

2015

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## Recommended Citation

Porter, Sabrina, "Protection of Live Performances: The Battle of “Ownership”" (2015). *Law School Student Scholarship*. 786.  
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## **Protection of Live Performances: The Battle of “Ownership”**

**By: Sabrina D. Porter**

### **Introduction**

With the increase in today’s technology, who knows how social media will impact one’s life and what role it will play as we move forward. Once you enter into the world of the “internet”, there is no way of turning back, or is there? If there is, who has the right to “undo” whatever damage that has been done? Such as potentially profiting from your personal stories, pictures, and/or videos for sale on today’s a new social media forum(s), without your (author/owners) permission or simply sharing moments that you intend to keep private? As the improvements in technology increased, it became more and more possible to record the live performance or the live broadcast without the consent of the performer.

For those who love attending concerts, listening to live music, and singing along with some of their favorite artist, it has almost become second nature as a fan, to instantly post a photo and/or a video to your popular social media sites of the artist’s live performance, while you are there in attendance. A “live performance” will be defined/described as an artist singing a song before a group of individuals. However, what may seem like an innocent post from a loyal fan could possibly violate an artist’s personal rights. This violation particularly increases if the fan attempts to obtain a financial gain from their personal recording of the artist’s live performance. Once the post and/or video of the recorded live performance is posted online, the issue then becomes...who has the control and authority to either enforce the takedown of the video or the right to let the video remain? In essence, who owns the recorded live performance and what

rights does that ownership provide? That question is the focus and topic of discussion throughout this paper.

Does the person who actually recorded the video of the live performance have the right to freely post that video on social media sites, essentially owning a copyright?; Does the performer own or have rights in that video that was taken of his/her live performance?; Or by virtue of the performer being signed to a record label, could the record label own that video via the work made for hire doctrine under the Federal Copyright Statute or other means such as their artist/label contract?

This issue is steadily growing, causing commotion within the music industry, as the era of technology and social media evolves among the artists, record labels, and third parties. Currently, Federal U.S. Copyright law allows a third-party to freely post an unauthorized recording of artist's live performance, freely roaming the world of the internet, with no consequences or action taken against them.

The main focus of this paper will discuss protection of a live musical performance and the issues involving a recording of that live performance. Please note that this paper is discussed from the viewpoint of a record labels and the relationships with their artist. Section I of this paper will discuss U.S. Federal Copyright Protection and Live Performances, as follows: (a) general overview of federal copyright protection; (b) analysis of federal copyright protection for a live performance, if any; and (c) whether fixation of a live performance warrants federal copyright protection. Section II of this paper will address alternative forms of protection, from and/or in addition to U.S. Federal Copyright Law such as: (a) the Anti-Bootlegging statutes and (b) common law copyright protection. Section III will discuss the available options/avenues that record labels have when addressing these scenarios such as: a takedown notice via the Digital

Millennium Copyright Act “DMCA or a Cease and Desist letter. Section IV of this paper will provide my conclusions and recommendations arguing why it is beneficial for record labels to have full control over these types of videos in order to enforce the right of taking down an unauthorized post of one of their artist live performance.

## **SECTION I: U.S. Federal Copyright Protection and Live Performances**

### **a) Overview of U.S. Copyright Protection**

Copyright law regulates the making of copies of literary or artistic works. The U.S. Federal Copyright Act<sup>1</sup> (the “Act”) provides protection for “*original* works of authorship *fixed* in any *tangible* medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>2</sup>

The Act does not define “original” in relation to a work of authorship. However, the United States court, through case law, has developed this definition over time. In Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., the court defined “original” to require only that the work be independently created by the author and that it possess at least some minimal degree of creativity.<sup>3</sup> In the U.S., once a work is found original, the next step is fixation in a tangible medium of expression in order to gain federal copyright protection.<sup>4</sup> The Act defines this “fixation” requirement as being embodied in a copy or phonorecord, by or under the authority of the author, is sufficiently stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>5</sup> Furthermore, the statute defines that a work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>6</sup>

In addition to the preliminary elements of copyrightability, there are certain subject matter categories provided by the Act that can obtain protection, such as: (1) Literary work; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>7</sup> Once an individual gains ownership as a copyright holder, that individual is granted six exclusive rights to their copyrighted work under section 106<sup>8</sup> of the Act. Those six rights are: (1) the right to reproduce; (2) the right to prepare a derivative work; (3) the right to distribute; (4) the right to perform the work publicly; (5) the right to display the work; and (6) the right to perform the work publicly by means of a digital audio transmission.<sup>9</sup>

Having the ability to obtain U.S. Federal Copyright protection is extremely beneficial for the owner of the intellectual property. As mentioned above, there are a number of exclusive rights that are granted to the owner that allows the owner to profit from his/her own creativity. Generally speaking, creativity plays a large part in our nation's growth.

#### **b) Federal Copyright protection for a live performance**

Of the eight enumerated categories provided under the Act, protection for a live performance is not explicitly expressed.<sup>10</sup> However, the exclusion does not automatically mean it is not possible for protection to be granted. Neither the Act nor case law have expressed whether or not the list of enumerated categories granted in section 102 are exhaustive. The language in section 102 states "the work of authorships includes the following:"<sup>11</sup> Since the statute is unclear as to whether the statute is exhaustive or non-exhaustive, statutory interpretation would lead one to believe that the term "includes" used is reasonable to conclude that the list is a non-exhaustive. For purposes on this papers discussion, the viewpoint taken will be that the list is non exhaustive.

Additionally, please note the important distinction between the exclusive right to perform a copyrighted work under the exclusive rights granted in section 106 and a copyright in a live performance itself. That right to perform the copyrighted work does not extend to the actual live performance itself. This paper focuses on federal copyright protection for the actual live performance as an additional copyrighted work under the Act's subject matter categories.

When analyzing if a live performance meets the threshold requirements for federal copyright protection, the originality requirement is easily met. Again, the "originality" requirement is a low burden and is met so long as a "minimum degree of creativity" is obtained.

<sup>12</sup>It is natural for a person to have his or her own touch on how to perform and/or present something. A live performance is not something that can be repeated or duplicated by the same individual, let alone a third party. The main issue for determination of a live performance is that the work be fixed in a tangible medium of expression, the "fixation" requirement. Recognizably, a performance is not fixed in a tangible medium of expression if it is being performed "live". Therefore, it appears that federal copyright protection cannot be granted. Please note that this does not apply to live performances whose fixation is being made simultaneously with its transmission. <sup>13</sup> This transmission rule grants copyright protection to live broadcasts, sports, and performances if their fixation is simultaneously being recorded and transmitted through television or radio. Performers deserve the exclusive rights to the fruits of their labor. Likewise, a performer's work and performance are expressions of the performer's personality, signifying originality that should be exclusive to them.<sup>14</sup>

### c) **Federal Copyright Protection for a Fixed Live Performance**

Professor Robert Lind from Southwestern University posed an argument in a PodCast interview<sup>15</sup> that a live performance can in fact be granted copyright protection, if the live

performance is recorded, therefore satisfying the fixation threshold requirement.<sup>16</sup> The recording of the live performance via a video camera, cellular device, or something similar in kind, would satisfy the “copy” element of the “fixation” requirement.

Once the live performance is fixed, it seems as if the threshold elements for copyright protection are completely satisfied but that is not the case. To recap, “fixed” is further defined to include “embodied in a copy or phonorecord, by or under the authority of the author”.<sup>17</sup>

If the performer, as the author of the live performance, decided to personally record that live performance, it is likely to conclude that protection shall be granted and that protection shall be granted to the performer as the owner of that recorded live performance. However, Professor Lind argues that once a live performance is recorded, assuming it is eligible to receive federal protection, it then receives protection as a musical work<sup>18</sup> under the Act and not as an additional copyrighted subject matter.<sup>19</sup> A musical work has been left undefined by the Act because it relatively has a settled meaning and has not typically been the subject of significant litigation. A musical work is typically defined as an instrumental component of the work and any accompanying words.<sup>20</sup> This paper argues that protection shall be granted as a separate subject matter category in addition to the enumerated list of categories in section 102.

To the contrary, what if the live performance was recorded without the consent of the author (the performer)? If a third party recorded the live performance without consent of the author, then there is no valid copyright in that third party recording. While the fixation requirement would in essence be satisfied, the lack of granted authority by the authority prevents copyright protection from being granted under the Act. Not only is the third party prevented from receiving federal protection but so is the performer. One third-party argument is that since he/she is the one who actually recorded the video, he/she owns the copyright and shall be granted the copyright.

Similar argument to a photographer owning a copyright in a photo he took of a random person outside. The photographer did not obtain permission by the person in the photo, yet the photographer would still be granted copyright protection in that photograph as a pictorial work<sup>21</sup> under section 102. However, there are a lot of constitutional differences between a photographer and paparazzi compared to the right to record a live performance.

However, would a record label possibly have some rights to assert a claim if a “master” was playing in the background during the live performance? The Act defines a sound recording as “works that result from a fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture, or other audiovisual work, regardless of the nature of material objects, such as disks, tapes, or other phonorecords, in which they are embodied”.<sup>22</sup> Once an artist records this sound recording, the record label owns this sound recording which is known within the industry as the “master” stated above, via their artist-label contract. For example, in a standard RCA Artist Agreement found online, the language states “each Master will be considered a work made for hire for Company from the Inception of Recording. If any Master is determined not to be a work made for hire, it will be deemed transferred to Company in accordance with this paragraph.”<sup>23</sup> This language is typical standard language within artist-label contracts in the music industry, especially new artists since they typically do not have any leverage to negotiate their contract. This copyright ownership granted to the record label, as the owner of the master, is separate and distinct from the copyright in the underlying musical composition.

The distinction of a performer singing along with a master versus singing with a live band is important because there are different arguments that can be made regarding the rights that parties can enforce under both scenarios. For example, in the event the recording included a master

playing in the background of the live performance, the record label would be able to potentially enforce an infringement claim as a violation of their exclusive right to publicly perform and/or display/distribute their copyrighted work, the master. That is not the case if the performer was performing to a live band...a live band meaning that there is no prerecorded music playing the background. In the latter scenario, the record labels would have no valid claims. Please note that this argument does not take into consideration claims that could be made by the publishers of the underlying musical composition.

One additional way that a record label could possibly gain and/or have protection is if the performer was also a songwriter. As a songwriter, the performer would also have publishing rights. As previously mentioned in the preceding sentences, the publishers still and will always have a valid claim in any unauthorized use of their underlying musical composition, such as failure to obtain a license, etc. This reference is important for record labels because if the artist/performer is also a songwriter, they could potentially assign this right to the record label, therefore granting the record label ownership. This scenario is highly unlikely to occur but it still remains a potential option available to resolve this issue.

The mere fact that federal copyright protection is not granted to a live performance does not leave protection nonexistent because state common law protection is currently provided in its absence. It is understandable that it would be extremely difficult and tediousness to provide or attempt to provide protection to every live performance because the fact remains that every live performance is different. The argument for protection of a live performance simply revolves around the idea that a performance is an original piece of work and most artists/performers, if not all, do not their performances to be duplicated or attempted to be duplicated by another artist in the industry. The saying "imitation is the greatest form of flattery" is not well respected within

the music industry. Regardless of how talented and well known of an artist you are, the music industry does not respect those who copy others work. This is statement is a slightly contradictory because everything starts from something, meaning that there is also some level of duplication that is taking place. Furthermore, if you were to interview an artist and ask them who they get their inspiration from...they will most likely name a well-known and respected artist in the industry, whether dead or alive, who at some point they have duplicated that artist's style.

In 2011 at the Billboard music awards, Beyonce debuted her performance for her current hit single "Girls". The focus shall remain on Beyonce's content of her performance and not on the discussion regarding her performance skills. It is acknowledged that since this performance was being broadcasted live via television, it was being simultaneously fixed, therefore eligible to obtain copyright protection for the performance. The purpose of this example is to illustrate how much scrutiny, no matter the artist, one comes under if you are found to have copied someone else's work. It was alleged that Beyoncé copied/ stole her Billboard performance from an artist name Lorella. Videos of both artists' performance were posted on line to demonstrate the similarities and both performances were identical. In an interview, Beyoncé claimed that she was so inspired by Lorella's performance and that she was simply paying homage to her.<sup>24</sup> While that may be true, this is another big area of controversy within the music industry. It was an outstanding performance with remarkable effects but nonetheless, Beyoncé took a lot of heat for that performance, regardless of the fact that she has one of the largest fan bases in the industry.

## **SECTION II: Alternative Forms of Protection For A Live Performance**

### **a) Anti-bootlegging statutes**

The Anti-Bootlegging statutes, codified in § 17 U.S.C. 1101<sup>25</sup> and § 18 U.S.C. 2319A<sup>26</sup> prohibits unauthorized recording, copying, and distribution of live musical performances and provides protection for unfixed works for unlimited times.<sup>27</sup> These statutes grew out of the Agreement on Trade Related Aspects of Intellectual Property (“TRIPS”).<sup>28</sup> The TRIPS Agreement requires WTO members to afford various intellectual property protections to nationals of all member countries and involves copyright, trademark, patent, and related issues.<sup>29</sup> In particular, Article 14 requires member nations to protect performers from unauthorized recording and broadcasting of their musical performances.<sup>30</sup> TRIPS does not protect against visual and audiovisual fixations and essentially only protects musical performances.<sup>31</sup>

§ 17 U.S.C. 1101<sup>32</sup> reads in pertinent part:

- (a) Unauthorized acts. Anyone who, without the consent of the performer or performers involved –
- 1) Fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,
  - 2) Transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or
  - 3) Distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether fixation occurred in the United States,

Shall be subject to the remedies provided in sections 502 through 505 [17 U.S.C. 502-505], to the same extent as an infringer of copyright.

- (d) State law not preempted. Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

§ 18 U.S.C. 2319A<sup>33</sup> reads in pertinent part:

- a) **Offense.**— Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—

1. fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
2. transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
3. distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;

There is one slight difference between these two statutes. Section 18 U.S.C. 2319A contains the language “for purposes of commercial advantage or private financial gain”,<sup>34</sup> whereas section 17 U.S.C. 1101 does not. Both of these statutes are significant when record labels are dealing with unauthorized recordings of their artist’s live performance being posted to the internet for personal use and/or for sell. Prince is currently suing a number of his fans under this statute for allegedly bootlegging copies of his performance online.<sup>35</sup>

Unfortunately, these provisions grant this right of protection to the performer(s) and the performers only. A situation that is common with in the record labels is that they are commonly approached by their artist’s publicist for certain requests. Some of those requests consist of the removal of a video of the artist’s live performance posted online by a third party. Technically, the record label would have no valid right of its own to assert. It would be asserting a right on behalf of the artist. The statute is silent on if whether these rights are transferrable, in the event of the situation posed above existed.

There are a few concerns with the transfer of the performer right granted in the Anti-bootlegging statutes. One is, would a record label want control over both statutes...both civil and criminal. The more beneficial argument is that record labels would probably like to obtain the right under the criminal anti-bootlegging statute, § 18 U.S.C. 2319A<sup>36</sup> in the event a third-party is attempting to achieve a “commercial advantage or private financial gain”.<sup>37</sup> If the record label

assumed the rights under § 17 U.S.C. 1101<sup>38</sup>, the argument could be made that the record label is essentially taking on more work than is required and necessary. The benefits of assuming the rights under § 17 U.S.C. 1101<sup>39</sup> is less beneficial and/or non-beneficial to the record label since they are not directly losing any monetary from that situation. To the contrary, an argument could be made that the record label should assume the rights under § 17 U.S.C. 1101<sup>40</sup> because the record labels are in fact being harmed, but in an indirect way. For example, the harm by having a third-party post an unauthorized video of one of the record label's artist, could potential prevent future tickets sales in some way shape or form.

**b) State Common Law**

Common law copyright protection exists and provides protection for unfixed works.<sup>41</sup> For many years, copyright holders resorted to traditional common law remedies in order to protect musical compositions. A New York state court applied the equitable doctrine of unfair competition in one of the first bootlegging cases, Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.<sup>42</sup> The court held that the defendants who recorded the Met's broadcast performances and released them on phonographic records engaged in unfair competition with the Met because the Met derived its income from performances in the presence of a paying audience, from broadcasting the productions over the radio, and from licensing to its record company the exclusive privilege of making and selling records of the operas.<sup>43</sup>

Before the Copyright Act of 1976 became effective, state law, known as common-law copyright, protected unpublished works.<sup>44</sup> Common-law copyright gave the author two principal legal rights: (1) the right to determine when and where the work would be first published and (2) creating a property right that can be enforced by other legal theories.<sup>45</sup> Publication (technically a "general publication") automatically terminated the common-law copyright.<sup>46</sup> This general

publication rule was found to be too harsh<sup>47</sup> so courts began to distinguish between (1) a “limited publication” that did not extinguish common-law copyright and (2) a “general publication” that did extinguish common-law copyright.<sup>48</sup> A public performance is a “limited publication” that does not terminate common-law copyright. This rule that performance is a “limited publication” is especially important for common-law copyright of performances of music. <sup>49</sup>

This common-law copyright for works not fixed in a tangible medium of expression continues in the Copyright Act of 1967, 17 U.S.C. § 301 (b). <sup>50</sup> The U.S. Court of Appeals for the Seventh Circuit explained:

It is, of course, true that unrecorded performances are per se not fixed in tangible form. Among the many such works not fixed in tangible form are “choreography that has never been filmed or notated, an extemporaneous speech, ‘original works of authorship’ communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down.” Because such works are not fixed in tangible form, rights in such works are not subject to preemption under §301(a)<sup>51</sup>

California is one state that has codified its common law copyright:

(a)(1) The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device. <sup>52</sup>

Furthermore, the state of Florida has also codified its common law copyright in Fla. Stat. 540.<sup>53</sup>

11. Titled “Unauthorized copying of phonograph records, disk, wire, tape, film, or other article on which sounds are recorded.” It reads in pertinent part as follows:

(2)(a) it is unlawful:

(3) Knowingly and willfully and without the consent of the performer, to transfer to or cause to be transferred to any phonograph record, disk, wire, tape, film, or other article any performance, whether live before an audience or transmitted by wire or through the air by radio or television, with the intent to sell, or cause to be sold, or to use or cause to be used for profit through public performance or to be used to promote the sale of any product or such article onto which performance is transferred. <sup>54</sup>

It is great that common state protection is granted throughout various states. Unfortunately, the state law protection that has been granted does not seem to be more beneficial than if Federal Copyright protection is granted. In addition, these state common law protections have the issue of being preempted by Federal Law which is discussed below. There should be a concrete form of Federal protection granted to live performances.

The existence of a common-law copyright in a performance gives a property right that can be enforced by other legal theories such as unfair competition, misappropriation, unjust enrichment. <sup>55</sup> The plaintiff in Giesecking v. Urania Records, Inc. brought a claim for unfair competition and the unauthorized use of plaintiff's name to sell a product in violation of the New York Statute when Urania released gramophone records of Giesecking's performance without the permission of Giesecking. <sup>56</sup>

Since these common law rights are made by case law, they vary from state to state. However, each state that may grant these common law rights have the concern of preemption by Federal Law. The general rule is that after 1978, all rights specified under the Act, for works that are fixed in a tangible medium of expression, whether created on or before that date, published or unpublished, are governed by federal law. However, if there is federal protection under copyright law that does not cover the particular work/object, then a state law claim can be asserted.

The court in Katz Dochterman v. HBO<sup>57</sup> set out a two-part test to determine if preemption applies: (1) Does the subject matter of the work in which the state law rights are asserted come within the subject matter of copyright law? And (2) are the state law rights asserted in the work equivalent to the exclusive laws protected by federal copyright law.<sup>58</sup> If the state law claim simply alters the scope of federal protection, then it is preempted.<sup>59</sup>

### **PART III: Available Options for Record Labels to Remedy the Issue**

#### **a) Digital Millennium Copyright Act**

The Digital Millennium Copyright Act (“DMCA”)<sup>60</sup> was enacted and signed into law by President Clinton in 1998, to adapt copyright law to the digital age.<sup>61</sup> Title II of the DMCA adds a new section 512 to the Copyright Act<sup>62</sup> to create four new limitations on liability for copyright infringement by online service providers.<sup>63</sup> Courts have begun to apply the DMCA to actions for copyright infringement shortly after it was in 1998.<sup>64</sup> The process of providing a DMCA takedown notice is an industry norm in having something removed that is copyright protected, especially within the music industry. Most online host providers such as YouTube, IG, dropbox etc., have to abide by these DMCA notices and counter-notices that they receive from different people regarding certain material posted on their websites. These sites typically provide direct access to the user for the DMCA takedown process.<sup>65</sup> It is a relatively easy process for an individual to submit a DMCA takedown request. The steps to submit a DMCA takedown request on [dropbox.com/dmca](https://dropbox.com/dmca) reads as follows:<sup>66</sup>

- 1) Identify the copyrighted work that you claim has been infringed;
- 2) Identify the material or link your claim is infringing (or the subject of infringing activity) and to which access is disabled, including at minimum, if applicable, the URL of the link shown on the Site or the exact location where such material may be found;

- 3) Provide your company affiliation (if applicable), mailing address, telephone number, and, if applicable, email address;
- 4) Include both of the following statements in the body of the Notice:
  - “I hereby state that I have a good faith belief that the disputed use of the copyrighted material is not authorized by the copyright owner, its agent, or the law (e.g., as a fair use).”
  - “I hereby state that the information in this Notice is accurate and, under penalty of perjury, that I am the owner, or authorized to act on behalf of, the owner, of the copyright or of an exclusive right under the copyright that is allegedly infringed.”
- 5) Provide your full legal name and your electronic or physical signature.

However, when a person submits a DMCA takedown notice, they are claiming that they are the copyright owner of the material requested to be taken down.<sup>67</sup> This is troublesome if record labels are sending DMCA take down notices on behalf of their artist for a recorded live performance because as discussed above, a valid copyright has not been established to third party recording of the artist’s performance. The requirement of having to own a valid copyright in the work that a party is requesting to be taken down is troublesome for the record label and puts the record label at high risk for potential law suits. For example, in Lenz v. Universal Music Corp.<sup>68</sup>, a music copyright owner’s motion to dismiss a claim for misrepresentation pursuant to 17 U.S.C. § 512(f) was denied because the allegation that the copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine was sufficient to state a misrepresentation claim pursuant to § 512(f). Granted, the Lenz case is distinguishable in the fact that it actually contained copyrighted material, but it goes to show how certain a person has to be when bringing these takedown notices. Part of the reason Prince is currently in the middle of a lawsuit with his fans, as mentioned above, is that according to court documents, Prince sent “take down” notices to Facebook and Facebook complied, but the defendants objected to having the controversial subject matter material removed.<sup>69</sup>

## **b) Cease & Desist letter**

A cease and desist letter is simply a letter sent to an individual or business to halt purportedly unlawful activity ("cease") and not take it up again later ("desist"). Although these letters are not exclusive to the area of copyright law or intellectual property, they are frequently used when handling disputes with intellectual property and they represent an important feature of the intellectual property landscape.<sup>70</sup> The letter may warn that if the recipient by deadlines set in the letter does not cease and desist specified conduct, or take certain actions, that party may be sued. These letters may have a number of effects: they may be instrumental in commencing settlement negotiations or serve as an impetus for licensing discussions; and also mobilize their addressees to take steps in preparation for a potential lawsuit and initiate development of alternative brands, products, and design-around technologies.<sup>71</sup>

Again, the effects of cease and desist letters easily explain why their addressees are eager to clarify the situation. Cease and desist letters alone, absent additional acts in the forum, are very unlikely to establish general jurisdiction.<sup>72</sup>

These letters typically state something similar to the following:<sup>73</sup>

“Dear [name of alleged infringer],

It has come to our attention that you have made an authorized use of my copyrighted work entitled [name of work] (the “Work”) in the preparation of a work derived therefrom (or whichever setting the unauthorized use of work was in). I have reserved all rights in the Work.

Your work entitled [name of infringing work] is essentially identical to the Work and clearly used the Work as its basis. I demand that you immediately cease the use and distribution of all infringing works derived from the Work, and all copies, including electronic copies, of same, that you deliver to me, if applicable, all unused, undistributed copies of same, or destroy such copies immediately and that you desist from this or any other infringement of my rights in the near future.

If I have not received an affirmative response from you by [date] indicating that you have fully complied with these requirements, I shall take further action against you.”

While these types of letters are common they are tedious for a record label to have to complete every time an alleged infringer post a recording of one of their artist’s live performance. It is a safe assumption that record labels come across numerous videos of an artist’s live performance online, especially if the artist is on tour. To have to complete multiple cease and desist letters each time will be overly burdensome. More particularly, these letters seem to hold the least weight in regards to confidently asserting authority. More importantly, if a record label chooses to send a cease and desist letter to an alleged infringing party, the issue still remains similar to that in the DMCA takedown notice, what rights can the record label actually assert as theirs within these letters. An individual, who remains anonymous, employed at one of the major record labels in the music industry expressed his concern with constantly sending cease and desist letters.<sup>74</sup> This individual expressed that, “as a major record label, these cease and desist letters do not hold much weight for the record label and with the music industry as it is, the record label should minimize at many of their risks as possible.”<sup>75</sup>

On the other hand, there are additional benefits that these letters grant. For example, a record label could continue to send these letters to an individual, in the event the individual fails to comply, to later establish a claim of wilful infringement – knowingly infringing on a protected work. The Act provides enhanced statutory damages in cases of wilful infringement,<sup>76</sup> and punitive damages may be awarded for wilful common law copyright infringements.<sup>77</sup> Although letters are not essential for establishing these forms of infringement, they are extremely helpful to provide, especially if no other proof is available.<sup>78</sup>

Still open to research is the finding of how many cease and desist letters actually get sent out by record labels and how many of these letters actually receive push back. It would seem as if an individual and/or corporation like Yahoo received this type of letter that they would simply comply. Apparently, that is not the case.

#### **PART IV: Conclusion and Recommendations**

While it is great that there are some forms of protection available to performers, and possibly the record label via an assignment from the performers, the available protection is simply not enough. The current law as is creates more of a burden for both the artist and record label. Although, some protection is better than no protection, the protection becomes slightly irrelevant if the party who wants to benefit is unable to do so, either because protection is not granted to that party or simply because the process is overly burdensome.

Federal Copyright Protection under the Act is arguably the highest form of protection for a person's expression of an original idea. Gaining protection under the Act is at the top of the hierarchy when comparing available forms of protection. As expressed earlier, gaining federal copyright protection under the Act for a live performance is not completely excluded. However, there particular scenarios in which protection can arguably be gained is so narrow in scope that these restrictions make it almost impossible for a person to gain Federal Copyright Protection under the Act for a live performance. For example, the fixation requirement under the Act is an extreme hurdle and not all countries have this fixation requirement. The Berne Convention<sup>79</sup> allows members to make this determination by stating "it shall be a matter of legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."<sup>80</sup> The underlying purpose of the Berne Convention is to ensure that "authors of literary and artistic works....shall

have the exclusive right of authorizing the reproduction of their works, in any manner or form.”<sup>81</sup>  
The Union’s aim is to extend the copyright protections available in one member country to all other member countries.<sup>82</sup>

The countries of Spain, France, and Australia do not contain this fixation requirement. Therefore, those countries do not face these copyrightable issues for a live performance that the United States face. Since the United States have the authority to decide whether or not works in general or in any specified category shall be fixed in some material form, the United States should provide protection for a live performance but exclude the fixation requirement under this category.

Additionally, Italy grants protection for live performance for twenty years.<sup>83</sup> Under Italy’s Article 80, the only requirement for copyright clearance is that performers be paid for all reproductions of their live performances.<sup>84</sup> The Italian regime could be a potential resolution if the performers were granted a payment for their live performances, such as a performance royalty. Furthermore, this royalty payment could be negotiated in the artist-label contract, therefore also allowing the record label to benefit.

This grant of protection, in addition with the fixation exclusion, is potentially overbroad and will need some restrictions put in place. Potential restrictions could include only allowing protection for a series of live performances that are put together by an artist in preparation for a tour. A lot of main stream artist such as Beyonce, Usher, Prince along with up and coming artist such as Teyana Taylor have spoken about their disappointment in knowing that a fan can see their show online, due to videos taken at the concert being posted online, before their tour even hits the next city. It is an unfortunate situation in today’s era and this solution will not conquer the issue one hundred percent but it is a good step in the right direction of prevention.

Furthermore, if this right is granted to the performer of the live performance, as the author of the work, this copyright shall also have the ability to be assignable similar to the other subject matters and exclusive rights.

In addition, the anti-bootlegging statutes grant sufficient protection for the unauthorized use and/or sale of a person's live performance. However, this right is granted solely to the performer. This right granted to the performer shall have the ability to be assigned to the record label, so long as the artist in contract with the label, so that the label can assert this right on behalf of the artist, if need be, without having to constantly contact the artist or risk asserting a claim they have no right to.

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<sup>1</sup> 17 U.S.C.A. § 101 (West)

<sup>2</sup> 17 U.S.C.A. § 102 (West)

<sup>3</sup>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

<sup>4</sup> 17 U.S.C.A. § 102 (West)

<sup>5</sup> 17 U.S.C.A. § 101 (West)

<sup>6</sup> 17 U.S.C.A. § 101 (West)

<sup>7</sup> 17 U.S.C.A. § 102 (West)

<sup>8</sup> 17 U.S.C.A. § 106 (West)

<sup>9</sup> 17 U.S.C.A. § 106 (West)

<sup>10</sup> 17 U.S.C.A. § 102 (West)

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- <sup>11</sup> 17 U.S.C.A. § 102 (West)
- <sup>12</sup> Feist, *Supra*, note 3
- <sup>13</sup> 17 U.S.C.A. § 101 (West)
- <sup>14</sup> 24 Cardozo Arts & Ent LJ 617, \*653
- <sup>15</sup> PodCast Interview.  
[www.cali.org/lesson/1078](http://www.cali.org/lesson/1078)
- <sup>16</sup> PodCast Interview.  
[www.cali.org/lesson/1078](http://www.cali.org/lesson/1078)
- <sup>17</sup> 17 U.S.C.A. § 101 (West)
- <sup>18</sup> 17 U.S.C.A. § 102 (West)
- <sup>19</sup> PodCast Interview.  
[www.cali.org/lesson/1078](http://www.cali.org/lesson/1078)
- <sup>20</sup> Websters Dictionary
- <sup>21</sup> 17 U.S.C.A. § 102 (West)
- <sup>22</sup> 17 U.S.C.A. § 101 (West)
- <sup>23</sup> RCA Form Agreement.
- <sup>24</sup> [Beyonce Explains Lorella Cuccarini “Inspiration” For Billboard Performance:](http://www.idolator.com/5875782/beyonce-explains-lorella-cuccarini-inspiration-billboard-awards-performance)  
<http://www.idolator.com/5875782/beyonce-explains-lorella-cuccarini-inspiration-billboard-awards-performance>
- <sup>25</sup> 17 U.S.C.A. § 1101 (West)
- <sup>26</sup> 18 U.S.C.A. § 2319A (2006).
- <sup>27</sup> United States v. Moghadam, 175 F.3d 1269 (11th Cir. Fla. 1999).
- <sup>28</sup> Moghadam, *Supra*, note 27
- <sup>29</sup> General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C, Apr. 15, 1994, 33 I.L.M. 1143, 1997 – 1211.
- <sup>30</sup> General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *Supra*, note 29
- <sup>31</sup> 24 Cardozo Arts & Ent LJ 617, \*640
- <sup>32</sup> 17 U.S.C.A. § 1101 (2006).
- <sup>33</sup> 18 U.S.C.A. § 2319A (2006).
- <sup>34</sup> 18 U.S.C.A. § 2319A (2006).
- <sup>35</sup> Why Prince Is Suing His Fans:  
<http://abcnews.go.com/blogs/entertainment/2014/01/why-prince-is-suing-his-fans/>
- <sup>36</sup> 18 U.S.C.A. § 2319A (2006).
- <sup>37</sup> 18 U.S.C.A. § 2319A (2006).
- <sup>38</sup> 17 U.S.C.A. § 1101 (2006).
- <sup>39</sup> 17 U.S.C.A § 1101 (2006).
- <sup>40</sup> 17 U.S.C.A. § 1101 (2006).
- <sup>41</sup> See Cal Civil Code 980(a); Hemingway v. Random House, 23 N.Y.2d 341 (Ct. App. 1968).
- <sup>42</sup> Metropolitan Opera Ass’n, Inc., v. Wagner-Nichols Recorder Corp., 101 N.Y.S. 2d 483 (Sup. Ct. 1950).
- <sup>43</sup> Metropolitan *Supra*, note 42
- <sup>44</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>45</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>46</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>47</sup> Brown v. Tabb, 714 F.2d 1088, 1091 (11<sup>th</sup> Cir. 1983).
- <sup>48</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf; Parton v. Prang, 18 F.Cas. 1273, 1277 (D.Mass. 1872)
- <sup>49</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>50</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>51</sup> House Report at 131, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5747.
- <sup>52</sup> Cali. Civ. Co. § 980

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- <sup>53</sup> Fla. Stat. 540. 11 (2)(a)(3) (2002).
- <sup>54</sup> Fla. Stat. 540. 11 (2)(a)(3) (2002).
- <sup>55</sup> Common-Law Copyright in the USA, Ronald B. Standler, Rbs2.com/clc.pdf
- <sup>56</sup> Gieseeking v. Urania Records, Inc., 155 N.Y.S.2d 171 (N.Y. Sup. 1956).
- <sup>57</sup> Katz Dochterman v. HBO, 963
- <sup>58</sup> Katz Dochterman v. HBO, 963
- <sup>59</sup> Katz Dochterman v. HBO, 963
- <sup>60</sup> DIGITAL MILLENNIUM COPYRIGHT ACT, 1998 Enacted H.R. 2281, 105 Enacted H.R. 2281,112 Stat. 2860
- <sup>61</sup> The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary  
<http://www.copyright.gov/legislation/dmca.pdf>
- <sup>62</sup> The Fairness in Musical Licensing Act, Title II of Pub. L. No. 105-298, 112 Stat. 2827, 2830-34 (Oct. 27, 1998).
- <sup>63</sup> 17 U.S.C.A. § 512 (West)
- <sup>64</sup> ALS Scan, Inc. v. RemarQ Cmty., Inc., 239 F.3d 619 (4th Cir. Md. 2001)
- <sup>65</sup> <https://www.dropbox.com/dmca>
- <sup>66</sup> <https://www.dropbox.com/dmca>
- <sup>67</sup> <https://www.dropbox.com/dmca>
- <sup>68</sup> Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008)
- <sup>69</sup> Why Prince Is Suing His Fans  
<http://abcnews.go.com/blogs/entertainment/2014/01/why-prince-is-suing-his-fans/>
- <sup>70</sup> 50 IDEA 777, \*783
- <sup>71</sup> 50 IDEA 777, \*783
- <sup>72</sup> Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
- <sup>73</sup> Sample Cease and Desist Letter
- <sup>74</sup> Anonymous Individual
- <sup>75</sup> Anonymous Individual
- <sup>76</sup> 17 U.S.C.A. 504(c)(2)(2006) (West)
- <sup>77</sup> Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 475 (6th Cir. 2007).
- <sup>78</sup> Janel Russel Designs, Inc. v. Mendelson & Assoc., Inc., 114 F. Supp. 2d 856, 862 n.2 (D. Minn. 2000)
- <sup>79</sup> Berne Convention for the Protection of Literary and Artistic Works, 25 U.S.T. 1341, 828 U.N.T.S. 221.
- <sup>80</sup> Berne *Supra*, note 79
- <sup>81</sup> Berne *Supra*, note 79
- <sup>82</sup> Berne *Supra*, note 79
- <sup>83</sup> See CLINTON HEYLIN, BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY 42 (1995).
- <sup>84</sup> See IFPI Takes Legal Action Against Italian Bootleggers, Music & Copyright, June 22, 1994, at 2.