that acting companies such as the Lord Chamberlain's Men exerted control over literary properties by constantly revising them. No one gave a thought to alterations in a written text; what the company performed was the play. In this endless process of revision, "Early modern plays were never finished; they were merely sent to the printers."<sup>5</sup> Print remained a byproduct of performance practices, and the economics of print—as embodied in the Stationers' Company, which enforced its regulatory ownership system by supervising the printing monopoly—were at odds with the semi-royal privileges players' companies asserted over their repertoire. "Revision, for the players," writes Marino, "was the essence of theatrical possession."<sup>6</sup> In this pre-Statute of Anne era, any emergent notions of an author's right ceded to the practice of playmaking. Property rights in plays existed because a company or a printer actively improved the property, either through revising and performing, or through printing and selling the work in question.

In the wake of the Civil War and the closure of theaters before and during the interregnum (1642-1660), Charles II granted royal patents to two troupes, restricting to them all rights to perform spoken drama in London. The patent theatre duopoly upended entirely the casual system of proto-performing rights that had defined the Elizabethan and Jacobean periods. As Marino explains, “The most important abstract properties in the Restoration theater were Killigrew’s and D’Avenants royal patents, which approached the condition of property much more nearly than did plays or shares in acting companies.”<sup>7</sup> Performing rights in a given play became far less important than the right to perform any play. As patent theatres became the valuable properties in Restoration theater, the duopoly foreclosed a competitive market for drama.

Robert D. Hume notes the absence of performing rights in this period with surprise, given that property, particularly in the form of patents, “reign[ed] supreme” in the period’s theatrical culture.<sup>8</sup> But the patent theatres’ performance duopoly, like the Stationers’ Guild’s print monopoly, restricted the means of publication and acted as a de facto copyright system. This system, however, relied on an implicitly non-commercial attitude towards performance as property, in which the right to perform—both the right to stage any play, and the specific plays they could stage—derived from the monarchy. The original patent theatres under Killigrew and Davenant claimed the right to perform a set of existing plays, staging them, in Marino’s words, as “tenant[s] of the Crown.”<sup>9</sup> The system depended on each company’s acknowledgment of the others’ claims, and Hume reports that “Neither company is known to have attempted to stage a post-1660 play premiered by the other. New plays were treated as the property of the company that first produced them, and publication made no difference to exclusive rights, at least within London.”<sup>10</sup> Although non-patent theaters, such as Thomas Betterton’s splinter company,

performed any work they saw fit, the patent theatres respected each others' exclusivity, at least for two years after a play's premiere.<sup>11</sup> An author's rights, in the sense that copyright created them, were irrelevant in this system: playwrights received compensation in profits from the third, sixth, and ninth nights of an initial run during most of the eighteenth century, but plays were the property of the house. Ultimately, as Hume explains, valuable new plays were few and far between—a condition encouraged by the duopoly's stranglehold on theatrical production. Given this situation, when Parliament reconsidered its censorship laws and the patent theatre duopoly in 1832, they included performing rights on the agenda. In short, from the Restoration until the advent of statutory performing rights, theater practitioners and members of the governing class regarded performing rights as valuable within a theatrical economy that limited the right to perform itself. Crucially, that right remained conceptually non-commercial, derived from the monarch. This situation displaced legal disputes over economic value, and occluded the abstract legal arguments about aesthetic value that emerged when the law considered performance's commodity form. In place of economics and aesthetics, courts and parties to lawsuits valued physical property, propriety, and royal privileges.

*Macklin v. Richardson: Manuscripts and Personal Use*

Despite the absence of statutory performing rights and the general irrelevance of performing rights to the duopolist theatrical economy that emerged in the Restoration, a few playwrights attempted to articulate a relationship between the new copyright laws and the performance of plays. Because playwrights' claims during the period were particularly uncertain, the law was only one means—and often an ill-suited means—of resolving a disagreement. Indeed, it must be noted that not everyone followed the implicit or explicit rules, and the law was

usually a solution of last resort. For example, while the patent theatre duopoly limited play piracy in London into the 1840s, the provinces supported many rogue companies, and successful new plays usually found their illicit way to provincial stages. One such play was Charles Macklin's *Love à la Mode*, which premiered at Drury Lane on December 12, 1759. Macklin was one of the most successful actors of his day, equally famous for his Shylock and for his disputatious nature, which landed him at one time a conviction for manslaughter (he killed a fellow actor quarreling over a wig) and led him to successfully pursue charges of riot and conspiracy against a claque he accused of ousting him from Covent Garden in 1773. (In his combination of a famed and successful career with a litigious temperament, Macklin closely resembles the people featured in many of the cases I discuss.) *Love à la Mode* brought Macklin money and accolades both for the script and for his performance as Sir Archy MacSarcasm.<sup>12</sup> Macklin biographer William Appleton reports that "For the last forty years of his life this play was his main source of income."<sup>13</sup> With a rare crowd-pleaser in hand, Macklin himself performed the piece throughout the British Isles. Provincial theater managers, however, also took up the text, compiling versions from illicitly distributed sides, from shorthand notes taken during performances, from an unauthorized printing of the first act in a magazine (discussed below), and from memory.<sup>14</sup> Macklin was not pleased.

Amidst this chaos, Macklin succeeded in calling some rogue managers to account, revealing cultural norms that functioned like performing rights, but without regarding the performing right as an alienable commodity. Macklin called on would-be pirates' sense of honor, and on his own claims as both the playwright and the star performer. Writing to Tate Wilkinson, who had invited Macklin to perform in York, Macklin warned Wilkinson that he was "sensible that several Companies act [*Love à la Mode*]; and the reason why they have hitherto done it with

impunity is, because I was in Ireland: but now I am returned, and shall settle here, depend upon it, I shall put the law against every offender of it, respecting my property in full force.”<sup>15</sup>

Wilkinson’s memoir reports that Macklin “forgot and forgave, and occasionally favoured me with permission to act” the play, but under what financial arrangements remains unclear. “I could not but allow the justice of [Macklin’s] accusation,” Wilkinson wrote in retrospect, revealing that, despite Macklin’s only hypothetical legal rights to his play, Wilkinson recognized the latter’s legitimate claim to the play as Macklin’s property.<sup>16</sup> Possibly, both men recognized Macklin’s intangible property right as an author. If so, those claims are difficult to disentangle from Macklin’s physical presence in England, his appearances as a performer for Wilkinson, and the men’s personal relationship.

Other offenders proved more recalcitrant than Wilkinson. In 1771, Macklin wrote to his solicitor about James Whitley, who ran a strolling company in Leicester, and whom Macklin imagined would be a slippery target for legal action. (Macklin writes worryingly about how to determine Whitley’s first name, should they need to file a bill of complaint against him.)<sup>17</sup> When the solicitor suggested Macklin travel to Leicester, Macklin complied, from whence he wrote to Whitley, copying his solicitor, advising Whitley of “intended proceedings in defence” of the play.<sup>18</sup> Apparently, Whitley had already ignored a face-to-face plea from Macklin, asserting that Macklin’s complaints had no legal grounds. Macklin included his recollection of the meeting in his letter to Whitley:

You [i.e., Whitley] answered me with a kind of legal defence of what you had done, letting me know ‘*that you had been bred an attorney; that you perfectly knew what the law was in your conduct respecting your acting my Farce [...];*’ and, by way of legal reasoning, warmly urged, ‘that you were not the only person that acted Love-a-la-mode without my leave—for that one Laurence Kennedy, one Heaton, Miller, and Wilkinson of York, had acted it many times;’ and it was your opinion, ‘that any man might act it safely;’—and thus fortified by precedent, and many moral and legal arguments, you seemed to stand upon your defence, as if you were confident that your knowledge of the



law would bear you and your company out in the transgression of the law, and the invasion of literary property. I cannot help observing on one argument, on which you seem to have great legal dependance [sic]. You urged, as a clear defence—‘that the copy of *Love-a-la-mode*, by which your Company acted, was not the same *literally* as mine; for that yours differed from it in *many Passages*.’ So that, by this kind of reasoning, and justice—if you had stolen, or had received my horse that had been stolen by another, and you then had lamed him, cut off one of his ears, and had daubed him with various colours that had disguised him, you think you might effectually plead that the horse was not mine, as he was so nicely and artfully disguised, so lame, and so very much altered for the worse. What effect this ingenious argument will have in a court of law I shall not pretend to say.<sup>19</sup>

As the passage reveals, Whitley presumed that Macklin had, at best, a tenuous legal right to control performances of his play. Whitley’s claim to have staged a sufficiently altered text so as to make Macklin’s title moot anticipates some of the ontological arguments that courts addressed after the advent of performing rights. But Macklin’s horse metaphor resists conceptualizing his play as an intangible performance-commodity, seeing the play instead as a kind of chattel. Conceptually, if Whitley ruins the play by his altered performances, Macklin will not be able to perform the unmutated play anymore himself. This is not the metaphor of alienable property, but of close personal association between the play and the performer.

In Whitley’s arguments, moreover, the law yields to a plea to the theater community’s norms. In Whitley’s view, his adulterated production of the play really was different from Macklin’s; Whitley’s emendations and alterations made the work his. And, Whitley notes, he was far from alone in committing the purported crime, numbering himself among Kennedy, Heaton, Miller, and the aforementioned Wilkinson. If theater managers formed any consensus about Macklin’s property in the play, that consensus affirmed Whitley’s rights, not Macklin’s.<sup>20</sup> Whitley’s opinion, moreover, emphasizes not legal, but social mores by referring to the demonstrable fashion for piracy among theater managers: producing *Love à la Mode* without Macklin’s permission was *à la mode* in provincial theaters.

Whitley responded to Macklin's missive with a florid, somewhat evasive, but apologetic letter, promising to cease his unauthorized productions.<sup>21</sup> He begins argumentatively, casting himself as the legitimate purchaser of a work he did not know to be out of bounds. But he abandons his disputation, and offers, "as a Gentleman, born and bred above meanness," to cease performances.<sup>22</sup> Honor again takes precedence over property. Whitley frames the dispute's resolution as having taken place between two gentlemen ("you, like a Gentleman, offered the alternative [to a lawsuit], I, as a Gentleman, [...] do embrace the alternative").<sup>23</sup> One Macklin biographer reports that "This concession on the part of *Whitley* terminated all the differences between the parties," however Macklin did file a Chancery bill against Whitley on June 22, 1771, to which Whitley filed an answer.<sup>24</sup> The parties likely settled out of court.

These disputes over *Love à la Mode* underline that possession of play was as much a process of semi- and extra-legal negotiation as of direct legal confrontation. While Macklin frequently used the threat of a lawsuit to bring offenders to heel—as in the Whitley case, or in a 1785 Chancery bill filed against Robert Owenson, manager of the Fishamble Street Theatre in Dublin—the actual opinions of jurists were not always necessary to effect a result.<sup>25</sup> Similarly, as evidenced in the Wilkinson exchange discussed above, pleas to honor and morality, accompanied by hints at official censure, might curb offending behavior. This dissertation emphasizes official legal channels, with occasional evidence of how practitioners responded to the influence of the law, rather than the many other ways, direct and indirect, through which owners policed performances of their works. Even with the evolution of strong copyright laws and mechanisms to enforce violations, the system relied on a give and take at which any narrative, this included, can only hint. *Love à la Mode* thus provides a superb object lesson in the difficulty of enforcing

intellectual property rights. The play merits pride of place, however, not for its legal near-misses, but for its precedent-setting courtroom success.

In the disputes just discussed, Macklin's claiming of performing rights depended upon his persistent assertion of ownership, both as a star performer actively exploiting the play to promote his acting, and as a gentleman whose honor pirates impeached. Macklin thus performed a new authorial role, suppressing attempts by other producers and actors to make their own mark with his play. Although Macklin successfully employed such abstract arguments to control his play's performing right, his sole reported success in court depended on statutory print rights and on the close watch Macklin exercised over his play as a physical object, that is, as a manuscript. When Drury Lane staged Macklin's play, "the scribe was allowed to write out only the players' sides and forbidden to make a copy," thus keeping the full manuscript away from prying eyes.<sup>26</sup> Yet in April of 1766, Richardson and Urquhart, publishers of *The Court Miscellany*, printed in that magazine a version of Act One transcribed from a performance in shorthand by Joseph Gurney.<sup>27</sup> Macklin sought an injunction in Chancery to prevent Richardson and Urquhart's printing the second act. Although the offenders offered to recall extant copies of Act One, pay some of Macklin's legal costs, and refrain from future violations, Macklin pursued the suit, which resulted in the first judicial opinion of the status of a dramatic text under the Statute of Anne.<sup>28</sup> Macklin's victory, however, derived not from a legal recognition of performance, but from the court's unequivocal protection of Macklin's print rights, rights to which Macklin lay claim, in significant part, through his control over his manuscript.

Simultaneous proceedings in a relevant copyright case before the King's Bench (*Millar v. Taylor*, which established that the Statute of Anne neither abrogated nor limited a pre-existing common law copyright) delayed hearings in *Macklin v. Richardson*. Following *Millar's* eventual

affirmation of common law copyright, the Chancery judges felt sufficiently informed to consider Macklin's suit, finally ruling on December 5, 1770. In court, the parties tussled over whether or not the magazine's printed text and Macklin's play differed enough to make the magazine's version a different work, but this ontological debate was a sideshow. The real issue in the case, as recognized by both parties and by the judges, was whether or not Macklin's performances of the play in any way affected his common law print rights. They offered evidence from two cases to that effect, one in which a work was printed from a stolen manuscript, and another in which the work was printed from a clerk's copied notes.<sup>29</sup> Given *Millar v. Taylor*'s recent affirmation of a common law print right, Macklin's lawyers hammered on their client's print right, grounding their theory of the case not in any careful consideration of performance or performance's ontology, but in an author's clearly established right to assent to (or withhold assent from) the printing of his manuscript works.

The plaintiff's attorneys' only acknowledgments of performance attempted to wall off performance from print: "the representation of the farce [...] upon the theatre, was no gift to the public," they argued. To the extent that the lawyers cited the play's economic value, they divided that value into two separate spheres: "the profits which he received from the representation on the stage did not take from him the profits of printing and publishing."<sup>30</sup> In short, they posited that the play's representation on stage could not affect Macklin's print rights. Those print rights remained inviolable, moreover, precisely because Macklin's work remained in manuscript. As his attorneys argued, "where the author did not print or publish his work, it never was doubted that no other person had a right to print or publish it."<sup>31</sup> Whatever incipient ideas of intangible property Macklin may have held, his legal advisors regarded the manuscript as Macklin's most solid ground.

Richardson and Urquhart’s lawyers countered that performance, to the contrary, “gave a right to any of the audience to carry away what they could, and make any use of it.”<sup>32</sup> In the defendants’ view, one could not brush performance aside as irrelevant to print rights; performances manifestly placed a work in the public sphere. The opinions from Lord Commissioners Smythe and Bathurst, however, accepted the plaintiff’s emphasis on print and dismissal of performance. Bathurst found simply that “The printing it before the author has, is doing him a great injury.”<sup>33</sup> The laconic formulation hints at the Macklin’s right as personal, rather than as a right of property in a commodity: the defendants have done “*him* a great injury,” as Bathurst put it. Smythe’s opinion takes up the plaintiff’s distinction between the commerce in performance and in print: “It has been argued to be a publication, by being acted; and therefore the printing no injury to the plaintiff: but that is a mistake; for besides the advantage from the performance, the author has another means of profit, from the printing and publishing.” For Smythe, the play circulated in two distinct commercial spheres, in each of which the play was a different form of property. Having confirmed a common law print right in *Millar*, the court granted Macklin’s manuscript play the status of a protected commodity in the world of print.

Strikingly, the terse opinions give the impression that the violation at issue had nothing to do with performance. As Ronan Deazley summarizes, “That the work in question was capable of, indeed originally conceived for, performance upon the stage was not necessarily relevant.”<sup>34</sup> Thus, one of the first Anglo-American court cases regarding copyright in the performing arts, while protecting such works as a species of literary property, barely considered as important the fact that the work was performed. This despite the fact that performance was essential to the existence of the case—because the printed version was a shorthand transcript of a performance—and to the defense’s argument.

Unsurprisingly, the court's sharp distinction between print and performance closely mirrors the contemporary economic situation, and emphasizes that Macklin directly associated the commercial value of his play with his own person. Just as Macklin's attorneys had asserted the separability of Macklin's potential profits from the play's performance and printing, so too did Macklin treat each income stream as mutually exclusive. As mentioned above, Macklin zealously guarded his play throughout his career as a performer. Only after retiring from the stage did Macklin assent to the play's official publication. The subscription announcement explicitly noted that the play's printing resulted from its no longer being a valuable performance property for the writer-performer: "The two pieces, on which the applause of numerous audiences has stamped a value, were never printed, and as Mr. Macklin's memory has so far deserted him, as to render those productions of no further use to him, it has been agreed [...] to offer them to the public by Subscription."<sup>35</sup> Although the play gained some form of "value" from the audience's approbation, Macklin decided to print the play explicitly because productions were "of no further *use to him*." While Macklin consistently sought to capture the maximum possible income from his play, the path to that income depended on his personal control of the manuscript, and the play's usefulness to him as a performer. Macklin may have had a strong, emergent idea of his play as an intangible property he had created and, thus, rightfully owned. His behavior, however, reveals the stronger claims of older systems of ownership.

#### *Coleman v. Wathen: Honor*

While the *Macklin* judges essentially side-stepped performance as a right, focusing exclusively on the playwright's print rights, a 1793 British suit forced the law to confront

performance directly. Although newspaper reports of the case hint at the court's sensitivity to performance as a unique form of expression, print again occluded performance in the law's eyes. Moreover, the legal avenue by which the plaintiff pursued remedies evinces an honor-bound conception of performance's value, rather than a commercial ideology.

In 1781, *The Agreeable Surprise*, a two-act comic opera by John O'Keeffe, with music by Samuel Arnold, premiered at the Theatre Royal, Haymarket. O'Keeffe had sold his copyright to the Haymarket's proprietor, George Colman the Elder. (Colman the Younger was the plaintiff by the time the suit arose eight years later, as the senior Colman was institutionalized as a lunatic in 1790.)<sup>36</sup> Captain George Wathen, a comic actor who came to theater from a military career, produced the piece at the Theatre Royal, Richmond, where he was the manager, whereupon Colman sued.

In *Macklin*, the piracy (if any) had occurred in print; performance was in question only insofar as Macklin's own performances might have nullified his print rights. For *Coleman v. Wathen* (the nominative report misspelled the plaintiff's name), the piracy itself was a performance. A jury trial had granted Colman nominal damages, pending the resolution of a point of law before an *en banc* panel of the King's Bench, namely, "whether this mode of publication [i.e., performance] were within the statute."<sup>37</sup> In other words, the court assessed whether or not a performance could violate the statutory ban on unauthorized "publishing." Colman's barrister defined the stakes: a ruling against the plaintiff meant that "all dramatic works might be pirated with impunity; as this was the most valuable mode of profiting by them."<sup>38</sup> This position recognizes explicitly the economic value of performance, asking the court to protect performance as property precisely because performances generate profits. The judges, however, refused to embrace a definition of publication that included performance: "The statute

for the protection of copy-right only extends to prohibit the publication of the books itself [...]. But here was no publication,” ruled Chief Justice Kenyon.

While the nominative report cited above records a cut-and-dry discussion of “performance” and “publication,” newspapers narrated the proceedings differently. Here is *The Morning Chronicle*:

The question for the opinion of the Court was “Whether the law respecting literary property extended to jokes and stories?”

Mr. Law [the defendant’s barrister] said it was absurd to suppose that literary property imported, or extended to a performance like that in question. He cited a song in this farce beginning with the words *Horum Scorum, &c.*, which he said was meer [sic] gibberish. [...]

Mr Justice Buller said that there were men whose memories were so very retentive as to be able to repeat the whole of a sermon they had heard, but he believed no lawyer would say an action could be maintained for repeating any discourse which a man’s memory had carried away. It were still more absurd to say that a man should not repeat or rehearse a joke or a story he had heard upon a stage.<sup>39</sup>

The defendants thus not only questioned whether performance was a form of “publication,” but also attempted to disassociate the work itself from the realm of “literary property” by focusing on absurd moments in the play and categorizing the entire work as “jokes and stories.”

(Recording the trial in his memoir, O’Keeffe complains that Mr. Law chose to read the lyrics from that farcical song, rather than a more artful passage.<sup>40</sup>) In other words, the defendants encouraged the court to regard theater—or, at least, O’Keeffe’s comic opera—as a form of casual orality, built on “gibberish” rather than craft. From this perspective, despite the play’s economic value, its lack of aesthetic value undermined Colman’s assertion of property rights.

O’Keeffe writes that Chief Justice Kenyon dismissed Law’s needling, but Justice Buller, in the news report quoted above, picked up on the defendant’s suggestion. Buller expressed interest in the theory that audiences have the right to reperform, not a play necessarily, but a lesser sort of oral performance such as a “joke or a story he had heard upon a stage.” The court



did not, in the end, accept this belittling approach to theatrical performance. The decision, all sources agree, rested firmly on a strict interpretation of the statute and that law's definition of publication as referring only to print. Newspaper reports of the case reveal, however, that decisions about the copyrightability of dramatic works would eventually require the court to assess the nature of a theatrical work. Although the *Coleman* court avoided judging the nature of Wathen's performance or of O'Keeffe's play, the defense's argument in the *en banc* hearing suggested that an aesthetic evaluation of a theatrical work might play an essential role in assessing a work's legal viability. Because the statute, in the court's interpretation, did not include performance as a protected commodity however, the court disregarded these aesthetic questions.

While *Coleman* failed to engage the questions of aesthetic value raised in court, the case also suggests that Colman, like the court, resisted an economic attitude to performance, favoring instead a sense of propriety. Robert Maugham, author of the first English legal treatise on copyright, points out that Colman, strangely, did not pursue a bill in Chancery to enjoin Wathen's performances (as Macklin had done against Richardson), but rather filed an action for the penalty provided under the Statute of Anne.<sup>41</sup> Precisely because Colman pursued a penal action, rather than an equitable solution, the court was "bound by the express provisions [the statute] contained."<sup>42</sup> As a result, although performance was the only medium in question in *Coleman*, the court assessed performance in relation to laws that explicitly affected only print. The strategic choice to pursue the monetary penalty seems strange, as Colman might have had more leeway with equitable claims for a performing right at common law. In the later *Morris v. Kemble* (1814), for instance, David Morris of the Haymarket won an injunction prohibiting Covent Garden from presenting O'Keeffe's *The Agreeable Surprise*, Colman's *X. Y. Z.*, and two

other pieces. Although Covent Garden's managers claimed a right to perform the former "by reason of its ancientry and the fact of its having been performed at other Theatres," the Lord Chancellor let the injunction stand.<sup>43</sup> An equitable outcome, in that suit, trumped social practice. Legal, as opposed to equitable, redress was altogether rare in copyright litigation.<sup>44</sup>

Colman's choice to pursue money makes sense, however, if one recognizes the payment as a form of personal restitution, a fine for violating Colman's honor. Pursuing an injunction would have accepted Wathen as a worthy—if illicit—commercial competitor whose pirated performances diminished the market value of Colman's commodity. But Colman forwent the pursuit of his monopoly power in favor of a single fine. A monetary reward rights a wrong by levying a penalty, but fails to remedy the market situation, as an injunction does. In other words, Colman's attitude towards Wathen is barely economic, but rather personal and social: Colman seeks redress because Wathen has wronged him.

*Macklin* and *Coleman* make clear that performance, in the law's eyes, remained irrelevant to the new mode of commodification inaugurated by copyright law. As a result, the law excluded considerations of performance's economic and aesthetic value from its deliberations. Charles Macklin situated his play's value in his own possession of the manuscript and his personal appearances as an actor in the play. He treated the value derived from performance and print as mutually exclusive, reaping the benefits of the former as long as he could act in *Love à la Mode*, and of the latter after his retirement from the stage. Aesthetics barely entered into *Macklin's* suits. In *Coleman*, aesthetic considerations surfaced in the defense's arguments, but the court avoided embracing those points, emphasizing instead the statue's ignorance of performance. Economic value, meanwhile, lay outside *Coleman's* purview, as demonstrated by Colman's decision to seek damages, rather than to eliminate his market competitor. The two cases

remained enmeshed in systems of theatrical production and notions of performance that had yet to address performance as a true commodity, instead returning to physical objects and propriety.

### Robert Elliston's Property

Tangible objects and personal honor thus formed two pillars of performance's legal existence prior to statutory performing rights. The third and dominant form of performance-as-property was the patent privilege, rights advocated by Robert Elliston, a former actor and erstwhile fierce opponent of the patent theatre duopoly who became an equally fierce patent protector as the lessee and manager of Drury Lane. A series of lawsuits involving Elliston reveals the deep entanglement of this old form of theater-as-property in debates over theater and copyright law in the decade prior to the advent of performing rights. Specifically, these suits turn not on the nature of theatrical performance but upon the nature and force of the patent privilege. This argument extends Joseph Marino's thesis that, in the period, "The most important abstract properties [were the] royal patents."<sup>45</sup> Even when engaged in suits about copyright, the real issue remained Elliston's power as a patent holder. Elliston used his theater, moreover, to promote the monarchy's social and political power, which, in turn, reaffirmed his theater's authority by enhancing the authority of that theater's patron. The Elliston copyright suit discussed below was not about economics, but about politics, reaffirming the principle that, although lawsuits in the late-eighteenth and early-nineteenth-century appear to incorporate performance—and arguments about theatrical performance's ontology—into the developing intellectual property system, those suits in fact continued to regard performance as a royal privilege, rather than as a commodity.

Patent theatres were under significant attack in the early nineteenth century. In the battles between the patents and the semi-licit minor theaters, theories of theatrical performance

occasionally emerged in courtrooms, only to retreat in favor of assertions of the patent right itself. For instance, in 1820, Elliston instigated proceedings against Joseph Glossop, founder of the Coburg Theatre (now the Old Vic), for presenting an adaptation of *Richard III* without a license from the Lord Chamberlain to stage a dramatic entertainment.<sup>46</sup> (The self-serving Elliston had successfully defended himself against similar charges two years earlier.)<sup>47</sup> The prosecuting attorneys emphasized Glossop's lack of a patent theatre license, and stressed that the license he did hold restricted him to "entertainments of music and dancing for public recreation."<sup>48</sup> Witnesses offered evidence of how Glossop's performance imitated a patent theatre's performance of the play; the case thus addressed performance directly. John Doobey, a box-office assistant at Covent Garden, testified that the Coburg's presentation "corresponded very closely with the play of 'King Richard III' as performed at Covent-garden. [...] In the general character of the performance there was no variation from the manner in which it was conducted at Covent-garden."<sup>49</sup> This repetition of "Covent-garden" ties the violation to the place of performance, more than to the performance itself. Glossop sinned less in staging *Richard III* than in mimicking a patent theatre's production. The patent right supersedes the nature of the performance. Another witness, American actor Junius Brutus Booth, answered the tantalizing ontological question "What do you mean by a performance?"<sup>50</sup> But the attorney used Booth's reply to demonstrate merely that Glossop had exceeded his license and trespassed, not on Covent Garden's property in the play, but on that theater's patent privilege to perform legitimate drama. The plaintiffs even presented explicit evidence of having "searched the [relevant] books, and found no letters patent given to Mr. Glossop."<sup>51</sup> The case considered performance's status, then, only insofar as performance remained the royal prerogative of the patent theatres, not as an abstract commodity.<sup>52</sup>

A suit the following year pitted Elliston directly against Glossop, whom the former accused of performing a French play, *Theresa, or The Orphan of Geneva*, in a translation that Elliston had purchased from Howard Payne. The court originally rejected the suit for lack of an affidavit demonstrating the similarity between the two theaters' versions of the play, encouraging the litigants to engage in a comparative analysis of the performances.<sup>53</sup> When the parties returned to court, Elliston's attorney claimed that his client's version of the play "was not translated, but written, and also that the names of the characters were different from the French." Glossop's version, "had partly the same dialogue, and generally the same names" as Payne's adaptation.<sup>54</sup> A lengthy tussle ensued, parsing in detail the similarity of the two plays, an argument very similar to the line-by-line comparisons of suits to come.<sup>55</sup> The Lord Chancellor himself expressed a wish for "a comparison of the two [prompt] books," priming the case to establish ontological evaluations as central to performing rights. Elliston, however, himself shifted the debate away from the two plays' identity and onto his patent. Addressing the court, Elliston advocated his rights as the manager-lessee of Drury Lane, rather than locating his legal claim in the question of literary property. Elliston, *The Morning Chronicle* reports, "dwelt on the great property he had at stake, and declared himself to be more actuated by a wish to protect the interest of the patent right than from any personal motive. He shewed the great danger to be apprehended by suffering the minor theatres to copy the performances of the patent ones."<sup>56</sup> Although this suit drew the court's attention to the fine points of owning a performed work, Elliston retreated from this abstract line of argument in favor of his rights as an owner of the older, more concrete form of property, the patent theatre privilege at Drury Lane.

While asserting his patent right, Elliston simultaneously used his theater to promote royal authority. For a patentee, monarchist cheerleading generated a virtuous cycle: a strong monarch

meant strong patent rights, increasing the value of Elliston's property (i.e., the patent theatre), which then staged more royal support. Although shares in the patent companies had been bought and sold numerous times since first granted to Davenant and Killigrew, their exchange value remained closely entangled with their usefulness to the monarch. That utility depended upon the theaters' ability to act as a unique performative sphere for the monarch and monarchical power. Simultaneously, some of the patents' value derived from the king's willingness to continue supporting the duopoly. As Judith Milhous explains, "Given this official protection from competition, the patent companies fully realized the wisdom of not offending the government and thereby risking loss of an increasingly lucrative business. A compelling sense of 'the King's pleasure' never ceased to haunt the managers."<sup>57</sup> The nexus of economic and aesthetic value for the patent theatres lay not in the legal system, but in the person of the monarch. Unsurprisingly, Elliston promoted monarchy vociferously. His royalist efforts climaxed in late 1821, when he restaged George IV's coronation at Drury Lane, carefully reproducing the real coronation's ritual and attire.<sup>58</sup> Drury Lane became the platform for the pageant of royal authority. Cloaking himself in the Union Jack, Elliston claimed not the natural law rights of a creator (or his rights as the owner of a creator's work), but his rights as a privileged subject of the King.

The most famous Elliston copyright lawsuit, involving Lord Byron's closet drama *Marino Faliero*, recognizes this political context, casting performance as an essential form of political currency for the monarchy. Elliston and his attorney claimed his rights by characterizing performance as a unique and vital manner—and the patent theatre auditorium as a unique and vital place—for projecting royal power. Simultaneously, the lawsuit deemphasized print rights, over which royal authority had severely waned. While Byron and his attorneys emphasized *Marino Faliero*'s unsuitability for the stage and the impact of unauthorized performances on the

book's sales and the author's reputation, Elliston and his attorneys underlined their adaptations to the work and the fundamental right of theaters to perform plays. In this, the last major theater lawsuit involving copyright prior to the 1833 advent of theatrical performing rights, performance's ontology again arose as a central question. Elliston situated performance's value, however, within the patent theatre system and the older forms of British ownership on which that system relied. This entanglement of performance with pre-capitalist forms of ownership and monarchical, rather than civil, subjecthood, arose repeatedly in the clash between Elliston and Byron.

The two sides held decidedly different ideas about performance. Byron's Preface to the printed edition of *Marino Faliero* insists that the play is not designed for performance:

I have had no view to the stage; in its present state it is, perhaps, not a very exalted object of ambition; besides I have been too much behind the scenes to have thought it so at any time. And I cannot conceive of any man of irritable feeling putting himself at the mercies of an audience:—the sneering reader, and the loud critic, and the tart review, are scattered and distant calamities; but the trampling of an intelligent or of an ignorant audience on a production which, be it good or bad, has been a mental labour to the writer, is a palpable and immediate grievance, heightened by a man's doubt of their competency to judge, and his certainty of his own imprudence in electing them his judges. Were I capable of writing a play which could be deemed stageworthy, success would give me no pleasure, and failure great pain. It is for this reason that even during the time of being one of the committee of one of our theatres, I never made the attempt, and never will."<sup>59</sup>

The passage includes a lengthy footnote specifically degrading English drama (discussed below).

For the moment, note Byron's fear of the "palpable and immediate" impression of an audience on an author, and his absolute dismissal of theatrical accomplishment or failure. The audience's close presence in the theater, in contrast to that of "scattered and distant" print consumers, threatens Byron. Moreover, Byron deems the audience of questionable "competency." Theater, in Byron's telling, aggravates a writer who has expended "mental labour," a phrase that recalls the natural rights discourse used to promote the Statute of Anne a hundred years earlier. For

Byron, performance's presence always necessarily disrupts and insults that which is the font of an author's intellectual property rights. The Preface pits the threat of embodied responses against the ideal thought of the author. As Byron acknowledges, theater, and theater audiences, work in peculiarly strong and direct ways upon emotions.

While Byron's Preface offers such abstract objections to performance, his diaries and correspondence reveal a more pragmatic sense of *Marino Faliero*'s lack of stageworthiness. Byron first got wind of the plan to perform his play in January, 1821, from his publisher John Murray, four months before the work's publication. The poet sent Murray "a fierce protest at any such attempt," objecting that the work "is not intended for the stage. It is too regular—the time, twenty-four hours—the change of place not frequent—nothing *melo*-dramatic—no surprises, starts, nor trapdoors, nor opportunities 'for tossing their heads and kicking their heels'—and no *love*—the grand ingredient of a modern play." Byron acknowledged the possible legality of an unauthorized performance, but he opposed any attempts to "lug[] me out of the library."<sup>60</sup> As he complained to Murray, "it is *not* an acting play; it will not serve *their* purpose; it will destroy *yours* (the sale); and it will distress me. It is not courteous, it is hardly even gentlemanly, to persist in this appropriation of a man's writings to their mountebanks."<sup>61</sup> In that communication, Byron recognized three different values at stake in performing his play: his own social status ("It is not courteous" or "gentlemanly"), Murray's economic success, and the would-be producers' nebulous "purpose." A close examination of the events that transpired in the ensuing months reveals that Elliston's purpose was not fundamentally aesthetic or economic, but rather political.

Murray published *Marino Faliero* on April 21, 1821, a Saturday. Elliston immediately acquired a copy, and announced a performance for the coming Wednesday, April 25. Elliston's manager, James Winston, sent an edited script to the Examiner of Plays on the day of



publication, and was promised a swift reply. The censor's license arrived Tuesday afternoon, followed at eight that evening by a letter from Murray warning Elliston to cease and desist.<sup>62</sup> His pleas ignored, Murray sought and won an injunction from Lord Chancellor Eldon on Wednesday, but Elliston was not to be dissuaded. As described in a frequently quoted passage from Elliston's *Memoirs* (compiled by George Raymond), Elliston ran back and forth across London, seeking the Lord Chancellor. Finding him, an animated Elliston won a one-night reprieve. (The story of Elliston's odyssey around the capital, and his face-to-face plea with the Lord Chancellor, affirms the power of presence, something equally important to theater and to monarchical authority.) The play appeared at Drury Lane that night, though, as the *Times* reported, at an unusually late hour.<sup>63</sup> Newspapers' unanimously bleak assessments of the drama noted that the condensed but still dialogue-heavy tragedy was indeed, as its author had argued, better read than acted. "The scenes are too long," complained *The Caledonian Mercury*, "the incidents are not drawn sufficiently close to prevent that degree of heaviness and languor pervading the whole, exhausting to the patience and good humour of an audience."<sup>64</sup> *The Morning Post* concurred that "there can be little doubt that the audience considered its merits more suited for closet perusal than for dramatic representation."<sup>65</sup> Byron was right; his play was not fit for performance.

Yet however underwhelming the drama on stage, the Drury Lane theater also hosted the legal drama's enactment. Murray, anticipating Elliston's disregard for the injunction, had prepared "a number of printed bills" that "were showered from the gallery into the pit and boxes" during the second act. They read:

The public are respectfully informed, that the representation of Lord Byron's tragedy, *The Doge of Venice*, takes place in defiance of an injunction of the Lord Chancellor, which was not applied for until the remonstrance of the publisher, at the earnest desire of

the Noble Author, had failed in protecting this drama from its intrusion on the stage, for which it was never intended.

At the end of the premiere, a Mr. Russell reported to the audience the delay of further performances, pending resolution of the legal proceedings.<sup>66</sup> In Drury Lane's production of *Marino Faliero*, the question of copyright law thus not only encroached on the notion of performance, but also formed part and parcel of the performance itself.

While Murray invited the theater audience to characterize Elliston as a scoff-law, Elliston understood that his theater's power lay as much off the stage as on. Thus, the following day, Drury Lane distributed a circular, reprinted in *The Morning Post*, professing confusion and dismay at the legal proceedings, which had been brought "on grounds at present incapable of being understood, and which remain to be explained and justified." The circular described the injunction as an "impediment thus thrown in the way, not only of the interests of the Theatre, but of the gratification of the Public."<sup>67</sup> During the hearing before the Lord Chancellor on April 27, Elliston and his attorneys took up this theme of the public's interest, appealing not only to Elliston's legal rights, but also to a different conception of the function and value of theatrical performances than that advanced by Byron in his Preface.<sup>68</sup> That is, while both Byron and Elliston recognized theater as a charged site capable of powerful expression, Byron cast that possibility negatively, whereas Elliston embraced it. Elliston's attorney posited that "the object of writing a tragedy [is] to have it performed," and analogized that, once published, a play "might be recited on the stage with the same freedom that it might be recited in a private room," making a claim for the overriding interests of the public sphere.<sup>69</sup> Additionally, the attorney used the first night's performance as evidence of the work's theatrical appeal, arguing that "it had been received with all that applause which a work of this kind was likely to excite."<sup>70</sup> Elliston's advocate begged what injuries Murray or Byron could have suffered by the performance,

suggesting that the play's sales increased after Drury Lane's staging. Elliston himself had gone to some expense to produce the performance, and an injunction would demonstrably cost him money. Finally, Elliston's side argued that a ruling for the plaintiff would have a severe effect on theatrical commerce around the nation: "It had always been understood by the managers of theatres, [...] when an author published [a play], that they were at liberty to perform it. This was done every day, and injunctions might, in consequence, be applied for against different theatres."<sup>71</sup> In sum, Elliston's attorney defined *Marino Faliero*'s performance as (1) fulfilling the "purpose" of tragedy; (2) pleasing the public; (3) beneficial to the publisher Murray; (4) costly for Elliston; (5) in line with common theatrical practice, which an injunction would threaten. From this vantage, Elliston's production performed a vital role in offering the nation its theatrical due by staging the work of an admired author. In contrast to Byron's fear of the public, Elliston embraced and championed what he characterized to be the public interest. As manager of Drury Lane, Elliston not only had a right, but also an obligation to perform Byron's work.

Murray's attorney, Shadwell, relied on terms familiar from Byron's objections in his preface, diaries, and correspondence: "it could not be supposed, that a poem, which came from the author's pen, not fit for the theatre, implied a poem that was to be performed on the stage," argued Shadwell.<sup>72</sup> He also emphasized Elliston's alterations to Byron's text as demonstrative proof of the printed play's unsuitability for the stage. Indeed, a notice in the Drury Lane playbill had averred that

Those who have perused *Marino Faliero* will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ardent admirers of Lord Byron's eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage of the Drury-Lane Theatre.<sup>73</sup>

Shadwell stressed initially that “those very alterations might cause the tragedy to be censured by the public, while the work, if left as it originally stood, might add to the author’s fame.”<sup>74</sup> That is, the literary emendations most greatly injured, or had the potential to severely injure, the author and his work, hinting at important questions about the nature of a work. But Shadwell soon shifted to a more general assault on theatricality: the public

might discover faults in the performers; they might be displeased with the embellishments of the theatre; they might perceive various errors, for which the author was not accountable, but the consequence of which must be, that the play would suffer in the representation. [...] Would not the public judgment be warped against the play, on account of the manner in which it was represented?<sup>75</sup>

In this formulation, not the act of editing for the stage, but performance itself makes the fault; even the physical state of the theater building threatens the work’s reception. Shadwell, following Byron, thus articulated not only a legal perspective different from that proffered by Elliston and his team, but also a diametrically opposed attitude towards performance. While the plaintiff’s attorneys regarded performance only as a threat and hindrance to value, the defense characterized performance as a producer of value, and the British public as the beneficiary of those gains.

In the event, the parties agreed to permit future performances, while raising the question of Murray’s right to bring a case against Elliston in a court of law (rather than in Chancery, a court of equity).<sup>76</sup> When the case appeared before the King’s Bench the following year, Murray’s barrister emphasized Elliston’s performance as an invasion of a property right, analogizing failed performances to “unfair and malicious criticism,” against which one could bring suit if such criticism proved detrimental to a work’s economic value. Again, Elliston’s side emphasized the unique sphere of performance: “Persons go [to a theatrical exhibition], not to read the work, or to hear it read, but to see the combined effect of poetry, scenery, and acting. Now of these three

things, two are not produced by the author of the work; and the combined effect is just as much a new production, and even more so than the printed abridgment of a work.”<sup>77</sup> This argument raises even broader issues about the contributory labor of “scenery and acting,” not to mention the nature of abridgment. At the argument’s core lies the nature of theatrical performance. In its decision, the court agreed with the defendant, that “an action cannot be maintained [...] for publicly acting and representing the said tragedy, abridged in manner aforesaid, at the Theatre-Royal, Drury Lane, for profit.”<sup>78</sup>

While this suit thus brought the nature of performance to the courts, the legal proceedings disguised the larger political stakes. That is, although Byron thought performance destroyed value, and Elliston felt performance created value, neither party was particularly clear as to what value they referred. The context in which the suit arose suggests that the performance was most valuable for the political work it performed in favor of monarchist politics and royal authority. The true stakes in this case touched not on Byron’s play as a commodity, but as a form of radical political expression, which Elliston, in his staging, adapted to pro-monarchist political ends. Just as, in the suits against Glossop discussed above, Elliston returned always to his patent right as the font of his legal claim, so too the patent right and the attendant importance of royal authority lurked immediately under the surface in the case involving Byron. Despite these cases’ dabblings in theatrical ontology, aesthetic value never took center stage because commercial value never took center stage: the true stakes were not economic or aesthetic, but political.

Throughout this period, Elliston worked hard to maintain his and his theater’s ties to the crown. *Murray v. Elliston*, I argue, must be read as part of the ongoing struggle over royal authority in the theaters, which was itself an outlet for disputes about the monarchy itself. Consider first the near-simultaneity of the *Marino Faliero* performance and the suit against

Glossop over *Theresa*, only two months prior. In that case, purportedly about copyright, Elliston had claimed that he was “more actuated by a wish to protect the interest of the patent right than from any personal motive.”<sup>79</sup> Crushing Glossop’s piracy was not about rights to *Theresa* or any other specific play, but about reserving the right to perform as a royally sanctioned privilege.

Second, when the Byron suit arose in late April and early May of 1821, George IV had recently made his first royal visit to the theaters, beginning with Drury Lane on February 6, then attending Covent Garden the following day.<sup>80</sup> He returned again to Drury Lane on May 9, a mere two weeks after the *Marino Faliero* premiere, during which appearance the crowd clamored for repeated singings of “God Save the King,” preferring its monarchist sentiments to those of the generically nationalist “Rule Britannia.”<sup>81</sup> With these royal visits, Drury Lane became a site for the physical embodiment of monarchical power, a stage for the social presentation of the King himself. The association between the crown and the patent theatres was thus not an abstract ideal in 1821, but a reality, reaffirmed by the physical presence of the sovereign. (Remarkably, the King’s physical presence transformed the genteel legal battle over the patent theatres into an actual physical confrontation. Glossop, of the Coburg Theatre, was present in the King’s retinue for the second royal visit. During the evening, Winston, Drury Lane’s stage manager, forcibly ejected one of Glossop’s servants, in retaliation for which Glossop attacked Winston in the street two days later.<sup>82</sup> Lest anyone underestimate the importance of embodiment, the altercation between Glossop and Winston confirmed that the royal presence altered the stakes of the heretofore abstract patent theatre battle.) Third, Elliston’s reproduction of George IV’s coronation (the real enactment of which had been delayed over a year after his ascension to the throne) would occur that summer, a performance of royal authority on the stage of Drury Lane

itself. This context, in which Drury Lane plays host to multiple performances of royal power, frames the battle between Byron and Elliston.

With Drury Lane's value to the monarchy as a seat of royal power in mind, let us return to the long footnote in Byron's preface, mentioned above. As quoted earlier, the Preface to *Marino Faliero* patronizingly refers to the stage as "not a very exalted object of ambition."<sup>83</sup> Byron wrote as an insider of the theatrical world, having served previously on the sub-committee of Drury Lane that selected Elliston as lessee. In the long footnote, Byron insists that he, and his fellow committee members, "did our best to bring back the legitimate drama," offering examples of Sotheby's *Ivan*, and his own attempt to commission a work from Coleridge.<sup>84</sup> However, Byron then disclaims any knowledge of the current state of British drama. After apologizing if he "may be traducing, through ignorance, some excellent new writers," Byron explains: "I have been absent from England nearly five years, and, till last year, I never read an English newspaper since my departure, and am now only aware of theatrical matters through the medium of the Parisian Gazette of Galignani, and only for the last twelve months."<sup>85</sup> Byron thus dismisses theatrical writing, while simultaneously admitting that his long physical absence from Britain might have left him entirely ignorant of the state of such writing. While George IV used the theater as a site for displaying his person, Byron had not set foot in Drury Lane in years. Subjecting British drama to this abstract and acknowledgedly uninformed critique reproduces the fear of presence expressed in Byron's apologia (the "palpable and immediate" force of an audience's reaction). Byron himself is "the sneering reader, and the loud critic" of British drama, but a "scattered and distant calamit[y]," not only without a "view to the stage" as an author, but without a view *of* the stage, as an audience member.<sup>86</sup> Oddly, while British drama remains occluded from Byron's view, British acting receives Byron's fulsome praise. "I can conceive

nothing better,” he writes, “than Kemble, Cooke, and Kean, in their very different manners, or than Elliston [!] in *gentleman’s* comedy, and in some parts of tragedy. [...] Siddons and Kemble were the *ideal* of tragic action.”<sup>87</sup> Rich and vital British performances, for Byron, apparently do not suffice to make the stage a place worthy of Byron’s attention and ambition. Byron remains inordinately and bizarrely disdainful of the British stage, despite his obvious admiration for some of the work performed there.

Why, then, does Byron offer such praise for actors and simultaneously such disdain for the theater? What is the source of Byron’s fear of embodiment, if he clearly harbors such admiration for and derives so much pleasure from that embodiment? David Erdman argues that Byron harbored, in fact, a strong secret desire to succeed as a playwright; protestations to the contrary were but a psychological smoke-screen to avoid a fear of failure.<sup>88</sup> Yet as Thomas Ashton and Michael Simpson demonstrate at length, whatever the question of Byron’s unconscious desires, the manifest fact is that *Marino Faliero*, as written by Byron, was *politically* unperformable. Ashton, carefully documenting Elliston’s abridgment of the printed drama, writes that “A detailed consideration of the excised passages confirms the censorship of *Marino Faliero*: Political and moral considerations—Crown, Country, Church, and Chastity—dictated and enlarged the shape of cutting required by stage convention. The revolutionary drama pitting plebeian against patrician was watered down act by act.”<sup>89</sup> Elliston’s adaptations to the play addressed not merely the work’s suitability for staging generally, but also the drama’s fitness for performing at a locus of royal authority. In like vein, Simpson’s close reading of the play and its successor, *Sardanapalus*, leads him to conclude that Byron’s avoidance of a “material realization” in the theater “help[ed] project a materialization that is instead political.”<sup>90</sup> And while “theatrical display and political process are usually polarized alternatives” in



*Sardanapalus*, “they are mutually implicated throughout *Marino Faliero*.”<sup>91</sup> In other words, the text of Byron’s play itself recognized the political force of theatrical display, the power of performance. By attempting to keep the play unstaged, Byron not only preserved unstageably radical elements of the text, but also channeled the work’s latent theatrical energies into a political assault. Elliston’s production of *Marino Faliero*, in this view, transforms Byron’s radical political tragedy into a monarchist tract, neutering its incipient political message by literally staging that which gained material political force in inverse proportion to its theatrical presence.

While Simpson and Ashton have already noted *Marino Faliero*’s radical politics, and Elliston’s undermining of that politics, neither has identified the work that such whitewashing performed for Elliston himself, as the proprietor of Drury Lane. The Elliston *Marino Faliero* at Drury Lane served the monarchy, but in serving the monarchy, Elliston served himself. The production helped Elliston assert his authority as a producer and demonstrate the power of the stage to smother the radical political energy of Byron’s printed text. In other words, the play’s production at Drury Lane demonstrated performance’s usefulness to the crown, while the lawsuit, purportedly about copyright, affirmed performance at the patent theatres as a crucial connection between the monarch and the British people.

The success of this strategy took a final embodied turn when Queen Caroline, the estranged spouse of—and symbol of radical opposition to—George IV, visited Drury Lane on May 14, 1821. That night, the theater performed *Marino Faliero*. Reporting her appearance, a disapproving *Morning Post* quoted passages of the performance text, alluding to the previous year’s trial of the Queen for adultery.<sup>92</sup> The paper snidely bemoans the fact that the constant catcalling might have muffled the valuable lessons of those lines. Music again played an

important role in the theater's display of political energy. When audience members shouted "Queen, Queen" upon her arrival, Elliston, rather than acceding to an acknowledgment of her presence, "informed them that if it was their wish to have the National Anthem sung, it should be done at the conclusion of the play," demonstrating a royal theater's ability to control the public discourse. As David Worrall writes, the following month, by contrast, Caroline was happily received at the Royal Coburg Theatre, Glossop's establishment, against which Elliston had been battling, and where the plays had a decidedly pro-Caroline tone.<sup>93</sup> In short, Byron and his attorneys were right: seeing the play at Drury Lane did fundamentally alter the reception of the poet's work, reframing his radical polemic as a powerful assertion of royal authority. And Elliston used the play and his theater to assert that authority vehemently and, some argued, even violently. Rumors attributed the Queen's death a few months after her theatrical outing to poisoning at Drury Lane.<sup>94</sup> The performances of *Marino Faliero* thus shared the stage with a legal battle ostensibly about copyright; but that battle merely masked a life-and-death political drama in which the monarchy itself was at stake.

Worrall posits that "the role of the theatre in the early 1820s was as a pivotal and defining public space in which were articulated a complex set of competing discourses surrounding commerce, print culture, monarchy, and the popular politics of the street."<sup>95</sup> But commerce, as we have seen, was still a smokescreen for politics in this case, not a competing discourse. The dispute over Elliston's production of *Marino Faliero* was only nominally about copyright. And although the legal proceedings solicited two starkly different notions of performance, neither ideology of performance was capitalist or commercial. Rather, the theater remained explicitly a seat of royal authority, on the stages of which a heavily edited *Marino Faliero* purported to give the lie to Byron's revolutionary politics. Additionally, the case elucidates the intimate ties among

the patent theatre monopoly, the 1737 Licensing Act, and copyright. A dozen years after this incident, when Parliament took up performing rights, it did so alongside questions about the patent theatres and censorship. The reform of the stage only occurred in the wake of George IV's demise and during the debates about and passage of the Reform Act of 1832.<sup>96</sup> The capitalist legal ontology of performance, occluded by the monarchist overtones of *Murray v. Elliston*, emerged in concert with the democratic political reforms of the mid- and late-nineteenth century.

### ***Jones v. Thorne: Performance in a Competitive Market***

*Macklin*, *Coleman*, and *Murray*, while flirting with conceptions of theatrical performance as a commodity, ultimately return to older ideologies of performance-as-property, rooted in physical objects, propriety, and royal authority. In the US, by contrast, a pre-performing rights suit evinces a strong awareness of performance as part of a competitive market in which economic and aesthetic value closely intertwine.<sup>97</sup> (The case also anticipates the complex interaction between statutory and common law that would characterize American litigation over performing rights in the years to come. Due to the language of British statutes, the issue was less central to British performing rights after 1833 than it was in the US throughout the nineteenth century.) The absence of a theater monopoly in the US like that of the patent theatres in Britain made performing rights a powerful weapon of commerce even before their statutory existence.

In 1837 and 1838, Joseph S. Jones wrote two historical dramas drawing on the Huguenots' sufferings during the French Wars of Religion. Jones wrote the plays for William Pelby, of the National Theatre in Boston, where Jones was a salaried employee at the time. By 1840, *The Carpenter of Rouen* had attracted the interest of Charles R. Thorne, owner of the Chatham Theatre in New York, who presented it there in November.<sup>98</sup> Nearby, Thomas

Hamblin's Bowery Theatre suffered under severe financial strain, having been closed for six days in May for failing to pay a \$500 license fee. Allston Brown reports that, through July, Hamblin's 1841 season was "one of the most unproductive on record."<sup>99</sup> At the Chatham, meanwhile, Thorne raked in money: on August 4, 1841, *The New York Herald*—a vocal Thorne promoter, and thus of suspect neutrality—reported that "the house is literally freighted down every evening with the respectability, fashion and good taste of the theatrical populace," who "vie with each other as to which shall bestow the greatest amount of patronage on the enterprising manager."<sup>100</sup> Thorne was thus generating social ("respectability"), aesthetic ("fashion and good taste"), and economic ("enterprising") value at his theater, while Hamblin suffered. In this competitive environment, Thorne advertised a production of Jones' *Surgeon of Paris*, a sister play to *Carpenter of Rouen*, for August 16. Hamblin quickly scheduled the same play, and according to *The New York Herald*, induced the playwright, Jones (who had worked as a stage manager for Hamblin) "to secure the copyright of this piece" and then to seek an injunction against Thorne, which was served at six in the evening before Thorne's scheduled performance.<sup>101</sup> The *Herald* emphasizes Hamblin's goal of undermining the successful Thorne, and reports that Hamblin even used the confusion at the Chatham as an occasion to entice one of Thorne's star actors to come over to the Bowery. Competition between the two theaters was thus immediate, raw, and fierce.

Two points of interest arose from the case: the legal rationale and the public discourse. The legal claims proffered by both sides were relatively simple. In the written complaint, Jones claimed his copyright as an author; he had deposited a "printed title-page" with the court, as the law required, to register his copyright.<sup>102</sup> Jones also asserted, apart from this statutory right, a common law right, arguing that "his manuscripts had been surreptitiously obtained by the

defendant,” who was going to perform the plays “without his consent.” Jones’ common law claim rested not on an abstract performing right, but rather on his concrete right in his manuscripts as personal property: the manuscripts had been, he claimed, “surreptitiously obtained.” This recalls *Macklin* fifty years earlier, in which Macklin’s personal control over his manuscript supported his claims of ownership. In the Chancery hearing, Jones’ attorney made the broader claim “that the acting of a drama from such manuscripts was an invasion of his common law rights.” In other words, he asserted a common law performing right. Thorne’s attorney argued, among other things, that statutory copyright had superseded the common law and that statutes offered no protection for “the *acting* of a drama,” which “was not a publication within the statute.” (These arguments rehash the argument in *Coleman*.) The vice-chancellor rejected the assertion that Jones’ work fell under statutory protection. However, he not only accepted the existence of common law copyright alongside statutory rights, but also ruled that “to carry off a manuscript drama with intent to perform the piece on the stage, against the author’s will, was an invasion of his common law rights.” In American law, common law performing rights existed in a manuscript, a ruling at odds with most English law of the same period. This would have far-reaching consequences in the years to come.<sup>103</sup>

Ultimately, the vice-chancellor ruled that, despite Jones’ common law right, Jones had equitably assigned that right to Pelby, for whom Jones had originally written the play, and from whom Thorne had received his manuscript. This point returns us to the case’s commercial context, which is its second, and equally important legacy. While the major British lawsuits leading up to statutory performing rights remained enmeshed in the pre-capitalist patent theatre system, this sole noteworthy American case was capitalist to the core. On the one hand, Thorne and Pelby still treated the manuscript of *Surgeon* as a barterable physical object. The two

managers had struck a deal “for the exchange of certain dramas, which each of them had in MS.”<sup>104</sup> In one sense, then, performance remained a commodity bound to the manuscript as a tangible thing. More expansive notions of capital and composition, however, also played a central role in the case. As the *Herald* reported the day following the aborted performance at the Chatham, Hamblin’s immediate reason for his aggressive action was Thorne’s rebuff of an attempt at price collusion: “it is said that Hamblin [...] frequently entreated the manager of the Chatham, to raise his prices.”<sup>105</sup> On August 18, Thorne published a letter in the *Herald* confirming the facts described in the previous day’s paper. The letter stresses Hamblin’s attempt to raise prices, and reports that he told Hamblin, “I was determined to cater, in a liberal manner, for the amusement of the New York public, and while I was Manager of the Chatham Theatre, I would do so by always endeavoring to afford my friends a cheap, intellectual and good entertainment.” According to Thorne, Hamblin replied, “damn the New York public; if they want amusement, let them pay for it.”<sup>106</sup> Thus Thorne, while emphasizing his legal right to stage *Surgeon*, casts the legal battle as between capitalist, cheap entertainment and a monopolistic price cartel. Typical of most capitalist copyright fights, diminution of the author’s control—in this case, Jones’ right to enjoin performances of his play—permits, in the accused pirate’s view, more competition and lower prices. However, only a weak link connects copyright and economics here: the injunction from Jones was prompted, according to Thorne, by Hamblin’s attempts to increase prices. But Thorne does not explicitly connect Hamblin’s monopoly right to perform that specific play, *The Surgeon of Paris*, to the price of tickets. That is, Thorne does not claim that he should be allowed to play *Surgeon* because his tickets would be cheaper than Hamblin’s, nor that Thorne’s legal victory would somehow make the play more widely available. Thorne’s discourse of the case explicitly connects the capitalist ideology of price

competition with aesthetic value, but that connection remains in the causal realm of motive, rather than as a plea for leniency by the accused pirate.

The Thorne-promoting *New York Herald*, however, made the final logical leap, suggesting that, as long as the injunction remained in place, Hamblin's sole performing right ultimately harmed the market itself. The paper referred to the play as "monopolized" by Hamblin, reporting that the Bowery's production of *Surgeon*

has however, not drawn its expenses, and this is an additional evidence, if one could be wanting of the bad policy of all such illiberal proceedings, as have been resorted to in this matter. Had no injunction ever been served on Thorne, the Bowery would have shared in the excitement of playing the same piece at two such theatres, and numbers of persons have gone to the Bowery, who have from want of that very feeling staid away.<sup>107</sup>

For the authors of the *Herald* article, then, the true meaning of the case lay not in any past quarrel about price fixing, but in the value of directly competing productions. Hamblin used copyright as a means of creating the monopoly he could not otherwise arrange with Thorne. And the outcome of Hamblin's "monopolization" diminished the market value of the play on all sides. Hamblin might have foreclosed his competition, but Hamblin's production made him little money. When the court dissolved the injunction in October, the *Herald* celebrated the victory of "enterprise, industry and honesty" over Hamblin's "diabolical plot."<sup>108</sup> They posited that Thorne's legal success not only would permit the economic competition, and thus the economic boom, predicted by the article, but also would enable the audience to form an aesthetic comparison "between the merits of [Hamblin's] abortive attempts to play the sterling pieces with his miserly stage arrangement [...] and the array of sterling talent" at the Chatham. (Note the use of the adjective "sterling" to describe aesthetic qualities, a word the generically positive meaning of which derives from its concrete reference to economic value, i.e., the British pound sterling.) In this passage, the paper made the final leap, recognizing that performing rights unite economic

and aesthetic discourses of value. While the pre-statutory British cases hinted at copyright's confluence of economic and aesthetic value, the economic structure of British theater, rooted in the patent theatre monopoly, obscured this connection. In *Jones v. Thorne*, set on the competitive popular stages of New York, the full force of copyright litigation, the legal connection of aesthetics and economics, appeared in its true form.

Although the cases (and near-misses) discussed above all occurred prior to statutory performing rights, they anticipate two themes that would characterize litigation under statutes in the years to come. First, these cases affirm that the relationship between print and performance confuses copyright litigation over performed works. Whether it be *Macklin's* affirmation of print rights and avoidance of performance, *Coleman's* conclusive dismissal of performance from statutory concern, or *Murray's* attempts to distance the staged performance from the printed text, these cases all struggled to find a space for performance in a system of legal ownership rooted in the fixed form of the written word. Second, theater's emergence as a legal object encouraged, even in these early suits, careful consideration of the nature of live performance. For example, in many of these cases (*Macklin, Coleman, Murray*), performance itself was the medium of theft. Other questions, such as the defense's dismissive characterization of *The Agreeable Surprise* in *Coleman*, anticipate more specific critiques of theater's aesthetics that would form part of the legal debates in subsequent decades, once performance joined the statutory copyright system.

Even as these lawsuits anticipate disputes in later copyright cases over print and performance and over performance's ontology, they ultimately skirted these issues in favor of older ideologies of ownership. The right to perform was not yet a commodity in copyright law. As a result, despite the fact that these suits engaged copyright laws, they did so without treating performance as a commodity. *Macklin*, and Charles Macklin's numerous aborted suits, come out



of the unique situation of a playwright/actor's continued control over an exceptionally remunerative work. Macklin protected his play because of the work's essential role in bringing him prestige and income, which he guaranteed by controlling the play as a physical manuscript. In *Coleman*, the choice to pursue damages rather than an injunction suggests that Colman regarded Wathen's infringements as a personal affront rather than as a competitive threat. And, finally, *Murray* was a decisive victory in a larger war to maintain the viability of the patent theatre privilege by asserting those theaters and their performances as vital forces in supporting conservative, monarchical politics. By contrast, *Jones*, set in a capitalist American context, reveals how the commodification of performance connects aesthetic and economic value in the law. A surprising amount of copyright litigation involving theatrical performances appeared prior to the advent of statutory performing rights. Those cases, however, did not yet recognize performance itself as a commodity. Performance's commodification would eventually force courts to answer the ontological questions at which many of these cases hinted, and would encourage the reconciliation of economic and aesthetic value in a new legal theory of theater and performance.

#### Notes

<sup>1</sup> George Gordon Byron, *Life, Letters, and Journals of Lord Byron*, ed. Thomas Moore (London: J. Murray, 1839), 493.

<sup>2</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993), 62. The case is *Pope v. Curl*, 26 Eng. Rep. 608 (Chancery 1741). Rose writes elsewhere that "the claims of propriety and property reinforced and validated each other: the personal interests moralized the economic claim, while the property claim gave legal weight to the personal interests" (82).

<sup>3</sup> Tracy C. Davis, *The Economics of the British Stage, 1800-1914* (Cambridge: Cambridge University Press, 2000), 39, original emphasis.

<sup>4</sup> The Statute of Anne (An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned, 8 Anne, c. 19 (1710)) and its slight modifications was the law in question in most of these suits.

On early copyright history, see Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Oxford: Hart, 2004); Lyman R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968); and, Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993).

<sup>5</sup> James J. Marino, *Owning William Shakespeare: The King's Men and Their Intellectual Property* (Philadelphia: University of Pennsylvania Press, 2010), 74.

<sup>6</sup> *Ibid.*, 33.

<sup>7</sup> Marino, *Owning William Shakespeare*, 156.

<sup>8</sup> Hume, "Theatre as Property in Eighteenth-Century London," 39.

<sup>9</sup> Marino, *Owning William Shakespeare*, 156.

<sup>10</sup> Hume, "Theatre as Property in Eighteenth-Century London," 39.

<sup>11</sup> *Ibid.*, 40.

<sup>12</sup> At one point, Sir Archy offers a wry commentary on the vagaries of the law: "O, sir, yee do na ken the law—the law is a sort of hocuspocus science, that smiles in yeer face, while it picks yeer pocket: and the glorious uncertainty of it is of mair use to the professors than the justice of it." Charles Macklin, *Love à la Mode* (London: John Cawthorn, 1806), 56.

<sup>13</sup> William W. Appleton, *Charles Macklin: An Actor's Life* (Cambridge: Harvard University Press, 1960), 122. Appleton provides estimates of Macklin's earnings from twenty-one performances at Covent Garden in 1761, totaling over £500.

<sup>14</sup> W. Matthews, "The Piracies of Macklin's Love à-la-Mode," *The Review of English Studies* 10, no. 39 (1934), 312.

<sup>15</sup> James Thomas Kirkman, *Memoirs of the Life of Charles Macklin*, Vol. 2 (London: Lackington, Allen, and Co., 1799), 33.

<sup>16</sup> Tate Wilkinson, *Memoirs of His Own Life*, Vol. 4 (York: Wilson, Spence, and Mawman, 1790), 10.

<sup>17</sup> Kirkman, *Life of Charles Macklin*, 2, 35.

<sup>18</sup> *Ibid.*, 38.

<sup>19</sup> *Ibid.*, 38-40

<sup>20</sup> Tomás Gómez-Arostegui has suggested to me that Whitley may have been insinuating that, by these multiple performances, Macklin had effectively acquiesced in public use of his play.

<sup>21</sup> Kirkman, *Life of Charles Macklin*, 2, 42-5.

<sup>22</sup> *Ibid.*, 44.

<sup>23</sup> *Ibid.*

<sup>24</sup> Kirkman, *Life of Charles Macklin*, 2, 45; Appleton, *Charles Macklin: An Actor's Life*, 123n40.

<sup>25</sup> Appleton, *Charles Macklin: An Actor's Life*, 123.

<sup>26</sup> *Ibid.*, 122.

<sup>27</sup> Matthews, "The Piracies of Macklin's Love à-la-Mode," 315.

<sup>28</sup> Appleton, *Charles Macklin: An Actor's Life*, 123.

<sup>29</sup> *Macklin v. Richardson*, 27 Eng. Rep. 451 (1770), 451. The cases are, respectively, *Webb v. Rose* (1732), cited at 1 Eng. Rep. 842, and *Forrester v. Waller* (1741), cited at 98 Eng. Rep. 216.

<sup>30</sup> *Ibid.*, 451-2.

<sup>31</sup> Ibid., 451.

<sup>32</sup> *Macklin v. Richardson* (1770), 452.

<sup>33</sup> Ibid.

<sup>34</sup> Ronan Deazley, “Commentary on *Dramatic Literary Property Act 1833*,” in *Primary Sources on Copyright (1450-1900)*, eds. Lionel Bently and Martin Kreschmer, <http://www.copyrighthistory.org>.

<sup>35</sup> Charles Macklin, *Proposals for Publishing by Subscription: The Man of the World, a Comedy, in Five acts; and, Love à la Mode, a Comedy, in Two Acts, written by Mr. Charles Macklin* (London, 1791), 2.

<sup>36</sup> *Dictionary of Literary Biography*, s. v. “John O’Keeffe,” by Frederick M. Link, *Dictionary of Literary Biography*, s. v. “George Colman, the Elder,” by Sid Sondergard. Colman the Elder had previously successfully prevented the printing of unpublished plays he owned in a Chancery suit much like *Macklin*. Richard Brinsley Peake, *Memoirs of the Colman Family, Including their Correspondence with the Most Distinguished Personages of Their Time*, Vol. 2 (London: Richard Bentley, 1841), 18.

<sup>37</sup> *Coleman v. Wathen*, 101 Eng. Rep. 137 (1793), 138. I am grateful to Isabella Alexander and Tomás Gómez-Arostegui for clarifying the legal proceedings in this case.

<sup>38</sup> Ibid.

<sup>39</sup> “Law Intelligence,” *Morning Chronicle*, May 6, 1793.

<sup>40</sup> John O’Keeffe, *Recollections of the Life of John O’Keeffe, By Himself*, Vol. 2 (London: Henry Colburn, 1826), 313.

<sup>41</sup> It is possible that *Coleman* originally began in Equity, and was then referred to the law courts for an opinion. However, what reports I have found do not indicate any such transfer.

<sup>42</sup> Robert Maugham, *A Treatise on the Laws of Literary Property* (London: Longman, Rees, Orme, Brown, & Green, 1828), 155. Isabella Alexander agrees with Maugham’s distinction here between injunctive suits and suits for statutory penalties, pointing to a similar case with a different outcome. In *Morris v. Kelly*, 37 Eng. Rep. 451 (Chancery 1820), the equity court enjoined performances of an O’Keeffe play. Isabella Alexander, “‘Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words’: The Birth of the Performing Right in Britain,” in *Privilege and Property: Essays on the History of Copyright*, ed. Ronan Deazley, Martin Kreschmer and Lionel Bently (Cambridge: OpenBook, 2010), 324.

<sup>43</sup> *Morris v. Kemble*, reported in *The Morning Post*, December 19 (Chancery 1814)

<sup>44</sup> Tomás Gómez-Arostegui’s extensive archival work in copyright cases up to 1800 reveals “only a handful of clear examples of actions for the penalty.” H. Tomás Gómez-Arostegui, “What History Teachers Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement,” *Southern California Law Review* 81 (2008), 1269. Maugham’s treatise advises that “The most usual and expeditious means of obtaining redress for piracy, and preventing the continuance of the injury, are to be found in a Court of Equity, where, by the preliminary process of injunction, justice is more readily administered than in a Court of Law, where the evil may continue until the final decision of the cause.” Maugham, *A Treatise on the Laws of Literary Property*, 168.

<sup>45</sup> Marino, *Owning William Shakespeare*, 156.

<sup>46</sup> Elliston’s attorneys disclaimed interest in the case, which was technically brought by an informant, Charles William Ward. Such protestations were almost assuredly disingenuous. “Illegality of the Minor Theatres,” *Theatrical Inquisitor, and Monthly Mirror* (1820), 84-87.

- <sup>47</sup> *Oxford Dictionary of National Biography*, s. v. “Elliston, Robert William (1774-1831),” by Christopher Murray.
- <sup>48</sup> “Illegality of the Minor Theatres,” *Theatrical Inquisitor, and Monthly Mirror*, 89.
- <sup>49</sup> *Ibid.*, 90.
- <sup>50</sup> *Ibid.*, 91.
- <sup>51</sup> *Ibid.*, 92.
- <sup>52</sup> On the minor theaters generally, see Jane Moody, *Illegitimate Theatre in London, 1770-1840* (Cambridge: Cambridge University Press, 2007), and Watson Nicholson, *The Struggle for a Free Stage in London* (Boston: Houghton, Mifflin and Company, 1906). On this case, see also David Worrall, *Theatrical Revolution: Drama, Censorship, and Romantic Period Subcultures 1773-1832* (Oxford: Oxford University Press, 2006), 211-14.
- <sup>53</sup> “Law Intelligence ” *The Morning Chronicle*, February 13, 1821.
- <sup>54</sup> “Law Intelligence,” *The Morning Chronicle*, February 26, 1821.
- <sup>55</sup> A biography of Elliston contains a deposition testifying that Glossop and his “playwright,” Meddox, had transcribed the entire dialogue during a performance. George Raymond, *Memoirs of Robert William Elliston, Comedian*, 2nd ed., Vol. 2 (London: John Ollivier, 1846), 257-258.
- <sup>56</sup> “Law Intelligence,” *The Morning Chronicle*, February 26, 1821.
- <sup>57</sup> Judith Milhous, “Company Management” in *The London Theatre World, 1660-1800*, ed. Robert D. Hume (Carbondale: Southern Illinois University Press, 1980), 5.
- <sup>58</sup> See the discussion in Raymond, *Memoirs of Elliston*, 2, 287-298.
- <sup>59</sup> Lord Byron, *Marino Faliero, Doge of Venice* (London: John Murray, 1821), xvii-xviii.
- <sup>60</sup> Byron, *Life, Letters, and Journals of Lord Byron*, 477.
- <sup>61</sup> *Ibid.*, 493.
- <sup>62</sup> James Winston, *Drury Lane Journal: Selections from James Wintson’s Diaries, 1819-1827*, ed. Alfred L. Nelson and Gilbert B. Cross (London: The Society for Theatre Research, 1974), 29.
- <sup>63</sup> “Drury-Lane Theatre,” *The Times*, April 26, 1821.
- <sup>64</sup> “Drury-Lane Theatre,” *Caledonian Mercury*, April 30, 1821.
- <sup>65</sup> “Theatre,” *The Morning Post*, April 26, 1821.
- <sup>66</sup> “Drury-Lane Theatre,” *Caledonian Mercury*, April 30, 1821.
- <sup>67</sup> “Theatre,” *The Morning Post*, April 26, 1821.
- <sup>68</sup> On the strict point of the legality of Elliston’s production, the lawyers cited the cases discussed above (*Macklin, Coleman*), as well as *Morris v. Kemble* and a suit by the senior Charles Mathews in the *Macklin* line, *Mathews v. Duncombe* (Chancery 1819).
- <sup>69</sup> “Mr Elliston for the Representation of *Marino Faliero*,” in *The Edinburgh Annual Register*, ed. Sir Walter Scott (1821), 78.
- <sup>70</sup> *Ibid.*, 79.
- <sup>71</sup> *Ibid.*, 78.
- <sup>72</sup> *Ibid.*, 79.
- <sup>73</sup> *Murray v. Elliston*, 106 Eng. Rep. 1331 (King’s Bench 1822), 1331.
- <sup>74</sup> “Mr Elliston for the Representation of *Marino Faliero*,” 79.
- <sup>75</sup> *Ibid.*, 80.
- <sup>76</sup> The Chancellor appears to have continued the injunction, but on the understanding that Murray would permit performances, given that Elliston had gone to great expense preparing the

production. Elliston, however, was asked to swear that he had not seen the play's text prior to its publication. The archive reveals that Elliston swore falsely. He informed Winston in early April that he had "a copy & most of the parts are in a forward state." Elliston later sent Winston detailed instructions on how to make the copy for the censor look as though Elliston's edits had been made to an edition purchased from Murray's bookshop. Robert Elliston to James Winston, April 11 and 18, 1821, Robert W. Elliston Papers, Harvard Theatre Collection/Houghton Library, vol. 3.

<sup>77</sup> *Murray v. Elliston* (1822), 1332.

<sup>78</sup> *Ibid.*

<sup>79</sup> "Law Intelligence," *The Morning Chronicle*, February 26, 1821.

<sup>80</sup> Winston, *Drury Lane Journal*, 25.

<sup>81</sup> "The King's Visit to Drury-Lane Theatre," *The Morning Post*, May 10, 1821.

<sup>82</sup> "Winston, Esq. v. Glossop, Esq.," *The Morning Post*, 17 December, 1821.

<sup>83</sup> Byron, *Marino Faliero, Doge of Venice*, xvii.

<sup>84</sup> *Ibid.*, xviii.

<sup>85</sup> *Ibid.*, xix.

<sup>86</sup> *Ibid.*, xviii.

<sup>87</sup> Byron, *Marino Faliero, Doge of Venice*, xix.

<sup>88</sup> David V. Erdman, "Byron's Stage Fright: The History of his Ambition and Fear of Writing for the Stage," *English Literary History* 6, no. 3 (1939).

<sup>89</sup> Thomas Ashton, "The Censorship of Byron's 'Marino Faliero'," *Huntington Library Quarterly* 36, no. 1 (1972), 38. Ashton expands on connections between the play and recent political controversies in "'Marino Faliero': Byron's 'Poetry of Politics,'" *Studies in Romanticism* 13, no. 1 (Winter, 1974).

<sup>90</sup> Michael Simpson, *Closet Performances: Political Exhibition and Prohibition in the Dramas of Byron and Shelley* (Stanford: Stanford University Press, 1998), 173.

<sup>91</sup> *Ibid.*, 182.

<sup>92</sup> "The Queen," *The Morning Post*, May 15, 1821.

<sup>93</sup> Worrall, *Theatric Revolution*, 199-214.

<sup>94</sup> Raymond, *Memoirs of Elliston*, 2, 298-301.

<sup>95</sup> Worrall, *Theatric Revolution*, 201.

<sup>96</sup> An Act to amend the representation of the people in England and Wales, 1832, 2 William IV, c. 45 (1832). For an expansion of this argument, see Davis, *Economics of the British Stage*, 35-38.

<sup>97</sup> On early US copyright history see Patterson, *Copyright in Historical Perspective*. The relevant statute in this suit was An Act to amend several acts respecting copy rights, 4 Stat. 436 (1831).

<sup>98</sup> "Chatham Theatre," *New York Herald*, November 17, 1840.

<sup>99</sup> T. Allston Brown, *A History of the New York Stage: From the First Performance in 1732 to 1901*, Vol. 1 (New York: Dodd, Mead and Company, 1903), 119.

<sup>100</sup> "Chatham Theatre," *New York Herald*, August 4, 1841.

<sup>101</sup> "Chatham Theatre - Almost a Row," *New York Herald*, August 17, 1841, Brown, *A History of the New York Stage*, 1, 115.

<sup>102</sup> *Jones v. Thorne*, 1 N. Y. Leg. Obs. 408 (New York Chancery 1843).

<sup>103</sup> See Jessica Litman, “The Invention of Common Law Play Right,” *Berkeley Technology Law Journal* 25 (2010).

<sup>104</sup> “Theatricals,” *New York Herald*, August 21, 1841.

<sup>105</sup> “Chatham Theatre - Almost a Row,” *New York Herald*, August 17, 1841.

<sup>106</sup> Charles R. Thorne, “Chatham Theatre - A Card,” *The New York Herald*, August 18, 1841.

<sup>107</sup> “Chatham and Bowery Theatres,” *New York Herald*, August 28, 1841.

<sup>108</sup> “Chatham Theatre,” *New York Herald*, August 4, 1841.