

Abstract of “A Pre-History of Performing Rights in Anglo-American Copyright Law”

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Statutes creating performing rights--the subset of copyright that secures the right to perform a work--first appeared in the United Kingdom in 1833, and in the United States in 1856. As I explore in the larger project of which this paper forms a part, during the decades that followed these laws' passage, jurists and theater-makers defined performance as a marketable commodity, what I call the performance-commodity. They did so by negotiating between performance's aesthetic value and its economic value. This commodity-centered approach was absent from most copyright lawsuits about performance before 1833 and 1856 because jurists and litigants did not conceive performance's value primarily in terms of an artistic and economic marketplace. Rather, as this paper argues, parties to pre-performing rights suits concerned themselves with other values surrounding theatrical performances, including the utility of manuscript plays, social status, and political power.

In many ways, theater was property well before performing rights laws appeared. As the first section of this paper notes, during the Early Modern period, theater companies performed, adapted, and revised their repertory to suit their needs. To own a play meant to use a play in performance. When British theaters reopened during the Restoration, the monarchy restricted the right to perform to two theaters in London and Westminster, the so-called patent theaters of Drury Lane and Covent Garden. This duopoly encouraged a limited view of theater's value, with the most valuable properties being the theatrical patents, rather than any individual play. Thus, even as books became alienable commodities in the eighteenth century, the value of which existed in exchange, plays--and the right to perform them--remained tied to alternative value systems.

Reading three pre-performing rights suits about theater, I demonstrate how these lawsuits contest not the economic and aesthetic value of performance as a commodity, but rather theater's value as a physical object, a social product, and a political force. The first case, *Macklin v. Richardson* (1770), involved the actor Charles Macklin and his play *Love à la Mode*, which Richardson had printed, without authorization, from notes taken during a performance. Macklin's claims rested on a conception of the play as valuable primarily to himself as a star performer. The suit thus rested on the legal status of Macklin's manuscript, and his rights to keep the text out of print, rather than on the problematic value of performance. In *Coleman v. Wathen* (1793), performance similarly disappears from consideration, this time supplanted by the question of personal honor. I argue that the plaintiff, by pursuing an action for the penalty rather than an injunction, failed to conceive of his play as a commodity in a market. Coleman regarded the defendant primarily as having violated social norms and having offended Coleman's honor, for which the legal penalty would make proper amends. The final lawsuit reveals the close entanglement of theater and politics. Purportedly, *Murray v. Elliston* (1821) hinged on Lord Byron's right to forbid performances of his closet drama *Marino Faliero*. By situating that lawsuit within the contemporary political climate, and, in particular, in relation to recent battles over the patent theater duopoly, I offer a political reading of *Murray*. In staging Byron's play at Drury Lane, Robert Elliston converted the radical drama into an affirmation of the monarch's authority and a demonstration of the patent theater's ability to serve that authority.

I close with a discussion of a pre-performing rights lawsuit in the United States where, unlike in England, a competitively commercial mentality was emerging in the theater. In *Jones v. Thorne* (1843), commentaries on the lawsuit attend to the intersection of commercial and artistic concerns in a commodified performance. This pattern, in which defining performance for purchase and sale in the market necessarily provoked questions about performance's aesthetic ontology, would define performing rights litigation after the passage of performing rights statutes.

The remainder of this project takes up where this paper leaves off, exploring the development of the performance-commodity in that later period. Close readings of litigation, newspaper reports, legal treatises, and business and legal correspondence reveal how the problem of performance's legal (and, by way of the law, economic) ontology seeped into the period's artistic debates. For example, I read the affirmation of a performing right in melodramatic spectacle (*Daly v. Palmer* (1868)) as an endorsement of human presence over technological reproduction. And Gilbert & Sullivan's copyright troubles in the United States underlined Sullivan's anxiety about his music's subservience to Gilbert's libretti. Along the way, I trace the institution of the "copyright performance" in the United Kingdom, a performance genre meant to secure performing rights for unprinted or foreign-premiered plays that, in its pursuit of legal efficacy, became a theatrical nullity. I also interrogate the problem of adaptation and translation, whether across borders or between genres, and how such translations provoked theories about national identities and the relationship between the public and the private sphere. Ultimately, the project argues that copyright law is a form of criticism, and that legal theories of art contribute not only to how artists buy and sell their art, but also how they conceive of and make their work.