Introduction

Copyright, Commodification, and Performance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Economic and Other Values

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

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

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

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

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

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

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

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

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

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

[14] Ibid., p. 314.
[15] Regenia Gagnier has drawn attention to the historical confluence of the marginal economic revolution and the rise of aestheticism, both of which discarded normativity in favor of formalism. See Regenia Gagnier, "On the Insatiability of Human Wants: Economic and Aesthetic Man," *Victorian Studies* 36, no. 2 (1993).
[16] Michael Hutter and David Throsby, "Value and Valuation in Art and Culture: Introduction and Overview" in *Beyond Price: Value in Culture, Economics, and the Arts* (Cambridge: Cambridge University Press, 2008), p. 2.

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

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

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

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

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

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

Copyright History: From Laboring Authors to Valuable Commodities

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

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

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

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