In the nineteenth century, copyright law expanded to include performances of theatrical and musical works. These laws transformed how people made and consumed performances. Exploring precedent-setting litigation on both sides of the Atlantic, this book traces how courts developed definitions of theater and music to suit new performance rights laws. From Gilbert and Sullivan battling to protect *The Mikado* to Augustin Daly petitioning to control his spectacular “railroad scene,” artists worked with courts to refine vague legal language into clear, functional theories of drama, music, and performance. Through cases that ensnared figures including Lord Byron, Laura Keene, and Dion Boucicault, this book discovers how the law theorized central aspects of performance including embodiment, affect, audience response, and the relationship between scripts and performances. This history reveals how the advent of performance rights reshaped how we value performance both as an artistic medium and as property.

**Derek Miller** is John L. Loeb Associate Professor of the Humanities at Harvard University.
THEATRE AND PERFORMANCE THEORY

SERIES EDITOR
Tracy C. Davis  Northwestern University

Each volume in the Theatre and Performance Theory series introduces a key issue about theatre’s role in culture. Specially written for students and a wide readership, each book uses case studies to guide readers into today’s pressing debates in theatre and performance studies. Topics include contemporary theatrical practices; historiography; interdisciplinary approaches to making theatre; and the choices and consequences of how theatre is studied; among other areas of investigation.

BOOKS IN THE SERIES

JACKY BRATTON, New Readings in Theatre History
TRACY C. DAVIS AND THOMAS POSTLEWAIT (EDS.), Theatricality
SHANNON JACKSON, Professing Performance: Theatre in the Academy from Philology to Performativity
RIC KNOWLES, Reading the Material Theatre
NICHOLAS RIDOUT, Stage Fright, Animals, and Other Theatrical Problems
D. SOYINI MADISON, Acts of Activism: Human Rights as Radical Performance
DEREK MILLER, Copyright and the Value of Performance, 1770–1911
Copyright and the Value of Performance, 1770–1911

Derek Miller

Harvard University
Contents

Acknowledgments                                 page vii

Introduction: Copyright, Commodification, and Performance  1

1 Performance’s Valuable Propriety, 1770–1833  29

2 Ontologies of the Performance-Commodity, 1833–1886  66

3 Audiences, Actors, and Value, 1852–1911  122

4 The Performance-Commodity at Work, 1833–1911  175

Epilogue: Valuing Performance Today  236

Appendix: Timeline of Major Legislation and Litigation Affecting Performance Rights  253

Works Cited  257

Index  269
Acknowledgments

This book would not have been possible without immense support, professional and personal, from many people and institutions. Thanks begin at Stanford University, where this project appeared in its earliest iterations. Alice Rayner, Leslie Hill, Karol Berger, and Paul Goldstein read and offered advice with exceptional generosity. Faculty, graduate students, and staff in Theater and Performance Studies and in Music all lent their support at various stages. Some of those owed particular gratitude include Harry Elam, Tom Grey, Branislav Jakovljevic, Peggy Phelan, Rush Rehm, Lisa Surwillo, Sebastian Calderon-Bentin, Jessica Nakamura, Isaiah Wooden, Doug Jones, Lindsay Mantoan, Rachel Anderson-Rabern, and Ciara Murphy. A Stanford Interdisciplinary Graduate Fellowship made possible much of the book’s research. Other early funding came from the Stanford Research Opportunity Grant in Modern British History and Culture and a Littleton-Griswold Grant for Research in US Legal History from the American Historical Association.

At Harvard, I am grateful for advice and support from a similarly wide array of colleagues, including Robin Bernstein, Amanda Claybaugh, Daniel Donoghue, Jim Engell, Marjorie Garber, Ju Yun Kim, Deidre Lynch, Sam Marks, Mark Poirier, Martin Puchner, Elaine Scarry, Marc Shell, James Simpson, Andrew Warren, and Nicholas Watson. Staff in English and in Theater, Dance, & Media made teaching and research possible during the latter stages of writing, with particular thanks to Anna McDonald, Lauren Bimmel, Henry Vega-Ortiz, Sol Kim-Bentley, Deborah Foster, and Emily Warshaw.

While the pages that follow document written scholarship that has inspired and informed my own, I have also benefited tremendously from individual conversations and from sharing conference panels with many scholars working on theater and music and in legal history. My gratitude to Isabella Alexander, Phil Auslander, Chris Balme, Henry Bial, Oren Bracha, Joseph Donohue, Kate Elswit, Catherine Fisk, Oliver Gerland, Tomás Gómez-Arostegui, Chris Grobe, Melissa Homestead, Anthea Kraut, Nic Leonhardt, Jessica Litman, Cary Mazer, Meredith McGill,
viii  Acknowledgments

Heather Nathans, Paul Saint-Amour, Brent Salter, Nora Slonimsky, Simon Stern, and Steven Wilf.

Archivists provided essential advice and access to materials at many sites. These include: Beinecke Library at Yale, British Library, Folger Library, Harvard Theatre Collection, Huntington Library, Library of Congress, Morgan Library, National Archives (UK), National Archives and Records Administration (Boston, New York, Philadelphia, San Francisco), Templeton Library at the University of Kent, and the Victoria and Albert Museum. Portions of this book were presented at conferences of the American Musicological Society, the American Society for Theatre Research, the Association for Theatre in Higher Education, C19: The Society of Nineteenth-Century Americanists, the International Society for Music Librarians, the Law and Humanities Junior Scholar Workshop, Law and Society, Performance Studies international, and at the Princeton American Studies Graduate Conference. Part of Chapter 4 appeared as “Performative Performances: A History and Theory of the ‘Copyright Performance,’” Theatre Journal 64, no. 2 (2012): 161–77, under the encouraging editorship of Penny Farfan.

Tracy Davis, the series editor, has been an essential reader of this project; I am supremely fortunate to have had her deep knowledge on which to draw and her support on which to depend. I owe her a huge debt of gratitude. Kate Brett has patiently urged the book into production, along with her excellent staff at Cambridge University Press. The index was produced with speed and elegance by Paula Clarke Bain.

Throughout the years I have been working on this book, friends and family have provided essential joys. Linda and Bill Green and Martine and Terry Morris offered housing, food, and company on long research trips. I am always grateful for the friendship of Sari Altschuler and Chris Parsons, Martina Castro, Allison Crow and Kim Abrams, Devah Pager and Mike Shohl, Anthony Ramirez, and Tom White and Christina Nguyen. Thanks to my sister and brother-in-law, Alexis Miller and Eric Simanek, and to the Peppers and Farbers of North Carolina who provided familial cheer (and eventually cat- and childcare) over these many years. My parents, Deborah Kahn and Harris Miller, first introduced me to the theater and to music, and set me on this long path, which they have supported unfailingly along the way. This book would not exist without them. Finally, resisting years of precedent, my wife Hannah Farber typed none of this book. I suppose she was too busy with her own brilliant scholarship and teaching and helping to nurture our joint projects, Hiram and Rina. The love and support of all three is, truly, invaluable.