

# A FUNCTIONAL APPROACH TO COPYRIGHT POLICY

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## I. INTRODUCTION

Most theoretical approaches to copyright policy start from a highly abstract perspective on property rights divorced from any particular historical or cultural context. This critique starts from the opposite extreme, the particular cultural context of African American music and the specific historical period of early to mid-twentieth century musical innovation. The seed of this critique was planted by a specific question about a particular musician, naively asked nearly fifty years ago.

The summer after my junior year in college, John Coltrane unexpectedly died at the age of forty.<sup>1</sup> A few years earlier, I had

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\* I would like to thank my colleagues at the University of Maryland Francis King Carey School of Law, especially Taunya Banks, Frank Pasquale, and Michael Van Alstine, for the helpful comments they provided, and the other participants at a faculty workshop on February 7, 2013. Their thoughtful criticisms greatly improved this paper.

1. On July 17, 1967. Ed Hazell, *John (William) Coltrane*, in 1 THE NEW GROVE DICTIONARY OF JAZZ 491 (2d ed. 2002) (“He was, after Charlie Parker, the most revolutionary and widely imitated saxophonist in Jazz.”); see generally *id.* at 491–94.

become a passionate advocate of his music, and I knew enough jazz history to see the parallels with the earlier, equally sudden and critical loss of Charlie Parker in 1955 at the age of thirty-five.<sup>2</sup> Given the richly-endowed talents of Coltrane's musical peers in the 1960s, including Miles Davis,<sup>3</sup> Sonny Rollins,<sup>4</sup> Thelonious Monk,<sup>5</sup> and Charlie Mingus,<sup>6</sup> I wondered how long it would take for another saxophonist to arise from a new generation worthy enough to rank as Coltrane's successor. A similar transition occurred within a few years after Parker's death, and I expected it to take a half-dozen years at most.

Periodically, over the next several years I listened to the rising stars anointed by the marketing departments of record labels, but even musicians with amazing technical proficiency never seemed to achieve the creative innovations that would place them in the first rank of musical artists.<sup>7</sup> Even Coltrane's aforementioned great contemporaries seemed to grow stale.

Since the late 1960s, jazz has not experienced the kind of successful paradigm-changing innovations that arrived every decade or two and marked the transitions from New Orleans-style to swing, from swing to bebop, then to hard bop, and to the new thing. The music peaked just when it had achieved mainstream legitimacy, when jazz artists were first appointed to music faculties at colleges and received foundation grants and music prizes. Since then, institutionalization has intensified. The dual-credentialed classical and jazz trumpeter, Wynton Marsalis, has enshrined his program at Lincoln Center in a substantial edifice, but it might yet prove to be only a mausoleum.

During the past five decades, real jazz has continued to infiltrate mainstream culture. Background music on the Weather Channel has included the recordings of Monk, Mingus, and Coltrane. Jazz practitioners have achieved ever-increasing technical proficiency and formal credentials, but no further fundamental innovation has succeeded. Each successive generation of Young Turks has so far failed

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2. James Patrick, *Parker, Charlie*, in 3 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 227–33.

3. Barry Kernfeld, *David, Miles*, in 1 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 573–77.

4. Barry Kernfeld, *Rollins, Sonny*, in 3 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 444–47.

5. Ron Blake & Barry Kernfeld, *Monk, Thelonius*, in 2 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 793–96.

6. Barry Kernfeld, *Mingus, Charles*, in 2 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 770–74.

7. “[N]obody has appeared in jazz since John Coltrane who has captured the attention of fans and musicians and reshaped the music in the way that Armstrong, Parker, and to a lesser extent he and Davis did . . .” James Lincoln Collier, *Jazz*, in 2 THE NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 389.

to advance the music beyond the innovations achieved during the 1960s.

This conclusion, though controversial, might just reflect the biased opinion of a senior citizen reminiscing about the golden musical era of his youth. Musicologists have identified a common feature in the formation of musical tastes. Most people establish their favorite musical genre by the age of eighteen or twenty and often maintain that preference for the rest of their lives.<sup>8</sup> I “control” for this bias by observing that just as Parker, Miles, Monk, and Coltrane had their detractors in their heydays, they eventually changed the jazz paradigm in fundamental ways. By 1964, Monk’s musical status had evolved from that of a derided music outsider to a national icon, and he graced the cover of *Time Magazine*.<sup>9</sup> Miles Davis’s most critically acclaimed album, the 1959 recording *Kind of Blue*, was certified quadruple Platinum (4,000,000 albums in domestic sales) by the RIAA in 2008 with virtually no consistent marketing strategy or promotional effort.<sup>10</sup> The absence of such “objective” indications, which identify paradigm-changing artists, buttresses my conclusion that jazz has now stagnated for decades.<sup>11</sup>

Wondering why this vitality had been lost, I explored the musicological literature, considered my own observations, and wondered whether copyright policies might have contributed to this state of affairs. Has something changed in the jazz ecology? Did copyright affect the changes that occurred? What role did the dramatic increase in the scope of copyright protection wrought by the 1976 Act play?<sup>12</sup>

The jazz economy had changed profoundly by the late 1960s. The uniquely productive flowering of the 1960s might well have been the deathbed rally of a dying jazz culture. In their primes, Coltrane, Miles, Ellington, and Monk had working bands that provided full-time employment with stable personnel over multiyear periods<sup>13</sup> that played

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8. DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC* 226 (2006).

9. Blake & Kernfeld, *supra* note 5, at 794.

10. *Results for Miles Davis*, RIAA GOLD & PLATINUM SEARCHABLE DATABASE, <http://www.riaa.com/goldandplatinumdata.php> (type “Miles Davis” in search box; then follow “Search” hyperlink); ASHLEY KAHN, *KIND OF BLUE: THE MAKING OF THE MILES DAVIS MASTERPIECE 193–94*, 198 (2000).

11. “By the end of the 1960s many jazz fans were in despair; some announced the death of the music, and others predicted that it was flowing into forms so disparate that it might as well be dead.” Collier, *supra* note 7, at 385. *See generally id.* at 382–86.

12. The 1976 Copyright Act greatly increased the scope of protection by replacing the earlier 1909 Act’s requirement of publication with notice and compliance with other formalities with the minimal requirement of fixation. It also replaced the initial twenty-eight year term followed by a renewal term obtained by a separate renewal application with a single unitary term of life of the author plus fifty (now seventy) years.

13. “No other composer [Ellington] in history had his own orchestra for half a century or

before live audiences in clubs for extended engagements.<sup>14</sup> Many other bandleaders had similar arrangements, especially through the 1950s.<sup>15</sup> By the 1970s, virtually no one could sustain such enterprises. Since that era, few engagements of leading bands last more than a long weekend.<sup>16</sup> Frequent perusal of the entertainment sections of major metropolitan newspapers reveals that performing successive weekends in the same locality is now rare, even for musicians with national reputations. Musicians might work together several times a year, and a band might coalesce for occasional weekend engagements or for recordings, but individual musicians cobble together a living through other means. Career paths previously closed to African American musicians have opened up, including positions on academic faculties,<sup>17</sup> with recording studios, and highly visible roles in television orchestras on talk shows and late night television.<sup>18</sup> Careers have flourished economically, but

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commanded comparable dedication from as many celebrated musicians.” GARY GIDDINGS, *VISIONS OF JAZZ: THE FIRST CENTURY* 105 (1998). The preeminent baritone saxophonist of his era, Harry Carney, spent forty-seven years with Ellington, from the age of sixteen until his death. *Id.* at 112. The Modern Jazz Quartet stayed together for twenty years. Collier, *supra* note 7, at 380. The second great quintet under Miles Davis’ leadership endured for four years with the same personnel, Wayne Shorter (1964–1970), Ron Carter (1963–1968), Tony Williams (1963–1969), and Herbie Hancock (1963–1968). Kernfeld, *supra* note 3, at 574. Exemplifying the deterioration of the jazz economy after the late 1960s, his groups from 1969–1975 were less stable and “[o]ften the instrumentation and style of his ever-changing recording ensembles (up to 14 players) diverged considerably from that of his working groups (generally sextets or septets).” *Id.* Charlie Rouse (tenor saxophone) played with Monk for eleven years, from 1959 through 1970. Barry Kernfeld, *Rouse, Charlie*, in 3 *NEW GROVE DICTIONARY OF JAZZ*, *supra* note 1, at 459.

14. Ellington came to national prominence during a more than three-year engagement (1927–1931) at the Cotton Club in Harlem. GIDDINGS, *supra* note 13, at 109. In 1960 a New York club, the Half Note, offered John Coltrane’s group twelve to fifteen weeks a year. BEN RATLIFF, *COLTRANE: THE STORY OF A SOUND* 132 (2007). In 1960, the first full year that 3/4s of his classic quartet played together (McCoy Tyner and Elvin Jones) they played eighteen full weeks at different American jazz clubs, seven at the Half Note, three at the Jazz Workshop in San Francisco, one at the Apollo in Manhattan, one at the Zebra lounge in Los Angeles, six at the Village Gate in Manhattan, and one at the Showboat in Philadelphia. *Id.* at 134. In 1957, John Coltrane joined Thelonious Monk’s quartet in what became a legendary engagement at the Five Spot Café from mid-July until December; the quartet appeared for six nights a week, for four sets a night. ROBIN D.G. KELLEY, *THELONIOUS MONK: THE LIFE AND TIMES OF AN AMERICAN ORIGINAL* 225, 229, 239 (2009).

15. Ahmad Jamal, a noted pianist, recorded live his most popular and critically acclaimed album, *Live at the Pershing* after he and his group had played the material recorded, five sets a night, six nights a week for over a year at the Pershing nightclub. Marc Myers, *A New Architecture for Jazz*, WALL ST. J. ONLINE (Sept. 28, 2013, 8:01PM), <http://online.wsj.com/news/articles/SB10001424127887324492604579082994292232418>.

16. “Most jazz musicians will tell you that this [extended engagements] is the crucial element missing in jazz today; this is what is preventing bands from attaining a special coherence and preventing bandleaders from becoming the properly seasoned role models and coaches. In jazz, experience is everything.” RATLIFF, *supra* note 14, at 134.

17. Collier, *supra* note 7, at 388 (discussing the jazz education movement).

18. First Branford Marsalis and then Kevin Eubanks have hosted “The Tonight Show” band. Barry Kernfeld, *Marsalis, Branford (Iweanya)*, in 2 *NEW GROVE DICTIONARY OF JAZZ*, *supra* note 1, at 712. Branford’s younger brother, Wynton Marsalis was the driving force behind and serves as artistic

perhaps the roots have starved.

Was there something about the format of constant performance before live audiences that made an essential contribution to the collaborations that created successful musical innovations? Did dancing have something to do with it? Live performance in the context of a collaborative ensemble was a consistent presence in the development of African American music. The field hollers that developed into the blues<sup>19</sup> and the religious music epitomized by the spirituals developed before the invention of recording technology and without the benefit of music literacy.<sup>20</sup> Live performance was the only way to hear these genres of music. Even hip hop, which significantly<sup>21</sup> relies upon previously recorded music and which began only in the 1970s (after enactment of the 1976 Act), started in the context of live performance by DJs, who performed their artistry with multiple turntables to sample, repeat, and modify recordings live for dancers at parties.<sup>22</sup> Such a series of coincidences might indicate something more causal. Did copyright law have something to do with this development?

Jazz, the most illustrious African American—and American—music, reflects the live-performance and collaborative-ensemble tradition. In its heyday before the transition to bop, jazz was the American popular music, and it was primarily dance music,<sup>23</sup> influenced by the mutually responsive dynamic between musicians and dancers. In its formative era, jazz partially evolved on the riverboats that sailed out of New Orleans and other river towns on day and evening (moonlight) cruises

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director of the jazz division at Lincoln Center. Berry Kernfeld, *Marsalis, Wynton Learson*, in 2 NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 713.

19. Blues “emerged through the conflation of hollers and ballads. Hollers were freely extemporized songs performed by individual workers in the South as accompaniment to field labor, and they largely replaced group-labor work songs after the decline of the plantation system.” Paul Oliver & Barry Kernfeld, *Blues*, in 1 NEW GROVE DICTIONARY OF JAZZ, *supra* note 1, at 247.

20. Spirituals developed underground in the ante bellum South. RUSSELL SANJEK, 2 AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS 220–22, 269–73 (1988).

21. The recorded status of the music is significant, because after 1978 mere fixation creates a protectable copyright interest without the notice and other formalities required under the previous copyright act. The live performance and collaboration could occur relatively uninhibited by property considerations because Hip-Hop developed on the margins of society among groups that were essentially copyright “outlaws.”

22. See generally JIM FRICKE & CHARLIE AHEARN, YES YES Y’ALL: ORAL HISTORY OF HIP-HOP’S FIRST DECADE (2002).

23. “By 1941, . . . big band jazz was the dominant popular music of the country: there were hundreds of big bands, some 50 of which were nationally known, had large followings, recorded regularly, and worked in dance halls and theater all the year round.” Collier, *supra* note 7, at 375–76. At its birth, jazz was intimately linked to dancing. “Jazz mania [in 1917] was wedded to the dancing craze. . . .” RUSSELL SANJEK, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY 29 (1996). “The fast-dance mania and the new jazz music were shaped by Afro-American culture, a fact completely disregarded by those who capitalized on their union.” *Id.* at 30.

that featured dancing.<sup>24</sup> Louis Armstrong apprenticed for three seasons on these boats<sup>25</sup> before departing for Chicago and making history with his early Hot Five and Hot Seven recordings.<sup>26</sup> On the riverboats, incipient jazz bands with long serving personnel played for dancers, sometimes for two cruises a day, each lasting from two to four hours.<sup>27</sup>

During the Swing Era, the big bands of Count Basie and Duke Ellington played for many scores of dances every year, because jazz was the popular music of this era, and it was primarily dance music.<sup>28</sup> Many less famous bands played innumerable one-night stands on the Chitlin' Circuit, the African American club circuit that developed throughout the segregated South during the 1930s, '40s, and '50s.<sup>29</sup> (John Coltrane even spent some time on this circuit with the King Kolax band.<sup>30</sup>) One of the leading touring groups, the Billy Eckstein band, in 1944 had as members a number of talented innovators including Charlie Parker and John (Dizzy) Gillespie,<sup>31</sup> two of the most seminal figures in the development of bebop, the music of the succeeding era in jazz. Frequent, often daily, live performance for dancers was endemic to jazz's development as a popular music.

Bebop revolutionized jazz, making it a more complicated music, rhythmically<sup>32</sup> and harmonically, with chromatic harmony replacing diatonic harmony.<sup>33</sup> As a result of this complexity, it became less accessible and lost its sway as America's popular and dance music. Few recordings document this transition, because it occurred during the years of World War II, when both a musicians' strike and the dispersal of many musicians into wartime service severely curtailed the production of music recordings.<sup>34</sup> We do know, however, that during those years, many of the innovators of bebop frequented Minton's Playhouse in Harlem to play at the regular Monday night and after-hours jam

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24. See generally WILLIAM HOWLAND KENNEY, *JAZZ ON THE RIVER* (2005).

25. *Id.* at 64.

26. *Id.* at 47, 58–66.

27. *Id.* at 6, 23–24, 79.

28. Duke Ellington first came to national prominence during a three year engagement (subject to interruptions for tours and a 1930 movie) at the Cotton Club in Harlem that included live radio transmissions that helped spread exposure of his music. GIDDINGS, *supra* note 13, at 109.

29. PRESTON LAUTERBACH, *CHITLIN' CIRCUIT AND THE ROAD TO ROCK 'N' ROLL* 12 (2011).

30. *Id.* at 81.

31. Berry Kernfeld, *Eckstein, Billy*, in 1 *NEW GROVE DICTIONARY OF JAZZ*, *supra* note 1, at 683.

32. Berry Kernfeld, *Bop*, in 1 *NEW GROVE DICTIONARY OF JAZZ*, *supra* note 1, at 270–71.

33. *THE LAROUSSE ENCYCLOPEDIA OF MUSIC* 520–21 (Geoffrey Hindley ed., 1971).

34. Gordon Mumma et al., *Recording*, in 3 *NEW GROVE DICTIONARY OF JAZZ*, *supra* note 1, at 375–77. “When the two-year recording strike ended in 1944, two new musics suddenly flowered, each having mutated in relative privacy as enforced by the ban: in jazz, the byword was bebop, and Charlie Parker was its avatar. . . .” GIDDINGS, *supra* note 13, at 252.

sessions.<sup>35</sup> Thelonious Monk, considered the greatest post-war jazz composer, was the resident house pianist, and Kenny Clarke, an originator of the bebop style of drumming, was the resident drummer.<sup>36</sup> Successful creative innovation took place in an environment of intensive frequent collaborative live performances and drove the subsequent evolution into a more challenging aesthetic.<sup>37</sup>

Later, in 1957, John Coltrane joined Thelonious Monk's quartet in what became a legendary engagement at the Five Spot Café. From July 16th until December, the quartet appeared six nights a week for four sets a night.<sup>38</sup> Even a sophisticated audience needs time and repeated exposure to discern new musical vocabularies. While live performance was critical to the development of this new language, it proved too forbidding for mass audiences and forfeited jazz's role as America's popular dance music.<sup>39</sup> It also appears that this new language undermined jazz's potential for future development. Live audiences abandoned it, and the jazz economy could no longer support working bands with stable personnel over several years and weekly engagements throughout the year.

My disappointment at the absence of worthy successors to Coltrane led me to suspect that something about the way the arts are performed and created have consequences for their vitality. Vigorous and frequent live performance in the presence of a live congregated audience appears to frequently correlate with successful creative innovation. Creative innovation is not solely the product of individual creative genius but is itself a social process.<sup>40</sup>

No direct connection exists between specific copyright provisions or court decisions and the decline in live performance that occurred in the jazz ecology. The expanding scope and term of copyright protection undoubtedly played a role. So, too, did the growing cultural legitimacy of jazz, a consequence in part of civil rights successes, which raised jazz's profile. With greater prominence and acceptance into the mainstream music culture came more emphasis on legalities and formal contractual relationships. By creating property at the moment of

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35. RALPH ELLISON, *SHADOW & ACT* 199–212 (1964).

36. Blake & Kernfeld, *supra* note 5, at 793.

37. Collier, *supra* note 7, at 376–78.

38. KELLEY, *supra* note 14, at 229.

39. The jazz mania that began in 1917 was wedded to the dancing craze. SANJEK, *supra* note 23, at 29. In 1937 18,000 musicians regularly traveled to play in drinking establishments and for dancing. *Id.* at 204.

40. Academics in their pursuit of creative and innovative scholarship implicitly subscribe to the same view or why else would we traipse to conferences and workshops to make presentations to peers? We consider the communication that occurs face-to-face with a live audience essential to the development of our best work.

authorized fixation, the 1976 Act inhibited the kind of free collaboration that had earlier produced so much innovation in African American music. Just as the desegregation of public accommodations undermined the black business community by eliminating its monopoly hold on the black consumer,<sup>41</sup> it also undermined cultural infrastructures like the Chitlin Circuit, which had given birth to so much musical innovation. It is probably not coincidental that the most innovative musical form to develop since the 1976 Act has been hip hop, a musical genre that started as an outlaw music, both in the socioeconomic and legal senses. Performed live at neighborhood parties by marginalized youth in distressed areas, it originated outside the legal structure created by copyright. These youths created a new musical form by sampling existing music, a practice whose legality was dubious at best.

This Article proceeds in an unconventional manner. It starts from the proposition that the *content* of the works of cultural expression that form the core subject matter of copyright really matters. Incorporating several interdisciplinary parts before engaging with the copyright statute and suggesting reforms is necessary to provide a basis to understand this Article's proposed changes to copyright law. From the perspective that cultural content matters, the true significance of these works lies in their social, psychological, and even physiological effects rather than in the economic revenues they generate. The current and dominant view of copyright, perhaps influenced by the Constitution's Copyright Clause with its economic emphasis anchored by the monopoly grant, attempts to devise incentives that maximize the production and distribution of cultural works. The economic revenue generated by this activity is the conventional measure of success. The large trade surplus generated by our content industries, movies, records, and the like, indicates successful policy. The approach broached here considers cultural health to be the goal of copyright policy. As a goal, cultural health is more akin to spiritual health or healthy nutrition; revenues are beside the point. In the midst of an obesity epidemic, it would make no sense to measure food policy success by our caloric intake or to recommend more sugar subsidies. Measuring spiritual health by the revenues garnered by religion is similarly inapposite. At the cusp of the Protestant Reformation, the Catholic Church had burgeoning revenues, fueled by the sale of indulgences. Despite the wealth, it was at a low point of spirituality, hence the rebellion of Martin Luther. I argue that an analogous misconception drives copyright policy.

Part II contains a descriptive analysis of the core subject matter of

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41. Robert Suggs, *Recent Changes in Black-Owned Business* 25–26 (Joint Center for Pol. Studies, Working Paper, 1986).

copyright, which I call *expressive culture*,<sup>42</sup> as a cultural phenomenon. It analyzes the complexity of these cultural products, a complexity that the Copyright Act ignores and which is alien to most copyright scholarship. Disassembling expressive culture into some of its components makes it possible to examine how it might function in society. Part III considers whether, beyond the economic revenues it generates, expressive culture really matters. Based upon its presence as a phenomenon in all human societies and its costly use of resources even in the most marginal-subsistence societies, this Part considers whether expressive culture performs vital functions for individuals or societies. It considers the possible evolutionarily adaptive functions of expressive culture and identifies and examines some of the candidate functions. Part IV focuses on the significance of live performance, because until the recent introductions of technologies of reproduction, all culture was live. Currently, almost all our cultural experience is through recorded media, and this potentially momentous difference has been little noted. Fueled by the suspicion that live performance plays an essential role in creative innovation, this section discusses the implications for copyright policy, arguing that live performance should have a privileged status.

Part V suggests how the current Copyright Act might be amended with respect to two of the six exclusive rights of copyright to facilitate some of the possible functions of expressive culture. It considers two changes to the derivative work right. The first, requiring legislation, would shorten its term, while the second would simply resolve the doctrinal ambiguity surrounding whether an infringing derivative work must be “fixed.” The second right to be modified, the public performance right, would exempt certain live performances from its scope. In making these proposals, this article makes no claim to clairvoyance but merely seeks to pose some different questions, because existing approaches give no satisfactory response to the following query: What is expressive culture for?

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42. The term *expressive culture* is not coextensive with the subject matter protectable by copyright, because I use this term in a narrower sense. It encompasses only the works at the core of copyright, i.e., novels, music, images, sculpture, dance, dramas and movies, and excludes thinly protected factual and routine works, such as news reports, directories, and other works that make no pretense of competing on the basis of aesthetic merit. I do include histories, although they are factual works, but the ancient Greeks considered them among the greatest literary works, rivaling poetry and drama; and creation myths are some of the earliest histories of all cultures. History as literature seeks to achieve more, to convey understanding that affords insights into contemporary circumstances, cultures and people beyond the specific time and place constraints of the work itself. Such histories are not routine factual works.

## II. EXPRESSIVE CULTURE — A MULTIDIMENSIONAL PHENOMENON

Copyright treats expressive culture as a simple phenomenon. The Copyright Act categorizes copyrighted works into eight categories<sup>43</sup> and assigns some, but not all, of the six exclusive rights to each category.<sup>44</sup> Expressive culture is not so simple. It consists of distinct forms, including music, stories, dance, and visual images in both two and three dimensions, and it is delivered by different media, such as printed books, records, movies, live broadcasts or webcasts, and live performances. These media appeal to different senses in varying degrees and combinations. Expressive culture varies in thematic content, intellectual accessibility, and the challenges it presents to our mental processes. Possibly these differences correlate in some manner with different or discrete functions of expressive culture or accomplish those functions with varying degrees of efficacy. When one adds the undeniable qualitative distinctions to this witches brew, the phenomenon appears more magical than susceptible to objective analysis.

The Copyright Act makes no qualitative judgments about the property it creates and protects beyond the most minimal.<sup>45</sup> It essentially treats all works as fungible, and subsumed within this neglect are several unexamined issues.

Current copyright policy takes for granted that more is better. Whether greater familiarity with fewer and “better” works confers more of the benefits derived from expressive culture than fleeting exposure to the enormous number of works available today remains an unexamined question. It is difficult to believe that a point of satiety does not exist. The sheer amount of expressive culture available to us far exceeds our capacity to experience it. What do we gain from our technological capacity to immerse ourselves in a nearly constant sea of music, images, and stories? Current policy strongly implies that more is better, but if the classics (from whatever era or civilization) suffice for expressive culture to accomplish the full panoply of its functions, then we could just rely on digitalization and the Internet to provide these works for free and abolish copyright as just a source of friction and economic loss.

It is certainly possible that new works are essential because the functional efficacy of expressive culture requires that the context of works be contemporary. Thus acknowledged classics might not suffice to achieve the relevant purposes of expressive culture. If such were the case, the extraordinary increase in the term of protection since 1976 warrants revisiting. The current lengthy term removes existing works

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43. 17 U.S.C. § 102(a)(1)–(8) (2012).

44. *Id.* § 106 (2012).

45. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

from the potential inventory of raw material for derivative works for such long periods that they have much less utility as the basis for new works when they ultimately enter the public domain.

Expressive culture comes in different forms and appeals to different senses, but existing law ignores the possibility that we might have separate appetites for different media, i.e., stories told with the explicit specificities of language in contrast to the more amorphous, implicit, and emotional content of music. Dance, with its physical even strenuous movements, may satisfy different needs than those met by the quiet contemplation of a visual image or the shapely form of sculpture. Culinary works that appeal to our sense of taste or works that appeal to our sense of smell are currently outside the scope of copyright protection, but such works might also satisfy specific appetites. If expressive works are not fungible, then they might form a hierarchy of some sort, and the priorities implicit in such a hierarchy should at least inform copyright doctrine.

Copyright doctrine is agnostic with respect to the particular content of expressive culture. We know that particular themes have resonated through the ages. Classical Greek drama can move us as powerfully as any contemporary work. The works of Shakespeare have remained both critically respected and popular for centuries, and “the vast bulk of fiction consists in personal interactions constituted primarily by combinations of motives involving mating strategies, family dynamics, and social strategies devoted to seeking status and forming coalitions.”<sup>46</sup> Copyright policy ignores these recurrent themes and preferences. No expressive work is more important than any other. Such a stance makes sense if the value of expressive culture comes from the economic revenues it generates; then, the marketplace establishes value. If, contrary to this view, expressive culture performs critical functions for individual human or social development, such a stance abdicates responsibility merely because revenues are easily measured, and deeper, difficult analysis is required to determine what might be the essential functions of expressive culture.

The ease or difficulty of appreciation of expressive culture varies considerably. Some works are immediately accessible, while others, despite being immensely enjoyable, are challenging to the uninitiated. Novices may be intimidated by the effort involved and might question whether the experience is worth the cognitive effort. For example, we enjoy certain sports only if we have achieved sufficient physical conditioning; downhill skiing when your legs are out of shape is neither

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46. Joseph Carroll, *Wilson's Consilience and Literary Study*, 23 *PHIL. & LITERATURE* 361, 373 (1999).

safe nor enjoyable. Similarly, some works are enjoyable only after we achieve sufficient familiarity with the vernacular employed by the artist or the genre.<sup>47</sup> The efficacy of a work for a particular function of expressive culture might vary along this dimension of challenge.<sup>48</sup> The experience of a challenging but ultimately enjoyable work might exercise whatever neural functions are involved, so the experience makes us better at whatever benefit it bestows.

We experience expressive culture in different social environments: in solitude, among strangers, and among friends and family. This experiential factor adds another dimension to our relationship with expressive culture. Perhaps the social environment in which we experience expressive culture affects its function. The social milieu might even eclipse either its form or content. Alternatively, the functional benefit of expressive culture might not arise from how we consume it, but derive from how we create it. The passive consumption of expressive culture only developed recently and contrasts with its role in societies lacking sophisticated technologies of reproduction.<sup>49</sup>

### III. COPYRIGHT REALLY DOES MATTER

The complexity of expressive culture is no more than an interesting curiosity unless expressive culture<sup>50</sup> matters more than the relief of boredom. Of course copyright<sup>51</sup> matters in the Philistine sense to those fortunate few with large royalty incomes; it matters even more to the CEOs of media conglomerates that own the blockbuster content that sustains executive bonuses and rich stock option awards. For the rest of us, does it matter if all we ever get for content is the shallowest of pop music or network TV?

John Coltrane died in 1967; I still remember where I was when I first

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47. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

48. David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCIENCE EXPRESS 377, 377–80 (2013). Theory of the Mind (ToM) involves the characteristic human ability to imagine the mental states of others. *Id.* at 377. It allows us to maintain and exploit complex social relationships. *Id.* ToM has both an affective component (the ability to detect and understand others' emotions) and a cognitive component (the ability to infer the beliefs and intentions of others). *Id.*

49. “[I]t is only in the last five hundred years that music has become a spectator activity—the thought of a musical concert in which a class of ‘experts’ performed for an appreciative audience was virtually unknown throughout our history as a species.” LEVITIN, *supra* note 8, at 251.

50. See *supra* note 42.

51. Copyright is different from Trademark and Patent. No one doubts that counterfeit trademarked pharmaceuticals or aircraft parts can have social and economic consequences far beyond the profits lost by rightful owners. Patents either spur technological innovation or the commercialization of new technologies, and they may prove critical to human survival, given threats like global warming and pandemics of new pathogens like SARS (Severe Acute Respiratory Syndrome), MERS (Middle East Respiratory Syndrome) or the Ebola virus.

heard the news. Was his passing any more significant than a candy company discontinuing a favorite but esoteric jelly bean flavor? I would like to think so, but so does almost every fan of any artist. Maybe every other fan and I have just elaborately rationalized our investments of time, energy, and money in a foolish endeavor. If all our music, movies, and novels are just so much mind candy, then we can relax and stop stressing over the ever-increasing term of copyright and its expanding scope of protection. If copyright expansion strips consumers of their ability to manipulate content and shift it to more convenient media, then this result may have no more significance than any other failure to satisfy inconsequential consumer preferences.

On the other hand, we certainly act as though the content of our expressive culture matters. Totalitarian regimes on both the left and right, whether Nazi fascists or Soviet communists, worked very hard to create and support “authorized” expressive culture that conformed to their ideological requirements and eliminate those that did not.<sup>52</sup> Each regime had a list of particular artists, schools, or genres it favored or disparaged.<sup>53</sup> Though totalitarian regimes were mistaken about so many things, I suspect they were not mistaken about the significance of expressive culture.

Democracies usually abjure such heavy-handed cultural policies. Typically, they pick and choose which artists or industries to support with public resources, but democracies usually do not suppress unapproved sources. Many nations subsidize their individual artists and arts groups, and some, e.g., the French, have for decades limited the penetration of Hollywood’s movies into its film market.<sup>54</sup> The United States lags its developed peers in this respect, but millions of American novels are sold each year, because teachers have made them required reading in our schools. Almost all nations act as though their own

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52. C. W. Casseneli, *Totalitarianism, Ideology, and Propaganda*, 22 J. POL. 68 (1960).

53. Collier, *supra* note 7, at 373 (“Jazz was never actually banned by Hitler’s regime, but it was severely frowned upon, and by and large musicians had to be cautious in its performance.”). “Hitler’s Germany had condemned jazz as pertaining to African-Americans and Jews and therefore non-Aryan. . . .” *Id.* at 381. “During the Cold War Stalin forbade its [jazz] performance and the music went underground, not only in the USSR, but also in other eastern countries under Soviet dominance. . . .” *Id.* at 382.

54. “The modern history of the French cinema is the history of its protection and advancement by the French government. Immediately after the Second World War, France imposed quotas on the importation of American films and reserved a certain number of weeks per screen for French films.” Richard Brody, *The Future of French Cinema*, THE NEW YORKER (Jan. 3, 2013), [www.newyorker.com/online/blogs/movies/2013/01/france-and-politics-of-movies.html](http://www.newyorker.com/online/blogs/movies/2013/01/france-and-politics-of-movies.html). In 2012, France subsidized 279 films with \$1.75 billion in aid. Nicolas Vinocur, *France Claims Victory as EU Upholds State Subsidies for Film*, REUTERS (Nov. 14, 2013), <http://uk.reuters.com/assets/print?aid=UKBRE9AD12P20131114>. EU governments paid out three billion euros in 2012 to subsidize the production of 1,299 feature films. Benjamin Fox, *EU Pleases France, Widens Film Subsidy Rules*, EUOBSERVER (Nov. 15, 2013), <http://euobserver.com/news/122114>.

expressive culture is uniquely valuable and worthy of preservation. This value is so certain that no one bothers to identify why expressive culture matters or how it matters?

Our First Amendment jurisprudence frowns on censorship of expressive culture, but it reconciles the monopoly grant of copyright by limiting the monopoly to the expression itself, leaving the ideas free to be copied.<sup>55</sup> While this idea/expression dichotomy leaves ideas freely available in the marketplace of ideas, it also implies that expression lacks fundamental significance. It is no more than an attractive frill, merely instrumental, like a scent or brilliant color to attract the bee to the flower.

### A. *Cheesecake?*

Stephen Pinker has argued most famously that the arts are no more than “strawberry cheesecake” that provide “intense artificial doses of the sights and sounds and smells that ordinarily are given off by healthful environments.”<sup>56</sup> Such fitness-promoting environments were themselves adaptive; but, according to Pinker, the arts are not adaptive, because, despite their universal appeal, their proponents fail to specify how the arts enhance our species’ chance of survival.<sup>57</sup> Pinker criticizes as a bad evolutionary explanation the reason for the purpose of music: “It brings the community together.”<sup>58</sup> He faults this reason because it lacks any explanation for “[w]hy do rhythmic noises bring a community together?”<sup>59</sup>

If expressive culture were no more than “cheesecake,” the implications for copyright policy would be enormous. It becomes difficult to explain why we need more new and original works? Far more such works already exist than anyone could consume in an entire lifetime. Digitalization and the Internet make the entire world’s

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55. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

56. STEVEN PINKER, HOW THE MIND WORKS 525 (1997) (“We enjoy strawberry cheesecake, but not because we evolved a taste for it. We evolved circuits that gave us trickles of enjoyment from the sweet taste of ripe fruit, the creamy mouth feel of fats and oils from nuts and meat, and the coolness of fresh water.”). The fruit, fats and oils contain necessary nutrients and do enhance survival.

57. Doubters like Stephen Pinker, fault explanations that fail to explain why expressive culture is adaptive:

Many suggestions have been made—music bonds the social, group, coordinates action, enhances ritual, releases tension—but they just pass the enigma along rather than explaining it. *Why* do rhythmic sounds bond the group, dissipate tension, and so on? As far as biological cause and effect are concerned, music is useless. It shows no signs of design for attaining a goal such as long life, grandchildren, or accurate perception and prediction of the world.

*Id.* at 528 (emphasis added).

58. *Id.* at 37.

59. *Id.* at 38 (emphasis added).

inventory of such creations available almost without cost to everyone, anywhere with an Internet connection. By devoting the time and energy that we do to copyright policy debates, compliance, and litigation, we must believe, at least implicitly, that these works affect our lives in important ways, and that new works offer essential benefits not found in pre-existing works.

Whatever the original functions of expressive culture for our hunter-gatherer ancestors, its contemporary role may have changed or become obsolete, or it may continue to change as society, social relationships, and media technologies evolve. In the unlikely event that the sole role of expressive culture was to foster group cohesion for offensive or defensive purposes among small hunter-gatherer groups, then professional police forces and military organizations have completely supplanted this function. Complete obsolescence is unlikely, however, simply because the fundamental social nature of the human species has not changed, and all human societies continue to produce and consume the phenomenon of expressive culture.

### *B. Adaptive Functions of Expressive Culture*

Regarding functions of expressive culture,<sup>60</sup> a number of possibilities exist; but the core meaning of the term, expressive culture, encompasses two categories. The first is fictional works, which by definition are not true, although they may be based upon historical events. The second is works with no explicitly intelligible content, e.g. music (without lyrics) and much visual art, especially the nonrepresentational kind. Away from the core are imaginative factual works; the best history and biography achieve that status by imaginative selection and interpretation of facts. The same can be said even of representational visual art. The artist has selected from life but has interpreted the “facts” using color, light, perspective, and composition to express something more than the bare factual content of a surveillance photograph. Outside the scope of the term, as used here, are bare factual works, such as news reports, directories, instructional manuals, and the like that select facts based upon what facts are readily available or necessary and not for expressive purposes. While such works are presently protected by copyright, it is a “thin” copyright.<sup>61</sup> Most such works aspire only to convey immediately useful information. While such works easily satisfy the minimal standards for copyrightability, they rarely have value for more than a few years, often no more than days or weeks—certainly not life plus

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60. See *supra* note 42, where I define the term.

61. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); 4 NIMMER ON COPYRIGHT § 13.03[A][4] (2013).

seventy years.

We know too little about the motivations that drive us to create expressive works to claim that any list of their possible functions is comprehensive, but the candidate functions discussed in this Part identify some of the possibilities. Any or all of these functions may operate on our social relationships or individual psychologies. Our lack of knowledge means that we cannot even preclude the possibility that the functional relevance of expressive culture might vary along a spectrum that we have yet to discover. Candidate functions of expressive culture fit roughly into two categories, those that develop our individual skills and those that strengthen social ties among individuals and augment group bonds. Both categories provide benefits that would tend to increase an individual's chances of survival and would thus be adaptive.

### C. *Individual Development*

Life's lessons, wisdom gained from experience, come at a cost. Exposure to expressive culture may accelerate our personal development as individuals. We might vicariously learn valuable lessons from stories without actually having to experience first-hand the narrated events. For example, imagine a story cautioning against the potentially endless cycle of revenge and retribution. This has survival value if actually experiencing the narrated events would entail risks.<sup>62</sup>

Alternatively, imaginative works might enhance our social intelligence, so we can more accurately predict the intentions of others, again with significant survival benefits. Some recent research has hypothesized that reading fiction helps the reader understand the mental states of others.<sup>63</sup> Undergirding the extraordinary capacity of the human species to form and maintain complex social relationships is our evolved ability to detect and understand the emotional states of others, and perhaps uniquely among all species, to infer their beliefs and intentions.

Developing a *theory of the mind* of others is a critical developmental milestone typically reached by humans around age of four.<sup>64</sup> This is when a child understands that others can have false beliefs—when another person's subjective knowledge of a situation can diverge from

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62. "The worlds of fiction though, pose fewer risks than the real world, and they present opportunities to consider the experiences of others without facing the potentially threatening consequences of that engagement." Kidd & Castano, *supra* note 48, at 378.

63. *Id.* at 1-6.

64. DOUGLAS FRYE & CHRIS MOORE, CHILDREN'S THEORIES OF MIND: MENTAL STATES AND SOCIAL UNDERSTANDING 92 (2014).

reality.<sup>65</sup> Even more remarkably, the research suggests that “literary” fiction, with its complex characters, which compel readers to draw on more flexible interpretive resources to infer the feelings and thoughts of the characters, seems to at least temporarily enhance the research subjects’ ability to accurately infer the beliefs and intentions of others.<sup>66</sup> Popular fiction, described as bestselling fiction with internally consistent and predictable characters did not show such an effect. These results, while preliminary, suggest that quality fiction of the conventional kind, precisely the type of narrative that survives the test of time, provides important benefits that would increase survival.<sup>67</sup> Expressive culture may thus help us cope with the changing threats in our physical and social environments.

Significantly and independent of this effect, expressive culture may also help us cope with the social and psychological stresses created by new or unanticipated threats. Many sources of stress degrade our immune system or otherwise negatively affect an individual’s health.<sup>68</sup> Music, especially live music, has health benefits for infants in the stressful environment of neonatal intensive care units. A meta-analysis of music research with premature infants in neonatal intensive care units showed large, significant, and consistent effects, and live music conferred even greater benefits.<sup>69</sup>

The ever-increasing speed of technological and social change in contemporary societies raises stress levels, making the stress-coping function of expressive culture more important than ever. As a species, we evolved over millennia during which change occurred very slowly, and if expressive culture helped us accommodate to such change, imagine what we need today when mores and living environments can change drastically in less than a lifetime. How might it help? Narratives might allow us to work through and vicariously experience multiple iterations of the change and prepare us for real changes by providing a kind of practice run that makes real changes more tolerable. Alternatively, expressive culture might function through emotional contagion, which, by enhancing social connections, allows us to

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65. *Id.* at 159.

66. Kidd & Castano, *supra* note 48, at 378.

67. It also suggests that Learned Hand correctly established copyright doctrine for the copyrightability of characters. *See* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

68. *Stress Weakens the Immune System*, AM. PSYCHOLOGICAL ASS’N (Feb. 23, 2006), <http://www.apa.org/research/action/immune.aspx>; *Understanding the Stress Response*, HARV. HEALTH PUBL’NS (Mar. 1, 2011), <http://www.health.harvard.edu/staying-healthy/understanding-the-stress-response>.

69. Jayne M. Standley, *A Meta-Analysis of the Efficacy of Music Therapy for Premature Infants*, 17 J. PEDIATRIC NURSING 107 (2002); Jayne M. Standley, *Music Therapy for the Neonate*, 1 NEWBORN & INFANT NURSING REV. 211 (2001).

experience changes as a group, and provides the comforting reassurance that we are not alone.

#### *D. Group Bonds*

Research from a number of disciplines—anthropology, public health, physiology, and psychology—offer tentative answers to the challenge posed by Pinker. One tentative answer from psychology relies upon emotional contagion, that is, the alignment of the emotional states of those experiencing the same event. Music, as we listen to it today, autonomously and through recordings, does not produce the same effects as music heard live and with a congregated audience, especially when it is combined with rhythmic movement, i.e., dance, as music was almost invariably so combined in many cultures.<sup>70</sup> The physiological evidence is abundant that music and dance perform the notable psychological feat of synchronizing the emotional states of participants in the activity, and some have argued that their very purpose was to synchronize our emotional moods.<sup>71</sup> Song and dance also generate “euphoric highs, as well as feelings of happiness and warmth,” and may “generate surges of opiates from the brain . . . .”<sup>72</sup> The release of endorphins during these activities would further cement social bonds and conceivably allow the formation of even larger groups than language. Robin Dunbar argues that song and dance strongly contributed to social cohesion and helped to keep the large groups that “emerging humans needed for their survival” from fragmenting.<sup>73</sup>

Aesthetic works plausibly provide mechanisms for social bonding that our primate ancestors lacked, and such a mechanism provides a possible explanation for the ability of early humans to organize and maintain substantially larger groups than nonhuman primates.<sup>74</sup> Thus, in their original forms, live performances and congregated audiences who participated as active collaborators in performances might have

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70. LEVITIN, *supra* note 8, at 251 (“One striking finding is that in every society of which we’re aware [contemporary societies with hunter-gatherer lifestyles], music and dance are inseparable.”). “The Sesotho verb for singing, . . . as in many of the world’s languages, also means to dance; there is no distinction, since it is assumed that singing involves bodily movement.” *Id.* at 7.

71. See, e.g., ROBIN DUNBAR, GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE 142–48 (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); *id.* at 147 (“The anthropologist Chris Knight has argued that the use of ritual to co-ordinate human groups by synchronizing everyone’s emotional states is a very ancient feature of human behavior, and coincides with the rise of human culture and language.”).

72. *Id.* at 146.

73. See *id.*

74. *Id.*

been adaptive.

If expressive culture facilitates social connections, then it can enhance survival in at least two ways. First, an individual with more social connections has more allies and resources to draw upon in times of scarcity or conflict.<sup>75</sup> Strengthened group cohesion augments defensive or offensive capabilities in circumstances of group conflict. It is probably not coincidental that the genre of military music exists. Battlefields have featured instruments from bagpipes to war drums. In less deadly contexts, sports teams and their supporters sing fight songs. Music and dance, through emotional contagion, can synchronize the emotional states of groups, thereby enhancing group prowess. Second, social connections themselves, even in the absence of conflict or scarcity, have well-documented beneficial health effects, because self-perceived social isolation has well-documented physiological effects that increase morbidity and mortality.<sup>76</sup> From this perspective, copyright policy has significant public health implications.

If expressive culture functions to inhibit social isolation, then performing live in front of an aggregated audience of music fans should prove a fruitful environment. The resulting emotional contagion should have beneficial health consequences, especially when compared to the alternative, listening in solitude to a recording of the same music.<sup>77</sup>

Alternatively, expressive culture might reduce conflict or tensions between individuals and groups by facilitating empathy. The experience of another's expressive culture accomplishes an exchange of viewpoints in a uniquely effective manner.<sup>78</sup> Iacoboni, based upon neurological experiments with Macaque monkeys, has hypothesized controversially that observing another person perform an action causes a similar but less intense neurological response in the brain as though the observer were herself performing the action, creating a neurological basis for the expression of empathy.<sup>79</sup>

The relevant evidence in support of each possible function for expressive culture varies but in all cases is far from definitive, often only suggestive.<sup>80</sup> While these qualifications might suggest that reform

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75. Such an individual also has more claimants for his own resources and allegiance in times when these claimants experience conflict or scarcity.

76. Louise C. Hawkey & John T. Cacioppo, *Loneliness Matters: A Theoretical and Empirical Review of Consequences and Mechanisms*, 40 ANN. BEHAV. MED. 218 (2010).

77. Simultaneous use of social media conceivably might facilitate emotional contagion even with disaggregated audiences experiencing recordings.

78. To extend this hypothesis to the medium of drama, a function of this particular medium could lie in the empathetic response to the circumstances of the observed.

79. MARCO IACOBONI, *MIRRORING PEOPLE: THE NEW SCIENCE OF HOW WE CONNECT WITH OTHERS* (2008). See also Kidd & Castano, *supra* note 48, at 377, 380.

80. Expressive culture might strengthen pair bonds between individuals of the opposite sex. It

proposals would be premature, copyright policy has historically been formulated in an evidentiary vacuum.<sup>81</sup>

*E. Evaluating Expressive Culture: A Different Metric*

If expressive culture has critical functions, then some works may fulfill particular functions better than others.<sup>82</sup> Comparative functional efficiency or success measures the quality of expressive culture across a different spectrum than media executives, fans, or critics typically use. Media executives emphasize the revenues generated by strong property rights. Consistent with this orientation, policy analysts and copyright scholars focus on economic incentives in order to predict consumer choices in copyright markets. Neither of these approaches identifies better copyright policies, unless maximizing monetary returns for content owners is the ultimate purpose of copyright.

Critics make aesthetic judgments, but these too fail to identify those works that most effectively accomplish the functions of expressive culture. And which critics? Critical opinions vary enormously and often change over time, so reliance on critical judgments provides no guidance. Even fans, whose intuitive and visceral responses generates their enthusiasm, might miss the mark, just as consumers who choose the tastiest food, with the most fat, sugar, and salt, often do not select the most nutritious food. A functional approach to copyright casts policy formulation adrift from its usual moorings.

Consequently, the copyright debate must extend beyond the usual economic concerns involving the relative efficiency of the economic incentives and burdens created by the copyright monopoly grant. The debate must include a number of novel issues, and we must consider how such issues might affect the contours of copyright law. Whatever the functions of expressive culture, generating a commercially attractive monetary return was not the original purpose of its production, and we know this because expressive culture pre dates the invention of both money and mercantile trade.

The current copyright policy debate often takes place in the context of “data,” which may be purely anecdotal or even spurious. In attempting to compile data quantifying the economic impact of counterfeit

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may have something to do with sexual selection as Darwin famously believed.

81. The Copyright Act of 1976 was enacted in part to harmonize U.S. law with European law. Harmonization was pursued to capture the increase in economic revenues that resulted from the 1976 Act's expansion of protection, increase in the term of protection, and elimination of formalities. Reformers gave no thought to the cultural costs of such changes, even though the 1909 Act had transformed us from a cultural backwater into an international powerhouse.

82. Kidd and Castano found that literary fiction provided benefits that popular fiction lacked. Kidd & Castano, *supra* note 48, at 379.

trademarked goods and pirated copyrighted goods, a perennial topic of media coverage and press releases from the trade associations of the content industries, the Government Accountability Office (“GAO”), in detailing the problems it encountered, acknowledged that the task was

challenging primarily because of the lack of available data on the extent and value of counterfeit trade. . . . data have not been systematically collected or evaluated and, in many cases, assessments ‘rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts.’ . . .

. . . .

Three commonly cited estimates of U.S. industry losses due to counterfeiting have been sourced to U.S. agencies, [the FBI, the Federal Trade Commission, and the Customs and Border Protection] but cannot be substantiated or traced back to an underlying data source or methodology. . . .

. . . .

These estimates . . . continue to be referenced by various industry and government sources as evidence of the significance of the counterfeiting and piracy problem to the U.S. economy.<sup>83</sup>

The use of anecdotal or speculative evidence to guide copyright reform is well within the mainstream of copyright history. The 1976 Copyright Act, the first comprehensive rewrite of Copyright since 1909 and the product of more than two decades of Copyright Office study and legislative hearings, radically changed American copyright law in order to harmonize it with the much longer terms and lack of formalities prevalent in European copyright.<sup>84</sup> We abandoned a system that brought American culture from a position of being ignored by the rest of the world to one of a cultural superpower, and we adopted the system of those we had just vanquished. You will look in vain for any comparative analysis that examined whether the benefits of harmonization with Europe would exceed the losses from abandoning our unique system. Instead, what swayed Congress were the enhanced revenues that would accrue to copyright owners from extended terms, a tautological conclusion.

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83. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-423, REPORT TO CONGRESSIONAL COMMITTEES, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 16, 18–19 (2010) (quoting from a 2008 OECD report, *The Economic Impact of Counterfeiting and Piracy*).

84. While many have emphasized the considerable continuity between the 1909 and 1976 Acts, the exponential expansion of copyright protection by premising it upon fixation instead of publication with notice, worked a radical cultural transformation whose long term consequences are only beginning to become manifest.

Before the complete rewrite of the Copyright Act that occurred in 1976, a more comprehensive comparative analysis between the U.S. system and the European approach would have looked beyond the effects on the revenues generated by existing copyright properties. It would have considered the effects on expressive culture more broadly and grappled with the fundamental questions: What are the functions of expressive culture, and how best should they be accomplished? An attempt to answer such a question must necessarily rely on preliminary and even speculative analysis.

For copyright policy to assist rather than inhibit the functions of expressive culture, we must examine particular aspects of expressive culture. Different policy recommendations result depending upon which aspects we prioritize. Our understanding of the functions of expressive culture is limited and preliminary, so the analysis raises more questions than answers, but finding the right questions is a necessary step to understanding the phenomenon of expressive culture.

#### IV. THE SIGNIFICANCE OF LIVE PERFORMANCE

*[I]n some ways there has been no more musically destructive force than the phonograph.*

*Of all the ways in which music changed over the course of the twentieth century, the most fundamental was the shift from being something people played to something they consumed and from being part of a larger experience to being a thing that is often heard alone and out of any set context. Audio recordings, simply by existing, separated sound from performance. Until recording, music did not exist without someone playing it, and as a result music listening was necessarily social.<sup>85</sup>*

Music recordings have drastically, perhaps catastrophically, altered the experience of music and disrupted the historic African American pattern in which creative innovation took place in an environment of intensive live performance, often for dancers. While this paper is too brief to fully explore whether this pattern extends to other genres of music and expressive culture generally, some evidence hints that it might. The early history of rock and roll shows its origins springing from the Chitlin' Circuit, the network of performance venues that developed in the segregated South; one top group stayed together for over a year and in one stretch of one-night stands played thirty-one days

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85. ELIJAH WALD, HOW THE BEATLES DESTROYED ROCK 'N' ROLL: AN ALTERNATIVE HISTORY OF AMERICAN POPULAR MUSIC 12–13 (2009).

straight.<sup>86</sup> The Beatles developed their music in the bars of Hamburg over a two-year period, beginning with a 3 ½ month residency, suggesting a parallel development.<sup>87</sup> Punk rock and other variants of contemporary popular music seem to have developed from a specific scene and frequent live performance engagements.<sup>88</sup> The origins of country and folk music lie in the era prior to the advent of commercial recordings after World War I, necessarily relying upon live performance.

Further back in time, long before sound recordings, when only music notation recorded approximations of musical sounds, the greatest composer of his era, Johann Sebastian Bach, was also a working musician. Appointed to various musical posts in important churches and the courts of the higher nobility,<sup>89</sup> his daily duties included responsibility for the musicians and choirs of his patrons.<sup>90</sup> Many classical European composers of his era, when so much music performed functions of worship, pageantry for the nobility, or household entertainment for the wealthy and powerful were nurtured in similar composing and performing environments.<sup>91</sup> Composers in this era could explore their ideas with actual musical performance simultaneously with creation.

In contrast, modern classical composers work in isolation, rarely hearing their compositions performed even once and almost never with the frequency that permits ideas to be developed with the responsive participation of sophisticated audiences.<sup>92</sup> To counteract this isolation of the composer from live performance, Duke Ellington subsidized his band (when it was no longer economical to tour) with revenues from his music royalties to maintain them as a working unit in order to immediately hear and develop his musical ideas.<sup>93</sup> Classical music's rare performance of contemporary works, the unpopularity of such

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86. LAUTERBACH, *supra* note 29, at 159, 161 (Roy Brown assembled a band composed of Ernie Roth, Edward "Lil' Tatum" Sentino, Teddy Riley, Johnny Fontenette, and Leroy "Batman" Rankins that came to be known as the Mighty Mighty Men).

87. MARK LEWISOHN, *THE COMPLETE BEATLES CHRONICLE: THE DEFINITIVE DAY-BY-DAY GUIDE TO THE BEATLES' ENTIRE CAREER* 28–29, 42–43 (2010).

88. *See generally* Will Straw, *Systems of Articulation, Logics of Change: Communities and Scenes in Popular Music*, 5 *CULTURE STUD.* 368 (1991).

89. *THE LAROUSSE ENCYCLOPEDIA OF MUSIC*, *supra* note 33, at 197–201.

90. *Id.*

91. *Major Baroque Composers*, *MUSIC OF THE BAROQUE*, <http://www.baroque.org/baroque/composers.htm> (last visited Aug. 19, 2014).

92. "Contemporary classical" music is practiced mostly in universities; it is listened to by almost no one; it deconstructs harmony, melody, and rhythm, rendering them all but unrecognizable; it is a purely intellectual exercise and save for the rare avant-garde ballet company, no one dances to it either." LEVITIN, *supra* note 8, at 257.

93. GIDDINGS, *supra* note 13, at 105–06.

works, and the atrophy of its audience<sup>94</sup> despite enormous prestige and considerable public subsidies might well reflect the isolation of its composers from both performers and audiences.

Hints of the same relationship between frequent live performance and creative innovation are also found in the other creative arts. Consider theater. Shakespeare was not only perhaps the greatest playwright, but he was also an actor, part owner of a playhouse, and principal playwright for the leading acting company of his day.<sup>95</sup> His acting troupe performed a different play each day, introduced as many as twenty new plays annually, and revived old favorites.<sup>96</sup> Shakespeare constantly revised his plays in response to audience reaction, and he wrote for the most experienced playgoers in history.<sup>97</sup>

While modern theaters perform a single play for months, even years if successful, a variant of Shakespeare's creative performance practice survives in contemporary theater. Productions bound for Broadway use out-of-town preview performances to refine their productions and test audience reactions before Broadway openings.<sup>98</sup> Once a play opens, collaboration and revision typically ends.<sup>99</sup> At an earlier stage of a play's development, local theater groups sometimes use theater workshops to help playwrights develop their ideas.<sup>100</sup> The award-winning *Rent* used such a process.<sup>101</sup>

Even in the visual arts, practices have changed. In fields like painting and sculpture, the modern artist usually works alone in her studio, a departure from the norms of the past. Artists like Rembrandt, Michelangelo, and Rubens employed numerous apprentices and artisans,<sup>102</sup> who accomplished much of the routine work; these skilled artists-in-training must have had opinions on the progress of particular works and probably communicated these views among themselves and to their respective principals. Art historians must therefore often attribute the more mundane parts of iconic works to anonymous artisans laboring in their masters' studios.<sup>103</sup> When so much art served religious purposes and was created in public spaces, e.g. frescoes in churches, a

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94. NAT'L ENDOWMENT FOR THE ARTS, HOW A NATION ENGAGES WITH ART 12–13 (2013).

95. JAMES SHAPIRO, A YEAR IN THE LIFE OF WILLIAM SHAKESPEARE: 1599, at xviii, 3–6 (2005).

96. *Id.* at 9.

97. *Id.*

98. See generally Patrick Healy, *Musicals Born on Broadway Cause Jitters* (Oct. 12, 2010), <http://www.nytimes.com/2010/10/13/theater/13preview.html?pagewanted=all>.

99. *Id.*

100. *Id.*

101. *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).

102. Stan Sesser, *The Art Assembly Line*, WALL ST. J. ONLINE (June 3, 2011), <http://online.wsj.com/news/articles/SB10001424052702303745304576357681741418282>.

103. *Id.*

wider audience would have had myriad opportunities to observe and comment upon the emerging images. This would have been performance art in a literal sense.

In motion picture production, which has no pre-20<sup>th</sup> century antecedent and which has a history of successful aesthetic innovation, we also find a similar kind of intense collaboration among a multitude of creative participants. Directors, actors, screenwriters, cinematographers, casting directors, make-up artists, costumers, sound engineers, and others all make creative contributions to the final product.<sup>104</sup> Moreover, shooting on location, away from ordinary distractions, permits the kind of focused involvement over weeks and months that must be the most intensive creative collaboration occurring in our modern arts economy.<sup>105</sup> The medium itself is an audio/visual recording; while some productions are tested with live, congregated viewing audiences prior to the final edit and commercial release of the film, the production process involves a high degree of collaboration among participants on the production set.<sup>106</sup> While this medium lacks a live performance counterpart, the presence of so many creative collaborators on the set during production may compensate for the lack of a live audience.

#### A. *Advantages of Live Performance*

Recorded expressive culture is a phenomenon of the modern world, and current recording technologies have fundamentally changed the way people experience culture. Before the invention of recording technologies, live performers narrated stories, acted out dramas, and performed dances or music with congregated audiences. Until one hundred years ago, with the exception of visual images and silent reading of printed texts, all culture was live. Even with respect to reading, most people experienced written texts through someone else reading aloud. This was a popular form of entertainment among the literate and a necessity among the illiterate, who constituted an overwhelming majority of the world's population and a significant share of the U.S. population. Today, we experience our expressive culture largely through recordings; live performances have become infrequent. This change might prove a momentous one, but it has occurred largely unnoticed and has provoked little comment or analysis.<sup>107</sup>

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104. *See, e.g.*, SUSAN HAYWARD, CINEMA STUDIES: THE KEY CONCEPTS 124 (2000).

105. *Id.*

106. *See, e.g., id.* at 464.

107. The commentary that does exist concerns the economic displacement of unionized professional musicians. Musicians unions fought a losing struggle over decades. *See generally* Vern Countryman, *The Organized Musicians: II*, 16 U. CHI. L. REV. 239 (1949) (detailing the American

The ubiquity of replacing live performance with recordings may most significantly impact the functions of expressive culture. In the communications field, considerable research has documented the superiority of face-to-face communications over substitute technologies for the conveyance of implicit information. In one experiment groups of six subjects played a game in which everyone could earn money by cooperating. One set of groups interacted face-to-face, while another set interacted electronically. The groups meeting in person cooperated better and earned more money, and the groups that communicated only electronically fell apart as members pursued personal gain over the groups' needs. "Face to face contact leads to more trust, generosity, and cooperation than any other sort of interaction."

For better or worse, recordings change the experience of expressive works. Recordings bring an exponentially wider selection of works to audiences, permit us to repeatedly experience works at our convenience, and allow the creation of forms of expression, such as motion pictures, that are impossible to perform live. Unfortunately, recording technologies also ossify the content of the work, forestall communication between performers and audiences, and limit the number of senses engaged when the audience experiences the work.

Recording technology also can directly affect the content of particular works, because artists can use recording techniques, such as overdubbing their own voices to create duets with themselves, to make works that cannot be performed live.<sup>108</sup> Access to recordings by audiences has also changed what composers create. Classical composers particularly no longer compose to exploit the market for amateur musicians as they did throughout the nineteenth century.<sup>109</sup> Recordings also permit composers to create more challenging content, because the audiences can repeatedly access the work, typically at no incremental cost, at their own convenience.

Recordings have also changed the environments in which we experience expressive culture. Music, dramas, and stories, when experienced live, almost exclusively occur with a congregated audience, often large ones. Yet we typically experience recorded works in small

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Federation of Musicians battles against the technological competition of motion pictures, phonographs, radios, jukeboxes and television); Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 SW. L.J. 697 (1983); Chris Milazzo, Note, *A Swan Song for Live Music?: Problems Facing the American Federation of Musicians in the Technological Age*, 13 HOFSTRA LAB. L.J. 557 (1996) (highlighting the unique threat to musicians posed by synthesizers and digital audio tape).

108. They can even dub over old recordings and create duets with long dead performers, as Natalie Cole did with her father, Nat "King" Cole. NATALIE COLE, UNFORGETTABLE: WITH LOVE (Electra/WEA 1991).

109. See ROBERT PHILIP, PERFORMING MUSIC IN THE AGE OF RECORDING 7 (2004).

groups of acquaintances or, ever more frequently, in solitude. Large audiences for mass media recordings consist of geographically or temporally dispersed strangers. A live, congregated audience permits the phenomenon of emotional contagion, in which the emotional mood of the audience synchronizes. Television sitcoms add laugh tracks to exploit this phenomenon.

Audiences for recordings necessarily engage the work more passively than live audiences. They might respond to works, but they cannot communicate their responses to the performers. Segregated in time and place from the performers, they cannot collaborate in the performance. In contrast, live performances allow performers and audiences to respond dynamically to each other. Just as when jazz was the popular dance music, dancers provided immediate feedback to performers of the utility and pleasure derived from musical performances and what worked artistically. Live audiences could, in theory, limit themselves to a passive role, but the mere presence of a live audience, passive and utterly disengaged, would communicate powerfully to the performers, so only recordings have truly passive audiences. The creative dynamic between performers and audiences might have even more significance than the content of the work performed.

Compared to the experiences of live audiences, audiences for recordings engage fewer senses. Recordings may engage only a single sense, when listening to music, or two senses, when watching a movie, but as yet no recordings involve the senses of touch or smell. The sensory data from touch, the vibrations from the movements of performers, or the heat and smells of other bodies in the crowd are lost.

The distinction between live and recorded performances also has significance for the content of what can be communicated. Evidence from the research of economic geographers suggests that face-to-face encounters communicate nuances that escape transmission as explicit content by various media.<sup>110</sup> Critical implicit content is lost when telephone or video conferencing is used in lieu of face-to-face communication, even when the explicit content is the relatively objective content of scientific discourse.<sup>111</sup> Technologies such as video conferencing have been shown to be complementary to face-to-face collaboration rather than substitutes for it.<sup>112</sup> This is why the most tech savvy early adopters on the planet still pay premium real estate prices in order to cluster together in Silicon Valley.<sup>113</sup> The music, fiction, drama, and art that form the core of expressive culture probably contain a

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110. EDWARD GLAESER, TRIUMPH OF THE CITY 34–38 (2011).

111. *See id.* at 34–35.

112. *Id.* at 35.

113. *Id.* at 36.

greater proportion of implicit content than the science and engineering communications that predominate in Silicon Valley. The physical proximity of performers and audiences, their face-to-face exposure, and the resulting multisensory experience of each other permit more communication to occur, especially of implicit content.

The distinction between live and recorded performances also has physiological significance. Different things happen in the brain when we experience a live performance instead of a recording of the same event.<sup>114</sup> Brain scientists have demonstrated, using electrodes implanted in macaque monkey brains, that different patterns of neurons fire when monkeys watch an event live compared to a video recording of the same event.<sup>115</sup> Depending upon what the functions of expressive culture are in human societies, this distinction might warrant differential legal treatment.

### B. *Advantages of Recordings*

While recordings cannot match live performances as an immersive multisensory experience, recordings offer unique advantages. Recordings provide access to dead artists or niche artists when audience interest would not support a live tour. They allow us to experience works conveniently, without the logistical complications that live performances entail. We do not have to arrange childcare, find parking, or negotiate with scalpers for sold-out performances. Recordings permit us to experience far more works than we could ever see or hear live. They make expressive culture available without the temporal or geographic constraints that limit live performances.

If, as some speculate, expressive culture enhances empathy<sup>116</sup> between individuals and groups, recordings might better extend the range of empathetic experiences, because recordings offer greater geographic and temporal variety.<sup>117</sup> While the multi-sensory intensity of a live performance might generate a more powerful experience, the variety of expressive culture available on recordings might trump intensity.

Recordings also allow the repeated experience of works, which

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114. MARCO IACOBONI, *supra* note 79, at 160.

115. *Id.* at 161.

116. Maya Djikic et al., *Reading Other Minds: Effects of Literature on Empathy*, 3 SCI. STUDY LITERATURE 28 (2013).

117. "People learn from fiction about the human psychology, . . . through taking the perspective of the characters and to experience the events as if it is the reader's own experience . . . [enabling them] to understand other people across time and space, an opportunity which is not readily available in daily life." P. Matthijs Bal, Martijn Velkamp, *How Does Fiction Reading Influence Empathy? An Experimental Investigation on the Role of Emotional Transportation*, 8 PLOS ONE 2 (2013).

increases familiarity and, in sophisticated works, reveals nuances, details, and connections that may have escaped initial notice. This might permit less-accessible works to achieve recognition and popularity. If more sophisticated works generate more of the benefits that expressive culture provides, then this expansion of benefits derived from expressive culture would represent a previously unavailable benefit.<sup>118</sup>

Recordings also enable the creation of entirely new types of works that could not be performed live. Motion pictures are the most prevalent example. The storytelling techniques of movies, the visual grammar of extreme close-ups, cross cutting edits, and dramatic shifts in place and time, might stimulate the human brain in novel ways and would be impossible to stage in a live drama. *Forrest Gump* incorporated and manipulated live documentary footage in fictional scenes to place the principal character in newsreels from the period. Documentaries can reconstruct historical reality in newly perceptive ways. Special effects and computer generated images allow movies to tell stories that live theater could never replicate.

Recording technologies, especially software, expand the pool of artists. Without being able to carry a tune or play a musical instrument, almost anyone can record a musical album using a number of software products that eliminate or correct off-key notes or out-of-time beats. A layperson can assemble music from snippets available in public files and create a symphony without even possessing basic music literacy. Photography and videography have witnessed similar advances. Software now corrects mistakes that professional photographers spent years learning how to avoid. *Girl Talk*, the stage name of mashup artist Gregg Gillis, represents the logical extension of recording technologies.<sup>119</sup> He performs electronic music live by using a computer to produce mash up remixes of recorded samples of songs.<sup>120</sup> Such work might exemplify an innovation that achieves the functions of copyright in new and better ways. It might cause unique groups or patterns of neurons to fire in the brain that have no comparable equivalent in live performances. Or, it might merely demonstrate how recordings continue to impoverish expressive culture by distancing us even further from the live collaboration at its roots.

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118. See Kidd & Castano, *supra* note 48, at 377–80.

119. Nick Bilton, *One on One: Girl Talk, Computer Musician*, N.Y. TIMES (Feb. 28, 2011 8:30 AM), [http://bits.blogs.nytimes.com/2011/02/28/one-on-one-girl-talk-computer-musician/?\\_php=true&\\_type=blogs&\\_r=0%7Cauthor=Nick](http://bits.blogs.nytimes.com/2011/02/28/one-on-one-girl-talk-computer-musician/?_php=true&_type=blogs&_r=0%7Cauthor=Nick).

120. *Id.*

## V. MAKING COPYRIGHT MORE FUNCTIONAL

The following analysis suggests how modest reductions in the scope of the copyright monopoly might align copyright policies more with the needs of our social species. Achieving this realignment requires modifying two of copyright's six exclusive rights, the derivative work right<sup>121</sup> and the public performance right.<sup>122</sup> Two changes are necessary in the derivative work right; the first requires legislative action, while the second requires only judicial resolution of a statutory ambiguity. Congress would need to shorten the duration of the derivative work right, something that sounds simple but is conceptually quite difficult. The judicial interpretation needed would resolve the doctrinal ambiguity concerning whether an infringing derivative work must also be fixed. Regarding the public performance right, statutory change is needed to reduce the scope of the public performance right. I propose creating a royalty-free zone for live performances, provided no fixation occurs. Making such performance environments exempt would allow both experimentation and collaboration with audiences with relatively modest consequences for existing claims on copyright revenue. The other four exclusive rights can retain their current lengthy terms.

### A. *Reduced Duration of the Derivative Work Right*

If expressive culture functions to help us cope with the stresses produced by changes in our physical and social environments, then this function has significant implications for copyright terms. If it accomplishes this function by providing vicarious experiences to acclimatize us to those changes, then a copyright term of life plus seventy years locks away relevant raw material for far too long. Too many works remain unavailable until the passage of time and changes in technology and social mores have so transformed society that formerly insightful works have become impenetrable.

Our culture and society changes rapidly, driven by the frenetic pace of technological innovation. In less than one hundred fifty years our society has evolved from rural patterns of settlement and an agrarian economy, through urbanization and industrialization, to the current exurban sprawl and information-services-based economy. If expressive works play a critical role in enabling both individuals and society to adapt to rapid change, then copyright policy has increased in importance. In earlier eras, change proceeded much more slowly, and in our prehistoric past—the great bulk of time during which evolution

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121. 17 U.S.C. § 106(2).

122. *Id.* § 106(4).

molded the human animal and our use of expressive culture—change occurred at a glacial pace. Rapid change would seem to increase our reliance on expressive culture to help mediate the psychological stresses and social tensions created by such speedy transitions. The increasing pace of technological and cultural change should imply a shorter term of copyright, not the ever-lengthening term of present circumstances.<sup>123</sup>

Historically, the arts have served as key interpreters of the human experience, helping us make sense of our lives, our environment, and our social relationships. For authors to create the works that fill this role, they need access to the immediate past, not just the distant past, beyond roughly one hundred years under the current Act.<sup>124</sup> The cultural meaning of works created only a few decades ago now escapes contemporary audiences. The rigid political and sexual mores of Hollywood that constrained its subject matter throughout its heyday are incomprehensible to contemporary audiences. The current revival of interest in African-American music forms, from jazz to blues to do-wop, involves audiences listening to this music without knowing the racial caste divisions out of which this music grew and which often fueled its expression.<sup>125</sup> Lengthy copyright terms reduce the relevance of many works by the time they eventually enter the public domain. In an era of such rapid change, the less relevant the public domain becomes, the less value it has as raw material for subsequent authors. For copyright to

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123. The 1790 Act, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, established an initial term of fourteen years and a renewable term of fourteen years. The 1831 Act, Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439, lengthened the initial term to twenty-eight years and kept the renewal term at fourteen years. The 1909 Act, Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1080–1081, kept the initial term at twenty-eight years and lengthened the renewal term to twenty-eight years. Then Congress changed the term to the life of the author plus fifty years, Pub. L. No. 94-553, 90 Stat. 2572 (1976), before finally lengthening the term to life of the author plus seventy years, Copyright Term Extension Act of 1997, Pub. L. No. 105-298, 112 Stat. 2827-28 (1998).

124. Shortening the term of copyright would also reduce the problem of orphan works.

125. One of Billie Holiday's most iconic and controversial songs was *Strange Fruit*, written by Abel Meeropol under the pseudonym Lewis Allan:

Southern trees bear a strange fruit,  
(Blood on the leaves and blood at the root,  
Black body swinging in the southern breeze,  
Strange fruit hanging from the poplar trees.

Pastoral scene of the gallant South,  
(The bulging eyes and the twisted mouth,  
Scent of magnolia, sweet and fresh,  
(And the sudden smell of burning flesh.)

Here is a fruit for the crows to pluck,  
For the rain to gather, for the wind to suck,  
For the sun to rot, for a tree to drop,  
Here is a strange and bitter crop.

HOWARD ZINN & ANTHONY ARNOVE, VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 326–27 (2004).

play its proper cultural role, it must free more current raw material for use by contemporary creators.

Rapid change justifies a shorter term of copyright, but not so brief that it would impair incentives for the commercialization and distribution of nondigital creative works.<sup>126</sup> We can reconcile these competing objectives if we shorten the term of protection of only one of the six exclusive rights, the derivative work right. So long as users of otherwise protected material create new derivative works, then such a requirement would mute the impact on incentives, because the remaining five rights would retain their (overly) lengthy terms. How short could we make the term of protection? A range of ten to fifteen years would prove adequate. Very few works have commercial lives of greater length,<sup>127</sup> and the rapid pace of cultural change warrants making as much as possible of our recent history available to future authors. The difficulty lies in accomplishing this result as a doctrinal matter.

The scope of the derivative work right is highly problematic,<sup>128</sup> because existing copyright doctrine fails to adequately distinguish the derivative work right from the reproduction right. Both require “substantial similarity” for infringement.<sup>129</sup> The statute itself defines a derivative work to include an abridgement or condensation.<sup>130</sup> A derivative work, to constitute such a work, must contain enough original material to support a copyright for what it adds.<sup>131</sup> So an abridgment

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126. Copyright incentives may be overrated; they may be unnecessary to spur creation, and distribution of digital works is virtually costless.

127. “Even allowing for the optimism and self-confidence necessary in these creative and risky fields, the wildest dreams of artists and producers probably extend no farther than ‘smash hit’ status for their works for a year or two, and healthy sales for five or ten.” EDWARD RAPPAPORT, CONG. RESEARCH SERV., COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 4–5 (1998). The same study found that only about 1% of book copyrights were renewed after their initial twenty-eight year term. *Id.* at 6. Given the compliance with technical formalities necessary to secure federal copyrights during the period examined, a far lower proportion of protected works would have enduring value in the current copyright era of automatic protection upon fixation.

128. Compare *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) with *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) and *Munoz v. Albuquerque A.R.T. Co.*, 38 F.3d 1218 (9th Cir. 1994), *aff’g without published opinion* 829 F. Supp. 309 (D. Alaska 1993). See generally Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505 (2013).

129. *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986). In deciding whether a book of photographs could infringe a copyrighted work of choreography, the court held in response to the plaintiff’s claim that the book was either an infringing copy or, alternatively, an infringing derivative work, that “the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is ‘substantially similar’ to the former.” *Id.* at 162.

130. “A ‘derivative work’ is a work based upon one or more preexisting works, such as a[n] . . . abridgement, condensation. . . .” 17 U.S.C. § 101 (2012).

131. *L. Batlin & Son v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (“[T]o support a copyright [in a derivative work] there must be at least some substantial variation, not merely a trivial variation . . .”).

that qualifies as a copyrightable derivative work must contain enough preexisting material to be substantially similar to it and also contain enough new material to support independent copyright as a new derivative work.<sup>132</sup> At the same time, since any unauthorized substantially similar work infringes the reproduction right, courts can easily find that such a work created without authorization from the owner of the preexisting work infringes both rights. Few cases analyze this distinction.<sup>133</sup>

The substantial similarity test for infringement of the reproduction right prohibits considerably more than just literal copies,<sup>134</sup> and no amount of original material justifies an infringing copy.<sup>135</sup> Whether the two rights can be differentiated depends upon whether the definition of derivative work can be made precise. The statutory definition provides a laundry list of examples and adds the general category of “any other form in which a work may be recast, transformed or adapted.”<sup>136</sup> Only by cabining both the laundry list and the general category can the definition be precisely delineated, but the cases are far too few to achieve this with decisional law.

### *B. Requiring Fixation to Infringe the Derivative Work Right*

A second and more modest reform, requiring little more than a clarification, would encourage a more functional copyright. This reform would require fixation<sup>137</sup> to infringe the derivative work<sup>138</sup> right. An unfixed derivative work can rarely substitute for or supplant demand for the underlying work. Successful and free experimentation with a variety of underlying source materials for derivative works might well lead to a subsequent, fixed derivative work for which royalties would later

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132. Moreover, the threshold for copyrightability of the new material is famously low. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

133. *See generally* Samuelson, *supra* note 128.

134. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

135. When a small portion of the plaintiff's work is copied and the vast bulk of defendant's allegedly infringing work is original, the affirmative defense of fair use is typically the focus of the litigation. The fair use evaluation analyzes the amount taken as a proportion of plaintiff's work, not the defendants. 17 U.S.C. § 107(3) (2012).

136. 17 U.S.C. § 101.

137. “A work is ‘fixed’ . . . when . . . [it] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

138. *Id.* “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” *Id.*

become due. The derivative work might be all the better for the period of royalty-free experimentation in unfixed forms, which would allow authors to incorporate improvements and refinements derived from live audience responses. Investments in licenses for fixed derivative works might increase because the royalty-free period of experimentation and development with unfixed derivative works would reduce the uncertainty of audience demand for the work, allowing more accurate estimates of commercial value. The current system requires a license before creating even unfixed derivative works, forcing both the choice of the underlying work and the monetary commitment necessary to acquire a license before actually creating the derivative work and gauging its potential artistic or commercial success. Without a license, such an author risks not only infringement liability, but, even if the adaptation is successful, the author forfeits copyright protection for the new work.<sup>139</sup> These proposed changes would free the live performance of music and other categories of works to draw upon the entire body of existing works as source material so long as the newly created derivative works remained unfixed.<sup>140</sup>

We need only clarify existing doctrine to eliminate liability for unfixed derivative works, since an acceptable basis already exists to argue for the interpretation that unfixed derivative works do not infringe. Doctrinal ambiguity arises because “[a] work is ‘created’ when it is fixed in a copy . . . .”<sup>141</sup> Since “[a] ‘derivative work’ is a work,”<sup>142</sup> the statutory definition strongly implies that, to infringe the derivative work right, the infringing work must be fixed.<sup>143</sup> Unfortunately, the legislative history of the 1976 Act explicitly contradicts this implication by stating that no fixation is required to infringe the derivative work right.<sup>144</sup> The courts have failed to resolve

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139. 17 U.S.C. § 103(a) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

140. Live broadcasts of performances with a live studio audience would in theory be permitted, but these have become rare in contemporary broadcasting practice. Because of time zones, very few broadcasts are likely to be completely unfixed, since the economics of broadcast schedules create strong incentives for repeated broadcasts so that the same time schedules can be maintained in different time zones.

141. 17 U.S.C. § 101 (2012) (definition of “created”).

142. *Id.* (emphasis added).

143. See 2 NIMMER ON COPYRIGHT, § 8.09[A] (2006).

144. See H.R. REP. NO. 94-1476, at 62 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5675 and S. REP. NO. 94-473, at 58 (1975) (emphasis added):

*Preparation of derivative works.*—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, *may be an infringement even though nothing is ever*

these conflicting possibilities. In dictum<sup>145</sup> in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*<sup>146</sup> the court pronounced that “[a] derivative work must be fixed to be protected under the Act, but not to infringe.” It then proceeded to muddy this treatment of the fixation issue by declaring “[a] derivative work [that infringes] must incorporate a protected work in some concrete or permanent form.”<sup>147</sup> The statute, however, is unambiguous in its § 101 language, defining the moment a work is “created” as when it is “fixed,” and a derivative work is necessarily a “work.” Thus it is reasonable to hold that infringement of the derivative work right requires fixation of the infringing derivative work. Given this lack of ambiguity, one could resort to the well-established interpretative rule that reference to legislative history for purposes of statutory interpretation is justified only when statutory language is ambiguous,<sup>148</sup> and, in the § 101 definitions, there is no ambiguity to resolve.

Of course an unfixed derivative work could still infringe the public performance right of the underlying work,<sup>149</sup> because an infringing public performance requires no fixation. However, the proposal I make, *infra*, to create a royalty-free zone that would exempt live public performances before live audiences, in order to encourage the collaboration that occurs between audiences and performers in such an environment, would result in exempting such a performance, in effect limiting the public performance right to recorded media.

### C. A Royalty-Free Zone for Live Public Performance

If key functions of expressive culture require either or both a congregated audience (for emotional contagion) and a live performance (for collaboration), then the current copyright statute fails to support these functions.<sup>150</sup> For purposes of public performances or public

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*fixed in tangible form.*

145. It was dictum because the court ultimately concluded that the purported infringing work did not constitute a derivative work because it did not recast the plaintiff’s work.

146. 964 F.2d 965, 968 (9th Cir. 1992) (citation omitted).

147. *Id.* at 969.

148. “Given the straightforward statutory command, there is no reason to resort to legislative history.” *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997). *See also* *U.S. v. Fisher*, 6 U.S. 358, 399 (1805).

149. Fair use could rebut allegations of infringing the public performance right. If the unfixed derivative work varied substantially from the underlying work, the ephemeral nature of the unfixed work could be an additional (optional) factor in addition to the mandatory four-factor § 107 analysis that would weigh in favor of fair use.

150. The doctrinal approach to joint authorship, by developing a test that both permits promiscuous collaboration with peers, friends, editors, without the risk of opportunistic “claim jumping” by those whose opinions or advice was sought is one of the current Act’s recognition of the value of collaboration. *See Thomson v. Larson*, 147 F.3d 195, 200–02 (2d Cir. 1998). “The potential danger of

displays, the Copyright Act distinguishes neither between congregated and disaggregated audiences<sup>151</sup> nor between the public performance of a recording and a public live performance.<sup>152</sup> The Act's definition of "[t]o perform or display a work 'publicly'" treats as equivalent a live performance and the transmission of a recording to isolated members of the public, even at different places and times.<sup>153</sup> Given the disparate psychological and physiological outcomes from these two ways to experience the same expressive work, copyright doctrine should not treat them the same. Yet both are considered equivalent public performances of the expressive work.

If emotional contagion were the sole critical function, then the statute would appropriately distinguish a congregated audience from a disaggregated one. Emotional contagion could occur so long as the audience is congregated, regardless of whether the public performance is recording, such as in a dance club, or is of a live performance transmitted to a remote congregated audience, such as a concert on a closed circuit telecast.<sup>154</sup> Alternatively, if the only desired function were collaboration, then the critical distinction would differentiate environments where performers and audiences can interact from those where they cannot. The statute would treat a live performance before a

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allowing anyone who makes even a minimal contribution to the writing of a work to be deemed a statutory co-author—as long as the two parties intended the contributions to merge—motivated the court to set forth a two-pronged test." *Id.* (requiring all parties to intend co-authorship).

151. The exception is found in the section 109(c) exemption to the public display right, which permits the owner of a particular copy to publicly display that copy to viewers present at the place where the copy is located. Since at least with respect to paintings and sculptures, the copy is often a unique original (still defined as a "copy" under the Act, as 17 U.S.C. § 101 provides, "[t]he term 'copies' includes the material object . . . in which the work is first fixed."), this is akin to a live performance in that it privileges the congregated audience experiencing the original. On the other hand, it is unlike a live performance because it also applies to a reproduced copy and, further, even if the original is already permanently fixed and the act of creation occurred decades earlier, so no author and audience collaboration is possible, although within a live congregated audience collaboration might occur in the viewing and interpretation.

152. Only through the concept of fixation does the Act distinguish between live and recorded, since unfixated works remain outside the scope of copyright protection.

153. "To perform or display a work 'publicly' means:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;
- or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101.

154. Social media, while new and still evolving, permit some interaction among a disaggregated audience. Some of this interaction occurs in real time, provided one multitasks and accepts the resulting loss of cognitive resources devoted to experiencing the work. It does not yet simulate immersion in a crowd of enthusiastic fans.

live audience<sup>155</sup> differently from a live audience receiving remotely. However, the realization of the full, hypothesized functions of expressive culture requires both congregation of the audience and live performance.

#### *D. Limiting the Public Performance Right*

A live performer before a live audience implicates the same right as merely playing a recording for the same audience.<sup>156</sup> The same right applies even if those listening to the recording are not gathered together in one place but are dispersed in place, time, or both. If the social experience of public performance animated copyright policy, then this uniform treatment would change, because it neglects the widely divergent experiences of these variant “audiences.”

If performance rights varied by the nature of the audience’s experience, copyright policy could reduce the competitive cost advantage of recordings over live performances in order to encourage more live performances. Unless it is being recorded, a live public performance of a musical work should fall outside the scope of the public performance right. Making such performances royalty-free encourages live performances, offering the potential for creative interaction between performers and audience.<sup>157</sup> Eliminating monetary payment provides an obvious benefit, although a less obvious but perhaps more significant benefit might be the elimination of transaction costs, which would allow more spontaneous selection of material, a critical factor in the creative process, and opportunistic use of temporary performance venues.

The immediate audience response, effectively a collaboration with the performing artist, provides uniquely valuable criticism that recording studios and music industry executives cannot provide. A live performer with a live audience is immersed in the social interaction of the audience response, which may approximate the evolutionary milieu which

155. As opposed to a live audience receiving a transmission.

156. The statute does distinguish among the types of work involved, as this proposal does. The current statute grants no public performance rights to sound recordings (as distinct from the underlying musical work) unless the performance is by digital audio transmission, thus exempting analogue radio broadcasts. *See* 17 U.S.C. § 106(6).

157. Currently, § 110(4) exempts live amateur and free performances of nondramatic literary works or musical works. *See id.* § 110(4). Prior to the invention of recording technologies, amateur performance offered the predominant way to experience much of our expressive culture. Amateur musical groups performed for themselves or an audience drawn from their immediate community or social networks, and book groups engaged in public readings of the leading works of their day. The existing exemption encourages social consumption of our expressive culture. Such performances are artifacts from a vanished era, but with certain modifications, we could create more effective incentives to encourage such performances.

generated our need to make musical works.

Neither favoring the social experience of works nor limiting the public performance right is totally alien to the Copyright Act. The current public performance right is rife with exemptions. The 1976 Act established some limited incentives for social consumption. Two of the limited exemptions of public performance from infringement liability in § 110, teaching<sup>158</sup> and religious worship,<sup>159</sup> can be justified easily as recognition of the social context in which works are experienced during these activities. The teaching exemption applies only to performances or displays in “face-to-face teaching activities” and the religious exemption covers only performances or displays “in the course of services at a place of worship or other religious assembly.” In the exempt contexts, participants would interact socially, and the resulting benefits they receive reflect both this interaction as well as the consumption of the copyrighted work. The benefits derived from these dual sources could be deemed to outweigh the economic loss to copyright owners created by the exemptions. In a teaching environment, the learning experience depends upon the conflicts, contrasts, and comparisons that derive from the competing perceptions, understandings, and interpretations of the work experienced by participants in the learning group. In the religious context, the communal, shared experience of participatory worship is largely the point of the experience. Participants do not experience the expressive work for their own sakes but as an instrument to achieve their educational or religious purposes. In some respects, these exemptions are analogous to fair use exemptions. The contributions of the participants to their experiences of the works create social benefits<sup>160</sup> above and beyond the unmediated value of the work alone.

A related provision used by art galleries and museums depends upon the limitation of the public display right contained in § 109 (c),<sup>161</sup> which exempts the public display of a work, typically visual art, to a live

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158. *See id.* § 110(1)–(2).

159. *See id.* § 110(3).

160. Other § 110 exemptions benefit nonprofit or voluntary groups by indirectly subsidizing their charitable activities, and if these promote social cohesion, then the exemptions support this effort too. Section 110(10) exempts performances of nondramatic literary or musical works in the course of social functions organized and promoted by nonprofit veterans organizations or nonprofit fraternal organizations to which the general public is not invited, if the proceeds are used exclusively for charitable purposes and not for financial gain. *Id.* § 110(10). Section 110(6) exempts performance of nondramatic musical works by a governmental body or nonprofit agricultural or horticultural organization in the course of an annual fair or exhibition. *Id.* § 110(6).

161. “Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.” *Id.* § 109(c).

audience. Even a copy of the original work can be similarly displayed. At least at gallery openings for newly created works, which the artist typically attends, a live audience interacts with the artist to mutual benefit. In addition, the author probably suffers no loss of income from the exemption, since such displays usually enhance sales of the artist's works or enhance her reputation, increasing the value of her work. Charging the public admission would decrease attendance in what is functionally a retail store.

Changing the public performance right as proposed above would reverse more than a century of music practice, but it would not venture into unfamiliar policy territory. Only with the 1897 amendments did the public performance of musical works come within the exclusive copyright grant.<sup>162</sup> It took a further two decades for the courts to establish that the now-superseded "for profit" requirement did not necessitate a separate admission charge for music to find infringement.<sup>163</sup> This change would have little effect on the incomes of composers, since the public performance of recordings generates most of their incomes from the public performance right. As in the era before recordings, they would still receive royalties from the increased sales of sheet music necessary for live performers to learn their music. This seems a small price to pay to adapt copyright to our social species.

The public performance right is already complicated and differentiated by subcategories. The public performance right protected dramatic works for more than 40 years before it covered musical performances, and even then it initially applied only to musical performances "for profit."<sup>164</sup> Within the music category, the compulsory license applies only to the subcategory of nondramatic musical works.<sup>165</sup> Analog public performances of sound recordings are exempt, since § 106(6) applies only to digital audio transmissions.<sup>166</sup> Various exemptions within § 110 differentiate using various criteria, including the following: whether the performance involves face to face teaching at a nonprofit educational institution,<sup>167</sup> whether the work performed is a dramatic or nondramatic work,<sup>168</sup> whether the performance occurs in the course of a religious assembly,<sup>169</sup> whether the

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162. See Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481–82 (current version at 17 U.S.C. § 106(4) (2012)).

163. See *Herbert v. Shanley Co.*, 242 U.S. 591, 593–95 (1917).

164. Act of Mar. 4, 1909, § 1(e), 35 Stat. 1080–1081 (1909).

165. 17 U.S.C. § 115 (2012) ("In the case of nondramatic musical works, the exclusive rights . . . are subject to compulsory licensing. . . .").

166. *Id.* § 106(6).

167. *Id.* § 110(1).

168. *Id.* § 110(2) & (6).

169. *Id.* § 110(3).

performance is an amateur one,<sup>170</sup> the size of the retail establishment,<sup>171</sup> the nature and amount of electronic hardware used,<sup>172</sup> the organizational purpose of the sponsoring organization,<sup>173</sup> the purpose of retail promotion,<sup>174</sup> and whether the intended audience or performers have visual or auditory handicaps.<sup>175</sup> Compared to the complexity of these categories, the difference between live performers and recordings and between live audiences and others appears straightforward.

Moreover, the exemption from copyright protection for live performances is not altogether out of character with the current statute. Of the six exclusive rights, four, the reproductive right, the derivative work right,<sup>176</sup> the distribution right, and the public performance of sound recordings by digital audio transmission right, assume fixation in copies and are concerned with the exploitation of those copies. A fifth right, the public display right, exempts the public display of a lawfully owned copy when the audience is present at the place of display, essentially an exemption for a live display.<sup>177</sup> Copyright is primarily concerned with copies, and privileging live performance does not contradict this emphasis.

#### *E. Economic Consequences of a Functional Approach to Copyright*

What would be the economic consequences for performers, content owners, and authors if such live public performances with live audiences occurred in a royalty-free zone? It might reduce licensing income, but it might increase performance fees. To the extent some composers are not performers and some performers are not composers, such a change might redistribute revenues between performers and composers, but its initial effects could be revenue-neutral, and its long-term effects might be strongly beneficial if it strengthens our expressive culture.

The bulk of copyrighted works generate most of their revenues for authors and content owners from the sale and performance of recordings, with the exceptions of live theater and dance. Books, sound recordings, and movies are recordings by definition, and the revenues

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170. *Id.* § 110(4).

171. *Id.* § 110(5)(B)(i) & (ii).

172. *Id.* § 110(5)(A); 17 U.S.C. § 110(5)(B)(i) (I) & (II).

173. *Id.* § 110(6) & (10).

174. *Id.* § 110(7).

175. *Id.* § 110(8).

176. The derivative work right presupposes copies as a matter of statutory interpretation, since it is a “work” which is only created upon fixation. However, the legislative history of the Act indicates that Congress thought that a derivative work could exist without fixation. H.R. Rep. No. 94-1476, 94<sup>th</sup> Cong. 2<sup>nd</sup> Session, p. 62 (1976).

177. 17 U.S.C. § 109(c) (2012).

from these works would remain unaffected. Through the end of the nineteenth century, authors generated substantial incomes from oral readings of their works. Currently such appearances, when they still occur in the contemporary copyright economy, are usually free and done to promote sales of the book.<sup>178</sup> Music is about the only content that, while generating the bulk of its revenues from sales or performances of recordings, still generates significant revenues from live performances, and this share is increasing.<sup>179</sup> In any royalty-free zone for live performances, music composers would lose the revenues collected on their behalf by performing rights organizations from live performance venues. When the live performers are themselves the composers, they would probably lose no revenue, because their appearance fees could increase to compensate, and the performance venue's costs would remain unchanged. The only revenues lost to the creative side of the music industry would be performance royalties generated from venues that feature live music groups performing cover songs, since these composers would receive neither appearance fees for performing nor public performance royalties.

Perhaps the most significant loss to authors would be from the loss of public performance royalties for drama and dance. Playwrights and choreographers would lose royalties from the performances of their works by others. This loss might be offset somewhat by an increase in the number of productions, since they would become cheaper to produce because of the exemption from the royalty obligation, and increased royalties from the sale of the copies needed to perform them since

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178. Matthew Pearl, *Dickens v American*, MORE INTELLIGENT LIFE, <http://moreintelligentlife.com/story/dickens-vs-america> (last visited Aug. 13, 2014). Dickens found his second American lecture tour so lucrative that he made 38,000 pounds from seventy-six public readings. When “he died a year and a half later, more than 20% of his estate’s assets had come from this American tour.” *Id.*

“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.” STEVEN ROGER FISCHER, *A HISTORY OF READING* 275 (2003).

179. BMI reported \$944 million in revenue for its fiscal year ending June 30, 2013. Press Release, BMI, Broadcast Music Inc. Reports Record-Breaking Revenues of \$944 Million (Sept. 23, 2013), <http://www.bmi.com/press/entry/563077>. Of this amount, \$116 million came from bars, restaurants, and other commercial establishments. *Id.* A significantly smaller share would derive from live performance venue licenses, since the category reported includes everything from Muzak in dental offices or telephone on-hold, to bars and restaurants playing background music. *See id.* The resulting residual amount would be the upper bound for the amounts lost with a further reduction from the amounts that would accrue to the performers.

ASCAP is the other major Performing Rights Organization. BMI and ASCAP reportedly account for 98% of performing rights licensing revenues. *Music Licensing*, INT’L MUNI. LAW. ASS’N, <http://www.imla.org/component/content/article/23-programs/112-music-licensing> (last visited Aug. 18, 2014); Sheridan Lyons, *Song Fees Have Towns Singing Their Own Blues*, BALTIMORE SUN (Sept. 8, 2003), [http://articles.baltimoresun.com/2003-09-08/news/0309080288\\_1\\_manchester-carroll-county-small-town](http://articles.baltimoresun.com/2003-09-08/news/0309080288_1_manchester-carroll-county-small-town).

productions would become cheaper to stage. If the financial impact on playwrights and choreographers were too great, these forms could just be exempted from a royalty-free zone, since recordings of dances or plays, presented as such, are infrequently made.

What might be the cultural consequences for such a royalty-free zone? In such a zone, any works could be performed live, so long as no fixation occurred, and variations could evolve with none of the chill derived from fear of creating infringing derivative works. Creating a royalty-free zone does not require that we give up any of the advantages recordings offer. Instead, recordings could be made and could conventionally exploit any creative innovations spurred by such a zone. The benefit of a royalty-free zone would be a richer cultural life, richer in the functional sense, given the hypothetical purposes of expressive culture.

## VI. CONCLUSION

Since 1909, technological innovation has given us convenient and inexpensive access to almost the entire recorded history of the world's cultures, but it has also helped eliminate the social context in which we once experienced our culture. We know too little about ourselves or the functions expressive culture serves to blithely accept this unexamined consequence of technological innovation. We are fundamentally a social species, and recognition of this social aspect should rightly inform copyright policy.

Restructuring copyright to make it more suitable for a social species implies a reduction in the scope of its monopoly, but such a reduction risks neither a decline in innovation nor the potential future of our cultural heritage. We have assigned too much value to the incentive granted by the ever-expanding copyright monopoly. The United States achieved world dominance in expressive culture, much to the annoyance of the rest of the world, with the idiosyncratic, hyper-technical 1909 Act, which granted much weaker property rights than those granted in Europe or by our own 1976 Act. Even with the current, expanded scope of protection, innovation has occurred, but outside of the copyright system, most notably with the development of hip-hop. Cutting back a few of these expansive grants risks little and promises to reduce inhibitions on innovation by creating a legal environment more compatible with our social nature as a species.

The opposite view, implicit in the current copyright regime, holds that expressive culture performs no vital function and satisfies no essential need. Expressive culture is an economic phenomenon, whose worth is appropriately measured by the economic revenues it generates as a

product. In this case, expressive culture is only mind candy, and only the calories consumed, i.e., revenues generated, matter. Since we already possess enough expressive works to last all our lifetimes, and since the reproduction and distribution of digital works costs virtually nothing, we no longer need copyright incentives for these works. New works merely appeal to foolish and inconsequential tastes for novelty. The copyright monopoly then contributes only friction to the economy, a dead weight loss on society, sustained only by unrelenting rent-seeking by corporate content owners.

But if expressive culture plays an essential role in our social and psychological development and is truly food for the soul, then counting mere calories distracts us from identifying whether our expressive culture nourishes us, whether it serves the necessary functions for which it evolved in all known human societies, and we evolved to produce to help sustain our lives and societies.

I have identified and summarized some of the possible adaptive functions of expressive culture. I have also identified the research that specifies the physiological mechanisms that account for the functions. This research is still preliminary, and some of the findings might fairly be categorized as speculative, but then so is almost all copyright policy analysis. Those who would reject a functional approach to copyright policy must still produce a satisfactory answer to the question: What is expressive culture for?