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### Copyright's Creative Hierarchy in the Performing Arts

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# Copyright's Creative Hierarchy in the Performing Arts

Michael W. Carroll\*

## ABSTRACT

*Copyright law grants authors certain rights of creative control over their works. This Article argues that these rights of creative control are too strong when applied to the performing arts because they fail to take account of the mutual dependence between writers and performers to fully realize the work in performance. This failure is particularly problematic in cases in which the author of a source work, such as a play or a choreographic work, imposes content-based restrictions on how a third party may render the work in performance. This Article then explores how Congress might craft a statutory license to mitigate this unequal treatment.*

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In 2005, two students were anxiously preparing for the “Cappies” awards show, the high school version of the Tony Awards in the Washington, D.C. area.<sup>1</sup> These students had won an award for their big number, “Muddy Water,” from *Big River*, a musical adaptation of Mark Twain’s *Adventures of Huckleberry Finn*.<sup>2</sup> In the scene, Huck and Jim float down the river on a raft singing the song on their way to freedom.<sup>3</sup> This production switched the races of the characters; the student cast as Huck was black and the student cast as Jim was white.<sup>4</sup> Hours before the performance, the licensing agent for the play alerted the director that the students could not perform the song because doing so would violate the racial covenant embedded in the play’s copyright license.<sup>5</sup> The Cappies scrapped the performance, and the students instead improvised a parody mocking the absurdity of copyright law.<sup>6</sup>

Does copyright law really give the authors of works used in performance such extensive control over how others perform the work? If so, is this a problem? The answer to both questions generally is yes. The problematic nature of authorial control in the performing arts arises because of the necessarily collaborative process involved in realizing the work for the audience. Specifically, the process for creating a work for the performing arts usually requires collaboration among those who have specialized in writing source works—playwrights, musical composers, and choreographers, for example—and those who specialize in the skills and art of rendering these works in live and recorded performance, including producers, directors, performing artists, and a wide range of other creative contributors. Writers need performers to bring their texts to life, and

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1. John Harding, *Cappies Find Clarity in ‘Muddy Water,’* EXPLOREHOWARD.COM (May 26, 2005), <http://archives.explorehoward.com/news/6038572/cappies-find-clarity-muddy-water>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* (“Glenelg High School director Carole Lehan told the rights holders that all she wanted was the best actor for each role. But they said the casting distorted the play’s essential message. So they decided, in effect, to torpedo the raft.”). Had this issue been litigated, query whether a court could have enforced this racial license condition consistent with the Equal Protection Clause. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racial covenant in deed to real property to be unenforceable).

6. Harding, *supra* note 1.

performers, other than pure improvisers, need source works to practice their respective arts.

In light of this particularly salient interdependent relationship, how should copyright law govern disputes that arise when the writer's vision of how a work should be performed clashes with the creative vision of a producer, director, or performer? An egalitarian would seek to structure the relationship among these mutually dependent creators in a way that grants each an opportunity to practice her respective art.<sup>7</sup> Regrettably, copyright law in all countries takes an elitist approach. In the thrall, or under the pall, of the ideology of Romantic authorship, copyright grants the author of the source work a privileged position and the right to veto a live or recorded performance that does not suit her taste, unless one of copyright's limitations or exceptions applies.<sup>8</sup>

Specifically, in the United States, copyright law contains one prominent exception to this elitist principle. Colloquially known as the "cover right," a statutory license allows musicians to record and to distribute copies of a "nondramatic musical work" without the copyright owner's permission so long as: (1) prior notice is given, and (2) the recording artist pays the copyright owner a statutory license fee for each copy produced.<sup>9</sup> Combined with the music industry's regulated practice of blanket licensing for public performance of musical works,<sup>10</sup> the creator of a cover song can exploit the cover song in many, but not all, of the ways she might want.<sup>11</sup> Other performing artists do not enjoy similar statutory or blanket licenses, making them dependent upon the willingness of the source work's copyright owner to license if the source work is not yet in the public domain.<sup>12</sup> What

7. See discussion Part II.C.

8. See 17 U.S.C. § 106 (2006) (granting exclusive rights to copyright owner); see also Berne Convention for the Protection of Literary and Artistic Works, art. 11(1), Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention] ("Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works."); *infra* notes 58-67 and accompanying text describing instances of authorial control over performance.

9. See 17 U.S.C. § 115.

10. See *infra* text accompanying notes 92-94.

11. In particular, the creator of a cover song may not create a music video or otherwise synchronize the song with visual images without a "sync" license, which the creator must obtain from the copyright owner, because neither the statutory license nor the blanket licenses cover this use. See, e.g., *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 216 (S.D.N.Y. 2010) (explaining sync licensing in context of music video business).

12. See *infra* notes 23-27 and accompanying text. See generally Shane D. Valenzi, Note, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 777-82, 785-89 (2012) (detailing the current licensing structure for theatrical productions and considering statutory or blanket licensing as alternative schemes).

principle justifies this differential treatment among performing artists?

This Article explicates how both copyright law and copyright licensing practices structure the relationship between composer and performer differently for music than for the other performing arts.<sup>13</sup> It then explores how copyright might embrace a more egalitarian approach to creative collaboration in the performing arts through a more general statutory license.<sup>14</sup>

The analysis draws from two larger, related projects. The first studies how and why intellectual property rights generally are designed with a one-size-fits-all approach, subject to tailoring by legislation, adjudication, or administrative regulation.<sup>15</sup> This project offers a framework for assessing tailoring measures, including whether they are designed at the right level of generality.<sup>16</sup> The second project, in the nature of a case study, focuses on the history of music copyright, both for its intrinsic interest and because many of the tailoring provisions in the Copyright Act of 1976 concern composed or recorded music.<sup>17</sup> This Article extends both projects by considering the proposition that the egalitarian principle implicit in the music-specific cover right justifies a more generalized statutory license that would (1) apply to the source works in the other performing arts, but not all works of authorship, and (2) license more than the production and distribution of a recorded performance.<sup>18</sup>

For some, the contemplated statutory license misapprehends the nature of authors' rights. In particular, proponents of authors' moral rights are likely to have strong objections to the premises and the discussion in this Article.<sup>19</sup> They may further argue that Article 6*bis* of the Berne Convention prohibits any Member State from adopting such a license.<sup>20</sup> Respectfully, this Article proceeds from a

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13. See *infra* Part I.

14. See *infra* Part II.

15. See generally Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006) [hereinafter Carroll, *One for All*]; Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009) [hereinafter Carroll, *One Size*]; Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 MICH. TELECOMM. & TECH. L. REV. 421 (2007).

16. See generally Carroll, *One Size*, *supra* note 15.

17. See generally Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005); Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405 (2004).

18. See *infra* Part II.

19. Cf. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal & Economic Analysis*, 26 J. LEGAL STUD. 95, 95-96 (1997).

20. See Berne Convention, *supra* note 8, art. 6*bis* (requiring protection of author's moral rights).

different understanding about legal regulation of creative collaborators. The argument presented herein is informed by a democratic ethic that treats the creative contributions of authors of source works and performers with equal dignity.<sup>21</sup> This ethic is in tension with a view of morality that privileges the interests of the creator over other creative individuals upon whom the initial creator depends.

## I. COPYRIGHT'S HIERARCHY IN THE PERFORMING ARTS

Since its inception three centuries ago, Congress has expanded copyright law's subject matter to encompass any "original work[] of authorship" that an author has embodied in some "tangible medium of expression."<sup>22</sup> In doing so, copyright has swept numerous creative communities within its ambit in the name of "promot[ing] the Progress of Science and useful Arts" by granting rights of exclusivity to the authors of such works.<sup>23</sup>

### A. Authorial Control and Its Limits

In every field that copyright regulates, tension arises between those who own copyrights and those who seek to use a copyrighted work for purposes, or on terms, to which the copyright owner objects.<sup>24</sup> Where such disputes arise, copyright law usually offers one of three resolutions: (1) the copyright owner may deny the putative user any right to make a desired use, and the owner may destroy any copies of a work made without authorization;<sup>25</sup> (2) the user may conform her desired use to the terms of a license defined by the law, which usually limits the scope of permitted uses and often requires payment of a fee

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21. While underspecified and undertheorized, the ethic to which the author refers derives from the principles of egalitarianism. See generally Richard Arneson, *Egalitarianism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2009), available at <http://plato.stanford.edu/archives/spr2009/entries/egalitarianism>. As applied to cultural production, this ethic is related to semiotic democracy insofar as it favors equal opportunities to conceive of, and share publicly, one's creative expression. Cf. JOHN FISKE, TELEVISION CULTURE 239 (Routledge 1999) (1987) (coining phrase "semiotic democracy" in connection with active television viewership); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217-18 (1998).

22. See 17 U.S.C. § 102(a).

23. See U.S. CONST. art. 1, § 8, cl. 8; 17 U.S.C. § 102(a) (encompassing literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, sound recording, and architectural works).

24. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269-74, 1276 (11th Cir. 2001) (holding that retelling of *Gone with the Wind* was fair use).

25. See 17 U.S.C. § 503 (authorizing impoundment and disposition of infringing articles).

to the copyright owner;<sup>26</sup> or (3) the use falls within a limitation on, or exception to, the owner's exclusive rights, permitting the user to exercise her background right to free expression without payment and over the objection of the copyright owner.<sup>27</sup> Designating a use as a fair use is one example of this third outcome. Theoretically, a fourth resolution would allow the copyright owner to prevent the use on condition that the owner pays the user (a reverse statutory license).<sup>28</sup>

Copyright law's limitations and exceptions derive from the recognition of the public benefits that come from ensuring rights of access or use and the need to restrict the copyright owner's veto right. As discussed in greater detail below, a theoretical framework is under development that would redress problems caused by full copyright-owner control with a limitation or exception.<sup>29</sup> In practice, the actual contours of most of these tailored exceptions and limitations reflect not only political compromises between representatives of corporate copyright owners and user groups,<sup>30</sup> but also reflect the principle that full copyright-owner control over a work's use must be subject to certain limits to solve particular problems. Of the exceptions and limitations that are specific to certain subject matter, most target musical works or sound recordings as meriting a statutory license or a right of reuse without license.<sup>31</sup> The reasons for music's distinct treatment vary, but generally stem from the need to use music as an input to a variety of follow-on uses, or to the transaction costs associated with licensing music from multiple copyright owners.<sup>32</sup>

This Article contends that the problems that stimulated enactment of limitations or exceptions applicable to rights in music

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26. See, e.g., *id.* §§ 111 (cable retransmission), 114-116 (musical works), 119 (satellite retransmission of distant signals), 122 (satellite retransmission of local signals).

27. See, e.g., *Suntrust Bank*, 268 F.3d at 1269-74.

28. Thanks to James Grimmelmann for this suggestion. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (offering a more general taxonomy).

29. See discussion *infra* Part II.C.1.

30. See generally Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (describing legislative negotiations leading to the Copyright Act of 1976); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

31. See, e.g., 17 U.S.C. § 110(6)-(7) (exempting some performances of nondramatic musical works); *id.* § 112 (licensing ephemeral recordings); *id.* § 114 (tailoring rights in sound recordings); *id.* § 115 (licensing reproduction and distribution of copies of nondramatic musical works); *id.* § 116 (licensing nondramatic musical works for use in jukeboxes); *id.* § 513 (codifying performing rights consent decree); *id.* § 1008 (exempting certain uses of certain digital recording devices).

32. See generally Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003) (examining and explaining complexity of copyright law's application to musical works and sound recordings).

are also problems in other performing arts; therefore, these problems may merit a similar response. This Article defines the “performing arts” as those creative fields in which a source work must be rendered through the physical interpretation by one or more persons for the work to be fully realized. This Article focuses on those creative fields that generally involve a mutually dependent relationship between the author of a source work and those who interpret the text in a live or recorded setting for the benefit of an audience. At a minimum, the performing arts for present purposes include theatre, motion pictures, music, dance, pantomime, and performance art.<sup>33</sup> One might well include comedy, poetry, spoken word, and the public performance of literary works, such as audiobooks; however, this Article hesitates to be so expansive. Performance of illusions and magic tricks appears to be a borderline case for which copyright’s role is evolving and rights of creative control are not yet fully specified.<sup>34</sup> The power dynamics concerning creative control between an author of source work and a performer in comedy and spoken word appear to favor the performer.<sup>35</sup> In the case of the nondramatic literary work, the author does not depend on the actor to reach her audience. Moreover, the author’s desire for control over who voices the work in an audiobook seems more deserving in light of the relative degree of creative contributions of author and actor.

A key premise of this Article’s argument is that the problems of access and reuse in the performing arts are different in kind, rather than degree, from the problems that appear in other creative fields. To be sure, the rights of creative control do pose poignant problems for follow-on creators generally. For example, authors of literary works frequently wish to retell, reimagine, or rework a preexisting narrative; they also often borrow characters or settings.<sup>36</sup> In some cases, a copyright owner may deny a license to reuse or borrow merely because

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33. Performance art is a contested, interdisciplinary form of performance that has a looser connection to narrative than is traditionally associated with drama; the Wikipedia description is sufficiently reliable to support this general point. See *Performance Art*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Performance\\_art](http://en.wikipedia.org/wiki/Performance_art) (last updated Apr. 10, 2012).

34. See, e.g., *Teller v. Dogge*, 12 Civ. 00591(D. Nev. Apr. 11, 2012) available at <http://ia601207.us.archive.org/28/items/gov.uscourts.nvd.86951/gov.uscourts.nvd.86951.1.0.pdf> (famous magician alleges infringement of his trick, *Shadows*, registered as a “dramatic work” with the U.S. Copyright Office).

35. See generally Dotan Oliar & Christopher Sprigman, Reply, *From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create*, 95 VA. L. REV. IN BRIEF 57 (2009); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

36. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (agreeing that “Salinger is likely to succeed on the merits of his copyright infringement claim” with respect to defendant’s unauthorized borrowing of plot and character elements from *The Catcher in the Rye*).

the user cannot afford the owner's price.<sup>37</sup> In many other cases, however, the copyright owner, often the author or her estate, seeks to censor certain kinds of retelling and to control the fate of the narrative in popular culture for the duration of copyright.<sup>38</sup> In such cases, the copyright owner can frustrate the user's creative impulses in dramatic fashion; she can obtain a court order requiring that the user's books be pulped<sup>39</sup> unless fair use grants the follow-on author a reprieve.<sup>40</sup> One might respond to the presence of this tension across creative fields by arguing that copyright should be generally more solicitous of the user's creative requirements; that is, it should be reformed to become only a right of compensation rather than a right of control. This Article does not take up this argument. Rather, it accepts the general case that rights of exclusion, backed by the power of injunctive relief, are necessary to achieve copyright's purposes.

What makes the performing arts different from other creative fields is the condition of *mutual dependence* that exists between the author of the source work and the many creative persons upon whom the author of the source work relies for a work to be fully realized. Both the authors and the other creative parties contribute individual creativity to the collective performance. A range of creative individuals sits between the author of the source work and the performer, such as directors, producers, dramaturges, and cinematographers. Even though producers, directors, and performers may qualify as "authors" of their contributions under copyright law, this Article treats this group collectively as "performers" to focus on the mutually dependent relationship between the writers of source works and those who render them in performance. Even film directors considered *auteurs* work from a script.<sup>41</sup>

The landscape is varied with respect to independent rights owned by creative contributors. In the theatre, a few cases have

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37. See, e.g., Steve Lambert, *Music Streaming Service Rejects Canada*, GLOBE & MAIL (Sept. 23, 2010), <http://www.theglobeandmail.com/news/technology/personal-tech/music-streaming-service-rejects-canada/article1720247> (reporting that music service Pandora abandoned plans to offer its service in Canada because of the high cost of copyright licenses).

38. See, e.g., *Salinger*, 607 F.3d at 68; *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1386 (N.D. Ga.) (granting preliminary injunction enjoining distribution of *The Wind Done Gone*, a novel reimagining *Gone With the Wind*), *vacated*, 268 F.3d 1257 (11th Cir. 2001).

39. See 17 U.S.C. § 503 (2006) (authorizing judicial orders to impound or dispose of infringing articles).

40. See *id.* § 107 (providing for fair use).

41. See, e.g., Doree Shafir, *Bored of Directors: Why Can't a Screenwriter Be an Auteur, Too?*, SLATE (Oct. 27, 2006, 5:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_gist/2006/10/bored\\_of\\_directors.html](http://www.slate.com/articles/news_and_politics/the_gist/2006/10/bored_of_directors.html) (describing conflict between screenwriter and film director considered an *auteur*).

contested the issue of whether a director's stage directions are independent works of authorship<sup>42</sup> and this subject is a perennial favorite for student-authored legal commentary.<sup>43</sup> Playwrights are having none of it:

The Council of the Guild has become aware that directors, dramaturgs and other theatrical collaborators have from time to time claimed copyright and other ownership interests in any such changes or contributions for which they claim to be responsible. . . . Such claims and actions infringe on the rights of dramatists to own and control their plays, and may inhibit the opportunities of other professionals, and audiences, to participate in the re-creation and enjoyment of the play.<sup>44</sup>

Performers fare differently, depending upon the art. An actor, a dancer, and a musician each face a range of creative choices when deciding how to perform a role or a piece of music. These creative choices can be fixed in a tangible medium simply by recording the performance.<sup>45</sup> On copyright's first principles, these creative choices are sufficiently original to qualify the performer as an author of her performance.<sup>46</sup> This view does not enjoy full acceptance, however. Usually the issue arises when a collaborator asserts rights as a joint author, and courts must address the intent of the parties, whether the collaborator's contribution is independently copyrightable, and

42. See, e.g., *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006); *Mantello v. Hall*, 947 F. Supp. 92, 100 (S.D.N.Y. 1996).

43. E.g., Beth Freemal, Note, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017 (1996); David Leichtman, Note, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996); Jessica Litman, Note, *Copyright in the Stage Direction of a Broadway Musical*, 7 ART & L. 309 (1982) (student note by now-Professor Litman); Jennifer J. Maxwell, Comment, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions*, 7 J. MARSHALL REV. INTELL. PROP. L. 393 (2008); see also Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427 (2009) (arguing for copyrightability of stage directions).

44. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1423 n.263 (2010) (quoting statement of the Dramatists Guild of America on *Dramatist Copyright and Intellectual Property Rights*). The Guild's web site has changed its content, but Internet Archive has an archived copy. See *Guild Statements-Dramatists' Copyright & Intellectual Property Rights*, DRAMATISTS GUILD AM. (May 16, 2008), [http://web.archive.org/web/20080516092242/http://www.dramatistsguild.com/about\\_statements\\_copyright.aspx](http://web.archive.org/web/20080516092242/http://www.dramatistsguild.com/about_statements_copyright.aspx); see also Janine Carter, *What Light from Darkness Grows*, WWW.WHATLIGHT.COM (2001), <http://www.whatlight.com/treatment-outline.html> (reproducing Dramatist Guild's position in opening of script).

45. Although performers seeking to claim copyright might fix their work by recording, performers' guilds frequently demand in their contracts the right to control whether a live performance is recorded. See, e.g., ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT UNDER THE ASSOCIATION OF NON-PROFIT THEATRE COMPANIES (ANTC) ¶ 38(A)(1) (2010) (prohibiting recording of auditions or performances in which Equity members are employed without "the express prior written permission of Actors' Equity Association and under terms and conditions established by it").

46. See 17 U.S.C. § 102(a) (granting copyright in any "original work[] of authorship" that has been "fixed in any tangible medium of expression").

whether the parties' contributions are works made for hire.<sup>47</sup> Courts treat musicians, producers, and some sound engineers as authors of their recorded performances.<sup>48</sup> Nevertheless, courts recognize only some collaborators in theatrical productions as authors, and actors and dancers usually are not treated as authors.<sup>49</sup>

Rather than seeking recognition within copyright law, some actors have sought control over their rendition of the characters they have embodied through the state-law right of publicity, which has yielded mixed results.<sup>50</sup> Critics often refer to actors as having a "trademark" style, but these styles are not actually protected as marks.<sup>51</sup> Similarly, the patent system has not attracted performers

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47. See *infra* note 48.

48. See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. OF THE COPYRIGHT SOC'Y 387 (2001) (arguing that musical performers and producers, as authors, are asserting rights to terminate transfer their interests in sound recordings made after January 1, 1978); see also Copyright Law Revision: Hearings before Subcommittee No. 3 of the Committee of the Judiciary House of Representatives on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 89th Cong. 1863 (Sept. 2, 1965) (testimony of Abraham Kaminstein) (identifying elements of authorship in sound recordings).

49. See, e.g., *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (holding a dramturg as not a joint author but as author of independently copyrighted contributions); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071-74 (7th Cir. 1994) (holding that actors must both demonstrate that their contributions to a play would be independently copyrightable and that the playwright intended for the actors to be considered joint authors); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (holding joint author's contribution must be independently copyrightable); *Supreme Records, Inc. v. Decca Records, Inc.* 90 F. Supp. 904, 909 (S.D. Cal. 1950) (treating as absurd the proposition that actors could claim exclusive rights in their renditions of famous characters such as Henry VIII or Hamlet); see also Douglas M. Nevin, Comment, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1543-46 (2004) (reviewing joint authorship and work for hire doctrines as applied to theatre). In some settings, such as Chicago's improvisational troupe, Second City, ownership in copyright to the works created by the troupe is unified through work-made-for-hire agreements. See Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 915-19 (1986). In the absence of such agreements, actors and dancers arguably could claim copyright in their creative contributions if fixed in tangible medium of expression. See 17 U.S.C. § 101 (defining requirements for a work made for hire).

50. See, e.g., *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811-12 (9th Cir. 1997) (noting a fact dispute for the jury on the publicity right asserted by the actors who played characters Norm and Cliff on television show *Cheers* against airport bar chain that had acquired a copyright license); *McFarland v. Miller*, 14 F.3d 912, 917-23 (3d Cir. 1994) (leaving right of publicity issue for trial); *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 836-37 (C.D. Cal. 1998) (holding that right of publicity is preempted by copyright); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 204 n.10 (2002) (collecting cases).

51. In the European Union, this would appear to be a plausible strategy. See Christina Michalos, *Sport and the Registration of Movement Marks*, 5RB (Dec. 2, 2003), available at <http://www.5rb.com/docs/Sport%20and%20the%20Registration%20of%20Movement%20Marks.pdf> (describing U.K. Trademark No. 2130164 for the movement of two characters slowly raising and replacing bowler hats in unison).

who have styled themselves as inventors by, for example, claiming to have invented a particular type of method acting.<sup>52</sup>

### B. The Problem of Authorial Control

Whether copyright law's preference for authors over performers is a problem depends both on how the law works in practice and whether one is comfortable with this state of affairs. In practice, star performers frequently invert copyright's hierarchy. Looking across the landscape of the big-dollar performing arts, the star power of the performers or directors often diminishes the writers' ability to assert creative control.<sup>53</sup> The average moviegoer might easily be able to name the starring actors or the director of the last movie she saw; on the other hand, she may have a difficult time remembering the names of the screenwriters.<sup>54</sup> Actors can use the leverage derived from this discrepancy to diminish writers' control. On Broadway, writers enjoy somewhat greater power, but star actors also are a staple of productions on the Great White Way.<sup>55</sup> In music, those who composed popular songs enjoyed considerable market power during the first half of the twentieth century.<sup>56</sup> Hit songwriters who do not perform their own music still enjoy important recognition, but it hardly compares to the attention given to the performers for whom they write.<sup>57</sup>

While star performers and directors may enjoy considerable creative control, in most cases the assertion of authorial sovereignty

52. For a database of patents pertaining to the arts, see *Patent Database*, PATENTING ART, <http://www.patenting-art.com/database/dbase1-e.htm> (last visited Apr. 9, 2012); also see Robert M. Kunststadt, F. Scott Kieff, & Robert G. Kramer, *Are Sports Moves Next in IP Law?*, NAT'L L. J., May 20, 1996, at C1.

53. Cf. Gavin Polone, *Four Star Screenwriters Talk About Rewrite Hell*, VULTURE (Feb. 29, 2012), <http://www.vulture.com/2012/02/polone-screenwriters-rewrites-hollywood.html> (interviewing four successful screenwriters on the common Hollywood practice of firing writers and hiring rewriters).

54. See, e.g., Gavin Polone, *Four Star Screenwriters Talk about Rewrite Hell*, THE VULTURE, Feb. 29, 2012, at <http://www.vulture.com/2012/02/polone-screenwriters-rewrites-hollywood.html> (interviewing four successful screenwriters on the practice of firing writers and hiring rewriters that is common in Hollywood).

55. See *Stars on Stage*, N.Y. THEATER GUIDE, <http://www.newyorktheatreguide.com/starsonstage/index.htm> (last visited Apr. 11, 2012) (identifying twenty-four stars acting in plays on Broadway in upcoming months).

56. See, e.g., *Tin Pan Alley: "Popular Standards"*, SONGWRITERS HALL FAME, <http://www.songwritershalloffame.org/exhibits/eras/C1106> (last visited Apr. 25, 2012) (providing biographical information about the numerous inductees who penned the tunes that became standards in the American songbook).

57. See Nekesa Mumbi Moody, *Do Pop Stars Really Write Their Own Hits?*, CBSNEWS (Feb. 11, 2009), [http://www.cbsnews.com/2100-207\\_162-3089948.html](http://www.cbsnews.com/2100-207_162-3089948.html); cf. *ASCAP Celebrates the Songwriters Behind Pop Music's Biggest Hits at Annual Awards Ceremony in Hollywood*, ASCAP (Apr. 27, 2011), [http://www.ascap.com/press/2011/0427\\_Pop\\_Biggest\\_Hits.aspx](http://www.ascap.com/press/2011/0427_Pop_Biggest_Hits.aspx).

over public performance is widespread among those who write for the performing arts. A particularly strong form of authorial control comes in the form of license conditions that include race-based and gender-based casting prohibitions. Two of the more famous examples are the Gershwins and Samuel Beckett. As Professor Funmi Arewa recounts, the Gershwins, and now their estate, will grant licenses to perform *Porgy and Bess* only if the cast is black, and the estate has even asserted rights to limit scholars from creating alternative interpretations.<sup>58</sup> Perhaps inconsistently, the estate itself has launched a revised version on Broadway, which audiences met with less than critical acclaim.<sup>59</sup> Samuel Beckett notoriously resisted granting licenses or approval for performances of *Waiting for Godot* except with an all-male cast.<sup>60</sup> Even when playwrights or their estates allow for standardized licensing through an intermediary, the standard license includes content controls. For example, the Dramatists Play Service offers community and educational theatres licenses to perform a number of plays at reasonable prices.<sup>61</sup> These groups can stage Edward Albee's *Who's Afraid of Virginia Woolf?* for seventy-five dollars per performance.<sup>62</sup> However, the license imposes significant content-based restrictions on the licensee. In particular:

(1) The play(s) must be presented only as published in the Dramatists Play Service, Inc. authorized acting edition, without any changes, additions, alterations or deletions to the text and title(s). These restrictions shall include, without limitation, not altering, updating or amending the time, locales or settings of the play(s) in any way. The gender of the characters shall also not be changed or altered in any way, e.g., by costume or physical change.<sup>63</sup>

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58. Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 324-27 (2006).

59. Patrick Healy, *The Songs Remain the Same, but Broadway Heirs Call the Shots*, N.Y. TIMES, Jan. 9, 2012, <http://www.nytimes.com/2012/01/09/theater/with-porgy-on-broadway-gershwin-heirs-flex-their-rights.html?pagewanted=all>.

60. WILLIAM HUTCHINGS, SAMUEL BECKETT'S *WAITING FOR GODOT: A REFERENCE GUIDE* 93-94 (2005) ("This practice has touched off a continuing debate within theatrical and literary communities over the extent to which a playwright or his or her estate can or should have absolute control over the production of his or her works."); *see also id.* at 93-94, 96 (explaining limits on Beckett's ability to obtain injunctions against productions with women in the cast and his response by requiring in subsequent licenses that a disclaimer be announced to the audience prior to each performance).

61. *See Nonprofessional Licensing*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/text/npalinks.html> (last visited Apr. 11, 2012).

62. *Who's Afraid of Virginia Woolf?*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/cgi-bin/db/single.asp?index=0&key=1623> (last visited Apr. 9, 2012). Dramatists Play Service, Inc., also charges a fee for the "authorized acting edition." *See id.*; *infra* text accompanying note 63.

63. *Application for Nonprofessional Stage Performance Rights*, DRAMATISTS PLAY SERVICE, INC., <https://www.dramatists.com/cgi-bin/db/secure/autonpa.asp> (last visited Apr. 9, 2012).

Such time, place, and manner restrictions imposed by copyright license constrain performers' creative freedom to interpret source works imaginatively. In contrast, when copyright expires and a work enters the public domain, community theatre groups have exercised with gusto the freedom nurtured by the public domain, particularly with source works such as the plays of William Shakespeare. For example, a local theatre group recently staged a science-fiction version of *The Tempest* at a nearby public high school, and American University's public radio station broadcasted the performance live. No copyright issues arose because the source work is in the public domain rather than subject to a restrictive copyright license.<sup>64</sup>

A few other examples further illustrate this understanding about the hierarchical relation between author and performer. Choreographer Antony Tudor wrote in his will:

I request my Trustee, in order to insure the integrity of my ballets in performance, to require as a condition of any agreement entered into or permission given for performance of any of my ballets that the performance be based on the best available record of the ballet and, specifically, if the ballet has been notated by the Dance Notation Bureau or by The Institute of Choreology, that the Bureau or the Institute be consulted and the performance based upon its notation.<sup>65</sup>

Musical composers share this view as well. "I do think that, as composers and writers, we should leave pretty specific instructions to our estates about how we want our work to be protected," said John Kander, the eighty-four year-old composer who, with Fred Ebb, wrote the scores for hits like *Cabaret* and *Chicago*.<sup>66</sup>

Ironically, while playwrights enjoy a significant degree of control, this does not readily translate into significant revenue. As Professor Jessica Litman relates:

Today, playwrights in America retain both copyright ownership and creative control in their plays. Those strong copyright rights have not, however, made playwriting remunerative. A 2009 study by the Theatre Development Fund concluded that it is no longer possible for even the most successful playwrights to earn a living from productions of their plays. Working playwrights need to supplement their incomes with teaching or with writing scripts for film or television under work made for hire contracts.<sup>67</sup>

Copyright law creates a hierarchy of creative control in the performing arts by recognizing those who compose source works as authors who have exclusive rights to determine how, and by whom,

64. Sophia Bushong, *The Tempest! In! Space!*, WASH. CITY PAPER, Mar. 2, 2012, <http://www.washingtoncitypaper.com/blogs/artsdesk/theater/2012/03/02/the-tempest-in-space>.

65. Francis Yeoh, *The Value of Documenting Dance*, BALLETT-DANCE MAG. (June 2007), <http://www.ballet-dance.com/200706/articles/Yeoh200706.html> (citation omitted) (quoting Antony Tudor's will).

66. Healy, *supra* note 59.

67. Litman, *supra* note 44, at 1424 (footnotes omitted).

their works will be performed.<sup>68</sup> The exclusive rights of authorial control produces a creative hierarchy specific to the performing arts because authors of source works depend upon the creative contributions of performers to present the work to an audience in its intended form.<sup>69</sup> These performers depend upon the authors of source works because audience expectations lead to demand for performances of familiar works. While these creative communities are mutually dependent, copyright law grants authors of source works the right to deny public performance except on the author's terms subject to certain limitations and exceptions, such as fair use.<sup>70</sup> This Article regards this unequal treatment of codependent creators unjustified.

## II. TAILORING RIGHTS TO RECOGNIZE CREATIVE CODEPENDENCY

As a general matter, copyright law provides the same set of exclusive rights to all works of authorship,<sup>71</sup> but international and U.S. copyright law contain a number of provisions that lawmakers tailored to provide differential treatment depending upon the subject matter of a work of authorship.<sup>72</sup> Other provisions differentiate on the basis of the author's identity.<sup>73</sup> In addition, the courts have improved the functioning of the law's general standards by applying them in a manner that differentiates on the basis of subject matter to accommodate particular issues of incentives and access in context.<sup>74</sup>

### A. Tailoring in Theory

Whether these tailored provisions improve copyright law depends upon one's theory of tailoring. Current law lacks a general theory that explains both why copyright's default entitlements should be one-size-fits-all as well as why, when, and how the law should tailor these otherwise uniform provisions.<sup>75</sup> When viewed through the

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68. See 17 U.S.C. § 106(4) (2006).

69. Cf. Moody, *supra* note 57.

70. Compare 17 U.S.C. § 106(4) (granting exclusive right "to perform [a] copyrighted work publicly"), with *id.* § 107 (subjecting the public performance right to a fair use exception).

71. See 17 U.S.C. § 106.

72. Congress has granted authors of certain types of work additional rights. See, e.g., 17 USC § 106A (works of visual art). For other classes of author, such as architects, see *id.* § 120, and authors of sound recordings, see *id.* § 106(6), Congress has limited the exclusive rights available. Similarly, Congress has limited the scope of rights in functional pictorial, graphical, or sculptural works. See *id.* § 113.

73. See, e.g., 17 U.S.C. § 105 (placing works of the United States Government in the public domain in the United States).

74. See generally Stacey L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203 (2005).

75. Carroll, *One for All*, *supra* note 15, at 861-71, 875-78.

prism of law and economics, copyright law imposes “uniformity cost” on society because one-size-fits-all rights are likely broader than necessary in many cases and not broad enough in others.<sup>76</sup> The economic justification for copyright law supports the argument for uniform rights as an initial policy.<sup>77</sup> This justification holds that even though it would be socially less costly for the government to directly subsidize the costs of producing and distributing creative works, granting copyrights to authors is a preferable policy because the government lacks sufficient information to choose which creators and distributors to subsidize. Copyright places the risk of failure on the creator or distributor rather than on taxpayers. However, as authors, publishers, user groups and policymakers gain experience with, and understanding of, the economic effects of how copyright affects different industries, policymakers can use this information to tailor copyright to refine its balance between providing incentives and rights of access.<sup>78</sup>

Thus, when done carefully, tailoring rights or remedies improves copyright’s effectiveness as a means of “promot[ing] Progress . . . and the useful Arts.”<sup>79</sup> Even though not all of the tailored provisions in current law necessarily have been “done right,” the presence of these provisions as a whole demonstrates the problem of uniformity cost: these provisions were enacted only through contested legislative processes that required, in some cases, substantial resource commitments.<sup>80</sup> While some of these investments may have resulted simply from an interest group seeking a particular advantage,<sup>81</sup> others reflect lobbying in response to demonstrable uniformity costs.<sup>82</sup> As a structural matter, Congress has created legislative tailoring in U.S.

76. *Id.* at 848.

77. *See* Carroll, *One Size*, *supra* note 15, at 1391-94.

78. *See id.* at 1422-23.

79. *See* U.S. CONST. art. 1, § 8, cl. 8.

80. *See, e.g.,* Valenzi, *supra* note 12, at 771-72 (detailing the expansive efforts of the theatre and music lobbies to extend increased copyright protection to theatrical and musical works at the turn of the twentieth century).

81. *See, e.g.,* 17 U.S.C. § 110(10) (2006) (exempting from infringement liability a public performance of a “nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans’ organization or a nonprofit fraternal organization to which the general public is not invited”).

82. For example, without the safe harbors from monetary liability tailored for Internet service providers (ISPs), it is doubtful that companies such as YouTube could have succeeded to the extent that they have, even though the safe harbor applies only to a small percentage of the content on the site. *See id.* § 512(c) (removing monetary liability for infringement by reason of storage at the direction of a user); *see also* *Viacom Int’l, Inc. v. YouTube, Inc.*, Nos. 10-3270-cv, 10-3342-cv, 2012 WL 1130851, at \*1 (2d Cir. Apr. 5, 2012) (holding most of YouTube’s conduct fell within § 512 safe harbors); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) (same for Veoh).

copyright law through exceptions and limitations to the exclusive rights granted in section 106, rather than as direct redefinitions of such rights.<sup>83</sup> As interpreted by the courts to date, this structure places the burden on a user to show that her use of a copyrighted work falls within the scope of an exception or limitation, once the copyright owner has proven *prima facie* infringement.<sup>84</sup>

This author's work to date proposes a framework for tailoring rights to improve intellectual property law's function as a matter of economic policy.<sup>85</sup> But economic efficiency is not the only value to be considered in relation to copyright law. Tailoring rights may also be an appropriate response to give effect to these other values. Copyright law stimulates investments in some speech, but it also suppresses other speech.<sup>86</sup> As a result, concerns about content-based regulation also may inform arguments for tailoring copyright law or for disregarding content-based tailoring measures, regardless of their effects on efficiency. It is partially for this reason that Justice Holmes avoided the tailored provision of the 1831 Act, as modified in 1874, which limited protection to "pictorial illustrations or works connected with the fine arts,"<sup>87</sup> and announced the now-famous non-discrimination principle in *Bleistein v. Donaldson Lithographing Co.*: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>88</sup> While challenging in some circumstances, tailoring copyright either through legislation or judicial interpretation can, and has, improved the law's ability to foster investments in cultural production, while relieving the pressures caused by a one-size-fits-all approach to economically heterogeneous creative sectors.

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83. See, e.g., *id.* §§ 108, 110-122 (defining limitations and exceptions to exclusive rights granted to copyright owners).

84. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985).

85. See generally Carroll, *One Size*, *supra* note 15.

86. See Golan v. Holder, 132 S. Ct. 873, 889-92 (2012) (emphasizing limits of First Amendment on copyright owner's exclusive rights). See generally Rebecca Tushnet, *Essay, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004) (arguing that emphasis on transformative use in fair use inquiry undervalues free speech contributions of verbatim copying in some contexts).

87. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (quoting Act of June 18, 1874, ch. 301, 18 Stat. 78, 79).

88. *Id.* at 251.

*B. The Music Exception in Copyright*

The Copyright Act of 1976 treats music differently than the other performing arts because the Act includes numerous tailored limitations or exceptions applicable to musical works or sound recordings.<sup>89</sup> For example, section 110 groups together a range of limitations and exceptions that apply to the copyright owner's exclusive rights of public performance and public display, three of which apply only to nondramatic musical works.<sup>90</sup> Section 115 provides the "cover right," a statutory license that allows for the recording of a nondramatic musical work that the copyright owner has already recorded and publicly distributed.<sup>91</sup> In addition to these statutory provisions, public performance rights in the music industry have been brought under collective management subject to judicial oversight.<sup>92</sup> The very large majority of professional songwriters and music publishers license the public performance of their nondramatic musical works with one of three performing-rights organizations, ASCAP, BMI, or SESAC, with the first two sharing most of the market equally.<sup>93</sup> While not formally statutory licenses, the blanket licenses offered by these entities operate very similarly because the owners of the musical works' copyrights have ceded the rights to performing-rights organizations to control individual uses of the copyrighted work in exchange for a right to receive compensation.<sup>94</sup>

Taken together, these provisions provide significant, but not complete, equalization of creative control between musical composers and those who perform their music. This Section explores the rationale for these provisions to investigate whether this rationale supports broadening them within the music industry and also extending these provisions to the other performing arts. While the section 110 provisions are more directly aimed at authorizing

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89. See, e.g., 17 U.S.C. §§ 110, 114-116, 1008 (2006). While not all sound recordings are of musical works, the legislative history makes clear that most provisions that provide distinctive treatment to sound recording are targeted at the recorded music industry.

90. *Id.* § 110(5)-(7).

91. *Id.* § 115(a).

92. See *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 211-12 (S.D.N.Y. 2010); see also *BMI v. CBS, Inc.*, 441 U.S. 1, 14-15 (1979) (holding that blanket licensing agencies were not engaging in *per se* antitrust violations).

93. See *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d at 211-12.

94. See *id.* at 211 ("A blanket license is a license that gives the music user the right to perform all of the works in the repertory of a performing rights organization ("PRO") such as ASCAP, the fee for which does not vary depending on how much of the music from the repertory the user actually uses. ASCAP negotiates with and collects license fees from entities that perform music publicly. ASCAP then distributes the collected royalties to its members based on a system of performance surveys and credits.").

performance without the copyright owner's permission, this Section begins with section 115 because (1) the policy debate around this provision has more directly engaged with the question of composer control versus performer access, and (2) this provision provides compensation to the composer of a source work in exchange for the license to render it in recorded performance.

### 1. Section 115

Section 115 in the current Act is the successor to the first statutory-license provision in U.S. copyright law, which Congress enacted in section 1(e) of the Copyright Act of 1909.<sup>95</sup> Under the current version of the license, the copyright owner of a piece of popular music, or any other "nondramatic musical work," has the exclusive right to first distribute recordings of the musical work to the U.S. public.<sup>96</sup> After this first distribution, any other member of the public may make use of a statutory license to make her own recording of the musical work and to distribute these recordings—even if the copyright owner objects—subject to the terms and conditions of the license.<sup>97</sup> Thus, the first authorized distribution acts as a temporal trigger for the availability of the license; a precondition consistent with the moral right of divulgation, granted in many other countries, under which the author has the exclusive right to make the work public.<sup>98</sup>

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95. Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075 (current version at 17 U.S.C. § 115(e)).

96. 17 U.S.C. § 106(3).

97. *Id.* § 115(a)

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

*Id.*

98. See, e.g., Hansmann & Santilli, *supra* note 19.

To satisfy the conditions of the license, the licensee must: (1) serve notice on the copyright owner prior to the public distribution of the licensee's recordings, (2) pay the copyright owner a statutory license fee, and (3) refrain from altering the basic melody or "fundamental character" of the work.<sup>99</sup>

As Professor Howard Abrams recounts in detail, Congress first introduced this license into the law to undermine the market power of a cartel that had formed between a group of music publishers and the principal manufacturer of player-piano rolls.<sup>100</sup> Over time, however, the rationale for granting a right of access to source works through the license has shifted from undermining monopoly power to satisfying industry expectations and standardizing licensing conditions.

In the early stages of the revision process that led to enactment of the Copyright Act of 1976, the Register of Copyrights proposed eliminating the statutory license.<sup>101</sup> The Register asserted that the danger of monopoly had passed, and argued that "the fundamental principle of copyright—that the author is to have the exclusive right to control the commercial exploitation of his work—should apply to the recording of music, as it is applied to all other kinds of works and to other means of exploiting music."<sup>102</sup> In this view, in the absence of the statutory license, negotiated licenses would be available for most musical works. However, "the author or publisher could refuse a license to a recorder whom he considered *irresponsible* or for a recording he considered *undesirable*, and the royalty rate would be fixed by free negotiation."<sup>103</sup> Maintaining a guaranteed right of access for the recording party did not, in this view, carry any weight.<sup>104</sup>

99. 17 U.S.C. § 115(a)(2) (providing that the licensee may arrange the musical work "to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner").

100. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 217-21 (2010).

101. *Id.* at 222 (citing REGISTER OF COPYRIGHTS, 87TH CONG., REP. ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW (1961)).

102. REGISTER OF COPYRIGHTS, 87TH CONG., REP. ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW 33 (1961) [hereinafter REGISTER'S REPORT].

103. *Id.* at 34 (emphasis added).

104. *Id.* at 35 (emphasis added). The Register of Copyrights continued:

We have previously mentioned the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. In the situation prevailing in 1909, the public interest was thought to require the compulsory license to forestall the danger of a monopoly of musical recordings. The compulsory license is no longer needed for that purpose, and *we see no other public interest that now requires its retention.*

*Id.* (emphasis added).

Many incumbent stakeholders in the music industry, contrary to the Register's view, believed that retaining the license, while improving the statutory rate, would be preferable; they preferred to operate under familiar conditions rather than confront the uncertainties associated with license negotiations. This sentiment was strong enough that the compulsory license remained a fixture in copyright law even though the license enshrines a principle of limiting creator control to guarantee access in the case of sources works for one of the performing arts.<sup>105</sup>

Arguably the license accomplishes very little in practice because the industry has created a private workaround through the Harry Fox Agency. This agency, for example, issued 2.44 million licenses in 2008 as compared to the 274 Notices of Intent to use the statutory license filed with the Copyright Office.<sup>106</sup> However, it is doubtful that this private licensing scheme would operate so automatically were it not for the shadow cast by the statutory license. The terms of the mechanical license largely mirror the statutory license except that the terms of payment are more flexible.<sup>107</sup> In the absence of a statutory license, master use and synchronization licenses must be negotiated with the copyright owners.<sup>108</sup> Surely, as the Register in 1961 recognized, musical composers and music publishers would want a right to refuse licensing to "irresponsible" or "undesired" recordings.<sup>109</sup> This interest in control does not appear to be particularly strong, however, because there is little to no evidence suggesting that songwriters have forsaken their craft or have chosen not to release a particular song because another artist might record and release it as a cover song.<sup>110</sup>

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105. Abrams, *supra* note 100, at 227 ("[T]he most salient fundamental aspect of the compulsory license for the making of phonorecords of a non-dramatic musical composition is that it sanctions the creation and exploitation of a derivative work without the authorization of the copyright owner of the derivative work. None of the other compulsory licenses do so." (footnote omitted)).

106. *Id.* at 237-39.

107. See, e.g., *Songfile FAQ*, HARRY FOX AGENCY, <http://www.harryfox.com/songfile/faq.jsp#faq6> (last visited May 4, 2012) (offering lump sum payment for low-volume license under HFA Songfile service); see also Abrams, *supra* note 100, (explaining that HFA licenses require quarterly rather than monthly accounting as is required under section 115).

108. See, e.g., *Songfile FAQ*, HARRY FOX AGENCY, <http://www.harryfox.com/songfile/faq.jsp#faq6> (last visited May 4, 2012) (explaining why HFA does not offer master use or synchronization licenses) at <http://www.harryfox.com/public/FAQ.jsp#10>.

109. Abrams, *supra* note 100, at 223 (quoting REGISTER'S REPORT, *supra* note 102, at 34).

110. See discussion *infra* Part II.C.

## 2. Section 110

Section 110 exempts an eclectic mix of public performances or public displays from infringement liability.<sup>111</sup> Two of these exemptions, subsections 110(1) and 110(9), could serve as the legislative building blocks for a broader statutory license for public performances of various source works.<sup>112</sup>

Section 110(1) exempts from infringement liability “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.”<sup>113</sup> This provision does more than provide an exemption from paying a license fee for performances that would not otherwise be fair use. It also gives performing arts teachers, among others, creative license to experiment with source works without requiring copyright owner permission.<sup>114</sup> Such experiments, however, are confined to the classroom or similar places.<sup>115</sup>

Section 110(9) exempts from liability certain noncommercial performances of a work (1) that the author has published at least ten years prior to the performance and (2) that the user will perform as a transmission directed to a print-disabled audience.<sup>116</sup> A proponent of a more general performance license could use this as a basis for allowing public performance by transmission as well as live performance. In addition, the ten-year, post-publication trigger for the exemption is an unusual provision, but it might serve as a potential source of compromise for a statutory license.<sup>117</sup> Other statutory licenses in the Copyright Act do not contain similar temporal triggers.<sup>118</sup>

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111. 17 U.S.C. § 110 (2006).

112. *Id.* § 110(1), (9).

113. *Id.* § 110(1).

114. *See id.*

115. *Id.*

116. *Id.* § 110(9). Specifically, the exemption provides that the following is not an infringement of copyright:

[P]erformance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization.

*Id.*

117. *See* discussion *infra* Part II.C.3.b.

118. *See generally* 17 U.S.C. §§ 111, 114-116, 119, 122.

### 3. Summary

Sections 115 and 110 identify particular circumstances in which either an exemption or a statutory license circumscribes the copyright owner's control over a source work for the performing arts.<sup>119</sup> Section 115 licenses the creation and recording of unauthorized derivative works on condition that the creator of the recording provides notice and compensation to the owner of the musical composition copyright.<sup>120</sup> Section 110 exempts certain public performances from the copyright owner's exclusive rights to facilitate performance of dramatic or musical works in educational settings or in other gathering places that have received Congressional favor.<sup>121</sup>

#### *C. Toward a More General Performance License?*

Inspired by the rationale and examples of sections 115 and 110, this Article argues that performers' interest in access to source works should receive more general legal recognition. Like the former Register, however, many in the performing arts likely accept the principle that playwrights, musical composers, and choreographers should retain creative control over how others perform their copyrighted works. The ideology of Romantic authorship runs strong throughout this discourse, and those who perform the works of canonical writers do so in service to such visions.<sup>122</sup>

Nevertheless, the mutual dependence between authors of source works for the performing arts and those who render these in performance requires distinct legal treatment from creative interdependence in other contexts. Authors of source works are not similarly situated to most other authors because their work is not fully realized until it has been performed.<sup>123</sup> The law should not give one of these codependent parties the right to veto the creative aspirations of the other, and the harms caused by copyright owners'

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119. *Id.* §§ 110, 115; *see supra* text accompanying notes 95-118.

120. 17 U.S.C. § 115; *supra* text accompanying notes 95-110.

121. 17 U.S.C. § 110; *supra* text accompanying notes 111-18.

122. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 200-09 (2008).

123. Authors of architectural works depend upon skilled laborers to fully render their works as well. While conflicts between architects and building contractors over the rendering of plans may bear some resemblance to the conflict addressed in this Article, building contractors generally do not evaluate their work on the basis of their creative interpretation of the plans. As a result, this difference between performers and building contractors justifies excluding architectural works from those that would be subject to the statutory license contemplated in this Article.

content-based license conditions or refusals to license are problems that deserve a legal solution.

This problem could be understood to be a form of economic inefficiency if, on average, the benefits of allowing a wide range of performing arts organizations and their audiences (to enjoy the same kind of creativity in the ways in which public domain texts, such as Shakespeare's plays, are rendered) outweigh the diminution in an author's incentive to compose. This is the argument that caused Congress to retain the statutory license in section 115.<sup>124</sup> There is little or no evidence to suggest, however, that songwriters value their right of control so highly that they would forsake their craft or choose not to release a particular song because a third party might record and release it as a cover song. Similarly, it strains credulity to think that playwrights and choreographers would be dissuaded from creating new works because those works would be subject to a statutory license.<sup>125</sup>

In addition, the current hierarchy creates an unjust distribution of power among cocreators. Performers seek to engage with their audiences. Audiences often want to see familiar works performed. As a result, performers need access to these compositions to do so. Giving the author of such a text a veto right over a director's or performer's ability to realize her creative vision is a form of government-backed censorship, even if it is done for the asserted higher purpose of promoting progress through authorial control over the use of the author's creative expression by others.

### 1. License or Exception?

However conceived, do the problems with the current discrepancy require a statutory license or an exemption from liability as a response? There may be reasons to broaden some of the circumstances in which royalty-free public performance is appropriate, either through an amendment of section 110 or through a robust interpretation of fair use.<sup>126</sup> But, as a general matter, the argument for a statutory license is more persuasive because the source work contributes significantly to the value of the performance, and the composer of the source work should enjoy economic rewards for

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124. See Abrams, *supra* note 100, at 225.

125. See Valenzi, *supra* note 12, at 789-92 (advocating the theoretical benefits of instituting a compulsory licensing scheme in the theatre industry).

126. See 17 U.S.C. § 107 (limiting exclusive rights to allow for royalty-free use of copyrighted expression without permission when balance of four factors favors the use).

contributing this value to the performance.<sup>127</sup> Unlike the section 110 exemptions discussed above, which are limited to noncommercial performances,<sup>128</sup> this license should also be available to performing artists who seek commercial advantage from their live or recorded performances.<sup>129</sup> Like the license in section 115,<sup>130</sup> this license should also require payment even if the performance is for a noncommercial or charitable purpose and is not otherwise exempt from liability. The goal of this license would be to remove an author's right to veto a production for content-based reasons, but performers should still be required to recognize the important contribution the source work makes to a production by providing compensation to the author of the source work. If Congress creates a statutory license, several issues will arise: What subject matter of works should be subject to the license? What is the license's scope and duration? By what procedure can a performer invoke the license? The next Sections explore these issues and analyze the policy options Congress should consider when designing such a license. While not advancing a legislative proposal at this time, the remainder of this Article takes a position on some of these policy trade-offs and concludes that further study of the likely economic effects of such a license is warranted while insisting that the problem of unequal treatment of codependent creators requires a solution.

## 2. Subject Matter

At a minimum, the license should apply to dramatic literary works, musical works, pantomimes, and choreographic works because these are source works characterized by the condition of *mutual dependence* between composer and performer for full realization. Other literary works, such as novels and short stories, would not be subject to statutory licensing, even in an unusual case in which a performer demanded a right to record or otherwise perform the work: an audiobook is one example of such a work. Authors of these works do not depend upon performers to realize their works, and therefore the condition this Article contemplates as the basis for tailoring copyright does not apply to these nondramatic literary works.

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127. See, e.g., *id.* § 801(b)(1)(A)-(D) (describing that the calculations of royalties should reflect the creative and economic roles both the copyright holder and user contribute to the creative expression).

128. *Id.* § 110; *supra* text accompanying notes 111-18.

129. See *infra* p. 826 (discussing commercial application of contemplated statutory license).

130. 17 U.S.C. § 115; *supra* text accompanying notes 95-110.

Somewhat more challenging is the issue of whether such a license should extend to already-recorded performances, such as motion pictures and sound recordings. In the case of a sound recording, a performer already may recreate sounds found on the recording or create derivative works therefrom by virtue of the limits on the exclusive rights in sound recordings in section 114(b).<sup>131</sup> With respect to motion pictures, two issues arise: First, although the license would apply to the screenplay for a film, if the screenplay has not been published, may the licensee reverse engineer the script from the film and then perform it, for example, as a play?<sup>132</sup> Here, the answer should be in the affirmative because the goal of the license is to provide access to source narratives regardless of form, but this is a tentative position because permitting the creation of this type of derivative work differs from rendering a work designed to be performed by others in performance. Second, even if the license permits live performances of a derived movie script, may a director remake the film under the license and distribute it analogously to recorded cover songs under section 115? The answer to this second question should be in the negative: this reaches too far. The idea/expression dichotomy<sup>133</sup> already provides filmmakers with considerable range to make films similar to those already released. In addition, the filmmaker is differently situated from stage directors and actors because audience expectations differ. Theatre audiences wish to see familiar plays, but movie audiences usually wish to see

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131. 17 U.S.C. § 114(b). Section 114(b) provides:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds, fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

*Id.*

132. This is not a hypothetical example. A college theatre group that could not obtain a license for the script to a popular film approached the author and asked whether it would be fair use for them to create their own script from the film.

133. See 17 U.S.C. § 102(b) (excluding ideas from copyright's exclusive rights).

new films.<sup>134</sup> In addition, the law has not considered remaking a film as one of the performing arts.

### 3. Triggering Conditions

#### *a. Bargaining Breakdown*

Although neither the license in section 115 nor the exemptions in section 110 contains conditions with bargaining breakdown to trigger their application, other statutory licenses either allow the terms of a negotiated license to trump the terms of the statutory license,<sup>135</sup> or commence the rate-setting proceeding after requiring a period for voluntary negotiation.<sup>136</sup> A reason to favor some bargaining as a condition of the license is that it allows the author of the source work to arrive at a price through negotiation if she does not seek to impose content-based restrictions on the licensee. Allowing the price to differ based on relative bargaining strength also is preferable under traditional economic reasoning because the parties are better situated than the government to value the transaction. Finally, a number of authors, particularly playwrights, already have agreed to standardized pricing in a number of cases.<sup>137</sup> This Article's proposal would seek to avoid disturbing the terms of these licenses to the extent that the prices reflect market realities and do not impose content-based restrictions on licensees.<sup>138</sup> The challenge is that an author set on imposing content-based restrictions could readily impose these under the guise of price negotiations.

For this reason, if Congress were to enact a general performance license, its terms should grant the license to use the source work while leaving price as the only open term. This approach would be consistent with that taken for the statutory licenses subject

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134. Cf. Associated Press, *'The Lion King' Passes 'The Phantom of the Opera' as Broadway's All-Time Box Office Champ*, NYDAILY NEWS (Apr. 9, 2012, 12:59 PM), <http://www.nydailynews.com/entertainment/music-arts/lion-king-passes-phantom-opera-broadway-all-time-box-office-champ-article-1.1058630> (noting that *The Lion King* recently ousted *The Phantom of the Opera* as Broadway's highest-grossing show).

135. See, e.g., 17 U.S.C. § 114(f)(3) ("License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.").

136. See, e.g., *id.* § 803(b)(3).

137. See, e.g., *Nonprofessional Licensing*, *supra* note 61 (providing for standard licensing agreements drafted by the Dramatists Play Service).

138. In the Dramatists Play Service example, standardized pricing has been achieved, but significant content-based restrictions also are imposed. See *supra* note 61-63 and accompanying text.

to the proceedings in section 803.<sup>139</sup> If the parties fail to agree on a price through good faith negotiations, the price would be subject to arbitration with both parties equally bearing the costs. In the event the arbitrator found that one of the parties had not negotiated in good faith, the arbitrator would impose the total costs of arbitration on that party.

However, some of the target beneficiaries of this proposed license would be educational and community performing arts organizations, which generally lack the resources to engage in extended negotiations or arbitration.<sup>140</sup> Therefore, the license should include some form of collective negotiation that would result in a menu of prices related to the relative wealth and the size of audience served. Standardized pricing already available supports the viability of such a menu.<sup>141</sup>

### *b. Temporal Trigger*

The complications inherent in a bargaining precondition are sufficient to require consideration of alternative triggering events for the license's availability. At a minimum, the license should not be available until after the first performance authorized by the copyright owner in the source work. Part of the justification for the license is that audience expectations make the performers dependent upon the authors of known works.<sup>142</sup> This can occur only after the audience has become familiar with the work, and it should be the right of the author to have the work first performed under the terms of a negotiated license. For recorded performances, the threshold condition for the license should be the copyright owner's first authorized public distribution of copies, public exhibition, or public performance. Such a condition would be analogous to the trigger for the section 115 statutory license.<sup>143</sup>

Persuasive arguments support two other conditions on the for the availability of the license, one of which would delay availability and the other which would allow the license to operate prior to the source work having been made public by the copyright owner. On the

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139. See 17 U.S.C. § 803 (setting forth procedures to be followed by Copyright Royalty Judges).

140. See Valenzi, *supra* note 12, at 781 (describing how the current licensing system for theatre provides access to performance licenses for amateur theatres that would otherwise lack the resources to negotiate on their own).

141. See, e.g., *id.* at 779-81 (detailing the standardized scheme for licensing the stock and amateur performance rights of plays and musicals by theatrical licensing houses).

142. See *supra* note 134 and accompanying text.

143. See discussion *supra* Part II.B.1.

one hand, allowing the first public performance of a work to be the trigger seems too soon, particularly as applied to theatrical productions. Current licensing practice distinguishes between “First Class” and “Subsidiary” rights, in which the former grants rights to perform in a “first class” theater, usually in New York or London and possibly through a national tour; whereas, subsidiary rights cover all other licensing opportunities, including licenses for amateur and stock productions.<sup>144</sup> Producers generally hope that a “First Class” production will be sufficiently popular to justify formation of a touring company and a national tour.<sup>145</sup> The author of the source work should be able to enjoy the market success of the first run on negotiated terms without having to face competing versions of the work. If a time delay is appropriate, a set period of time after the first public performance or public distribution of copies of a recorded performance would be better than some fact-sensitive determination about when the author has had her first bite at the apple. This would also have the advantage of triggering the license in the case of works for which the “first run” arguably does not end, such as *The Mousetrap*, *The Bald Soprano*, or *Shear Madness*.<sup>146</sup> The timing of any delay should be based on market data about the average length of a work’s first public exposure. In addition, ten years, as used in section 110(9),<sup>147</sup> should be the outer limit. In the theatrical context, the statutory license generally would not affect licensing of “First Class” rights, but would have an impact on licensing of “Subsidiary” rights, particularly licensing of amateur and stock productions.

What about an unpublished and unperformed work of a famous author who has passed away? Should the copyright owner be under

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144. See, e.g., DONALD C. FARBER, PRODUCING THEATRE: A COMPREHENSIVE LEGAL AND BUSINESS GUIDE app. E (2006) (reproducing Dramatists Guild’s Approved Contract for Musical Plays, which defines First Class Performance and Subsidiary rights). The first live production within a specific territory often is licensed as “First Class Performance” rights, as differentiated from “Subsidiary” rights for follow-on uses after the first production.

145. See Patrick Healy, *Broadway Musicals Hang on for Payoffs Beyond Weekly Gross*, N.Y. TIMES, Mar. 20, 2012, <http://www.nytimes.com/2012/03/21/theater/godspell-sister-act-and-priscilla-push-through-the-winter.html?pagewanted=all> (explaining that producers are extending Broadway runs to give productions “hit” status, in order to increase touring revenues).

146. See *About the Show*, SHEAR MADNESS, <http://www.shearmadness.com/about-the-show.html> (last visited Apr. 12, 2012) (“Shear Madness is listed in the Guinness [sic] Book of World Records as the longest running play in the history of the USA.”); *Mousetrap History*, ST. MARTIN’S THEATRE, [https://www.the-mousetrap.co.uk/online/default.asp?doWork::WScontent::loadArticle=Load&BOParam::WScontent::loadArticle::article\\_id=3453A9C0-5E53-4598-BD95-A64E14E61259&menu\\_id=C6AD551F-D15A-4A13-ACBE-C234F7B6209E](https://www.the-mousetrap.co.uk/online/default.asp?doWork::WScontent::loadArticle=Load&BOParam::WScontent::loadArticle::article_id=3453A9C0-5E53-4598-BD95-A64E14E61259&menu_id=C6AD551F-D15A-4A13-ACBE-C234F7B6209E) (last visited Apr. 12, 2012) (noting that *The Mousetrap* has been continuously running at St. Martin’s Theatre in London for thirty-eight years); *Theatre de la Huchette Review*, FODOR’S TRAVEL GUIDES: PARIS, <http://www.fodors.com/world/europe/france/paris/review-117764.html> (last visited Apr. 12, 2012) (noting that Paris’s Theatre de la Huchette has staged *The Bald Soprano* since 1957).

147. See 17 U.S.C. § 110(9) (2006).

some “working” requirement to stage the work or record its performance within a specific period of time before the license is triggered? Such a working requirement is more familiar in patent law.<sup>148</sup> Nevertheless, one can find a precedent for such a requirement in the Berne Appendix. Under the terms of the Appendix, a Member State may provide for the grant of a statutory or government license to substitute a license for the exclusive right of translation in educational text, provided it has not been translated and published in the local language within a set period of time.<sup>149</sup>

Where the author intended the work to be performed, a working requirement is desirable as a means of bringing the work to the public in a timely manner. Where the author did not want the work performed, however, the work probably should not be subject to the statutory license. Distinguishing between these two cases could be very difficult in practice, and therefore it would be preferable to exempt unpublished works from the statutory license.

#### 4. Scope

Once available, what would the license allow? There are roughly five variables. In its broadest form, the license could allow: (1) live public performance of the work, (2) recorded performance (whether of a live performance or a specially recorded version), (3) communication to the public by broadcast or transmission of either live or recorded performance, (4) public distribution of copies of any recorded performance, and (5) the right to secure copyright in any derivative works created by the performer. The drafter could pare back the license from its broadest form either by dropping one or more of the five rights or by imposing a noncommercial limitation on the exercise of one or more of these. In its narrowest form, the license would be limited to noncommercial live performance. This modest reform would broaden section 110(1) by removing the limitation on where the performance takes place.<sup>150</sup>

As attractive as the broad-form license would be to a director or performer, the scope appears overbroad to achieve a balance of creative control, at least at the outset. In particular, authorizing the claim of a derivative-work copyright by the director or the performers without consent of the author of the source work would go too far, at

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148. See Patent Law art. 83 (B.O.E. 1998, 26-3) (Spain) (“The owner of a patent shall be obliged to work the patented invention either himself or through a person authorized by him, by implementing it in Spain or on the territory of a Member of the World Trade Organization in such a manner that the working is sufficient to satisfy demand on the national market.”).

149. See Berne Convention *supra* note 8, app. art. II(2)(a).

150. See 17 U.S.C. § 110(1).

least in the early period during which the license is in effect. The author of the source work should have some leeway to refine and amend the text based on reactions to early performances, and to own the rights in these derivatives free from potentially competing claims from directors or actors who have adapted the work in performance. On the other end of the spectrum, the narrow version of the license would be insufficient to fulfill its purpose.

The baseline license should provide at least the director and company in an educational or community theatre with the rights customarily expected by these groups. This baseline license would grant the director and performers the rights to: (1) publicly perform and prepare derivative works for live performance, (2) authorize recordings of such live performances, and (3) distribute copies of such live performances—at least to the friends and family of the live audience—so long as it is not by general distribution, broadcast, or transmission (e.g., via YouTube). Formally, the license agreements for community and educational theatre license the right of public performance and do not grant any rights to record or distribute recordings.<sup>151</sup> It is nonetheless common practice to make and distribute such recordings.<sup>152</sup> The statutory license under discussion would bridge this gap between law and practice by licensing these common practices.

Two other variables regarding the scope of the license require further attention: First, should the statute limit the license to noncommercial performances? Second, should the license permit public broadcast or transmission of the performance or general distribution of copies of the recorded performance? While the noncommercial performance is the more sympathetic case, the license should not be limited to only noncommercial performances. The argument that motivates discussion of a statutory license is grounded in recognition that professionals who specialize in producing performances are dependent on source works. Since many of these professionals perform in a commercial context, limiting the license to

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151. See, e.g., *Frequently Asked Questions (FAQs): My Daughter is Playing Maggie in CAT ON A HOT TIN ROOF. May I Videotape This?*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/faqsmanager/applications/faqsmanager/index.asp?ItemID=19> (last visited Apr. 25, 2012) (“This may seem harmless enough, but the answer to this question is very likely to be no. Dramatists Play Service, however, does not control this set of rights. We only handle English-language stage performance rights to the plays that we publish.”); *How to License a Musical*, MUSIC THEATRE INT’L, [http://www.mtishows.com/content.asp?id=3\\_1\\_0](http://www.mtishows.com/content.asp?id=3_1_0) (last visited Apr. 25, 2012) (explaining the process for obtaining a performance license).

152. See, e.g., *Search Results for “Hairspray High School Production”*, YOUTUBE, [http://www.youtube.com/results?search\\_query=hairspray+high+school+production&page=1](http://www.youtube.com/results?search_query=hairspray+high+school+production&page=1) (last visited Apr. 24, 2012) (delivering 413 results of primarily high school productions in response to search query “hairspray high school production”).

noncommercial performances would not enable talented commercial creators to realize their respective creative visions.

With respect to uses of the source work outside of live performance, the three principal options include allowing the licensee to: (1) broadcast or transmit live performance or recorded live performances only, (2) record performance and distribute copies of the recordings only, or (3) broadcast or transmit performance plus distribute copies of recorded performances. Each of these uses currently is the subject of negotiated licenses and care needs to be given to the impact that a statutory license would have on these licensing markets. In addition, collective bargaining agreements between producers and performers' unions usually address the issue of recordings and uses of recordings, and the interaction between a statutory license and the process by which the parties reach these types of agreement should be considered. The argument for including the right to broadcast or transmit live performance in the statutory license is strongest because doing so would share the live event with a broader audience who would otherwise be unable to enjoy it. The argument for also including the right to record and distribute recordings would be analogous to the success of the market for cover-song recordings in the shadow of section 115.<sup>153</sup>

Furthermore, taking into account the costs of complexity, a license that grows in scope over time could reasonably balance the interests in this context.<sup>154</sup> For example, the license could extend only to a live performance for a certain period of time before being broadened to include broadcast, transmission, and distribution rights. Indeed, in light of the very long duration of copyright, the claim for a director's or a performer's derivative-work copyright would become more sympathetic after the passage of a substantial period of time after the author first publicly performed or released the work: perhaps the longer of twenty-five years or the life of the author.

### III. CONCLUSION

Copyright law treats creative collaborators in the performing arts differently from other collaborative creators; it grants its full range of exclusive rights to authors of source works while limiting its grant of rights to all others involved in rendering these works in performance. This unequal treatment of mutually dependent creators

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153. Further study of whether the market for recorded performance of drama, dance, and the other performing arts is sufficiently analogous to the market for recorded music may be needed to support this extension.

154. Cf. Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 787-92 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 449, 478 (2002).

is problematic, particularly when the author of a source work imposes content-based restrictions on how the work may be rendered in performance. And yet Congress can craft a statutory license that can mitigate this unequal treatment. While not advancing a legislative proposal at this time, this Article explores how and why Congress could craft such a license and justify it by reference to the statutory license for making sound recordings of nondramatic musical works in section 115 of the Copyright Act and to the exemptions to the public performance right found in section 110. This topic requires further study of the potential market impacts of such a license, but the fact remains that this problem is in need of a solution.