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Copyright Act [Revisions] Welcome[]: The Lax Copyright in Live Performance's Last Writ

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COPYRIGHT ACT [REVISIONS]
WELCOME[]:¹
THE LAX COPYRIGHT IN LIVE
PERFORMANCE'S LAST WRIT

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1. *Copyright Act Welcomed*, N.Y. TIMES (Mar. 21, 1897), <http://query.nytimes.com/gst/abstract.html?res=9E03E0D61F31E132A25752C2A9659C94669ED7CF&legacy=true> [<https://perma.cc/A954-VRS7>].

This Note begins with the classic *New York Times* article which proclaimed the birth of a new protection for artists in the United States. Many of the then-acclaimed minds of the copyright and political world sat around a table and celebrated their recent success in the Cummings Copyright Bill. Thanks to their foundational movement, copyright has been able to develop to better protect and inspire artistry. However, as is customary in the music business, one can only cherish the principal chair for so long before the etude book needs to reappear on the music stand. As such, the U.S. copyright act is due for revision.

INTRODUCTION

On March 20, 1897, a grand dinner was held at New York’s famed Delmonico’s restaurant . . . celebrating the final copyright revision of the nineteenth century—passage of the Cummings Copyright Bill, by which the owners of “dramatic” and “musical” compositions were granted the exclusive right of “public performance.”²

Countless retellings herald this occasion as a hallmark of copyright protection for live performances. But what few observe is that while this celebratory dinner marked a great advance in the protection of the underlying compositions of live performance, the bill also enshrined a blatant misunderstanding of the protection of the actual live performance that would persist through the centuries.³

The Cummings Copyright Bill⁴ was admittedly limited in establishing the right of protection of musical compositions in dramatic works, but it also preserved the idea that only composers and writers should receive the protection of a copyright in their live performance, not the performers of the works. While courts eventually recognized that copyright similarly affords protection to producers and sound technicians, the idea that copyright protects only written or tangible works has persisted.

United States copyright law enshrined this preference for written works in the requirement of fixation for copyright protection. While fixation seems an instinctively obvious requirement for legal protection, fixation poses a challenge for live performances. Here, live, public performance means actual performances—live concerts and comedy acts. These are properly categorized, when recorded, as “performing arts works” under United States copyright law.⁵ Largely improv-

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2. KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 33–34 (2012).
 3. See Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1216 (2007) (discussing how, despite criticism of the Cummings Bill’s treatment of music, “the bill was soon firmly ensconced into American law”).
 4. S. 2306, 54th Cong., 29 Stat. 481, ch. 4 (1896).
 5. 17 U.S.C. § 101 (2012). “The Copyright Act states that performing a work ‘means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.’” *Performing Arts*, U.S. COPYRIGHT OFFICE (quoting 17 U.S.C. § 101), <https://www.copyright.gov/registration/performing-arts/index.html> [<https://perma.cc/3QUF-6BLF>] (last visited Mar. 23, 2018). Works commonly registered under the Performing Arts

isational performances are by definition “unfixed.” The problem that this Note seeks to address is that the “unfixed” nature of live concerts and improvisational works encourages many concertgoers to “fix” the performance as videos on their cellphones and quickly send it to all of their friends or post on the Internet. Today, streaming and distribution occur quickly over low- or no-cost smartphone applications.⁶ These apps allow users to film increasingly high-quality audiovisual recordings of a performance and make them available for mass consumption to entire virtual communities, depending on the social networking site.⁷ Often referred to as “flash infringement” due to its ephemeral nature, this trend of unauthorized recording confounds the protections currently set forth in the Copyright Act.⁸ Copyright law fails to protect these live, public performances because neither the performer nor the authorized video-recorder of the concert has the incentive or capacity to prevent the recording, reproduction, or distribution made by concertgoers.

Once again, the current state of artistry in the law is faced with “a fundamental clash over culture, policy, and copyright law.”⁹ In order to resolve this conflict, this Note proposes that protection should be afforded to the performers in the reproduction and distribution of the unauthorized fixation of their live concerts. In Part I, this Note will address the rights that performers have in their live performance, the rights that the authorized video-recording crew has in the live performance, and the legal hole left agape for concertgoers to exploit. Part II will discuss possible resolutions to this dilemma by first addressing a recent technological response which could solve the

category include comedy routines, stand-up routines, live concerts, musical theater, and musicals. *Id.*

6. Michael M. Epstein, *Social Media and “Flash Infringement”: Live Music Culture and Dying IP Protection*, 3 BELMONT L. REV. 1, 4 (2016).
7. *Id.* The most popular apps include “Meerkat, Periscope, Live Stream, Ustream and Snapchat.” *See id.* at 4–7 (discussing streaming and distribution apps and their functions). Evergig, a platform that compiles fans’ live concert footage, aims to provide music lovers with “every concert, at [their] fingertips.” Will Hagle, *Evergig: Every Concert, at Your Fingertips.*, ALL MY FAVES (July 7, 2014), <http://blog.allmyfaves.com/video/evergig-every-concert-at-your-fingertips/> [https://perma.cc/J2SM-9HRF]. Evergig boasted over one million concerts as of October 2014. *Evergig Hits ONE MILLION Concerts!*, PRWEB (Oct. 9, 2014), <http://www.prweb.com///10/prweb12233163.htm> [https://perma.cc/93EN-YC6S].
8. *See generally* Epstein, *supra* note 6, at 7–8 (describing “flash infringement” as “the same ‘flash’ that, since the 1500s, has described something as rapid and fleeting”).
9. *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013).

bootlegging crisis; then by analyzing international treaties such as the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPS Agreement”), the World Intellectual Property Organization Performances and Phonograms Treaty (“WPPT”), and the Beijing Treaty on Audiovisual Performances (Beijing Treaty); and last, by addressing possible cultural solutions. Part III concludes with a recommendation, to add audiovisual protection as the next protected subject matter under the Digital Millennium Copyright Act (“DMCA”), or, more likely, for artists to embrace emerging technology to resolve this recording problem.

I. THE PROBLEM WITH FIXATION, THE RIGHTS AT PLAY, AND THE LINE THAT CONCERTGOERS JUMP

A. *The Fixation Problem with Live Performances*

The music industry, and artists in particular, are characterized by pride. Not so much in the lengths they have to go to for their artistry—subsisting on Ramen Noodles in New York City or playing on street corners, begging for some acknowledgement of their existence—but in the respect that once they have created something of recognizable value, they are ruthless in defending their rights. While inherent to all artists, this pride is further encouraged by the structure of the lack of legal protection in their live performance works.

The Intellectual Property Clause of the Constitution empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective *Writings* and Discoveries.”¹⁰ Congress and the lower courts have strictly construed this text when interpreting the protection extended to musical works. The constitutional policy underlying copyright protection is to balance granting “a fair return for an ‘author’s’ creative labor” and “stimulat[ing] artistic creativity for the general public good.”¹¹ In effect, “[t]he monopoly created by copyright . . . rewards the individual author in order to benefit the public” by giving access to the public in order to inspire the public’s creativity and creation.¹²

10. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

11. *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 698 (9th Cir. 2015) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)), *cert. dismissed*, 136 S. Ct. 445 (2015).

12. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting)).

It was with this balance in mind that copyright protection was developed. Copyright law provides protection for original works of authorship by bestowing certain exclusive rights upon their creators.¹³ When it comes to live performances, though, that balance has yet to be secured. This failure emanates from a fundamental misunderstanding of a musical work. “The origins of music copyright law are rooted in a particular, restrictive notion of the musical work . . . and its fixation in graphic form (the musical score).”¹⁴ Thus, Johann Sebastian Bach and the scores for his Brandenburg concerti, from the outset, were “valori[z]ed” over the performers actually creating the music.¹⁵ The underlying musical composition or dramatic work may be registered as a work of the performing arts; however, only the written composition is granted protection.¹⁶ Note the important distinction between the exclusive right to perform the copyrighted work under the exclusive rights granted in section 106 for this underlying work and a copyright in a live performance itself—not a subject matter of copyright.¹⁷ As a result, copyright does not properly cater to the unwritten jazz riffs of Thelonious Monk or other forms of improvisational arts. The rationale for this distinction follows from the requirements to obtain a copyright. Copyright protection arises automatically so long as a work of authorship meets three broad criteria: the work must be original, consist of expression, and be fixed in some tangible form.¹⁸ This last criterion, tangibility of form, is the sticking point for live performers because their performances are not properly “fixed.”

Fixation requires that a work be “fixed in a[] tangible medium of expression.”¹⁹ “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁰ Two types of fixation are described by section 101: “copies” and “phonorecords.” “Phonorecords’

13. 17 U.S.C. § 106 (2012).

14. MUSIC AND COPYRIGHT 140 (Simon Firth & Lee Marshall eds., 2d ed. 2004).

15. *See id.*

16. *See Choosing the Appropriate Registration*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/register/sr-choose.html> [<https://perma.cc/TP77-2WNV>] (last visited Mar. 19, 2018) (“The same principles apply to literary and dramatic works. A recorded performance of an actor speaking lines from ‘Hamlet’ could be registered on Form SR as a sound recording.”).

17. *See* 17 U.S.C. § 102(a).

18. *Id.*

19. *Id.*

20. *Id.* § 101.

are material objects” containing “sounds, other than those accompanying a motion picture or other audiovisual work,” while “[c]opies are material objects[] other than phonorecords.”²¹ Further, the statute encompasses simultaneous broadcasting by defining “[a] work consisting of sounds, images, or both, that are being transmitted, [a]s ‘fixed’ . . . if a fixation of the work is being made simultaneously with its transmission.”²² If no authorized recording is done, then certainly anyone who records the concert will have a potentially copyrightable fixation, albeit perhaps unauthorized.

Live performances are considered unfixed because they are transitory. The live performance of a comedy show or live concert is “a series of human-generated acts and sounds . . . leaving no trace of its existence” except in your bank account, through purchased memorabilia, and in your memory.²³ The possibility of registration for protection of a live performance exists only upon fixation—be it audio or audiovisual. As I will discuss in greater length in Section I.C, artists may authorize a production company to audio record their live performance. That recording can be sold to devoted fans in the form of live CDs.²⁴ Because of the artist’s authorization, that sound recording is the fixation which holds a copyright and provides the owner with exclusive rights under section 114 of the Copyright Act.²⁵ Any other audio recording of that performance by an audience member is unauthorized and thus an infringing work. Accordingly, the copyright owner may bring suit against the person who created that unauthorized recording for infringement of the copyright holder’s exclusive right to reproduce the work and perhaps to distribute that copy, as well. The same cannot be said for audiovisual recordings.

“Copyright registration for a sound recording . . . is neither the same as, nor a substitute for, registration for the musical, dramatic, or literary work that is recorded.”²⁶ Audiovisual recordings possess a far greater risk of generating multiple fixations. The video crew at a

21. *Id.*

22. *Id.*

23. Elizabeth Adeney, *Speculations on the Australian Right of “Integrity of Performership”: More Questions than Answers?*, 20 AUSTRALIAN INTEL. PROP. J. 200, 209 (2010).

24. This recording is separate and distinct from the studio recording produced for an album sale. This album and its copyright protection typically will belong to the record company.

25. 17 U.S.C. § 114 (2012).

26. U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, CIRCULAR NO. 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (2014), <https://www.copyright.gov/circs/circ56.pdf> [<https://perma.cc/B39Q-R8ZB>].

concert may register their fixation as an audiovisual work, but so too may others standing in the crowd. Audio recordings may vary minimally depending on where in the venue the recording is captured, but audiovisual recordings may vary substantially based on the recording decisions made regarding angles, lighting, filtering, and the material captured. Because audiovisual recordings have the ability to display such different perspectives of the ongoing performance, these varied recordings are considered independent fixations that, while unauthorized, are not necessarily infringing on the exclusive rights of the copyright in the audiovisual work. This is an alarming possibility considering that concert footage may, as in the case of Miley Cyrus or Michael Jackson, be made into a film capturing the entire concert experience.²⁷

Additionally, none of the protection in registration of the sound or audiovisual recording belongs to the performer. The copyright in those recordings belongs to whoever is authorized by the performer to record or videotape the concert—the producers, the sound technicians, and the other crew members facilitating that recording. Renowned as the indiscriminating sector of intellectual property where all creators are afforded protection despite the nature of their artistry, many copyright scholars describe this distinction of protection as a “strategy of forms.”²⁸

Historically, the “strategy of forms” distinction makes sense. Live performances could not be recorded until well after artistry began. The first audio recording of a musical performance took place in

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27. See HANNAH MONTANA AND MILEY CYRUS: BEST OF BOTH WORLDS CONCERT (Walt Disney Pictures PACE 2008) (depicting Miley Cyrus and her alter-ego Hannah Montana performing a live concert). Within one week, the film took in \$31.1 million at the box office. *Super Bowl Openings*, BOX OFF. MOJO, <http://www.boxofficemojo.com/alltime/weekends/superbowl.htm> [<https://perma.cc/37NT-7MCX>] (last visited Mar. 12, 2017). The film eventually amassed \$65.2 million. *Box Office/Business for Hannah Montana & Miley Cyrus: Best of Both Worlds Concert*, IMDB, http://www.imdb.com/title/tt1127884/business?ref_=tt_ql_dt_4 [<https://perma.cc/497U-TUNV>] (last visited Mar. 12, 2017). Once released for DVD, the film sold over \$134.2 million. *Hannah Montana and Miley Cyrus: Best of Both Worlds Concert*, WIKIPEDIA (last updated Dec. 27, 2017, 4:31 AM), https://en.wikipedia.org/wiki/Hannah_Montana_and_Miley_Cyrus:_Best_of_Both_Worlds_Concert [<https://perma.cc/6NEY-83CT>]; see also MICHAEL JACKSON'S THIS IS IT (AEG Live 2009); *Michael Jackson's This Is It*, BOX OFF. MOJO, <http://www.boxofficemojo.com/movies/?id=michaeljacksonthisisit.htm> [<https://perma.cc/BTV8-467C>] (grossing \$261.1 million worldwide) (last visited Mar. 12, 2017).
28. *E.g.*, Janet E. Mosher, *20th Century Music: The Impoverishment in Copyright Law of a Strategy of Forms*, 5 INTELL. PROP. J. 51, 69 (1989).

1888;²⁹ in 1910, “Enrico Caruso [wa]s heard [o]n the first live broadcast from the Metropolitan Opera” in New York City.³⁰ Of course, not everyone had a wax cylinder or gramophone at their disposal to enjoy these primitive tangible forms. However, as recordings became mechanically reproducible with player pianos and sound recordings, the concept of fixation changed—and so too should have copyright protection. The contributions to a creative work now encompassed the author, the performer, and the producer of the recording.³¹ Instead, performers must draw their protection from neighboring rights which do not exist in copyright law. Performing artists create their protection simply through contractual agreements and royalty arrangements.³² Performing artists are considered contractors, not creators.

Much like how streaming services have dissipated studio-recording revenue awarded to artists, live-streaming at concerts threatens to do the same with live performances. This Note suggests copyright act revisions which will prevent any further derogation of creative content, because, contrary to popular belief, it is not free.³³

B. The Historical Hierarchy

In order to properly understand the rights at play, how they developed, and the rationales supporting them, this Note now provides a condensed history of the development of current copyright law in the United States and in the international community as it pertains to live performances.

The first United States copyright act in 1790 protected the authors of maps, charts, and books.³⁴ The act was drafted quite

29. *Sounds of the 1860s: Listen to the Earliest Recordings Known*, CLASSIC FM (Jan. 4, 2016, 12:15 PM), <http://www.classicfm.com/discover-music/latest/oldest-recordings/#R68MerdqYoyu701X.97> [<https://perma.cc/T2VG-YJ47>].

30. *An Audio Timeline*, AUDIO ENGINEERING SOC’Y (June 13, 2014), <http://www.aes.org/aeshc/docs/audio.history.timeline.html> [<https://perma.cc/HX4Q-VEPD>].

31. J.A.L. STERLING, INTELLECTUAL PROPERTY RIGHTS IN SOUND RECORDINGS, FILM & VIDEO 65 (1992).

32. MUSIC AND COPYRIGHT, *supra* note 14, at 141.

33. See Peggy McGlone, *Songwriters Say This Federal Bureaucrat Championed Their Rights. Now She’s Lost Her Job*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/entertainment/music/with-change-at-the-top-of-copyright-office-a-battle-brems-over-free-content/2016/11/07/a8c0b140-a4ea-11e6-8042-f4d111c862d1_story.html?hpid=hp_hp-cards_hp-card-life-style%3Ahomepage%2Fcard&utm_term=.fa359b8a4069 [<https://perma.cc/D25B-HX5B>].

34. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

narrowly, eliminating the possibility of protection for any “other writings.”³⁵ Slowly, other works—engravings, etchings, and prints—began to receive protection.³⁶ Musical compositions “were registered under the 1790 Act as books,” but “did not receive express statutory protection until 1831.”³⁷ Dramatic compositions received copyright protection twenty-five years later.³⁸

The Berne Convention of 1886,³⁹ in response to varied national copyright policies, attempted to equalize every member nation’s protection for foreign works by implementing a uniform copyright plan. Later amendments to the Berne Convention additionally provided that the enjoyment of copyright “shall not be subject to any formality.”⁴⁰ While the rest of the world departed from formalities in accordance with the convention, the United States chose not to be a signatory to the convention and to continue premising protection on the formalities such as fixation.

Nevertheless, United States copyright law continued to develop. By 1897, Congress began to pay attention to the right of public performance in musical and dramatic works.⁴¹ The Cummings Copyright Bill expanded remedies for the unlawful public performance of performance works in operas, dramatic works, and music under an exclusive right of public performance.⁴² Historian Zvi Rosen found “that in none of the bills granting rights of public performance was the

35. WILLIAM PATRY, PATRY ON COPYRIGHT § 1:19 (2015).

36. *See id.* (“[I]n the construction of this act the word ‘book’ is to be construed to mean every volume and part of a volume, together with all maps, prints, or engraving belonging thereto . . .”).

37. *Id.*; Copyright Act of 1831, ch. 16, 4 Stat. 436 (1831); *see also* Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872) (“A book within the statute need not be a book in the common and ordinary acceptance of the word, viz., a volume made up of several sheets bound together; it may be printed only on one sheet, as the words of a song or the music accompanying it.”).

38. Edward S. Rogers, *The Law of Dramatic Copyright*, 1 MICH. L. REV. 102, 107 (1902).

39. Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886 (amended by 25 U.S.T. 1341, 1161 U.N.T.S. 3 (September 28, 1979)).

40. *Id.* art. 5(2).

41. Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (1897).

42. Cummings Copyright Bill, S. 2306, 54th Cong., 29 Stat. 481, ch. 4 (1896), *reprinted in* GEORGE H. PUTNAM, *THE QUESTION OF COPYRIGHT: COMPRISING THE TEXT OF THE COPYRIGHT LAW OF THE UNITED STATES, A SUMMARY OF THE COPYRIGHT LAWS AT PRESENT IN FORCE IN THE CHIEF COUNTRIES OF THE WORLD* 23–24 (3rd ed. 1896).

creation of this right for music anything but a secondary concern to the drafters of the bills,” and even when the right was finally established, it garnered very little attention.⁴³

By 1909, Congress expanded and amended copyright protection so many times that Congress wrote the Copyright Act to include “all the writings of an author” and list the forms of protected works—which, in relevant part, included only “dramatic work[s]” and “musical compositions.”⁴⁴ However, recognition that *performers* needed similar protection in their live performances was delayed until over a century later at the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961.⁴⁵ Better known as the Rome Convention, this treaty secured protection in “phonograms” of performances for performers of audiovisual works against unauthorized broadcasts or recordings of their performances. “Phonograms” refers to the exclusively *aural* fixation of sounds of a performance.⁴⁶ Article 7 of the convention secured protection in the “possibility” of preventing an unconsented fixation, reproduction, or broadcast to the public of the performer’s work except if the actual performance has already been fixed before transmission.⁴⁷ Because the U.S. was not a signatory to this agreement, though, this initial concept of performers’ rights beyond fixation did not become embedded in copyright law. Even so, these measures did not afford performers equal status with the rights accorded to composers, lyricists, and publishers because, once performers in audiovisual works consented to the initial recording of their performance, they were given no rights over its use.⁴⁸

In 1971, Congress attempted to incorporate the Rome Convention by extending the scope of the Copyright Act to incorporate sound recordings through the Sound Recording Act.⁴⁹ The act provided that the holder of a copyright in a fixed sound recording could prosecute unauthorized reproductions of a fixed recording.⁵⁰ Still, live unrecorded music concerts and performances remained unprotected—

43. Rosen, *supra* note 3, at 1158.

44. Copyright Act of 1909, ch. 320, §§ 1(d)-(e), 4, 35 Stat. 1075, 1075-76 (1909).

45. Art. 3(a), Oct. 26, 1961, 496 U.N.T.S. 43.

46. *Id.* art. 3(b).

47. *Id.* art. 7.

48. *Id.* art. 19.

49. 17 U.S.C. § 102(a)(7) (2012).

50. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005) (citing 17 U.S.C. § 114(b) (2012)).

anyone could record a live musical performance and distribute copies of the recording without violating U.S. copyright law.⁵¹

Again, in the Copyright Act of 1976,⁵² Congress resolutely adhered to its fixation requirement, providing no protection for unfixed works. Section 101 provided that a work is “‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵³ Congress, however, identified the problem posed by live performances and attempted to solve the problem while still retaining the fixation requirement. Congress added a second sentence to the definition of “fixed” in section 101 to clarify coverage over live performances: “[a] work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”⁵⁴ This remains the modern definition of “fixed” in U.S. copyright law. While Congress made some forward motions, the adherence to necessary fixation for protection still does nothing to advance performers’ rights. The copyright in the broadcasted recording belongs to the camera crew, but audience members may still freely record because the performer has no protection over the performance on stage. This onstage performance cannot be fixed, and thus still receives no protection.

Congress identified the fixation requirement as “the standard for determining when the work itself could be said to exist for purposes of federal copyright law.”⁵⁵ While admirable, the problem did not lie in the medium of fixation, but rather that fixation was required for a copyright to exist—at least when it came to live performances. According to the second sentence of the fixation definition, Congress determined that,

If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.⁵⁶

51. *United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999).

52. Pub. L. No. 94-553, 90 Stat. 2451 (codified at 17 U.S.C. § 101).

53. *Id.* § 101, 90 Stat. at 2452.

54. *Id.*

55. JULIE F. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 48 (2010).

56. H.R. Rep. No. 94-1476 at 52, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

The unique challenge presented by the current scenario of live musical or comedy performances is that these performances, unlike television broadcast or sports games, are not simultaneously broadcast or transmitted. A simultaneous recording that is not being transmitted may qualify under the first sentence of the fixation requirement, relying upon authorization from the performer. However, the leading treatise on copyright law asserts that the second sentence of the fixation definition sets forth the only treatment of simultaneous recordings.⁵⁷ This difference of interpretation is the basis on which this Note is written.

Several modifications to United States copyright law were made by enacting the Uruguay Round Agreements Act (URAA) in 1994.⁵⁸ Namely, it added a prohibition of bootleg sound and video recordings of live performances.⁵⁹

Shortly after, the TRIPS Agreement⁶⁰ attempted to address and promote technological innovation as it applied to intellectual property. Consistent with previous international treatments of copyright, the TRIPS Agreement incorporated the Berne Rule in forbidding formalities as a precondition to the enjoyment of copyright protection.⁶¹ Instead, protection is provided directly to the musical performance. Articles 9 through 14 establish minimum universal substantive standards for the protection of intellectual property. Of particular relevance is article 14, which requires member nations to provide protection to performers from unauthorized recording and broadcasting of their musical performances.⁶² Article 14 goes further to grant performers the possibility of “preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.”⁶³ Additionally, producers of phonograms “shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”⁶⁴

The international community made one more attempt to facilitate protection of performers and producers of phonograms of live perfor-

57. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2], at 1–115 (2017).

58. Pub. L. 103-465, §§ 1101, 2319A, 108 Stat. 4809, 4974–76 (1994) (codified as amended at 19 U.S.C. ch. 22).

59. *Id.*

60. Trade-Related Aspects of Intellectual Property Rights Agreement, Part 1, art. 7, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

61. *Id.* art. 9.

62. *Id.* art. 14.

63. *Id.* art. 14, cl. 1.

64. *Id.* art. 14, cl. 2.

mances in the digital environment in 1996 with the WPPT,⁶⁵ which updated the Rome Convention of 1961. The WPPT addresses issues of copyright protection in a variety of ways: advances in technology that bolster piracy, protection of live performances, and remuneration rights for communicating the performances to the public. Performers of unfixed performances were granted “the exclusive right of authorizing the making available to the public” of their performances by fixation or broadcast.⁶⁶ The WPPT further bolstered the performers’ powers by requiring that signatories provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms . . . in respect of their performances or phonograms, which are not authorized by the performers or the producers”⁶⁷ The major innovation was the protection for the right of communication to the public. The United States signed the WPPT on April 12, 1997.

Congress’s final move in copyright legislation was the 1998 DMCA.⁶⁸ The DMCA, in effect, implemented the WPPT and attempted to move the nation’s copyright law into the digital age.⁶⁹ DMCA was the congressional determination to “promote electronic commerce and the distribution of digital works by providing copyright owners with legal tools to prevent widespread piracy,” but this was tempered by a desire to maintain the formality of fixation.⁷⁰ The DMCA extended American copyright law to deal with digital copies and transmissions of copyrighted works online, while limiting the liability of the providers of online services for copyright infringement by their users.⁷¹ The Act provides a safe harbor for online service providers, making them immune from copyright infringement liability for

65. World Intellectual Property Organization Performances and Phonograms Treaty, art. 6, Dec. 20, 1996, S. Treaty Doc. 105–17 (1997), 36 I.L.M. 82 (1997) [hereinafter WPPT].

66. *Id.*

67. *Id.* art. 18.

68. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified within sections of 17 U.S.C.).

69. U.S. COPYRIGHT OFFICE, EXECUTIVE SUMMARY OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, SECTION 104 REPORT https://www.copyright.gov/reports/studies/dmca/dmca_executive.html [<https://perma.cc/ZFA4-3KNK>] (last visited Mar. 19, 2017).

70. *Id.*

71. *Id.*

posts on their sites.⁷² The DMCA made no attempt to deal with the protection of live performances.

Although the United States initially moved to deal with simultaneous recordings by amending the fixation requirement, its ultimate adherence to a fixation requirement has prevented the copyright law from being able to respond to live video-streaming of public performances. The rationale behind formalities was to create an incentive that would serve to screen works for which there was no commercial value.⁷³ This typically would work to preserve a strong public domain where commercially “dead” works would reside.⁷⁴ However, the modern adherence to a fixation requirement, and consistent denial of copyright protection in live performances, has de-commercialized concert footage, thus providing free content to concertgoers and viewers around the world.

C. Modern U.S. Rights’ Live Performances & Their Failures

Today, little has changed for copyright law with respect to performers’ rights. Federal law recognizes copyright protection for two separate and distinct types of music-related creations: “musical works” and “sound recordings.”⁷⁵ A musical work refers to a songwriter’s musical composition and accompanying lyrics,⁷⁶ while a sound recording is a “recorded version of a musician singing or playing a musical work,” as that rendition is captured in a recording medium.⁷⁷ The transmission of a musical work “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” constitutes a public performance.⁷⁸ However, this explanation does not effectively portray who holds the rights in a live, public performance.

72. *Id.*

73. *Id.*

74. Amanda Reid, *Claiming the Copyright*, 34 YALE L. & POL’Y REV. 425, 429 (2016).

75. BRIAN T. YEH, CONG. RES. SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 2 (2015) (citing 17 U.S.C. §§ 102(a)(2), (7) (2012)).

76. *Id.* at 2.

77. *Id.* at 3.

78. 17 U.S.C. § 101 (2012).

1. The Performers' Rights

“It has been an object of concertgoers since the early days of recording devices to capture their favorite acts on tape.”⁷⁹ Taking notice of this chronic recording problem, President Clinton signed the URAA in 1994, which provided a performer the right to authorize any fixation of their concert or act.⁸⁰ This amendment to the Copyright Act is considered a “neighboring” right to copyright—Congress’s attempt to protect unauthorized recordings, not by providing a copyright in the performance, but by creating an anti-bootlegging law. The amendment has a corresponding section which makes it a criminal offense to fix such a recording without the consent of the performer or performers involved.⁸¹ The statute additionally makes it a criminal offense to transmit, communicate, or distribute to the public the sounds and images or just the sounds of the live musical performance.⁸² The performers are not given a copyright in their live performance due to its unfixated nature, but given only the power to deem a fixation, transmission, or distribution of their live performance as unauthorized. The performer, in other words, may halt the unauthorized recorder. But the performer maintains no control of the fixation after it has been transmitted or distributed. In this way, performers must be diligent during their concerts because their rights effectively end as soon as the concertgoer finishes recording.

Beyond the curtain call, unauthorized recordings may be freely transmitted or distributed with little effect on the performer. A performer contracts with a recording label, producers, technical sound crew, and venue in order to perform a concert. The performer is bound by those contracts and whichever other contracts he establishes in order to merchandise the performance. The value of unauthorized recordings, especially when not commercialized, hardly dents the revenue amassed by the performer of a concert. Because a performer has heavily contracted in advance of the concert to facilitate a performance, plenty of money is already made from ticket sales, t-shirts, and VIP meet-and-greet passes to fill the performer’s pockets.

2. The Disincentivized Performer and Why Performer Substitutes Fail

Because performers do not possess a copyright in their live performances, they must turn to an amalgam of other rights to protect

79. ROBERT J. FROHWEIN & GREGORY SCOTT SMITH, *THE POCKET IDIOT’S GUIDE TO COPYRIGHTS* 117 (2004).

80. Pub. L. 103-465, §§ 1101, 2319A, 108 Stat. 4809, 4974–76 (1994) (codified as amended at 19 U.S.C. ch. 22).

81. 18 U.S.C. § 2319 (2012).

82. *Id.*

their work. In order to prevent the fixation, reproduction, and distribution of their work, performers utilize anti-bootlegging law, their right of publicity, and contractual rights.⁸³

Performer lawsuits are exceedingly rare due to the risk of alienating fans.⁸⁴ One historic exception involved Prince bringing suit against fans who enabled the free distribution of recordings of his concerts.⁸⁵ The superstar claimed over \$22 million in damages for the “massive infringement and bootlegging of Prince’s material,” which included sharing links “often containing copies of bootlegged performances of multiple separate musical compositions.”⁸⁶ Prince brought suit for the infringement of his underlying copyright in the musical composition,⁸⁷ but as for the fixation of his live performance, Prince relied on his only available legal right for live performances—unauthorized fixation.⁸⁸ Only a few days after the lawsuit went public, Prince dropped his claims, thus preventing any court analysis.⁸⁹ But the complaint reveals many of the challenges associated with bringing any type of suit against unauthorized video-recordings of live performances. First, the ability to track down and locate the unauthorized recorders is limited; Prince attempted to sue twenty-two individuals and was able to name only two—the majority of the complaint identified twenty Doe defendants based on their IP numbers

83. *See, e.g.*, Franklin v. Nat’l Film Pres. Ltd., No 15-CV-01921, 2015 WL 8483794 (D. Colo. Sept. 4, 2015).

84. Epstein, *supra* note 6, at 22; *see also* Ashley Lee, *Prince Wants to Charge \$10 for Concert Tickets*, HOLLYWOOD REP. (Feb. 6, 2014), <https://www.hollywoodreporter.com/earshot/prince-wants-charge-10-concert-677743> [<https://perma.cc/XY2D-66QC>] (detailing Prince’s attempt to save his reputation after suing his fans for creating and distributing bootlegged materials).

85. Complaint, Nelson v. Chodera, No. 3:14CV00273, 2014 WL 262844 (N.D. Cal. filed Jan. 16, 2014). Note, however, that Prince is also the owner of the underlying musical composition copyright thus incentivizing Prince to be more proactive in the defense of his underlying copyrighted works. This is uncommon in today’s world where the underlying musical composition copyright is often held by a lyricist or recording label separate from the actual performer.

86. *Id.* ¶ 4.

87. *Id.* ¶ 15.

88. *Id.* ¶ 16.

89. *Prince Drops \$22 Million Lawsuit Against Alleged Music Bootleggers [Update]*, THIRTY MILE ZONE (Jan. 28, 2014), <http://www.tmz.com/2014/01/28/prince-drops-22-million-lawuit-bootleggers-music/> [<https://perma.cc/46GY-N7EF>].

and blogger names.⁹⁰ Second, Prince's complaint incorrectly claimed that the creation, transmission, communication, and distribution of unauthorized fixations are copyright infringement.⁹¹ Copyright infringement is defined as occurring "when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner."⁹² Prince referred to anti-bootlegging law which specifically provides that violators shall be subject to the remedies of the Copyright Act "to the same extent as an infringer of copyright"—thus tacitly recognizing that bootlegged concert recordings are not infringements under copyright law.⁹³ Because a public performance is not copyrightable without fixation and because audience recordings are independent fixations, a claim against bootlegging is not copyright infringement. The only copyright infringement is contained in the first claim—for infringement of the underlying musical composition.⁹⁴ What is more, "bootleg" and "piracy" are not defined by the DMCA.⁹⁵ Third, Prince quickly abandoned this lawsuit due to widespread criticism and backlash.⁹⁶ Other performing artists dare not go so far as to risk alienating fans.⁹⁷

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90. Compliant, *supra* note 85, ¶¶ 17–25 (identifying defendants as PurpleHouse2, DaBang319, PurpleKissTwo, WorldOfBootleg, FunkyExperienceFour, NPRUniverse, PSPMusicBlog, and TheUltimateBootlegExperience).
91. Compliant, *supra* note 84, ¶¶ 30–39 (claiming direct copyright infringement); *see* MUSIC AND COPYRIGHT, *supra* note 14, at 199 ("Individual, non-commercial copying, however, has traditionally not been piracy but part of a range of activities that is deemed non-infringing.").
92. *Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq-definitions.html> [<https://perma.cc/CL27-V2UU>] (last visited Mar. 20, 2017).
93. Lee H. Rousso *The Criminalization of Bootlegging: Unnecessary and Unwise*, 1 BUFF. INTELL. PROP. L.J. 169, 186 (2002).
94. Complaint, *supra* note 85, at ¶¶ 30–39.
95. U.S. COPYRIGHT OFFICE, *supra* note 92.
96. Wrap Staff, *Prince Drops Copyright Lawsuit After Backlash from Fans*, WRAP (July 10, 2014, 7:01 PM), <http://www.thewrap.com/prince-drops-copyright-lawsuit-backlash-fans/> [<https://perma.cc/V9BJ-8TN4>].
97. *See* Ari Herstand, *Taylor Swift Threatens to Sue Her Fans*, DIGITAL MUSIC NEWS (Feb. 9, 2015), <http://www.digitalmusicnews.com/2015/02/09/taylor-swift-threatens-sue-fans/> [<https://perma.cc/9C59-KR5G>] (discussing Swift's decision to have her lawyers send cease and desist letters rather than filing a lawsuit); *see also* Chris Conde, *Go Phone Yourself: Stop Shaming People for Recording Concerts*, SAN ANTONIA CURRENT (June 8, 2017), <https://www.sacurrent.com/sa-sound/archives/2017/06/08/go-phone-yourself-shop-shaming-people-for-recording-concerts> [<https://perma.cc/UK2H-L7N3>].

Performers have also relied on the common law notion of publicity rather than copyright in order to protect the unauthorized recording of their works. This right grants individuals the exclusive right to the commercial use of their name, image, and likeness.⁹⁸ Performers have filed suit and succeeded in protecting against the appropriation of their identities.⁹⁹ However, no claims for violation of the right of publicity in unauthorized concert footage have been successfully litigated, without settling first.¹⁰⁰ Because particular states, namely California, provide better right of publicity protection, a performer could presumably protect themselves under this right. However, while varied from state to state, case law uniformly provides that the individual has the exclusive right “to license the use of their identity for commercial promotion.”¹⁰¹ Thus, the unauthorized concertgoers would have to reap some commercial gain from their recording, which does not occur under the provided circumstances.

Performers may attempt to reclaim their rights through their power to contract.¹⁰² Artists may use signage posted throughout the venue or on ticket stubs, or require audience members to agree to terms and conditions upon online purchase of the tickets. Assuming that concertgoers read the contractual language, concertgoers must be policed throughout the concert, and despite hulking security guards, their unauthorized recordings still saturate the Internet.

Thus, a performer’s only reliable legal remedy lies with anti-bootlegging law. But even anti-bootlegging protections fail to prevent concertgoers from fixing the performance and fail to halt the recordings from being dispersed. The recording devices used by concertgoers are

98. *Publicity*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/Publicity> [<https://perma.cc/6BVK-ZK82>] (last visited Feb. 7, 2018).

99. *See, e.g.*, *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988); *Y.ËR. Ordered to Pay Midler*, N.Y. TIMES (Oct. 31, 1989), <http://www.nytimes.com/1989/10/31/business/y-r-ordered-to-pay-midler.html> [<https://perma.cc/2ZBB-NQGZ>] (detailing a damage award for Bette Midler of \$400,000 in compensation for the use of a sound alike in a commercial); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096, 1112 (9th Cir. 1992) (affirming a damage award of \$2.6 million to the celebrity who was an ardent and outspoken opponent of celebrity endorsements).

100. *See supra* notes 83, 90.

101. *Publicity*, *supra* note 98; *see* RESTATEMENT (SECOND) OF TORTS § 652C, cmt. B (AM. LAW INST. 1976) (“The common form . . . is the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose.”). While some states have not required commercial appropriation, some benefit sought to be obtained is required, where, as here, there is none for the unauthorized recorders.

102. *See* MUSIC AND COPYRIGHT, *supra* note 14, at 140.

too small to catch. So too are the recordings that they take, especially if posted to private networks. Once the recordings enter the Internet, it is too late. The recordings can be downloaded and transmitted within seconds, entering the domain of the DMCA take-down policy,¹⁰³ which exempts online service providers from liability and is simply too reactive to matter. The same concerns regarding the unauthorized use of sound recordings warranted enough attention amongst scholars and politicians to enact appropriate legislation.¹⁰⁴ There, too, “Congress hoped to plug the loophole [in legislation that] left open [free rein] for webcasting services.”¹⁰⁵ This loophole becomes exponentially more infuriating when artists are performing valuable new material—performers may have higher incentives, but they desperately crave capacity.¹⁰⁶

3. The Video-Recorders’ Rights

Upon authorization by the performer, the video-recorder draws open the curtain to a whole world of rights based solely on his fixation of the performance. The video-recorder will typically make arrangements for the recording, choose the type of cameras, provide equipment, operate recording devices, and process the acquired footage. Additionally, the video-recorder may make creative contributions by directing the production, artistically choosing sound or lighting effects, and shooting from different angles.¹⁰⁷ The video-recorder may register the footage as an audiovisual work under the Copyright Act. If granted a copyright in this material, the recorder will also be

103. 17 U.S.C. § 512 (2012).

104. See generally Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium”*, 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999) (explaining that non-interactive webcasting services fell just outside the bounds of the sound recording copyright holder’s right of control); June Chung, Note, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music’s New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1367 (1997) (describing the problem of recording and copying webcasted music).

105. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 161–62 (2d Cir. 2009).

106. See, e.g., Rachel Stilwell & Makenna Cox, *Phone Recordings of Concerts Are More Than Just Annoying, They’re Potentially Illegal*, BILLBOARD (Mar. 17, 2017), <http://www.billboard.com/articles/business/7724330/phone-recordings-concerts-illegal-federal-bootlegging-laws> [<https://perma.cc/434V-V2ME>] (describing The Lumineers’ increased cell phone ban to protect one of its tours “booked specifically to afford the band the opportunity to publicly woodshed new material that had not yet been recorded”).

107. J.A.L. STERLING, WORLD COPYRIGHT LAW 176 (1998).

granted the exclusive rights of section 106.¹⁰⁸ However, these rights only exist in recordings that are identical or substantially similar to the copyrighted work.¹⁰⁹ Concertgoers create an “independent fixation” when pressed right up against the stage and filming the live performance.¹¹⁰ Although unauthorized, the concertgoer’s recording does not infringe the exclusive rights of the video-recorder in their copyrighted concert footage. Thus, as of now, copyright law does not prohibit the posting of an unauthorized recording of an artist’s live performance.

4. The Ill-Equipped Video-Recorder

None of the exclusive rights granted to the authorized concert footage allow the video-recorder to prevent the reproduction, distribution, or public performance of an independently fixed, non-commercial audiovisual recording. Because these rights are granted only as to the work in which the video-recorder holds a copyright, his exclusive rights pertain only to his fixation. Thus, to state a claim for copyright infringement, a plaintiff must establish that it owns a valid copyright in that independent fixation and that the defendant violated one of the exclusive rights the plaintiff holds in the work.¹¹¹ As stated above, the video-recorder does not have a copyright claim in the independent fixation and thus no violation of the exclusive rights bestowed.

Reproduction occurs only when the *copyrighted* work is fixed in a new material object.¹¹² Because there is no copyright in the unfixed

108. 17 U.S.C. § 106 (2012).

109. *See* KISS Catalog, Ltd. v. Passport Int’l Prods., Inc., 405 F. Supp. 2d 1169, 1171 n.5 (C.D. Cal. 2005) (“[B]ootlegging’ is ‘the making of unauthorized copy of commercially unreleased performance,’ and is distinct from ‘piracy,’ which is an unauthorized duplication of an authorized recording.”).

110. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 454 (S.D.N.Y. 2005) (“Insofar as a photograph is original in the rendition or timing, copyright protects the image but does not prevent others from photographing the same object or scene.”); *see also* U.S. COPYRIGHT OFFICE, U.S. LIBRARY OF CONGRESS, CIRCULAR NO. 45, COPYRIGHT REGISTRATION FOR MOTION PICTURES, INCLUDING VIDEO RECORDINGS 1 (Mar. 2014), <https://www.copyright.gov/circs/circ45.pdf> [<https://perma.cc/R4Y46-7MPA>] (“Only the expression fixed in a motion picture (camera work, dialogue, sounds, and so on) is protected under the copyright. Copyright does not cover the idea or concept behind a work or any characters portrayed in it.”).

111. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358–61 (1991)).

112. *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 649–50 (S.D.N.Y. 2013). *See id.* at 648 (stating that the reproduction right provides that “a copyright owner has the exclusive right to reproduce the

performance, there is no infringement of the reproduction right.¹¹³ The distribution right is also not violated.¹¹⁴ Much like the right of reproduction, courts have interpreted the right of distribution narrowly to apply only to the copyrighted work.¹¹⁵ Although the right of public performance¹¹⁶ has been interpreted slightly more broadly,¹¹⁷ the exclusive right again hinges on the fact that the sound recording, and not the live performance, is copyrightable.

The video-recorder is thus left with no ability to protect the footage when the widely distributed unauthorized recordings are from different angles or capture different material than the authorized, copyrightable recording.

D. The Rights Playbill and How Performers Have Gone Off Script

Because copyright has not caught up to the streaming age, performers and video crews must rely on other sources of law. What is left is a performer with little incentive to prosecute the unauthorized recorder because the performer is already compensated thoroughly through ticket sales and recording contracts. Moreover, the unauthorized recordings are so widespread and difficult to track down that, without control over the live performance, the task becomes too burdensome. The reality is that there are too many concerts and live events, compounded further by the many different apps and millions of users, for an army of lawyers to police effectively in real time.¹¹⁸ The performer has the ability to stop the unauthorized recorder only if the performer sees the concertgoer recording in the audience.

copyrighted work in . . . phonorecords.” (internal quotation marks and citation omitted)).

113. *See id.* at 649 (“[I]n order to infringe the reproduction right, the defendant must embody the plaintiff’s work in a ‘material object.’” (quoting NIMMER & NIMMER, *supra* note 57, at § 8.02)).

114. 17 U.S.C. § 106(3) (2012) (The distribution right provides that a copyright owner has the exclusive right to distribute the copyright work to the public by sale, rental, lease, or lending).

115. *Arista Records, LLC, v. Greubel*, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006) (“[C]ourts have not hesitated to find copyright infringement by distribution in cases of file-sharing or electronic transmission of copyrighted works.”).

116. 17 U.S.C. § 101 (To perform means to “perform or display [the copyrighted work] 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 to transmit or otherwise communicate a performance or display of the work.”).

117. *Capitol Records*, 934 F. Supp. 2d at 652 (quoting *United States v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64, 74 (2d Cir. 2010)).

118. *See Epstein*, *supra* note 6, at 13.

On the other side of the lens, though, authorized video-recorders have no capacity or power to stop the recording and distribution of the unauthorized recordings. As technology has advanced, recording devices are accessible to nearly everyone and conveniently fit in a pocket, which means that anyone can be a videographer now.¹¹⁹ Every concertgoer can capture a high-quality independent fixation with individual, artistic perspective that satisfies the viewers at home leaving the video-recorder helpless.

There is a disparity between incentive and capacity, which in copyright law, is fatal to the balance of protection and access. The DMCA is ill-suited to protect live performances and the live-streaming of audience members. Congress believed that it could finesse these issues by inserting that second sentence—“[a] work . . . is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”¹²⁰ Live performances of musical concerts, comedy acts, or dramatic works are not simultaneously broadcast or transmitted, leaving performers and video-recorders unprotected.

That is not to say that performers have taken a back seat in this legal scene. Upon realizing the failures of Taylor Swift’s approach,¹²¹ artists have gone to greater lengths to protect their performances while they still have the capacity. Numerous artists and performers have stopped their performances—quite literally brought the performance to a grinding halt while thousands of audience-members watch—and asked for a concertgoer to stop recording.¹²² Adele picked out one woman standing at her concert and rebuked her for creating

119. See Kate Connolly, *YouTube ‘Destroying Music’, Pianist Says in Angry Protest*, GUARDIAN (June 4, 2013, 8:46 PM) <https://www.theguardian.com/music/2013/jun/04/krystian-zimmerman-youtube-protest> [<https://perma.cc/6XYE-JTCS>] (“Clearly some people think buying a concert ticket entitles them to the film rights as well.”).

120. 17 U.S.C. § 101 (2012).

121. See Herstand, *supra* note 97 (criticizing Swift’s lawyers’ tactics of sending cease and desist letters to any Etsy users who sold products that mentioned Swift’s name in the tags, even if the products had nothing to do with the artist).

122. See, e.g., Daryl Nelson, *Recording Concerts with a Smartphone—Annoying and Probably Illegal*, CONSUMERAFFAIRS (June 6, 2013) <https://www.consumeraffairs.com/news/recording-concerts-with-a-smartphone-annoying-and-probably-illegal-060613.html> [<https://perma.cc/CL64-3L9B>] (reporting that Krystian Zimmerman, a pianist from Poland, spotted someone recording and said: “Would you please stop that?” and then walked off the stage).

her own “DVD”,¹²³ so too have Neutral Milk Hotel,¹²⁴ She & Him,¹²⁵ the Yeah Yeah Yeahs,¹²⁶ and the Savages.¹²⁷ Some artists have publicly stated their opposition to unauthorized concert recording, including Pink Floyd,¹²⁸ Kings of Leon,¹²⁹ Linkin Park,¹³⁰ the Lumineers,¹³¹ and Black Crowes.¹³² These performers have utilized a spectrum of methods to address unauthorized filming.¹³³ The All-American Rejects singer Tyson Ritter smashed a fan’s iPad on stage.¹³⁴ Glenn Danzig outdid his cohorts by instructing the crowd to

123. all around the web, *Adele Asks Fan to Stop Recording Her During Live Show—Adele Drags Woman [Video]*, YOUTUBE (May 29, 2016), <https://www.youtube.com/watch?v=Gg0pSgrtQJo> [<https://perma.cc/LSM6-3FGQ>].

124. Matt Pollock, *Science Proves That Using Your Cellphone at a Concert Is Ruining the Experience*, MIC (Aug. 5, 2014) <https://mic.com/articles/95410/science-proves-that-using-your-cellphone-at-a-concert-is-ruining-the-experience#.MAM4Mrhje> [<https://perma.cc/D7Q7-ZUXE>].

125. *Id.*

126. Nelson, *supra* note 122. Michael Hann, *Yeah Yeah Yeahs Launch Pre-Emptive Strike at Phone-Wielding Gig-Goers*, GUARDIAN (Apr. 10, 2013) <https://www.theguardian.com/music/shortcuts/2013/apr/10/yeah-yeah-yeahs-phones-gigs> [<https://perma.cc/6WME-VY7A>]. (“Please do not watch the show through a screen on your smart device/camera. Put that . . . away as a courtesy to the person behind you and to [the band members].”).

127. Pollock, *supra* note 124.

128. *See* Nelson, *supra* note 122.

129. Randy Friedberg, *One Man Gathers What Another Man Spills*, CONCERT BLOGGER MUSIC MAG., <http://concertblogger.com/2012/08/legal-issues-surrounding-recording-posting-concerts/> [<https://perma.cc/UMK5-PA9S>] (last visited Mar. 19, 2018).

130. *Id.*

131. Stilwell & Cox, *supra* note 106.

132. John Jurgensen, *Is Video Killing the Concert Vibe?*, WALL ST. J. (Sept. 24, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704129204575506281834570988> [<https://perma.cc/3TVV-E2UC>].

133. *See* Tankboy, *When Prince Says No Photos Allowed, Prince Means NO PHOTOS ALLOWED*, CHICAGOIST (Jul. 1, 2013, 10:20 AM), http://chicagoist.com/2013/07/01/when_prince_says_no_photos_prince_m.php [<https://perma.cc/CP73-HJJX>].

134. paypaaay3, *Tyson Ritter from The All-American Rejects Shattering a Fan’s iPad Screen-Cleveland, OH 4/10/12*, YOUTUBE (Apr. 10, 2012), <https://www.youtube.com/watch?v=gtFIQQwMhiY>, [<https://perma.cc/JQ5V-P8WA>].

descend on an unauthorized recorder.¹³⁵ Other artists have been more strategic. Linkin Park attempted to offer a “digital souvenir package,”¹³⁶ while Alicia Keys and The Lumineers utilized Yondr’s lockable pouches to prevent access to each concertgoer’s recording devices during the performance.¹³⁷

These reactions by no means have remained within the realms of high-profile musicians. Unhappy comedians include Dave Chappelle and Kevin Hart,¹³⁸ unamused magicians include Criss Angel,¹³⁹ and unimpressed actors include Lin-Manuel Miranda and Patti LuPone.¹⁴⁰ One might think that these trends do not affect the high arts, but unfortunately, this plague undermines the gamut of performing arts.¹⁴¹ Artists care, and so too must the law.

E. The Shame in the Game—Economic Harms

Concertgoers are trying to share their concert experience with friends via social media in a self-shot video and say “I was there” instead of buying a tour T-shirt.¹⁴² Because of the way that the performers’ and video-recorders’ rights interact, there remains a gaping

135. Alexander Henken, *Glenn Danzig Is an Asshole*, YOUTUBE (Oct. 10, 2013), <https://www.youtube.com/watch?v=8vPu6z1QX4M#action=share> [<https://perma.cc/7PPM-8D8Z>].

136. Friedberg, *supra* note 129 (“[A] ‘digital souvenir package’ for an extra \$14.99 . . . includes a link to original MP3s and photos from each stop on the tour.”).

137. Ree Hines, *Thought Adele Was Tough on Cameras at Concerts? Alicia Keys Bans Phones During Her Shows*, TODAY (June 17, 2016, 3:06 PM), <http://www.today.com/popculture/thought-adele-was-tough-cameras-concerts-alicia-keys-bans-phones-t99031> [<https://perma.cc/S4DC-Z36X>]; see also NPR Staff, *Lock Screen: At These Music Shows, Phones Go in a Pouch and Don’t Come Out*, NPR (July 5, 2016, 4:40 AM), <http://www.npr.org/sections/alltechconsidered/2016/07/05/483110284/lock-screen-at-these-music-shows-phones-go-in-a-pouch-and-dont-come-out> [<https://perma.cc/D67B-5F84>].

138. Alex Rawls, *Answering Questions About New Trend: Why Do Concert-Goers Record with Their Phones? How Does It Affect Musicians?*, ADVOCATE (Oct. 7, 2015, 1:41 AM), http://www.theadvocate.com/baton_rouge/entertainment_life/music/article_8aff3005-7514-54a4-8231-bc9f2c4ade6c.html [<https://perma.cc/PVW3-B3SA>]; Hines, *supra* note 137.

139. Jurgensen, *supra* note 132.

140. NPR Staff, *supra* note 137.

141. Nelson, *supra* note 122.

142. Rawls, *supra* note 138; see also Roy Trakin, *Adele, Alicia Keys, Jack White on Phone Use at Concerts*, RECORDING ACAD. (May 15, 2017, 2:36 AM), <https://www.grammy.com/grammys/news/adele-alicia-keys-jack-white-phone-use-concerts> [<https://perma.cc/6HUA-56SL>].

hole for these unauthorized recordings to persist.¹⁴³ But this has little significance to politicians and lobbyists without proof of harm.¹⁴⁴ This seemingly social activity has an economic effect on the industry as a whole. Although these unauthorized recordings are not distributed for a profit, the right to publicly perform is widely enjoyed as the “main source of income” for many modern-day songwriters.¹⁴⁵

Participants in the music industry have structured their business models around the rights of public performance and having one video-recording to sell to concertgoers. “Crowds are a source of income—they need entertainment which musical performers can instantly provide. And music is both an emotionally effective way of creating a community . . . and a socially effective way of attracting an audience”¹⁴⁶ New technologies have changed the role of music in society to provide new opportunities for its commercialization and, correspondingly, new opportunities for its exploitation.

Thirty-one percent of attendees at concerts used their smartphones during at least half the concerts and other live events they attended.¹⁴⁷ Fifty-three percent of respondents used their phone as a camera and 66 percent use camera phones to take pictures during the show.¹⁴⁸ Thirty-five percent of women and 22 percent of men shared

143. Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y U.S.A. 179, 185–86 (1997).

144. *Id.* at 191 n.76.

145. *Id.* at 197; see also William Morrow, *Perpetual Motion in the Music Industry*, HUFFINGTON POST (Dec. 6, 2017) http://www.huffingtonpost.com/william-morrow/perpetual-motion-in-the-m_b_10925888.html [https://perma.cc/ZG62-V9DA] (“Live concerts . . . are what pay for an artist’s success.”); Paul Michael, *How Much?! A Breakdown of Concert Ticket Prices*, WISEBREAD (July 5, 2011) <http://www.wisebread.com/how-much-a-breakdown-of-concert-ticket-prices> [https://perma.cc/5D9P-AUHD] (illustrating that, on average, 74 percent of ticket prices are paid directly to artists). This type of unauthorized recording is hard to ignore because of the “increasing reliance upon live performance as a necessary revenue source for artists, and the proliferation of technologies of distribution of streamed content from that performance venue.” Epstein, *supra* note 6, at 27.

146. MUSIC AND COPYRIGHT, *supra* note 14, at 174.

147. Chris Pappas, *Mobile Phones Have a Bright Future at Live Events*, TICKETFLY (May 7, 2015) <http://start.ticketfly.com/?p=56399> [https://perma.cc/WAV7-77EA]. The percentages reflect individuals in the 18-34 age range. *Id.*

148. Sarah Nazim, *The T-Mobile Camera Phone Chart Looks at the Increased Usage of Cellphones*, TREND HUNTER (Aug. 20, 2012) <http://www.trendhunter.com/trends/tmobile-camera-phone-chart> [https://perma.cc/RX7F-EE2V].

their experiences on social media.¹⁴⁹ On average, 32 percent share their experiences over social media during a show.¹⁵⁰ A Forbes article reported that seventy-two hours of video are uploaded to the Internet every minute and that users watch four billion hours of online streaming video per month.¹⁵¹

“People live through their cellphones now” and “watch[] the entire show through the lens of their phone. They seem more focused on sharing the experience with other people than they do enjoying the experience on their own.”¹⁵² One concertgoer attested that the popularity of his live clips of bands like Muse and Steely Dan on YouTube spurred him to record all of the concerts he attends; his most popular upload by Paramore accumulated more than 350,000 views.¹⁵³ “It’s part of a wider temptation to really go around an aquarium and instead of looking at the fish you take photos of the fish so that you can then show your friends”¹⁵⁴

Snapchat is the greatest offender and most ideal vehicle to satiate the “I was there” desire of younger generations.¹⁵⁵ Through the use of the Stories function, a user can upload a nearly uninterrupted live stream which will remain available to all of the user’s Snapchat

149. Pappas, *supra* note 147.

150. Nazim, *supra* note 148.

151. Erica Swallow, *Would You Skip a Concert If It Was Live-Streamed?*, FORBES (July 21, 2013, 11:58 AM) <https://www.forbes.com/sites/ericaswallow/2013/07/21/livestream-concerts/#5b1901f57b8c> [<https://perma.cc/R6MH-KWTP>].

152. Jay Cridlin, *Concert Crowds Full of Fans Watching Through Cellphones. Can It Be Stopped?*, TAMPA BAY TIMES (Oct. 16, 2016, 12:46 AM), <http://www.tampabay.com/things-to-do/music/everyone-watches-live-concerts-through-cell-phones-can-it-be-stopped/2297950> [<https://perma.cc/WZ4A-4CEC>].

153. Jurgensen, *supra* note 132.

154. Zach Silva, *Turn It Off: Cell Phones and Concert Culture*, HUFFINGTON POST, http://www.huffingtonpost.com/north-by-northwestern/turn-it-off-cell-phones-a_b_5432289.html (last updated Dec. 6, 2017) [<https://perma.cc/QLT2-EGM3>]; see also Nick Levine, *Johnny Marr Says Filming Gigs on a Mobile Phone Is for ‘Dicks’—Watch*, NME, (July 31, 2013) <http://www.nme.com/news/music/johnny-marr-57-1251559> [<https://perma.cc/JRU5-BVJ8>] (stating that looking at your phone during a concert as a “completely wasted opportunity.”).

155. See Michael Barris, *IHeart Media Rocks Mobile Engagement, Fans with Live Events*, MOBILE MARKETER (Nov. 4, 2014) <http://www.mobilemarketer.com/cms/news/music/19071.html> [<https://perma.cc/7DL8-3NJG>].

friends for twenty-four hours.¹⁵⁶ By the end of the fourth quarter of 2016, there were 161 million daily active users of Snapchat¹⁵⁷ and over ten billion daily video views.¹⁵⁸

Worse, viewers at home are now “just as content watching live concerts through their phones or camera screens as they would be enjoying the concert in person.”¹⁵⁹ Whether the concertgoer falls off the shoulders of the person who is holding her up in the video or the concertgoer is in the very back row of the venue, people do not care what the unintelligible pixels look like.¹⁶⁰ A *Forbes* article posed the question of whether a fringe fan—one who has not committed to buying a concert ticket—would be satisfied with a live streaming experience instead.¹⁶¹ The article presented a study of the 2012 Coachella audience composition which consisted of only 80,000 venue attendees compared to four million virtual attendees.¹⁶² These virtual attendees of the concert would otherwise be profitable for performers as concert tickets or as sales of concert footage, whether over the airwaves, satellite, or Internet.¹⁶³ Although little current data exists, the ability to capture high-quality footage and quickly distribute it has only increased since 2012.

Historically, copyright laws have been amended to respond to such exploitive technologies and establish corresponding rights, but such action has not been taken for live performances. The fact of the matter is that

When duplication is not difficult, many people rightly ignore the shady government granted monopoly that we call intellectual property. After all, only fools think [intellectual property] is

156. Elise Moreau, *What Is a Snapchat Story?*, LIFEWIRE (Mar. 9, 2017) <https://www.lifewire.com/what-is-a-snapchat-story-3486000> [<https://perma.cc/9T5W-YZ52>]; see also Nelson, *supra* note 122.

157. Jordan Novet, *Snapchat by the Numbers: 161 Million Daily Users in Q4 2016, Users Visit 18 Times a Day*, VENTUREBEAT (Feb. 2, 2017, 2:14 PM), <http://venturebeat.com/2017/02/02/snapchat-by-the-numbers-161-million-daily-users-in-q4-2016-users-visit-18-times-a-day/> [<https://perma.cc/H7B4-MYFP>].

158. Craig Smith, *121 Amazing Snapchat Statistics and Facts*, DIGITAL MARKETING RAMBLINGS (Mar. 2, 2017), <http://expandedramblings.com/index.php/snapchat-statistics/> [<https://perma.cc/A3WA-Y4YC>].

159. Silva, *supra* note 154.

160. *Id.*

161. Swallow, *supra* note 151.

162. *Id.*

163. See generally DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC INDUSTRY 141–168 (2012).

tangible and no amount of prattle from lawyers will really convince anyone that copying a computer file is the same as taking someone's diamond necklace.¹⁶⁴

With this history and attitude in mind, the Note proposes that Congress revisit copyright law as “a matter of simple justice.”¹⁶⁵

II. TECHNOLOGY, POLICY, AND CULTURE

The Copyright Act itself includes a self-revision provision that requires the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, to submit a report to Congress “setting forth recommendations as to whether performers and copyright owners [should be afforded] any performance rights in such material.”¹⁶⁶ The report should describe the “status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations.”¹⁶⁷ This is precisely the recommendation provided in this Note. Affording copyright protection in live performances without fixation is the ideal response to protect artistry. In the abstract, copyright does not seek to prevent all copying; rather, copyright law seeks to assure limited copying.¹⁶⁸ As such, the following three approaches to revision provide assurance that the artists, their cameramen, and the facilitators of a performance receive fair compensation for their efforts.¹⁶⁹ Because modern legal entitlements provide too little protection for performers, one of the following proposals should be embraced.

164. HECTOR POSTIGO, *THE DIGITAL RIGHTS MOVEMENT: THE ROLE OF TECHNOLOGY IN SUBVERTING DIGITAL COPYRIGHT* 45 (2012) (alteration in original) (citations omitted).

165. WILLIAM F. DRAPER, *RECOLLECTIONS OF A VARIED CAREER* 261, 266 (1908).

166. 17 U.S.C. § 114(d) (2012).

167. *Id.*

168. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 220–28; Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1059–60 (2001).

169. AARON J. BARLOW & ROBERT LESTON, *BEYOND THE BLOGOSPHERE: INFORMATION AND ITS CHILDREN* 82 (2012) (“I’m not on the side of free music if free music means that artists don’t get paid.”).

A. Technological Solution

As demonstrated above, the current enforcement regime for unauthorized recordings reacts too late in the reproduction and distribution process to effectively prevent devaluation of the live performance work. Frustrated, performers have turned to technology. Apple Inc. has recently patented one such supplemental protection that will effectively prevent initial fixation and eliminate the difficulties of policing during performances.

Technological advances historically have been regarded as in “implicit conflict” with copyright.¹⁷⁰ The business model of technology serves copyright’s constitutional goals of promoting the creation and dissemination of works, but fails to protect content so that artists are provided compensation for their creativity.¹⁷¹ This has promoted piracy as a socially acceptable means of obtaining content. It has also changed the music industry by rendering obsolete what was once its most valuable profit: CDs and other physical copies of music.¹⁷² Because tangible copies are no longer the main source of copying or reproduction, copyright law must be able to respond to digital recording, reproduction, and distribution.

The United States has struggled to adapt to recording devices and advancing technologies. Congress initially tried to respond with the Audio Home Recording Act.¹⁷³ The act aimed to prevent such unauthorized recording by requiring all digital audio recording devices to include a Serial Copy Management System, which was intended to prevent copying or increase the degradation of copies.¹⁷⁴ The act

170. John Gladstone Mills III, *Entertainment on the Internet: First Amendment and Copyright Issues*, 79 J. PAT. & TRADEMARK OFF. SOC’Y 461, 463 (1997).

171. See generally E. Jordan Teague, *Saving the Spotify Revolution: Recalibrating the Power Imbalance in Digital Copyright*, 4 CASE W. RES. J.L. TECH. & INTERNET 207 (2012).

172. See Morrow *supra* note 145; see also Michele Catalano, *Music Piracy: Major Studies Conflicted Over Recording Industry Impact*, FORBES (Mar. 25, 2013, 7:06 AM), <http://www.forbes.com/sites/michelecatalano/2013/03/25/music-piracy-major-studies-conflicted-over-recording-industry-impact/#4199feca2449> [https://perma.cc/W4H9-GQ6X].

173. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001–1010 (2012)). A United States government study conducted in 1989 found that 41 percent of respondents engaged in home audiotaping through their VCRs during the previous year. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 151 (1989).

174. 17 U.S.C. §§ 1001–02.

defined a “digital audio recording device” as “any machine or device of a type commonly distributed to individuals . . . which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.”¹⁷⁵

As VCRs went out of style, Congress adapted the DMCA to require that preventative measures be built into the tangible fixation itself—Digital Rights Management (“DRM”). DVDs, for example, are protected by content scrambling system algorithms.¹⁷⁶ DRM sought to degrade the audio quality of illegally transferred music upon digital transmission or to simply make it impossible to transfer the music and upon such attempt the player becomes locked and cannot be played further.¹⁷⁷ The corresponding provisions that bolstered this technology were known as the anti-circumvention provisions. This section of the DMCA makes it illegal to circumvent technical measures, such as encryption and copy protection, that prevent access to copyrighted materials, such as computer software or media content and bans the distribution of technical measures that prevent either access to or copying of copyrighted materials.¹⁷⁸

However, the “anti-circumvention” provisions, intending to stop infringers from defeating anti-piracy protections, have not been used as Congress envisioned.¹⁷⁹ As copyrighted materials became less tangible, copies could no longer be degraded and were in perfect listening condition for the next listener or viewer.¹⁸⁰ As such, the DMCA’s anti-circumvention provisions now respond too late in aiming to prevent the unauthorized recording of live performances. Apple’s recent patent responds to this failure.

On June 28, 2016, the United States Patent and Trademark Office approved a patent submitted by Apple, Inc.¹⁸¹ The abstract of

175. *Id.* § 1001(3).

176. OFFICE OF TECH. ASSESSMENT, *supra* note 173, at 201–02.

177. *Id.* at 199.

178. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1201, 112 Stat. 2860, 2863 (1998) (codified at 17 U.S.C. § 1201).

179. *See* 144 CONG. REC. 140–169 (1998); S. REP. NO. 105-190, at 29 (1998); H. REP. NO. 105-551, pt. 1, at 18–19 (1998); H. REP. NO. 105-551, pt. 2, at 38–39 (1998) (explaining the rationale for the anti-circumvention provisions).

180. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999) (“With digital recording . . . there is almost no degradation in sound quality, no matter how many generations of copies are made . . . allow[ing] thousands of perfect or near perfect copies (and copies of copies) to be made from a single original recording.”).

181. U.S. Patent No. 9,380,225 (filed Sept. 22, 2014) (issued June 28, 2016).

the patent application is deceptively simple: “Systems and methods for receiving infrared data with a camera designed to detect images based on visible light are provided.”¹⁸² In other words, technology installed in phones may be used to shut off recording capabilities when the phone receives a certain wavelength signal. Behind this simple description is the solution to all of our live performance needs.

According to the patent application, all electronic devices are able to detect visible or invisible light.¹⁸³ These devices may also detect infrared data.¹⁸⁴ Through the use of an infrared emitter, a strobe of infrared light may be emitted so that “cameras in the same general area of the transmitter can detect [the signal], regardless of the direction the cameras are facing.”¹⁸⁵ Apple’s technology manipulates the circuitry process of capturing an image upon detection of this infrared data. As the application explains, “[i]f the image processing circuitry determines that an image includes an infrared signal with encoded data, the circuitry may route at least a portion of the image (e.g., the infrared signal) to circuitry operative to decode the encoded data.”¹⁸⁶ This manipulated process will have three possible effects. Based on the decoded data, the device can: (1) display information to a user; (2) modify an operation of the device; or (3) disable a function of the device.

The first function, contemplated for “exhibits in a museum,”¹⁸⁷ is not too far from currently functioning technology. The ArtLens App, currently utilized by the Cleveland Museum of Art, allows an observer at the museum to hold the app camera over a particular piece of art, and the app will provide information about the artwork on display in the museum.¹⁸⁸ The second and third functions pertain more to unauthorized recordings of live performances. The second function provides a modifying effect to captured images or videos. The modifying effect may, for example, “apply a watermark to a detected image” or “portions of the image [may be] washed out or blacked out.”¹⁸⁹ The

182. *Id.* at 1.

183. *Id.* at col. 4 l. 30–31.

184. *Id.* at col. 4 l. 34–35.

185. *Id.* at col. 10 l. 65–col. 11 l. 1.

186. *Id.* at col. 1 l. 35–39.

187. *Id.* at col. 10 l. 29.

188. *ArtLens App*, CLEVELAND MUSEUM OF ART, <http://www.clevelandart.org/gallery-one/artlens> [<https://perma.cc/TPJ9-PRYK>] (last visited Mar. 20, 2017).

189. ‘225 Patent, at col. 2 l. 46–49, 58–60.

third function completely disables any recording capabilities on the device.¹⁹⁰

Apple’s claimed purpose specifically aims to cure unauthorized recordings:

For example, an infrared emitter can be located in areas where picture or video capture is prohibited, and the emitter can generate infrared signals with encoded data that includes commands to disable the recording functions of devices. An electronic device can then receive the infrared signals, decode the data and temporarily disable the device’s recording function based on the command.¹⁹¹

Later the patent specifically mentions “a concert or a classified facility.”¹⁹²

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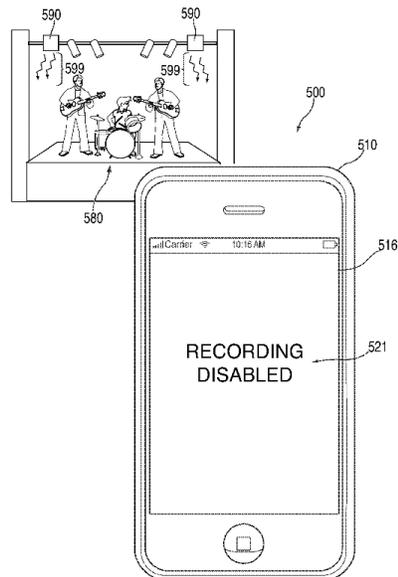


FIG. 5

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190. *Id.* at col. 5 l. 1–3, 67.

191. *Id.* at col. 1 l. 53–62.

192. *Id.* at col. 10 l. 41–42.

Apple's patent contemplates the use of this technology in media players with cameras, any cellular telephone with a camera, a pocket-sized personal computer with a camera, a music recorder with a camera, a video recorder with a camera, a stand-alone camera, and any other suitable electronic device with an image sensor.¹⁹⁴ The technology may be embodied as computer hardware or implemented by software—the latter of which may be simply downloaded as part of a new software update.¹⁹⁵ It should further be noted that this technology is not unique to the Apple technology and may be licensed and applied to other brand devices.

The implementation of this technology would rebalance the power that is currently stripped from performers. Much like the no-phone-zones, the Apple technology would completely prevent the unauthorized recording of live performances and effectively quell the policing problem with concertgoers.¹⁹⁶ Problems arise, however, in other realms of society.¹⁹⁷ Concerned parties carefully focus on the substantial First Amendment value of unlimited recording and, in particular, its value to news reporting.¹⁹⁸ These First Amendment concerns become more

193. *Id.* at fig. 5.

194. *Id.* at col. 3 l. 13–25.

195. *Id.* at col. 15, l. 37–39.

196. Apple's technology actually improves upon the no-phone-zone concept. No-phone-zones are limited by Title III of the Communications Act of 1934, which bans the use and sale of any device that jams a radio signal or otherwise willfully or maliciously interfere with that signal. 47 U.S.C. § 301 (2012).

197. See Julie Samuels, *Apple's "Censoring" Patent Just a Sign of Things to Come*, ELECTRONIC FRONTIER FOUND. (June 22, 2011), <https://www.eff.org/deeplinks/2011/06/apple-s-censoring-patent-just-sign-things-come> [<https://perma.cc/3VEB-BNS3>] (noting that the consequences would be "disastrous" if the government were to gain access to Apple's technology to prevent activists' ability to capture and disseminate important footage around the world).

198. The news reporting value of live-streaming became undeniable at the Baltimore protests:

The Freddie Gray protests against police in Baltimore also showed how valuable [live-streaming] can be for watching news as it unfolds. Guardian journalist Paul Lewis spoke to people in the streets via [live-streaming], giving them an unfiltered platform to share directly with his audience what they thought of the situation. Unencumbered by large TV cameras, Lewis was able to live stream as he moved around the city, bringing viewers powerful images like a community housing project going up in flames.

Rachel Rodriguez, *Periscope: Four Ways It's Shaking Up Media*, CNN (May 26, 2015, 9:15 AM), <http://www.cnn.com/2015/05/26/tech/periscope-android-media/> [<https://perma.cc/GY2R-X5FJ>].

significant if the Apple technology is utilized outside of concert venues.¹⁹⁹ With calculated licensing and proper regulation, these problems may be avoided. These concerns are not so overwhelming as to prevent use of this technology in limited concert and performance settings. The only remaining concern would be the inability to record physical encounters that occur during the concert when the infrared signal is being emitted. However, concertgoers could simply return to using their own vision to take proper account of the situation and report to the on-duty security personnel.

B. Legislative Solution

In the modern world where copying and distribution is no longer carried out by tangible “material objects,” one clear solution to fix copyright would be to no longer premise copyright protection on fixation. The United States is an international outlier in this respect; a majority of countries do not require fixation.²⁰⁰ Nor do the current international copyright treaties require fixation for protection. In fact, both current international copyright treaties—the TRIPS Agreement and WPPT—which have been signed, ratified, and implemented, provide protection for unfixated works.²⁰¹ However, because the United States has adamantly adhered to its fixation requirement, seeking legislative change in this respect seems unlikely. Thus, in light of the peer-to-peer and streaming crises involving sound recordings, copyright treaties should add a new protected subject matter—audiovisual recordings.

Currently, Article 14(1) of the TRIPS Agreement grants performers a right of fixation only against a fixation in a phono-

199. For example, if such technology fell into the hands of unethical public officials or could be used to prevent recording by traffic stops.

200. See Sabrina Porter, *Protection of Live Performance: The Battle of “Ownership,”* SETON HALL EREPOSITORY, 20 (2015). Spain, France, China, the United Kingdom, and Australia are included amongst such majority. DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT 120 (2017).

201. The TRIPS Agreement provides: “In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing . . . the fixation of their unfixated performance and the reproduction of such fixation . . . the broadcasting by wireless means and the communication to the public of their live performance.” TRIPS Agreement, *supra* note 60, 1869 U.N.T.S. at art. 14(1). The WPPT corollary similarly provides: “Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixated performances except where the performance is already a broadcast performance.” WPPT, *supra* note 65, 36 I.L.M. at art. 6.

gram—purely *aural* fixations.²⁰² Thus the TRIPS Agreement does not protect performers against unauthorized fixation of their live performances if an audiovisual fixation is involved.²⁰³ The WPPT is limited in the same respect: “the rights granted by the Treaty to performers are rights connected to their fixed, purely aural performances (which are the subject matter of phonograms).”²⁰⁴ Thus the United States does not differ from the international community in respect to these treaties. In fact, other countries around the world are experiencing the same unauthorized recording problem.²⁰⁵

The international resolution lies instead with the Beijing Treaty, which the United States signed on June 26, 2012.²⁰⁶ The treaty sought to protect “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expression of folklore”²⁰⁷ and grant them the exclusive right of “communication to the public.”²⁰⁸ This right is de-

202. TRIPS Agreement, *supra* note 60, 1860 U.N.T.S. at art. 14(1).

203. *Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [<https://perma.cc/7WZC-JWZB>] (last visited Dec. 29, 2017) (“The fixation right covers only aural, not audiovisual fixations.”).

204. *Summary of the WIPO Performances and Phonograms Treaty*, WIPO http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html [<https://perma.cc/79YH-C3GQ>] (last visited Mar. 20, 2017). *See Treaties*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#4> [<https://perma.cc/2VEB-4YHV>] (last visited Feb. 24, 2018) (explaining that treaties are eventually withdrawn if the Senate does not take action because treaties are not required to be resubmitted at the beginning of each new Congress).

205. Janine Mendes-Franco, *Live Streaming at Trinidad Carnival Brings Copyright Infringement into Focus*, CARIBBEAN RADIO, <https://www.thecaribbeanradio.com/live-streaming-at-trinidad-carnival-brings-copyright-infringement-into-focus/> [<https://perma.cc/3A63-R2PG>] (last visited Mar. 20, 2017) (arguing that broadcasts of parts of concerts “undoubtedly qualify under the ‘news reporting’ provisions of the Copyright Act” of Trinidad and Tobago); Anton Nilsson, *Foxtel Threatens to Sue Boxing Fans After They Illegally Live-Streamed the Mundine vs Green Fight on Facebook – as Two Men Crowdfund to Raise Money for Legal Costs*, DAILYMAIL.COM (Feb. 4, 2017, 7:39 AM), <http://www.dailymail.co.uk/news/article-4191048/Foxtel-sue-fans-live-streamed-Mundine-Green-fight.html> [<https://perma.cc/TV8U-YAD6>].

206. *Contracting Parties > Beijing Treaty on Audiovisual Performances (Treaty Not Yet in Force)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=841 [<https://perma.cc/W36E-ALPY>] (last visited Mar. 20, 2017).

207. Beijing Treaty on Audiovisual Performances, art. 2(a), June 24, 2012.

208. *Id.* at art. 6(i).

defined as “the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation.”²⁰⁹ The right of communication in this specific subject matter effectively gives the performers the exclusive right to communicate their work to the public without a simultaneous recording requirement. The performer is also accorded with economic rights in their unfixed performances—the right of reproduction, distribution, rental, making available of fixed performances, broadcasting, and communication to the public.²¹⁰ The right of communication to the public in the Beijing Treaty goes even further to protect the video-recorder. Parties contracting with the performer shall have the right to make a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.²¹¹

The treaty has not yet entered into force and will not do so until it has been ratified by at least thirty eligible parties of WIPO.²¹² Nineteen countries have already ratified and accessed the Beijing Treaty, chief among them, China.²¹³ Former President Barack Obama submitted the treaty to the Senate for ratification, but the treaty ratification expired at the end of their term.²¹⁴ Because current copyright law is ill-equipped to handle audiovisual recordings, the United States should inspire further support from the international community and take heed in preparing proper protections for live performers. With the Beijing Treaty roots already laid, countries must re-focus their efforts to provide protection in audiovisual works as a subject matter.

C. Cultural Solution

Going to a performance is certainly about the music or the play being performed. But it is also about the shared experience of watching the performance together.²¹⁵ In a technology-based society,

209. *Id.* at art. 2(d).

210. *Id.* arts. 6–11.

211. *Id.* at arts. 10–11.

212. *Id.* at art. 26; *Contracting Parties*, *supra* note 206.

213. *Contracting Parties*, *supra* note 206.

214. Barack Obama, *Message to the Senate—The Beijing Treaty on Audiovisual Performances*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Feb. 10, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/10/message-senate-beijing-treaty-audiovisual-performances> [<https://perma.cc/MRK3-BG65>].

215. Reuters, *Going to Concerts Is So Last Year: Apps Now Stream Live Music to Fans*, DENVER POST (May 7, 2016, 11:11 PM), <http://www.denverpost.com/2013/05/14/going-to-concerts-is-so-last-year-apps-now-stream-live-music-to-fans-2/> [<https://perma.cc/AZ34-K3VA>]. Oliver Sacks

concertgoers may provide a solution to the problem by weaning themselves off their devices and enjoying the experiences without recording.

The reality is that while many concertgoers upload their videos to Snapchat or YouTube, many of the videos “get[] filed deep within your camera roll with the pointless images of some overpriced, mediocre meal you ate from a trendy new food truck.”²¹⁶ Most people are motivated by preserving a memory, but watching the performance through a camera actually harms the memory process. Psychologist Linda Henkel discovered a “photo-taking impairment effect,” where reliance on photo-taking devices leads to less memory of the items or moments photographed.²¹⁷ Depending on this external memory aid allows one to transfer all efforts to remember the show to a memory card.²¹⁸ Henkel conducted a study where she instructed a group of individuals to go through an art museum and photograph certain objects on display. When she tested the individuals a day later, the individuals were able to recall details and locations of objects they did not photograph more accurately than the ones that they did.²¹⁹ Thus, concertgoers actually better preserve their memories by keeping their eyes on the stage rather than on their screens.

However, there is a counter-culture that is attempting to bolster the memory-preserving notion and allow access to concert footage, post-concert, for a price. It should come as no surprise that The Grateful Dead and Phish are at the forefront of this movement. The Grateful Dead historically “welcomed recording devices into their concerts.”²²⁰ “They believed that the sharing of their music would build their community of fans.”²²¹ Similarly, Phish provides unlimited

wrote “[w]e see the coercive power of music . . . at rock concerts where thousands of people, as one, may be taken over, engulfed or entrained by the music, just as the beat of war drums can incite extreme martial excitement and solidarity.” Silva, *supra* note 154 (quoting Oliver Sacks) (quotation marks omitted).

216. Jarrett Bellini, *Apparently This Matters: At Concerts, Put That Cell Phone Down*, CNN (Apr. 27, 2013), <http://www.cnn.com/2013/04/26/tech/social-media/apparently-this-matters-concert-phones/> [<https://perma.cc/9VHX-U3MN>].

217. Linda A. Henkel, *Point-and-Shoot Memories: The Influence of Taking Photos on Memory for a Museum Tour*, 25 PSYCHOL. SCI. 396, 399 (2014).

218. *Id.* at 397.

219. *Id.* at 396.

220. FROHWEIN & SMITH, *supra* note 79, at 118.

221. *Id.*

access to their content for a price on their website.²²² For this type of non-interactive webcasting, satellite radio, and mobile phone streaming, copyright law requires record companies to license their masters at a rate set by the government.²²³ The money is collected by SoundExchange which pays a portion of the money to the record company and a portion directly to the artist.²²⁴ This model has been unsuccessful thus far in protecting artists and providing a fair return on their content,²²⁵ but the memory-preserving concept is certainly accessible if the technology catches up.

CONCLUSION

Ultimately, the entertainment industry, legislators, and concertgoers must reexamine copyright law and its commitment to outmoded notions of fixation in order to determine whether they are willing to rebalance the economic interests and the value in artistic content. Just as we would not expect an accountant to prepare our tax return for free, we as a culture cannot expect artists and performers to display their talent without fair compensation. Many concertgoers clearly concede their valuation of the arts by recording, but there is an increasing reluctance to pay for the entertainment that they record and share. The skill and labor of performers are important to the public enjoyment of art works and performers should be protected against unauthorized exploitation of their performances in the same way as authors of tangible fixations enjoy copyright.²²⁶

Copyright law is now challenged to find balance in a world characterized by the ubiquity of entertainment in everyday life.²²⁷ With the Beijing Treaty hanging in the balance and concertgoers showing no sign of stopping their practices, the entertainment industry must rectify the imbalance by itself. The *Bridgeport Music* court notoriously stated that “the record industry, including the recording artists, has the ability and know-how to work out guidelines . . . if they so choose”²²⁸ This Note encourages artists to embrace the

222. *Featured Shows*, LIVE PHISH <http://www.livephish.com/> [<https://perma.cc/MEM7-KCCG>] (last visited Mar. 21, 2018).

223. PASSMAN, *supra* note 163, at 274–75.

224. *Id.* at 347.

225. *Id.* at 348.

226. MUSIC AND COPYRIGHT, *supra* note 14, at 174.

227. *Id.* at 171.

228. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005).

technology available to them and prevent the initial recordings at performances.

Technology leads and the law will follow. An artist must decide whether she is a copyright maximalist or minimalist—whether she wants to maintain control over live, public performances and potentially debuted material by utilizing technology or risk certain recording and distribution, and resulting loss of revenue, and follow the tide of streaming. Ultimately, the right to use this technology fits within the structure of artists' rights and artists should take advantage of this power from the outset because their power, and the value of their work, severely diminishes once the recording has been taken.

As for the readers of this Note, Beyoncé said it best: “Put the damn camera down!”²²⁹ Until the law can catch up and before technology invades your personal space, take heed of this understanding of the lax protection in live performances and be an asset to preserving future access to live music.

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229. Beyoncé Videos, *Beyonce Tells Fan Put That Damn Camera Down!*, YOUTUBE (Jan. 7, 2016) <https://www.youtube.com/watch?v=8XsGxLlcIQM> [<https://perma.cc/6NT8-PALE>].

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