

A COPYRIGHT LAW FOR A SOCIAL SPECIES

Robert E. Suggs*

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***Robert E. Suggs
Professor of Law
University of Maryland School of Law
500 West Baltimore St.
Baltimore, MD 21201
410/706-2937
rsuggs@law.umaryland.edu***

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INTRODUCTION

Virtual reality is no substitute for the real thing. Two separated lovers might wonder how their counterparts coped a century ago without cell phones, Twitter, Facebook, email, and Skype, but not even the most avid “early adopters” would willingly substitute an Internet experience for a lover’s physical presence. Humans are social animals, and this is so fundamental to our nature that we often overlook it. While the death penalty is controversial – but still imposed by a large number of state and federal statutes – life in solitary confinement is so barbaric a punishment that it has never been seriously considered for even the most heinous crime.¹ It is a fate worse than death. A meaningful life requires human society. Expressive culture,² the phenomenon that centrally concerns copyright, uniquely facilitates the human interactions that sustain our social lives. It may have even developed for this purpose. Yet almost imperceptibly we have tolerated, even embraced, technologies that eliminate human interaction from our cultural lives.

Until quite recently bands played music so listeners could dance, and we had no other way to hear music except by live performance. Live theater, vaudeville, and burlesque provided the only means to experience comedy and dramas. A century ago expressive culture (music,

¹ I exclude from this categorical assertion solitary confinement imposed on prisoners (typically the most dangerous ones) as sanctions for crimes committed after incarceration. I have been unable to find a provision in any jurisdiction, domestic or foreign, that provides for a life sentence in solitary confinement for crimes committed outside of prison. Any regime that would impose such a barbarity is probably so nonchalant in complying with its own laws that it would feel no need to formalize such a practice when adopted.

² Throughout this Article I will use the term “expressive culture” or “expressive works” for lack of a better term. The “arts” encompasses too little, failing to unambiguously include history and other factual narratives, like religious or patriotic texts that contain much social meaning. The term “culture” without modifiers is too broad, because it encompasses the material world of housing, clothing, and food, as well as social manners and customs that are not authored in any meaningful sense. In a different context too broad for my purposes, Susan Scafidi uses the term “cultural products” to encompass “cuisine, dress, music, dance, folklore, handicrafts, images, healing arts, rituals, performances, natural resources, or language . . .” SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW, at ix (2005). Her choice “emphasizes the ongoing nature of the products’ creation and the often controversial but significant role of the market in their life cycles.” *Id.* at x. Siva Vaidhyanathan uses the term “expressive culture” but does not define it. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 4 (2001).

drama, narratives, and images) was a social experience.³ Live actors and musicians performed before live audiences. Storytellers transmitted an oral culture to entertain and entrance social gatherings. Paintings were hung and statues were sited in public spaces where they were seen by groups gathered together for some common purpose. Ceremonies and rituals were celebrated and performed in the cathedrals of great cities and in remote villages.⁴ Until the recent achievement of nearly universal adult literacy, even reading was a social activity. In earlier times, the literate few read out loud to assembled congregants or in family, social, or communal settings.⁵ Only with the invention of recording and playback technologies over the past one hundred years, which enabled the storage and replay in private of aural and visual performances,⁶ did we lose the social dimension to these experiences. Playback technologies have gradually changed the communal, social experience of “live” expressive culture into the private, often solitary, perception of recorded media. What was once experienced only “live” and communally is now experienced that way only on special occasions.

Just as processed food with its shorter preparation times and longer shelf life is more convenient than fresh food, playback technologies allow us to experience expressive culture at more convenient times and places than live performance. But, just as nutrients are lost when the food industry transforms whole grains and fresh fruits and vegetables into convenience foods (and nutritionists still have only limited understanding of what is lost), something vital disappears from our culture when technology eliminates the human interaction between

³ I use the term “socially experienced” in this Article to designate group or communal experiences (as in an audience or some other collective) in contrast to private or autonomous experiences.

⁴ While these examples and many others are drawn from Western culture or history, the analysis is not culturally specific. It is just that Western culture and history is more familiar and accessible to the author and presumably to most readers in the American legal academy.

⁵ See *infra* notes 26-28 and accompanying text.

⁶ See, e.g., MARK KATZ, CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 6-7 (rev. ed. 2010). Katz discusses “sound-recording technology” beginning with the phonograph, in which people for the first time “could listen to the same pieces over and again without change. And *they* ultimately decided what they were to hear, and when, where, and with whom.” *Id.* at 12.

performer and audience. And we have been missing it for so long that its absence has become normal. Even so, does it matter?

The answer to this fundamental question depends upon the purposes served by expressive culture. If, as some believe, expressive culture arose as merely pleasurable byproducts of neural networks that evolved for other purposes,⁷ then it probably does not matter. Others argue⁸ that our cognitive capacity both to create and experience art evolved because this trait strengthened social bonds, conferring advantages in domains from reproduction to military defense. The disciplines most concerned with investigating these phenomena, anthropology and psychology, have reached no consensus on this question. They do agree that the skills necessary to create and maintain expressive culture are costly.⁹ Even today in our affluent societies with our devotion to self-improvement, few can play musical instruments, dance, draw, or tell stories well enough to entertain or amuse others. In the ancestral hunting and gathering bands in which humankind evolved, subsistence was marginal and physical survival always tenuous, yet wherever humans

⁷ See STEVEN PINKER, *HOW THE MIND WORKS* 521-65 (1997).

⁸ See, e.g., ROBIN DUNBAR, *GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE* 146 (1996) (suggesting that song and dance help to keep large groups that “emerging humans needed for their survival” from fragmenting); *id.* at 182 (citing cognitive scientist Geoff Miller for the suggestion that artistic skills evolved to charm and hold on to prospective mates); DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* 241-61 (2006). See also Geoffrey Miller, *Evolution of Human Music Through Sexual Selection*, in *THE ORIGINS OF MUSIC* 329, 329-30 (Nils L. Wallin et al. eds., 2000) (regarding Darwin’s original idea that human music evolved as a courtship display to attract sexual mates much as did birdsong); *id.* at 329-60 (assigning a biological role to music or to both music and dance); Ellen Dissanayake, *Antecedents of the Temporal Arts in Early Mother-Infant Interaction*, in *ORIGINS*, *supra*, at 389, 389 (suggesting that the biological origins of music did not result from competition or courtship but from the “affiliative interactions between mothers and infants”); Walter Freeman, *A Neurobiological Role of Music in Social Bonding*, in *ORIGINS*, *supra*, at 411, 419-20. Freeman writes:

There is no reason to doubt that [music and dance] give great pleasure and catharsis to those caught up in the communal spirit of the events What is at issue is the extent to which feelings of bonding and formation of a neural basis for social cooperation might be engendered by the same neurochemical mechanisms that evolved to support sexual reproduction in altricial species like ourselves, and that might mediate religious, political, and social conversions, involving commitment of the self to a person as in transference, fraternity, military group, sports team, corporation, nation, or new deity. The common feature is formation of allegiance and trust.

Id.

⁹ See DUNBAR, *supra* note 8, at 143 (“[S]ong and dance . . . are both very expensive activities to perform.”); PINKER, *supra* note 7, at 522 (“The very uselessness of art that makes it so incomprehensible to evolutionary biology makes it all too comprehensible to economics and social psychology. What better proof that you have money to spare than your being able to spend it on doodads and stunts that don’t fill the belly or keep the rain out but that require precious materials, years of practice, a command of obscure texts, or intimacy with the elite?”).

eked out a living, they still engaged in these costly pursuits.¹⁰ How likely is it that coincidentally all human societies allocated their scarce resources to these activities if they did not enhance their survival?

Too little is known to resolve this question. We cannot conclude with confidence that expressive culture arose only as a fortunate and nonessential byproduct of another adaptive phenomenon and that it has no independent significance. Neither can we safely conclude that it once enhanced survival but no longer does.¹¹ We can only speculate (as I do) that if expressive culture provides major adaptive benefits to human society, then a fundamental change in the way we experience and create it – from communal and live to solitary and recorded – may have serious unanticipated consequences. If subsequent evidence does establish the evolutionary significance of expressive culture, then, as with issues of global warming and human influence on climate, it would be tragic if copyright policy contributed to thwarting its most essential role.

Since we roamed savannahs in ancestral hunting bands, the way we experience and create culturally expressive works has changed greatly. As the scale of human societies has grown, these practices have become far more specialized. Agriculture, cities, long distance trade, and the industrial and information revolutions have tended to make expressive culture more elaborate. But recording and playback technologies¹² in the past one hundred years have worked a more fundamental change than anything before. Technology has divorced human interaction from expressive culture.

¹⁰ See, e.g., STEVEN MITHEN, *THE PREHISTORY OF THE MIND: THE COGNITIVE ORIGINS OF ART, RELIGION AND SCIENCE* 156-57 (1996) (“The archaeological record shows us that Stone Age art is not a product of comfortable circumstances—when people have time on their hands; it was most often created when people were living in conditions of severe stress. The florescence of Palaeolithic art in Europe occurred at a time when environmental conditions were extremely harsh around the height of the last ice age.”).

¹¹ See Brian Leiter & Michael Weisberg, *Why Evolutionary Biology Is (So Far) Irrelevant to Law*, 29 *LAW & PHIL.* 31, 43-44 (2010).

¹² Printed books record narratives; photographs record images; movies, television, and DVDs record dramas and comedies; and several different technologies record music.

The advent of digitalization and the Internet, the technologies that allow us to store cultural works and replay them anytime and anywhere, has further accelerated this change. Together, by permitting nearly costless reproduction and distribution, they pose a major challenge to the copyright regime. These symbiotic technologies have provoked a contentious debate about the need to reconfigure that regime. Much of the academic critique of copyright has focused on the growing proprietization of what originally began as a temporary fourteen year exclusive license limited to any “map, chart, book or books” and applicable only to “printing, reprinting, publishing and vending”¹³ such works.¹⁴ Principal concerns have centered on the ever-lengthening term of copyright,¹⁵ the expanding scope of media covered, as well as the change in 1976 to the automatic grant of copyright upon fixation from the earlier requirement of publication with scrupulous compliance with highly technical notice provisions.¹⁶ While I share these concerns, this existing literature accepts the treatment of expressive culture as primarily an economic phenomenon. In contrast, this article urges that we should view this aspect of human society as predominantly a social phenomenon.

Another body of work, somewhat tangential to discussions of copyright policy but deeply engaged with it, does consider some social aspects of expressive culture, but it focuses on the social potential of a networked cyberspace. It warns that expanded and assertive copyright will

¹³ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). The first statute also provided for a fourteen year renewal term. *Id.*

¹⁴ See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 75-300 (7th ed. 2006); INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006); LAWRENCE LESSIG, FREE CULTURE (2004); JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1 (2005); Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSN'L L. 595 (1996); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

¹⁵ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding parity of increased copyright duration in both future and existing works provided by the 1998 Copyright Term Extension Act that extended term length to “life-plus-70-years” after the author’s death).

¹⁶ See LESSIG, *supra* note 14, at 116-73 (detailing the vast domain of interests protected by copyright law and concluding that “[t]he property right that is copyright has become unbalanced, tilted toward an extreme,” *id.* at 173). Compare 17 U.S.C. § 102, with Copyright Act of 1909 §§ 10, 19.

stifle both the development of new technologies and new social practices.¹⁷ It celebrates the new interactive dynamism of digital networked technology, especially in comparison with the mid-twentieth century's static and passive experience with analogue technologies.¹⁸ From a social perspective, contemporary massive multiplayer online games might create a richer social experience than the passive television watching of a decade or two ago, but neither compares well to an even earlier era's sandlot ball games.

Virtual reality, to the extent its ease and ubiquity threatens to replace physical communion and interaction, represents from the perspective of this paper not an exciting new wonder but a possibly noxious technological hazard. This is not to deny that digital networks enhance workplace productivity and create previously unimaginable information sharing and collaborative work possibilities, but my concern is with human interaction as an evolved biological phenomenon. However rapidly technology advances, the human organism's biologically driven responses evolve at a glacial pace and cannot match the current pace of technological innovation. To the extent that evolved social needs rely upon expressive culture, copyright is one of the most important tools, acting as a sort of automotive transmission, to mediate between the fast-spinning gears of technological change and the creeping changes in the biologically based needs of our social species.

If the technology that now delivers expressive culture also impedes its adaptive purpose by degrading our social experience, then this has occurred at a dangerous time. The past century's rapid urbanization and industrialization has transformed much of the world's culture and separated us from the stable cultures developed over millennia as hunter gatherers, farmers, and herders in small villages and extended family communities. Human societies everywhere

¹⁷ See, e.g., LESSIG, *supra* note 14, at 7-9.

¹⁸ See *id.* at 35-38.

have somehow coped with the psychological and social stresses of such rapid and unprecedented change. Until the most recent era, human societies changed very slowly and incrementally.¹⁹ Almost all the existence of anatomically modern humanity was spent in ancestral hunting and gathering bands.²⁰ Humans had millennia to adjust to the agricultural revolution and its settled patterns of living and attachments to specific territories. We have experienced no evolutionary precedent for the continuous innovations instigated by modern technologies of transportation and communication – for our resulting mobilization into highly specialized and very large work bureaucracies or socio-political organizations like nation states – and the resulting social and psychological stresses created. These developments in our society, family relationships, and social roles have occurred over mere decades. The rapid pace of such changes is evolutionarily unprecedented, and we have only our culture, especially expressive culture, to help us cope and maintain social cohesion. To alter fundamentally the social environment in which we humans both create and experience expressive culture probably poses unknown but significant risks. Copyright policy has failed to consider this aspect, but despite this neglect it nevertheless continues to shape the way we create and experience our culture.

To discuss copyright reform without some consideration of the possible evolutionarily adaptive purposes served by humankind's universal commitment to the creation and experience of culturally expressive works leaves that discussion incomplete. Clear proof of an adaptive purpose is lacking, but even assuming that the contrary is ultimately shown, the changes in the way we experience our culture have been too momentous to allow them to pass without remark or discussion. Technology has fundamentally altered our perception and experience of expressive culture, and the implications for the legal doctrines of copyright come naturally

¹⁹ See, e.g., DUNBAR, *supra* note 8, at 69-70.

²⁰ *Id.*

within that discussion. This paper attempts to start that project.

A. Playback Technologies and the Social Experience

Various recording technologies, most obviously those used to record and play back music, but also some less obvious ones, have eliminated much of the social experience of our expressive culture. These technologies have made live performance, previously a dynamic social interaction between performer and audience, and among performers and individual audience members, an increasingly rare event. Until the beginning of the twentieth century, expressive culture necessarily entailed a social experience. Now it rarely does.

1. *Cheap Books and Mass Literacy.* – Playback technology originated with the printing press.²¹ Earlier, from Homer to anonymous griots, storytellers with prodigious memories performed oral narratives of folk tales, epic poems, and creation myths.²² Oral narratives necessarily were performed within a social context of at least two people, a narrator and a listener, and more typically involved a larger number of listeners.²³ Printing allowed their replacement by books, a relatively cheap, portable device, immune to memory lapses, disease and old age, which could be reproduced in practically infinite copies, could travel anywhere, and could simultaneously reproduce their contents all over the world. Rather than experiencing narratives in a communal setting with others eager to listen, books allowed literate individuals to

²¹ Holographic manuscripts did not constitute a playback technology because writing alone did not create a technology of reproduction in multiple copies with declining marginal costs. Holographic manuscripts were too few and too laborious to produce. See Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1, 3-10 (detailing the “slow, tedious, and very time-consuming” history of book copying before the invention of the printing press). Cambridge University, founded in 1209, see *800th Anniversary*, UNIVERSITY OF CAMBRIDGE, <http://www.800.cam.ac.uk/page/168/800-years-of-history.htm> (last visited Aug. 30, 2011), had only 122 books in 1424, when it was already two centuries old. Yu, *supra*, at 7. It took another half century to reach 330 books. *Id.*

²² See, e.g., Walter J. Ong, *From Mimesis to Irony: The Distancing of Voice*, BULL. MIDWEST LANGUAGE ASS’N, Spring-Autumn 1976, at 1, 4; see also JOHN D. NILES, HOMO NARRANS: THE POETICS AND ANTHROPOLOGY OF ORAL LITERATURE 1-32 (1999) (centering his study of storytelling around his theme that “oral narrative is and for a long time has been the chief basis of culture itself”).

²³ See Ong, *supra* note 22, at 4, 9 (emphasizing the participatory and integrative nature of public oral performance).

experience narratives at their own convenience, as solitary individuals, and for those with access to modern libraries, in far greater number and variety than even a collection of storytellers could ever muster. Weighed against these advantages is what was lost – the interactive conversation with and among the storyteller’s audience.

Before the advent of mass literacy in the nineteenth century,²⁴ reading could be a solitary experience for only the literate few. Even among the literate, the small number of available books meant that readers could discuss what they had read with the assurance that others were familiar with the same works.²⁵ With the current proliferation of choices, we need structured reading groups to assure by explicit commitments that we will have read works in common.

Until nearly one thousand years ago (at least as far as the Western experience is concerned) the social experience of text had not changed since the classical era, and then a minor departure occurred. It began with the innovative practice of silent reading.²⁶ Until then, to read, even when alone, was to sound out loud the text,²⁷ preserving both the oral tradition and at least a vestige of the social experience of the work. Words as text alone did not exist without their sounds. Those few who were literate read aloud to those who were not; and until quite recently reading aloud was a common form of entertainment,²⁸ and dramatic readings were a significant

²⁴ See, e.g., Carl F. Kaestle, *The History of Literacy and the History of Readers*, 12 REV. RES. EDUC. 11, 20 (1985) (noting that “[b]etween 1600 and 1900 the countries of Western Europe moved from restricted literacy to mass literacy, with immense consequences for education, social relations, and communications”).

²⁵ For an example of the small size of even university libraries during the Middle Ages, see Yu, *supra* note 21, at 7.

²⁶ See ALBERTO MANGUEL, *A HISTORY OF READING* (1996). In a discussion of St. Augustine and reading, Manguel concludes that “[t]he implication is that this method of reading, this silent perusing of the page, was in his time something out of the ordinary, and that normal reading was performed out loud. Even though instances of silent reading can be traced to earlier dates, not until the tenth century does this manner of reading become usual in the West.” *Id.* at 43 (citing previous scholarship on this point). The main text devotes several pages to this general theme of the evolution of silent reading and the tension between marks on a page and their sounds as spoken. See *id.* at 41-53. I thank the good fortune of a serendipitous encounter with a former colleague, David Luban, for the discovery of this source.

²⁷ *Id.* at 45 (“Written words, from the days of the first Sumerian tablets, were meant to be pronounced out loud, since the signs carried implicit, as if it were their soul, a particular sound.”).

²⁸ See, e.g., STEVEN ROGER FISCHER, *A HISTORY OF READING 274-75* (2003).

leisure activity even among the literate.²⁹ The subsequent development of printing then combined with the practice of silent reading produced the first of the “playback technologies” that stripped social experience from the experience of cultural works.

2. *Images.* – Even after printing and mass literacy developed and greatly reduced the social experience of narratives, we still experienced other types of cultural works collectively. For a time, we could only produce drama and music and dance in groups, and without storage media, we could only experience them in live performance, but purely visual works, especially static images, were soon revolutionized by technologies of reproduction.

Visual works, within the Western tradition, were experienced in a social environment within public spaces, whether pagan temples or Christian cathedrals, the public rooms of palaces of kings and princes, or the public squares of the towns. In the European tradition these media trace their origins back to the religious artifacts and images used in the rituals of the medieval church.³⁰ Images, whether two dimensional stained glass windows and painted frescos, or three dimensional statues carved in wood and stone, illustrated religious stories and Biblical parables and served as backgrounds and provided context and subject matter for sermons and homilies.³¹

²⁹ *See id.* at 275 (“Authors’ public readings of their works flourished in the nineteenth century to a degree that had not been experienced in Western Europe for nearly two thousand years.”).

³⁰ Michael Camille, *Seeing and Reading: Some Visual Implications of Medieval Literacy and Illiteracy*, ART HIST., Mar. 1985, at 26.

This group before the mosaic, wall painting or stained glass would have perceived these works of art, not in terms of individual response, but as a choric or mass one. . . . Reading in the medieval world was often, as Susan Noakes has shown, “a community experience in which the interpretation of the text any single listener or reader developed was the product, not of his understanding of the text alone, but of a combination of questions and insights supplied by others.”

Id. at 32-33 (citing S. Noakes, *The Fifteen Oes, the Disticha Catonis, Marculfius and Dick, Jane, and Sally*, U. CHI. LIBR. SOC’Y BULL., Winter 1977, at 2, 10-11.)

³¹ James H. Marrow, *Symbol and Meaning in Northern European Art of the Late Middle Ages and the Early Renaissance*, 16 SIMIOLUS: NETHERLANDS Q. FOR HIST. ART, 150-69 (1986) (“A central task for artists during the high and late middle ages was to provide works of art that functioned in or in association with diverse aspects of the cult, and that were to convey information from the teachings of the church [A]rtistic production continued to be dominated by works for use in conjunction with the cult or liturgy, or with other traditional devotional practices”).

One can easily imagine new paintings as the prized new possessions of congregations and the frequent subject of conversations among congregants. Adults might explain them to children, or among themselves children might make their own sense of new and stimulating images.

With the consolidation of temporal power by monarchs and princes in the precursors of European nation states, rulers displayed their images in public squares and palaces to demonstrate their grandeur and fitness to reign.³² Paintings and sculptures in town halls and squares solidified the power of local notables.³³ Rulers commissioned art, not for private aesthetic consumption, but for this instrumental purpose. These were not like the anonymous portraits that fill our contemporary museums, divorced from context and distant in time or place. These images were of people important to the world of the audience viewing them;³⁴ feckless princes, brave commanders, or cruel and arbitrary nobles known to their viewers from their personal experience of military campaigns or taxes to sustain grand palaces. Viewers probably gossiped about whether idealized likenesses captured the true personality; emotions, from scorn to ridicule to admiration, would have fueled their discussions. In the public environments of cathedrals and palaces in which these works were displayed and absorbed, consumption was social or communal. It was felt, like architecture, as much as seen.

Only after the Renaissance did the subject matter of the arts embrace the images and domains of ordinary people.³⁵ If our public spaces were filled with images of hereditary

³² See, e.g., GABRIELLE LANGDON, *MEDICI WOMEN: PORTRAITS OF POWER, LOVE, AND BETRAYAL FROM THE COURT OF DUKE COSIMO I* 7-8 (2006) (describing Cosimo de' Medici's control of imagery from his court and its influence in supporting his creation of dynastic rule in Florence); Kurt Bauch, *Portraiture: The European West. The Middle Ages*, in 11 *ENCYCLOPEDIA OF WORLD ART* 483, 483-84 (Institute for Cultural Collaboration ed., 1966) (noting the prominent display of images of "secular and religious princes"); Martha Wolff, *The Bourbons and the Bourbonnais*, in *KINGS, QUEENS, AND COURTIERS: ART IN RENAISSANCE FRANCE* 122 (Martha Wolff ed., 2011).

³³ See, e.g., Bauch, *supra* note 32, at 484; Eugenio Battisti, *Portraiture: Renaissance to 20th Century*, in 11 *ENCYCLOPEDIA OF WORLD ART*, *supra* note 32, at 487, 488.

³⁴ Battisti, *supra* note 33, at 488-89.

³⁵ Margaret A. Sullivan, *Bruegel the Elder, Pieter Aertsen, and the Beginnings of Genre*, 93 *ART BULL.* 127, 127 (2011).

officeholders, whose decisions affected our families and fortunes over generations, our responses might differ from both the hushed reverence with which we browse museum collections and the tepid comments we make about our friends' choices in coordinating paintings with throw pillows. Instead, graffiti – perhaps often obscene – might best capture our sentiments for such public images, which itself initiates a social conversation with subsequent viewers.

In the mid-nineteenth century the invention of photography changed image making from a lengthy, highly skilled process, like drawing, print making, or painting, which can take hours or even months, to a practically instantaneous one. Early photography, though time consuming, laborious, and skilled compared to current technology, was infinitely faster and required far less skill than the drawing and painting it replaced. Great photography may require great skill, but producing a recognizable image does not. In comparison, drawing or painting a recognizable portrait is a virtuosic performance. Both drawing and painting provide plenty of time for relationships to develop between author and subject or with others visiting the sitter or the artist. Conversation does not interfere with the process and may even help, but photography allows no time for relationships beyond a cursory introduction, since talking, unless to be reflected in the subject matter, spoils the pose. Modern photography and videography have become so quick and easy that subjects may remain oblivious to the process. To draw or paint a copy of a drawing or painting takes time and considerable skill; in contrast, to make another positive print from a photographic negative can now be automated and requires no human effort. Digital photographic reproduction is accomplished even more easily. Photography transformed image making from a slow relational process in which subject and artist could converse and interact with each other, to a process which reduces the subject to an inanimate object, lacking personality, volition, or attributes beyond the contours of the captured image.

Only the plastic, three dimensional arts have yet to experience a playback technology of instantaneous and inexpensive replication, but change appears imminent. Ordinary consumers lack any digital process to reproduce or send objects over the Internet, but for commercial and industrial users three dimensional reproduction has arrived.³⁶ 3D printers take computer-aided-design (CAD) files, often transmitted over the Internet, and through a process involving sprayed plastic particles and glue or ultra violet light and liquid resin baths, build three dimensional objects layer by layer.³⁷ The current technology takes one to four hours to complete the process and cannot yet make semiconductors, but some models can already use metal powders fused by lasers to make metal parts with strength comparable to metal castings.³⁸ In the near future these machines, by copying each of their parts, may be able to replicate themselves (assembly required).³⁹ In comparatively short order this technology will trickle down to consumers.

3. *Music Recordings.* – The invention of the piano roll at the end of the nineteenth century, followed soon after by the phonograph, changed music from a relational and social experience between performer and audience – and frequently a collective participatory experience – to a solitary one occurring in private spaces.⁴⁰ With headphones and ear buds, music has become a private experience, even in public spaces. And the pace of change continues to accelerate.

The technology that enables us to experience expressive culture as solitary individuals has superseded the social and communal origins of expressive culture. Recording technology has made music a solitary and passive activity for the listener, whether the teenager upstairs

³⁶ See William M. Bulkeley, *3D Printers Reshape World of Copying*, WALL ST. J., Aug. 3, 2006, at B1.

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ In the early years of phonograph ownership, when listeners sought to link their experience with the elite practice of attending live symphony concerts, “programs were often distributed and proper concert decorum was expected.” KATZ, *supra* note 6, at 64-65. Some “home impresarios” even prohibited talking during performances. *Id.* at 65 (citation omitted).

alone in his room, the commuter in his car, or the jogger with her Walkman and now her Ipod. It was not always so:

Brahms and his contemporaries never heard a note of music unless they were in the presence of someone performing it. One of the consequences of this fact . . . was that music-lovers had to seek out music, or make it for themselves. It did not come to them with a press of a button. Music was therefore not just an aural experience, as it has largely become. It was also a matter of physical presence, social interaction, and direct communication between musicians and audience.⁴¹

Live music concerts include the visual dimension, a significant aspect that recordings lack. The development of music videos does not compensate for this loss. Music videos, restricted to only the most heavily marketed pop music, rarely, if ever, show actual live concert performances. Instead, they are miniature films of narratives made to accompany the music. Much of the music marketed with music videos could not physically or sonically be performed live as shown, because the visual special effects, sound manipulation, and multiple locations used as settings require the elaborate production techniques of both film and music studios to create.⁴²

Beyond the visual dimension of live concerts is the dynamic between performers and audience.⁴³ Each responds to the other. Early styles of jazz functioned chiefly as dance music, although even in the absence of dancing, live jazz performances were often longer and featured more solos and improvisation than did recorded works.⁴⁴ Improvised jazz responded to the movements and energy of the dancers, and because improvising performers were unconstrained by the three to four minute maximum that the 78 rpm recording technology allowed, live

⁴¹ ROBERT PHILIP, *PERFORMING MUSIC IN THE AGE OF RECORDING* 4-5 (2004).

⁴² Budgets for the most elaborate music videos can rival those for independently produced feature films. *See, e.g.,* Keith Murphy et al., *Music Videos: What's the Most Expensive Music Video Ever Made?*, VIBE, Mar. 2008 (listing several videos with budgets over two million dollars).

⁴³ Robert Philip argues that the repeatability of recordings causes the loss of the element of surprise in music (and other) performances and makes our experience seem stale. *See* PHILIP, *supra* note 41, at 244-50. Is this not the loss of the "making special" that Dissanayake argues is the impetus and function of art? *See* Ellen Dissanayake, *The Core of Art: Making Special*, J. CAN. ASS'N FOR CURRICULUM STUD., Fall 2003, at 13.

⁴⁴ KATZ, *supra* note 6, at 83.

performances differed substantially from recordings. “[B]ands were unlikely to cut a performance short if they sensed the audience would keep dancing, even if that meant playing for unusually long stretches.”⁴⁵

Social dancing⁴⁶ has at times been an important social activity. “In Chicago alone, in 1911, it was calculated that 86,000 young people attended dancehalls every evening—many more than attended movies or pursued any other forms of recreation.”⁴⁷ Especially on the Mississippi and its tributaries, dancing to live bands on river excursion boats was a major source of entertainment prior to World War II.⁴⁸ Until music recordings became available, social dancing always entailed a live performance by musicians. During the “Swing” era of the 1930s all the major big bands, including those of Ellington, Basie, and Goodman, toured constantly and played for live dancers.⁴⁹ Social dancing is now largely limited to adolescents and young adults at proms, college mixers, and dance clubs. Few involve live music of the highest professional caliber.

During the nineteenth century the relationship between audiences and classical composers differed from those of contemporary composers. Nineteenth century composers

⁴⁵ *Id.*

⁴⁶ Formal dance concerts, such as ballet, were never participatory. Although the dancers perform to live music, audience members play a passive role, and virtually none takes place without public subsidies in one form or another.

⁴⁷ Kathy Ogren, *Nightlife*, in 3 *ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY 1713, 1717* (Mary Kupiec Cayton et al. eds., 1993) (quoting Russell B. Nye, *Saturday Night at the Paradise Ballroom; or, Dance Halls in the Twenties*, 17 *J. POPULAR CULTURE* 14, 15 (1973)).

⁴⁸ See WILLIAM HOWLAND KENNEY, *JAZZ ON THE RIVER* 1-2, 64-87 (2005).

⁴⁹ GARY GIDDINS, *VISIONS OF JAZZ* 157-58 (1998) (“Ellington continued on the road playing one-nighters as he composed and recorded the most extensive body of music ever produced by an American.”). ELIJAH WALD, *HOW THE BEATLES DESTROYED ROCK ‘N’ ROLL* 98 (2009) (“[A]ll the bands played dance music, which meant that their primary duty was to get people out on the floor, not to provide a deeply fulfilling listening experience.”). *Id.* at 103 (“Though by the 1930s some critics were already hailing him [Ellington] as one of America’s finest composers, many of his early masterpieces were written during his orchestra’s five-year residency at Harlem’s Cotton Club, where his job was to provide appropriate music for social dancing and gaudily risqué revues.”).

actively sought to exploit the market for amateur musicians.⁵⁰ Before recordings became available the only music readily available was produced by amateurs performing for their own enjoyment and that of their immediate social circles. “Hayden wrote piano trios for the domestic market. Schumann wrote not only virtuoso works but also albums of pieces ‘For the Young.’”⁵¹ Brahms wrote more than twenty piano duet arrangements of his chamber and orchestral works.⁵² “Little or nothing is written by major classical composers of the present day for ordinary people to play themselves.”⁵³

When conductors premiered works unfamiliar to their audiences, they played them differently, using performance techniques (e.g. exaggerated tempo modifications) that sonically “underlined” significant themes to assist their audiences in following changes of mood in new and unfamiliar works.⁵⁴ Audiences were also more interactive. They “almost always” applauded between movements and even during movements to show even greater appreciation.⁵⁵ They would also insist on encores of favorite movements (since prior to recordings they could not hear it again except in another concert) often even before completion of the entire work, and these were routinely performed.⁵⁶ In modern performances, encores are rare except at the end of a concert.⁵⁷

Even what constitutes a live performance has changed in the past century. Live pop concerts may not be what they seem. Many types of popular music cannot be performed truly live. Ostensibly “live” performances include added recorded elements while performers lip synch because the sound effects that create hits often either cannot be reproduced by live

⁵⁰ See PHILIP, *supra* note 41, at 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 8.

⁵⁴ See *id.* at 11-12.

⁵⁵ *Id.* at 11.

⁵⁶ See *id.* at 10-11.

⁵⁷ *Id.* at 10.

musicians or exceed the technical capabilities of celebrity performers. Acrobatic and exhausting dance routines require that even very talented vocalists lip synch their recordings, because their physical exertions make the breath control achieved in recording studios impossible. Such “live” performances’ rigidly choreographed routines, light shows, pyrotechnic displays, and special effects cannot be varied to respond to the audience’s reception. They cannot maintain a dynamic interchange between performer and audience.

We need to reestablish the bond and communication between performer and audience and among those in the audience. The feedback loop between creator and audience that once was immediate and must have been central to the act of creation is now relegated to a time long after the act of creation, when authors have moved on to other works.⁵⁸ Recording artists spend months sequestered in soundproof studios creating albums. Performers may record their individual contributions in separate studios and transmit them over fiber optic links and never physically meet their co-performers. Living performers perform with dead ones. Natalie Cole recorded a duet with her father, Nat “King” Cole, long after he died.⁵⁹ A recently released album combined the newly recorded big band of Count Basie (twenty-two years after his passing) with the 1973 vocal recording of Ray Charles.⁶⁰ Frequently, only after their albums are finished, reproduced, and marketed do pop musicians go on the road to tour and first perform their new music in front of live audiences. Only then do the critics weigh in with their reviews and the accountants render their verdicts with box office and royalty statements or Nielsen ratings.

4. *Drama, Movies, and DVDs* – Technology has made the most rapid and

⁵⁸ Mariah Carey became a best selling and Grammy award winning singer with virtually no experience performing in front of an audience. See Ann Oldenburg, *Carey’s Fairy Tale: Cinderella Ventures from the Castle*, USA TODAY, Oct. 27, 1993, at 1D.

⁵⁹ NATALIE COLE, *UNFORGETTABLE: WITH LOVE* (Electra/Wea 1991).

⁶⁰ RAY CHARLES & COUNT BASIE ORCHESTRA, *RAY SINGS, BASIE SWINGS* (Concord Records, 2006).

transformative changes to the dramatic form, and these changes have led to the most radical reshaping of our experience of drama. Technology has permitted the creation of new forms that do not just denude drama of social experience, but with film techniques that have no theatrical counterpart, have developed a new medium. Special lenses provide telescopic close ups or panoramic views. Film editing juxtaposes different points of view or flash backs in time. Special effects realistically portray outer space or the interior of the human body. These techniques have created a new medium, but one devoid of human interaction between performers and audience. This new medium quickly dominated the old, and by the mid-twentieth century live theater had virtually succumbed to motion pictures, which itself soon suffered the onslaught of television, whose disaggregated audience formed an even less social medium.

The decline in social experience is continuous and continuing. Theater had both live performers and a congregated live audience. Movies replaced performers with recordings (films) but still provided the experience of a live congregated audience viewing the film together. (Laughter is infectious.)⁶¹ Television broadcasts, except for a brief time during its infancy and except for sports and special events, are recorded. Television compounds the degradation of the social experience by dispersing its audience to the isolation of individual households. Televisions have become so cheap and ubiquitous that few families even watch together anymore.⁶² Instead each family member watches her own set, eliminating a frequent source of sibling conflict, but also discarding the social experience. With multiple televisions in each

⁶¹ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 217 (2000) (“The artifice of canned laughter reflected both the enduring fact that mirth is enhanced by companionship and the novel fact that companionship could now be simulated electronically.”). The aggregated movie audience experience reached its high point in the 1940s when weekly movie attendance peaked at 85 million tickets per week. See Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 *INDUS. & LAB. REL. REV.* 663, 665 (1994). Current movie attendance, with twice the population, is less than one-third that of 60 years ago. In 2008 weekly ticket sales averaged only 26 million. MOTION PICTURE ASS’N OF AMERICA, 2008 THEATRICAL STATISTICS 3 (2008) (citing domestic annual admissions of 1.364 billion).

⁶² See PUTNAM, *supra* note 61, at 224.

household and the increasing number and variety of channels, each viewer can find and watch particularized choices in solitude. Inventions like the videotape player and digital versatile disc (DVD), and services like TIVO, video on demand, and broadband downloads and streaming to computers, have further atomized the audience, disaggregating it in time as well as in space. Dispersed audiences find fewer spontaneous occasions to congregate for postmortem discussions of what they have seen, since network broadcasts no longer synchronize our viewing habits. The hardware itself has begun to limit the social experience of video. A small audience can collect around a television, especially one with a large screen, but how many can comfortably watch the screen of a computer, cell phone, or video Ipod? Private experiences now have largely supplanted social ones for drama, too.

Technology has changed the experience of drama for performers as well. Drama developed from religious pageants, initiation rites, and communal ceremonies as a public, participatory, and collective experience.⁶³ Movie making, for those involved, retains something of a social experience. It requires collaborative contributions from many different people and these often take place during months or weeks “on location” in sequestered and emotionally intense working environments far from the familiar homes and routines of the participants. Such an environment recreates, if only artificially and temporarily, something like the communal and immersive experience of religious and ceremonial ritual in of our ancestral societies. Unfortunately, the technology of filmmaking fundamentally differentiates the experience of those making the film from their audience’s experience. The participants’ experience is divorced from their audience’s, not just by time and space, but also by continuity and sequence. Directors do not shoot the many scenes that make up a film in the order in which the film editor will

⁶³ N.P. Miller, *The Origins of Greek Drama: A Summary of the Evidence and a Comparison with Early English Drama*, 8 GREECE & ROME 2D 126, 134-36 (1961) (comparing the evolution of drama from religious festivals and rites in both ancient Greece and in Medieval to Elizabethan England).

assemble them for the version audiences see. Far more film is shot than makes the final cut; directors shoot multiple takes of scenes until they are satisfied with their actors' performances, and they may even film alternative versions of plot elements. The experience of making a film is one of disjointed, unconnected segments in contrast to the seamless experience obtained from viewing the final product.

While actors will experience each scene, they will have no sense of the complete drama. Unlike the theatrical performers, who confront and engage the expectations of a live audience, film actors not only have no such audience response to guide them in their own interpretations of the script, but they lack any experience, based upon performance (as differentiated from reading the script), of the work as a whole. The gulf between performer and audience arises from more than just disparity in time and space. It also grows from the absence on one side and the presence on the other of narrative order.

B. The Social Audience

The audience for recorded arts and entertainment dwarfs the audience for live performance.⁶⁴ The most prestigious categories of live performance (symphonies, ballets, and

⁶⁴ Survey data from 2002 of the 205 million U.S. adults reveals that about 35 million adults attended at least one musical play (the most popular performing art) in the previous 12 months, averaging 2.3 performances per year. NATIONAL ENDOWMENT FOR THE ARTS, 2002 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS 13-14 tbls.7, 8 (2004), available at <http://www.nea.gov/pub/NEASurvey2004.pdf> [hereinafter NEA 2002 SURVEY]. This is about 1 in 6 adults. In the same period 25 million adults attended at least one non-musical play, 22 million at least one Jazz performance, 24 million at least one Classical music performance, 8 million attended at least one ballet performance and 12 million attended at least one of some other dance performance. Each attender averaged between 2 and 3 performances per year. *Id.* If visits to art museums and galleries are also included (and these are not live performances) then fewer than 4 in 10 adults engaged in at least one of these activities each year. *Id.* at 11 & tbl.6. In comparison, few Americans spend a single day without watching television or DVDs, listening to music on the radio or other music sources or viewing entertainment on the internet. "On average, TV-watching consumes about half of the total daily leisure time of all Americans ages 15 and older." NATIONAL ENDOWMENT FOR THE ARTS, TO READ OR NOT TO READ, A QUESTION OF NATIONAL CONSEQUENCE 38 (2007), available at <http://www.nea.gov/research/toread.pdf>. As of December 2010, the average U.S. consumer spent as much time on the internet as they did watching TV—thirteen hours per week. Jennifer Valentino-DeVries, *Internet Now as Popular as TV, Survey Shows*, DIGITS: WALL ST. J. BLOGS (Dec. 13, 2010, 10:31 AM), <http://blogs.wsj.com/digits/2010/12/13/internet-now-as-popular-as-tv-survey-shows/> (citing JACQUELINE ANDERSON

legitimate theater) are cultural dinosaurs that require large public subsidies to survive.⁶⁵ Even these do not reach substantial live audiences compared to those for recorded mediums.⁶⁶ Attendance at such events is reserved for special occasions for all but a tiny minority of the population.⁶⁷ Elite performance groups, like the symphony orchestra, face rapidly aging audiences and an inability to capture younger concert goers.⁶⁸ Perhaps the largest remaining reservoir of live performance comes from popular music groups, but nothing comparable occurs in other cultural forms.⁶⁹ Every major urban area has several live music performances scheduled for each weekend. These range from the intermittent appearance of major acts with national or even international followings to local or regional groups that often lack recording contracts and rely on performance fees for their income.⁷⁰ Sometimes performers perform “live” in only the narrowest sense.⁷¹ Only jazz and some types of folk and specialized country music persist as music forms with strong live performance traditions unaffected by the electronic enhancements found in most pop concerts, but these comprise only a small share of the music audience and a

ET AL., UNDERSTANDING THE CHANGING NEEDS OF THE U.S. ONLINE CONSUMER (2010)).

⁶⁵ In 1992 the overwhelming majority of classical music groups were tax exempt nonprofits (689- tax exempt; 51- taxable). NATIONAL ENDOWMENT FOR THE ARTS, CLASSICAL MUSIC GROUPS REPORT 22% GROWTH IN ECONOMIC CENSUS: 1987-1992, at 1 (1998), *available at* <http://www.nea.gov/research/Notes/68.pdf>. In that year classical music groups received 43% of their revenues from government and private grants. *Id.* at 4. Tax exempt dance organizations outnumbered their taxable counterparts in 1992, 275 to 133, and 41% of their revenues came from government and private grant support. NATIONAL ENDOWMENT FOR THE ARTS, DANCE ORGANIZATIONS REPORT 43% GROWTH IN ECONOMIC CENSUS: 1987-1992, at 1, 4 (1998), *available at* <http://www.nea.gov/research/Notes/67.pdf>.

⁶⁶ Americans 15 and older average 2 hours and 21 minutes of TV watching weekdays and 3 hours and 6 minutes on weekends and holidays. NEA 2002 SURVEY, *supra* note 64, at 39 tbl.3C.

⁶⁷ NEA 2002 SURVEY, *supra* note 64, at 13-14 tbls.7 & 8.

⁶⁸ Between 1982 and 2002, the percent of adults attending classical music performances declined from 13.0% to 11.6%; the average number of performances attended increased slightly between 1992 and 2002 from 2.6 to 3.1 per attender. *Id.* at 12-13 tbls.6 & 7. Of those who attended at least one such performance in the 12 month period ending in August 2002, 22.8% were younger than 35 and 57.4% were 45 and older. *Id.* at 14 tbl.8.

⁶⁹ *See generally* RUSSELL SANJEK, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY (David Sanjek ed., Da Capo Press 1996) (1988). Vaudeville and burlesque once provided drama, comedy, and music in innumerable venues and throughout the nation. *See id.* at 33, 57-61.

⁷⁰ One burgeoning subspecies of popular music is church based Christian rock music, whose purpose is not to seek commercial success but “to bring together a community,” perhaps a close cousin of the original purpose of the music created by ancestral societies. *See* Ben Ratliff, *Plugging in to Make a Joyful Noise unto the Lord*, N.Y. TIMES, Nov. 7, 2007, at E1.

⁷¹ *See supra* notes 57-58 and accompanying text.

minuscule portion of the total music experience (including recordings).⁷² Even grand opera, too small to register in our analysis, for some productions now grudgingly embraces electronic amplification.⁷³ Comparing the quantitative experience of live to recorded mediums, in only one hundred years, music has moved from collective, participatory ensemble music making, oriented around a common repertoire, to uniquely programmed Ipods experienced privately with earbuds even on public streets.

The recent phenomenon of “house concerts” represents an opposing and still very minor trend. House concerts, organized by music fans over the internet, feature professional acoustic musicians in private homes with intimate audiences measured in the dozens. Motivated by their enthusiasm for the performer rather than profit, hosts turn over cover charges as the performer’s compensation. With meals and lodging provided by such fans, some performers have managed to arrange national tours from house to house in an underground circuit that ignores zoning ordinances, fire codes, and performing rights organizations. The audience tends to be older, in their 30s and 40s, than those who frequent late night music clubs.⁷⁴

People generally enjoy performances more as members of an audience. We constantly talk with each other about music and movies because finding others that share our enthusiasms is pleasurable in itself, even if we never attend a performance together. Expressive culture, which seems to help create and sustain social bonds, now is delivered by technologies that isolate us

⁷² Jazz recordings held only 1.1% of the market in 2008, and going back to 1999, never gained more than 3.2%. Folk recordings are subsumed in the “Other” category, which comprised 9.1% in 2008, the highest in the years since 1999. Within this category’s 9.1% were also included Big Band, Broadway Shows, Comedy, Contemporary, Electronic, EMO, Ethnic, Exercise, Folk, Gothic, Grunge, Holiday Music, House Music, Humor, Instrumental, Language, Latin, Love Songs, Mix, Mellow, Modern, Ska, Spoken word, Standards, Swing, Top-40, and Trip-hop. RECORDING INDUSTRY ASS’N OF AMERICA, 2008 CONSUMER PROFILE (2008), available at <http://76.74.24.142/CA052A55-9910-2DAC-925F-27663DCFFFF3.pdf>.

⁷³ See, e.g., Richard Dyer, *Amplification: Turn It Up, or Turn It Down? Opera Companies Divided on Boosting Sound*, BOSTON GLOBE, Apr. 17, 2005, at N4; Anthony Tommasini, *Opera Is at a Technological Crossroads*, N.Y. TIMES, Jan. 10, 2006, <http://www.nytimes.com/2005/12/30/arts/30iht-loud.html>.

⁷⁴ Neil Strauss, *Acoustic Music, Live From the Living Room*, N.Y. TIMES, Nov. 8, 1999, at A1.

from each other and allow us to neglect even to establish and experience social bonds.⁷⁵

Recent research findings strongly suggest an unexpected and rapid decline in the number of our strong “core discussion networks, with a shift away from ties formed in neighborhood and community contexts and toward conversations with close kin (especially spouses).”⁷⁶

Contemporary technology moulds our experience of copyright properties into an increasingly private and individual experience. We may sit by the fireplace to read a book, but we no longer gather around a campfire to hear storytellers or poets. We no longer even gather with friends in baroque movie palaces to see the latest Hollywood offerings, scheduled for certain evenings and specific times. Instead, in the privacy of our homes we watch videos at odd hours of the day, whenever the impulse strikes.

Affluence itself has constrained the social experience of expressive culture. Our houses have grown dramatically larger as our families have grown smaller.⁷⁷ In the distant past, even if the technology had existed, the private spaces for solitary experiences were nonexistent or at least rare.⁷⁸ In hunting and gathering bands, solitude required separation from the group, which also dramatically increased the risks of predation from animals or human competitors.⁷⁹ While

⁷⁵ Robert Putnam, writing extensively about our loss of social connections, emphatically states that “[n]othing – not low education, not full-time work, not long commutes in urban agglomerations, not poverty or financial distress – is more broadly associated with civic disengagement and social disconnection than is dependence on television for entertainment.” PUTNAM, *supra* note 61, at 231. The importance of this increasing recognition of social isolation and its consequent dangers is that “civic connections help make us healthy, wealthy, and wise.” *Id.* at 287. *See also id.* at 326-35 (regarding how social connectedness dramatically reduces mortality and has numerous other important public health benefits). “[T]he *positive* contributions to health made by social integration and social support rival in strength the *detrimental* contributions of well-established biomedical risk factors like cigarette smoking, obesity, elevated blood pressure, and physical inactivity.” *Id.* at 326-27.

⁷⁶ Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 AM. SOC. REV. 353, 353 (2006).

⁷⁷ U.S. CENSUS BUREAU, MEDIAN AND AVERAGE SQUARE FEET OF FLOOR AREA IN NEW SINGLE-FAMILY HOUSES COMPLETED BY LOCATION (2011), *available at* www.census.gov/const/C25Ann/sftotalmedavgsqft.pdf (showing that median new home size increased from 1525 square feet in 1973 to 2169 in 2010); U.S. CENSUS BUREAU, AVERAGE POPULATION PER HOUSEHOLD AND FAMILY: 1940 TO PRESENT tbl.HH-6 (2011), *available at* www.census.gov/population/socdemo/hh-fam/hh6.xls (showing that over the same period, household size decreased from an average of 3.01 to 2.59).

⁷⁸ *See infra* note 80 and accompanying text.

⁷⁹ *See, e.g.*, DONNA HART & ROBERT W. SUSSMAN, MAN THE HUNTED: PRIMATES, PREDATORS, AND HUMAN

prehistoric individuals could easily escape their groups and wander the wilderness alone, such circumstances dictated heightened vigilance, not the inattentive creative reverie of aesthetic immersion. In more settled times, the large families typical of pre-modern eras usually lived in small living spaces, often one room, which limited opportunities for solitude. In medieval Europe, solitude was virtually unknown.⁸⁰

Increased affluence provides the gadgetry that delivers the entire world's expressive culture to our homes, but this same affluence reduces the opportunity for social experience of that culture. Prior to the contemporary era of extreme miniaturization and inexpensive electronic technologies, most of us inhabited what would now be called an impoverished media environment. The current era offers much more privacy in living arrangements and many more solitary entertainments – individual cell phones capable of playing music, computer games and short videos, mobile internet access on iPads, social media like Twitter, music reproduction systems of various kinds, and DVDs and other technologies – all to tempt the solitary person away from group interaction and provide an ersatz community through computers and the ubiquitous Internet. Public social spaces, the public taverns and cafes, have disappeared because part of their historic appeal came from the paucity of alternatives.

Technology has had an enormous impact on our individual subjective experience of expressive works, by changing the social and even physical environments in which these experiences take place. For millennia both the creation and experience of expressive works

EVOLUTION 170 (2005) (“[G]roup living equals safety in numbers. . . . More eyes, ears, and noses meant less risk of unseen, unheard, unsmelled predators sneaking up to eat you.” (citation omitted)).

⁸⁰ Georges Duby, *Solitude: Eleventh to Thirteenth Century*, in *A HISTORY OF PRIVATE LIFE: II: REVELATIONS OF THE MEDIEVAL WORLD* 509, 509 (Georges Duby ed., Arthur Goldhammer trans., 1988) (“People crowded together cheek by jowl, living in promiscuity, sometimes in the midst of a mob. In feudal residences there was no room for individual solitude, except perhaps in the moment of death. When people ventured outside the domestic enclosure, they did so in groups. No journey could be made by fewer than two people . . .”). “Men and women who traveled the roads without escort were believed to offer themselves up as prey, so it was legitimate to take everything they had.” *Id.* at 510.

occurred in communal gatherings,⁸¹ in social contexts in which the audience gathered to experience and often participate in the work for a particular shared purpose. Until the invention of playback technologies, we could not experience expressive works in solitude. Playback technologies allow us to experience works in contexts and places unrelated to their creation and with none of the visual or other cues that once comprised a significant part of the experience. What must be the typical person's experience ratio of live performance to recorded media? Few besides professional critics or performers experience cultural works predominantly live. Solitary listening to music is now not just the predominant form of musical experience,⁸² but for many the exclusive one.⁸³

Most of those few live performances that we do still experience are themselves radically different from what earlier societies experienced. We congregate at concert halls and theaters as anonymous individuals among crowds of strangers. Contrast this with the quite different way we must have experienced expressive works in pre-modern times – in specific ceremonial spaces that added meaning to the performance, surrounded by friends, neighbors, and kin sharing a common purpose in a society with few strangers and deeply rooted in particular locales. The strength and endurance of the African American church may owe much to the large role that musical performance plays in its worship services shared by its congregations whose members are often deeply involved in each others' lives.

While much of this discussion has concerned our experience of music, analogous developments have occurred in all the mediums in which culturally expressive works are created

⁸¹ See Dissanayake, *supra* note 43, at 31.

⁸² See KATZ, *supra* note 6, at 21, 214.

⁸³ In the course of a year only 36% of literary readers and 10% of non-readers attended a performance of a play or musical. And even fewer of both literary and non-readers attended jazz or classical concerts—29% of literary readers and 9% of non-readers. NAT'L ENDOWMENT FOR THE ARTS, TO READ OR NOT TO READ: A QUESTION OF NATIONAL CONSEQUENCE 18 (2007), *available at* <http://www.nea.gov/research/ToRead.PDF>.

and which are the central concern of copyright. Whether such fundamental changes in our experience should concern us depends upon whether such changes are really “fundamental.” If they are not, then we have technology to thank for the convenience and ubiquity of technologies that permit us to play many varieties of works whenever and wherever we choose. But if they are, then how should copyright policy reflect this concern?⁸⁴

Conclusion

The current rapid pace of social and technological change has no precedent in our evolutionary history. To the extent that expressive culture helps us cope with change by enhancing social bonds, we need it now more than ever. Technology and the Copyright Act have combined to fundamentally change the way we experience expressive culture, changing it from a communal and social experience to an individual and atomistic one. Given the possible evolutionary purposes served by this expressive culture, such a transition may pose significant if unknown challenges to our species. We would be well advised to reexamine the need and consequences of such drastic changes to a cultural phenomenon whose pervasive presence in all human societies and throughout our entire history suggests it plays a vital role in our societies and the ties that bind us.

We currently view our copyright policies as a subset of economic policies, but expressive culture is not primarily an economic phenomenon. It is a social one. Once we meet the minimums of food and shelter the quality of our social relationships determines the quality of our lives. A loving family and good friends provide contentment to nearly anyone, as well as measurable health benefits. Immense wealth and power without anyone to care about brings little satisfaction. Expressive culture probably exists because of the role it plays in forming or

⁸⁴ Proposals for statutory reform are the subject of a separate paper. See Robert E. Suggs, *Restoring Social Experience to Expressive Culture* (work in progress).

cementing social ties. Our current statute has been tailored for the rational economic man, but it seems wiser to reconsider this standard and instead reorient the Copyright Act to facilitate the social lives of a social species.